

The English translation of the derogation decision of May 2020 uses the wording of the English version of the Directive, ie “Freistellung” within the meaning of section 28b EnWG is translated as “derogation” as in Article 49a of the Directive.



Bundesnetzagentur

- Ruling chamber 7 -

Decision

Ref. BK7-19-108

In the administrative proceedings

concerning: application for derogation from regulation

parties to the proceedings:

Nord Stream AG, Industriestrasse 18, 6302 Zug, Switzerland, legally represented by its management board, which is represented by Alexey Zaytsev,

applicant,

- legal representatives: Gleiss Lutz, Dreischeibenhaus, 40211 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 Antje Peters
and its Vice Chair	Dr Werner Schaller

decided on 20 May 2020:

1. The gas interconnector Nord Stream is granted a derogation for the section of the pipeline located in German territory (including the German territorial sea) from the application of sections 8-10e and sections 20-28 of the German Energy Industry Act (EnWG) with retroactive effect from 12 December 2019.

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2. The derogation is limited to a period of 20 years.
3. The applicant shall inform the ruling chamber without delay of all circumstances that could affect compliance with the requirements of this derogation decision in accordance with section 28b(1) sentence 1 para 2 and para 3 EnWG and could require a re-assessment of the derogation requirements in accordance with section 28b EnWG.
4. Secondary provisions may be subsequently attached to the derogation in the event that changed circumstances require a re-assessment of the requirements present pursuant to this derogation decision in accordance with section 28b(1) sentence 1 paras 2 and 3 EnWG.
5. The derogation also applies in the event of the full or partial transfer of ownership of the gas interconnector and in the event of the transfer of operations to a third party provided that
 - a) the ruling chamber is notified of the intended transfer or change no later than three months before the agreed transfer of rights.
 - b) the third party commits to complying with the secondary provisions of this derogation.
6. The right to order payment of costs is reserved.

Rationale

I.

In these administrative proceedings, the applicant wishes to be granted a derogation from regulation in accordance with section 28b(1) EnWG regarding sections 8-10e and 20-28 EnWG for the Nord Stream gas interconnector, with regard to the section of the pipeline (kilometre point 1,173.893 to kilometre point 1,224.378 for line 1 and kilometre point 1,173.531 to kilometre point 1,223.931 for line 2 of the Nord Stream gas interconnector) located in the territory of the Federal Republic of Germany (including the German territorial sea) for the period of 20 years or alternatively for the longest possible period.

(1) The applicant was entered in the commercial register of the canton of Zurich on 2 December 2005 as a stock corporation in accordance with Title XXVI of the Swiss Code of Obligations with its headquarters in Zug, Swiss Confederation, with the original name NEGP Company (commercial register of the canton of Zug, CHE-112.660.698). It has been called Nord Stream AG since 2006. According to Article 3 of its statutes, the purpose of the company

is "(...) the planning, construction, development, ownership, administration, operation, maintenance and use of a pipeline transporting gas from the Russian coast to the German coast via the Baltic Sea (...)" . The shareholders of Nord Stream AG are PJSC Gazprom (51%), Wintershall Dea Schweiz AG (15.5%), PEG Infrastruktur AG, which is part of the EON group (15.5%), Gasunie Infrastruktur AG, which is part of the Gasunie group (9%), and Engie Energy Management Holding Switzerland AG, which is part of the Engie group (9%).

The applicant is the owner of Nord Stream, which has been in operation since 2011. As the operating company of Nord Stream, it provides capacity for the transport of natural gas through the Nord Stream pipeline. The operations include operating the landing terminals in Portovaya in the Russian Federation and Lubmin in the Federal Republic of Germany as well as the two control rooms in the Swiss Confederation. The applicant's activities also include dispatching and maintaining all technical components of Nord Stream.

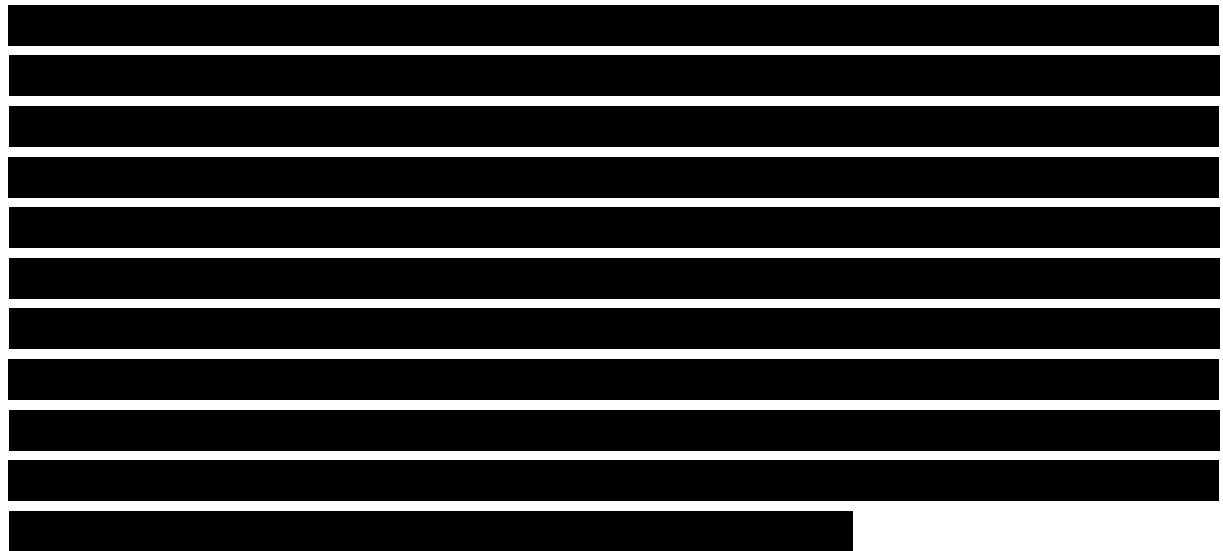
(2) Nord Stream transports natural gas produced in the Russian Federation, up to now primarily from the gas fields in the area around the city of Novy Urengoy, to the European Union, a distance of around 1,224 km. Nord Stream consists of two separate, parallel lines (line 1 and line 2) running a maximum of 100 metres apart in parallel and with a joint capacity of 55 billion cubic metres (bn m³) a year. It is designed to operate for at least 50 years. According to a notification to the Stralsund mining authority and the Federal Maritime and Hydrographic Agency (BSH) of 2 September 2011, the first line was taken into operation in November 2011, while the second line followed in October 2012, according to a corresponding notification of 28 August 2012.

Nord Stream runs from Wyborg in the Russian Federation through the Baltic Sea to Lubmin in the Federal Republic of Germany, where the landing terminal is located. On this route, Nord Stream crosses the German territorial sea and the German exclusive economic zone (EEZ), the EEZ of the Kingdom of Denmark, the Kingdom of Sweden, the Republic of Finland and the Russian Federation as well as the Russian territorial sea. The exact route is shown in Figure II.1 of the application.

Coming from the Russian Federation where kilometre point (KP) 0 is located, Nord Stream enters the German territorial sea within the meaning of the United Nations Convention on the Law of the Sea at KP 1,173.893 for line 1 and KP 1,173.531 for line 2, ie into the 12 nautical mile zone, ending at the landing terminal in Lubmin in the Federal Republic of Germany. The interconnection point of Nord Stream with the OPAL and NEL transfer stations is located there. It is also the plant border of the pipeline system, which is marked in the landing terminal by a

fence. It is located at KP 1,224.378 for line 1 and KP 1,223.931 for line 2. The exact border is shown in the figures under II.2 of the application.

(3) The investment volume for the whole Nord Stream project is €5.4bn for phase I of the installation of Nord Stream and €3.1bn for phase II. The applicant took in about €3.9bn of debt capital for phase I and €2.3bn for phase II, of which €3.1bn and €1,7bn respectively were covered by export guarantees.



Under the terms of the GTA, for the full length of the contract the applicant has to provide Gazprom export with the full capacity of Nord Stream for the transport of gas and to transport this gas. Gazprom export provides the remuneration for the transport capacity in accordance with a ship-or-pay obligation that requires it to pay the long-term transport charges regardless of whether it actually makes use of the export capacity. Under the GTA, Gazprom export is currently Nord Stream's only shipper. There was and is no other use or marketing of transport capacity on Nord Stream.

The applicant applied for a derogation from regulatory requirements for the German section of Nord Stream in accordance with section 28b EnWG in a letter dated 19 December 2019 and received 20 December 2019. The applicant submitted extensive documentation along with the application, which will be dealt with in detail. The documents included, in particular, information on the general description of the project; information on the company and organisational structure of the applicant; financing contracts for the pipeline construction project; an economic report on the effects of Nord Stream on the gas market and a report on the risks for the recovery of investment caused by a regulation of Nord Stream. In a letter of 24 January 2020, the

applicant further specified that it wished the derogation to be for a period of 20 years starting from the entry into force of section 28b EnWG.

The applicant is of the opinion that the requirements for a derogation in accordance with section 28b EnWG are fulfilled. It puts forward supported by evidence and reports that there are multiple objective reasons to grant a derogation for Nord Stream from unbundling, network access and network charge regulation. These reasons include security of supply, to which, according to the applicant, Nord Stream makes a positive contribution. The applicant states that various official decisions, including the planning approval decision of the Stralsund mining authority dated 21 December 2009, have determined this in a legally binding manner. The applicant believes that this positive contribution continues, as is evident, for example, in the winter months, when there is typically high demand for gas and falling levels of storage and Nord Stream is able to bring additional gas volumes onto the German and European market at short notice and satisfy demand for natural gas. Moreover, the applicant argues that it is necessary for Nord Stream to be granted a derogation from the perspective of ensuring the recovery of investments made. Among other things, it also points out that, were a derogation not to be granted and regulatory requirements thus to be applied in full, it would probably lead to amendments of various contracts, in particular the GTA. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The applicant further puts forward that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the European Union, since, due to the Russian export monopoly, only a Gazprom group company could use Nord Stream as a shipper anyway, regardless of any derogation. Any impact made by Nord Stream on the European wholesale gas market or on the utilisation of alternative transport systems would therefore be due to the existence of the pipeline itself and its use under the Russian export monopoly, and not brought about by a derogation. Only the latter is dealt with in section 28b EnWG.

The applicant thus requests

a derogation from the application of sections 8-10e and 20-28 EnWG for the gas interconnector Nord Stream with respect to the section of pipeline located in the territory of the Federal Republic of Germany for the period of 20 years.

The Bundesnetzagentur confirmed receipt of the application for derogation in an email on 20 December 2019. The applicant was requested in writing on 10 January 2020 to provide missing documents and information by 15 January 2020. The applicant responded to this request in various letters and emails. In a letter dated 24 January 2020, it also added the start date for the requested derogation to its application, giving the entry into force of section 28b EnWG as the relevant date.

Between 20 January and 16 February 2020, the ruling chamber carried out a consultation of Member States as required by section 28b(6) EnWG and Article 49a(2) of Directive 2009/73/EC in the version amended by Directive (EU) 2019/692 (hereinafter referred to as Directive 2009/73/EC). Previously, the ruling chamber had written to all Member States via the Permanent Representations to the European Union asking for the names of the competent institution and specific contact persons from each Member State for consultation. To carry out the consultation, the ruling chamber on 20 January 2020 sent the non-confidential version of the application with its annexes and the notice on applications under section 28b EnWG published on the ruling chamber's internet page to the institutions named by Member States or, if no response had been received, to the Permanent Representations of the remaining Member States.

The European Commission was informed of the proceedings in a letter of 21 January 2020. As its request, the Commission was provided with a non-confidential version of the application and annexes on 3 February 2020. This decision will be notified to the Commission in accordance with section 28b(8) EnWG.

In an email on 7 May 2020, the ruling chamber gave the Bundeskartellamt the opportunity to provide a statement in accordance with section 58(1) sentence 2 EnWG. The Bundeskartellamt took this opportunity on 14 May 2020.

The applicant was sent the intended operative part on 7 May 2020, to give it the opportunity to respond. It did so in a letter of 14 May 2020.

For further details reference is made to the files.

II.

The application is admissible and founded. The requirements for the granting of a derogation in accordance with section 28b EnWG are met.

Due to the amount of information to be presented, the following reasons for the decision are preceded by a structural overview, which is restricted to four levels for reasons of clarity.

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1. Formal requirements of the decision

Regarding the formal legality of this decision, the general legal provisions governing the proceedings have been adhered to and a consultation has been carried out (see section 1.1. below). In its role as the operator of Nord Stream, the applicant in particular also has the right to make an application (see section 1.2 below).

1.1. General procedural requirements

(1) The competence of the Bundesnetzagentur for this decision based on section 28b(1) EnWG in conjunction with Article 49a(1) of Directive 2009/73/EC is derived from section 54(1) half-sentence 1 EnWG and the competence of the ruling chamber is derived from section 59(1) sentence 1 EnWG.

(2) A consultation as set out in section 28b(6) EnWG in conjunction with Article 49a(2) of Directive 2009/73/EC was carried out in the period from 20 January 2020 to 16 February 2020. Six Member States – namely the Kingdom of Denmark, the Kingdom of Sweden, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania and the Republic of Poland – expressed their opinions during the consultation and submitted a statement. The Netherlands responded in writing that it did not wish to contribute to the consultation. The ruling chamber took the consultation responses from Member States into account in its assessment, regardless of whether each Member State was "concerned" in the more narrow sense of the word as used in Article 49a(2) of Directive 2009/73/EC. It was therefore not necessary to determine whether the character of being concerned should be understood geographically in the sense of the pipeline running through the territorial waters of another Member State or otherwise.

(3) In accordance with section 58(1) sentence 2 EnWG, the Bundeskartellamt was given the opportunity to provide a statement in good time before the proceedings were concluded. The Bundeskartellamt took this opportunity on 14 May 2020. No regulatory authority of a federal state had to be given the opportunity to provide a statement in accordance with section 58(1) sentence 2 EnWG in these proceedings because the applicant's headquarters are located in the Swiss Confederation and not in a federal state of the Federal Republic of Germany.

(4) In accordance with section 67(1) EnWG, the applicant was given the opportunity to state its views before proceedings were concluded; among other things, the intended operative part was sent to the applicant on 7 May 2020 for this purpose. The applicant responded in a letter of 14 May 2020.

1.2. Right to apply

The applicant has the right to submit an application under section 28b(1) sentence 1 EnWG, because it is the operator of the gas interconnector Nord Stream, including the operation of the section located in the territory of the Federal Republic of Germany.

The application was submitted on 20 December 2019, within the limit set out in section 28b(2) sentence 5 EnWG of 30 days from the entry into force on 12 December 2019 of the amendment to the EnWG by the Act amending the Energy Industry Act to implement Directive (EU) 2019/692 of the European Parliament and of the Council concerning common rules for the internal market in natural gas (Federal Law Gazette I 2019 p2002 et seq).

2. Substantive lawfulness of the decision

The decision is also substantively lawful, because the requirements for derogation are met for Nord Stream.

The Nord Stream pipeline is classed as a gas interconnector within the meaning of section 28b(1) EnWG in conjunction with Article 49a(1) of Directive 2009/73/EC (see section 2.1) and had been completed as at the reference date of 23 May 2019 (see section 2.2). Its first interconnection point is in the Federal Republic of Germany (see section 2.3). No international agreement concluded with the European Union by the third country to transpose the Directive on the internal market for natural gas precludes the application of section 28b EnWG for Nord Stream (see section 2.4).

The objective reason for the derogation is the contribution of Nord Stream to security of supply (see section 2.5.1). Since it is sufficient for one objective reason to be present, the applicant's explanations about the recovery of investment are no longer required (see section 2.5.2). The derogation from the provisions of sections 8-10e and sections 20-28 EnWG for the part of Nord Stream running through German territory has no negative effects on the internal market in natural gas (see section 2.6.2).

2.1. Interconnectors between the Federal Republic of Germany and a third country

Nord Stream is a gas interconnector within the meaning of section 28b EnWG, because Nord Stream is, in accordance with the legal definition of section 3 para 19(c) EnWG, a transmission line between a Member State of the European Union and a third country up to the territory of the Member States or the territorial sea of that Member State. Section 3 para 19(c) EnWG defines gas interconnectors with third countries separately to interconnectors as defined in section 3 para 34 EnWG, which are "facilities that serve to interconnect electricity systems or

a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States." Section 3 para 19(c) EnWG was regulated in the implementation of Directive (EU) 2019/692, although the starting point for the implementation was the adjustment of the definition of interconnector in the gas sector (see Bundestag printed paper 19/13443, page 1) and this is thus the more specific provision compared to section 3 para 34 EnWG for lines that run between the Federal Republic of Germany and a third country, as Nord Stream does. Moreover, section 3 para 19(c) EnWG defines gas interconnectors with third countries as a special type of transmission line within the meaning of section 3 para 19 EnWG, according to which transmission means the transport of natural gas through a high-pressure pipeline network other than an upstream pipeline network with a view to its delivery to customers, but not including supply.

Nord Stream is such a gas interconnector running between the Federal Republic of Germany and the third country of the Russian Federation (see section 2.1.1), which serves to transport natural gas through a high-pressure pipeline network and thus displays the characteristics of a transmission line within the meaning of section 3 para 19(c) EnWG (see 2.1.2) and is, in particular, not an upstream pipeline network (see 2.1.3).

2.1.1. Pipeline running between the Federal Republic of Germany and a third country

Nord Stream is a gas interconnector that, based on the direction of gas flow, runs from the Russian Federation through Russian waters and through the EEZ of several Member States, then reaching the German territorial sea within the meaning of Article 3 of the Convention of the Law of the Sea and finally making land in Lubmin on the German mainland as the first interconnection point with the European network. Both the territorial sea and the mainland are German territory.

(1) It should first be noted that the phrase "up to the territory of the Member States or the territorial sea of that Member State" in section 3 para 19(c) EnWG does not restrict the term gas interconnector to the part of Nord Stream running through German territory.

The aim of the proposed Directive from the European Commission was precisely to subject lines with third-country involvement to a uniform European regime. The Commission Staff Working Document of 8 November 2017 (COM (2017) 660) states: *"In the absence of applicable regulatory rules at Union level, the operation of such infrastructure could be regulated at the national level in the law of the respective Member States. For infrastructure entering the Union from a third country and thereafter crossing several Member States, this*

could result in the application of different rules to one and the same pipeline within the Union (...)." The objective of Directive (EU) 2019/692 was to remedy this by, as explained in recital 15 of Directive (EU) 2019/692, establishing consistency of the legal framework within the Union. Specifically, this is achieved by the decision on the derogation under Article 49a of Directive 2009/73/EC or the non-application of Article 9(1) of Directive 2009/73/EC being made by (only) the Member State in whose territory the first interconnection point of the gas interconnector with the network of the Member States is located.

The addition "up to the territory of the Member States or the territorial sea of that Member State" thus only has regard to recital 9 of Directive (EU) 2019/692, that the applicability of the amended Directive 2009/73/EC, and consequently the law regulating the internal market, remains confined to the territory of the Member States. The background to this clarification in recital 9 is likely to have been the discussion surrounding the scope of the new regulatory provisions. In the course of these, the Legal Service of the Council of the European Union examined and rejected the initially planned expansion of the Gas Directive to the EEZ in the version of 13 November 2017. It specifically stated that *"The Union does not have the jurisdiction to apply energy law on unbundling, transparency, third party access and regulated tariffs, which is unrelated to the economic exploitation of the EEZ, to pipelines crossing EEZ of member states. The application of the gas directive to the EEZ would be contrary to Art. 56 and 58 of UNCLOS as interpreted by the court of justice."* (Opinion of the Council Legal Service dated 1 March 2018 (2017/0294(COD) – 6738/18). Correspondingly, the explanatory note on section 3 para 19(c) EnWG (Bundestag printed paper 19/13443) states, *"a significant change in the Directive is the application of the law on the regulation of the internal market also to interconnectors with third countries. Its scope is to apply to the section of lines that run in the territory of the Member States or in the territorial sea of that Member State in which the first interconnection point of the line with the network of the Member States is located."*

The legal extension of the provision with respect to gas interconnectors is thus not identical to the reference point of the assessments in the context of section 28b EnWG as the provision implementing Article 49a of Directive 2009/73/EC: it is not the case that only the section of Nord Stream located in the German territorial sea is a gas interconnector within the meaning of section 28b EnWG, nor is a gas interconnector within the meaning of section 28b EnWG and Article 49a of Directive 2009/73/EC only the section of Nord Stream located in European territory, including territorial sea, but rather, as regards its criteria, the line must be regarded as a whole, including the section that runs through Russian waters outside the territory of the European Union. As the Republic of Estonia also emphasises in its consultation response, this understanding is shown in particular in Article 49a of Directive 2009/73/EC, which does not

make recourse to the legally defined "gas interconnector" but rather uses "gas transmission line" in contrast to the legal term as an actual, technical description. In section 28b EnWG, this connection to the understanding underlying Article 49a of Directive 2009/73/EC is expressed by the addition "*gas interconnectors within the meaning of Article 49a of Directive 2009/73/EC*". That aside, it would in fact be simply impossible to consider the contribution to security of supply only for sections of a gas transmission line.

Back in 2006, Decision No 1364/2006/EC of the European Parliament and of the Council (TEN-E decision) took account of this fact. In Annex III of that decision, the whole of Nord Stream (which was then known by its project name "North European gas pipeline"), and not just the part of the pipeline in the territory of the European Union, was designated a priority project of common interest. This is evident because, for example, the whole route "Russia – Baltic Sea – Germany" is mentioned in the specifications of the pipeline.

The statements of the Republic of Poland, the Republic of Latvia and the Republic of Estonia also express this understanding, although without differentiating as regards the scope of EU law, regulation and thus also the derogation in accordance with section 28b EnWG. However, reference should be made to the Opinion of the Legal Service of the Council of the European Union dated 1 March 2018 (2017/0294(COD) – 6738/18), in which the Legal Service examined and rejected the initially planned expansion of the Gas Directive to the EEZ in the version of 13 November 2017. It specifically stated that "*The Union does not have the jurisdiction to apply energy law on unbundling, transparency, third party access and regulated tariffs, which is unrelated to the economic exploitation of the EEZ, to pipelines crossing EEZ of member states. The application of the gas directive to the EEZ would be contrary to Art. 56 and 58 of UNCLOS as interpreted by the court of justice.*" In a further Opinion of 26 March 2018 (2017/094 (COD) - 7512/18), the Council of the European Union stated that a consequence of this could be that two legally very different regulatory systems might be applied to a gas interconnector within the meaning of section 28b EnWG; against this background, it saw the derogation set out in Article 49a of Directive 2009/73/EC, along with the conclusion of international agreements, as a way of avoiding these legal consequences.

(2) Regarding the status of the Russian Federation as a third country within the meaning of section 28b EnWG, the understanding expressed in section 4b EnWG, according to which third countries are countries that do not belong to the European Union or the European Economic Area (EEA), is referred to below. This reading of section 28b EnWG is confirmed by the European context of the provision, since section 28b EnWG implements the provisions of Article 49a of Directive 2009/73/EC, as attested by the explicit formulation in section 28b(1)

sentence 1 EnWG *"gas interconnectors with a third country within the meaning of Article 49a of Directive 2009/73/EC."*

Directive 2009/73/EC was amended in the light of the objective expressed in recital 2 of Directive (EU) 201/692, that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the Union, to gas transmission lines to and from third countries. In Directive 2009/73/EC as amended by Directive (EU) 2019/692 of 17 April 2019, therefore, third countries are understood as distinct from Member States. The question of how EEA countries should be viewed as regards their classification as third countries, depending on their degree of implementation of European energy provisions and with regard to section 28b EnWG, is not relevant in the case of Nord Stream 2, since the Russian Federation is not an EEA country.

2.1.2. Characteristics of a transmission line

Nord Stream fulfils the requirements of a transmission line within the meaning of section 3 para 19 EnWG, which also apply to a gas interconnector within the meaning of section 3 para 19(c) EnWG, since its purpose is the transport of natural gas through a high-pressure pipeline network with a view to its delivery to customers, in this case the delivery of gas from the Russian Federation to Lubmin. There, other transmission systems are connected to transport the gas further to distribution systems so that it can ultimately be supplied directly to customers.

2.1.3. Distinction from upstream pipeline network

In particular, Nord Stream is not an upstream pipeline network within the meaning of section 3 para 39 EnWG, as distinct from the transmission line under section 3 para 19 EnWG, since the operation of Nord Stream is not part of an oil or gas production project, nor is Nord Stream used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal. Since the gas that is transported through Nord Stream is produced on the gas fields of the region around the city of Novy Urengoy, in particular the Yuzhno-Russkoye field and the Bovanenkovskoye gas field on the Yamal peninsula and, having been processed in the Portovaya compressor station near Vyborg, is directed into Nord Stream, a Russian gas line connected in a narrow sense with gas production and thus comparable to the upstream pipeline network within the meaning of section 3 para 38 EnWG ends at the latest at the transfer station in the Russian Federation in which the processing to marketable gas takes place. Consequently, the purpose of Nord Stream can no longer be seen in the context of gas production but rather its transportation.

2.2. Completion before 23 May 2019

Nord Stream was a completed pipeline as at the reference date of 23 May 2019, because it had already been in operation for several years on that day. For the pipeline to be taken into operation, it must first have been completed in a constructional sense. There is no doubt that this is the case here.

2.3. The first interconnection point is in the Federal Republic of Germany

Coming from the Russian Federation where kilometre point (KP) 0 is located, Nord Stream enters the German territorial sea within the meaning of the United Nations Convention on the Law of the Sea at KP 1,173.893 for line 1 and KP 1,173.531 for line 2, ie into the 12 nautical mile zone of the Federal Republic of Germany, ending at the landing terminal in Lubmin in the Federal Republic of Germany. The interconnection point of Nord Stream with the OPAL and NEL transfer stations is located there. Thus the first interconnection point of Nord Stream on the mainland of a European Member State is in the Federal Republic of Germany. Whether it is the shortest geographical connection of a Member State with the third country, an aspect particularly stressed by the Kingdom of Denmark in its response, is not relevant here.

2.4. No exception from the possibility of derogation

(1) In accordance with section 28b(1) sentence 2 EnWG, section 28b(1) sentence 1 EnWG does not apply to gas interconnectors with third countries which have the obligation to transpose the Directive on the internal market for natural gas and which have effectively implemented provisions of the Directive on the internal market for natural gas under an international law agreement concluded with the European Union. The meaning of third country here arises from the legal context of section 28b EnWG, ie third country is the country in which the start or end point of the gas interconnector is located. That means the Russian Federation, not the Swiss Confederation, where the applicant has its headquarters. No such agreements have been made between the Russian Federation and the European Union, so the exclusion criterion of section 28b(1) sentence 2 EnWG does not preclude the applicability in principle of section 28b EnWG.

(2) The possibility of a derogation for Nord Stream is also not prevented by the fact that no negotiations about the conclusion of such an agreement were conducted prior to an application under section 28b EnWG. In its response, the Republic of Estonia submits that a derogation should only be granted as a last resort. However, neither section 28b EnWG nor Article 49a of Directive 2009/73/EC indicate a staggered procedure, according to which before a derogation can be granted under section 28b EnWG, negotiations must first be held on such an agreement

and the scope of section 28b EnWG can only apply if these negotiations fail. Given the tight decision deadline set out in section 28b(3) EnWG and Article 49a(3) of Directive 2009/73/EC, such a staggered procedure would not be possible for reasons of time alone.

(3) In its response to the consultation, the Republic of Poland calls for negotiations to be started between the Federal Republic of Germany and the Russian Federation before a derogation is granted, using as a reference Article 41(1)(c) of Directive 2009/73/EC as amended by Directive (EU) 2019/692. In this context it should be noted that the conclusion of a bilateral agreement between just one Member State and a third country cannot preclude the granting of a derogation under Article 49a of Directive 2009/73/EC, because Article 49a(3) of Directive 2009/73/EC requires a mandate to negotiate of the European Union. Any such agreement between the Federal Republic of Germany and the Russian Federation would not come under section 28b(3) EnWG. Moreover, given that section 28b(3) EnWG is not a discretionary provision and the derogation has to be granted if the requirements are fulfilled, the decision on an application under section 28b EnWG cannot depend on the concluding of any such agreement between the Federal Republic of Germany and the Russian Federation or on the entering into of related negotiations, particularly as this is outside the decision-making powers of the applicant. Rather, the Council Opinion of 26 March 2018 (2017/094 (COD) - 7512/18) shows that ultimately, both the derogation and an agreement between the Member State and the third country as set out in Article 41(1)(c) of Directive 2009/73/EC are tools that can prevent two different regulatory systems from being applied to different sections of a gas interconnector within the meaning of section 28b EnWG. However, these exist in parallel and do not rule each other out as regards the possibility of derogation, unlike in the event of an agreement by the European Union with the third country under section 28(3) EnWG.

(4) In its response, the Republic of Lithuania emphasises the benefits of technical agreements for compatibility with EU law. There are no technical agreements regarding operation within the meaning of Article 48a of Directive 2009/73/EC in the case of Nord Stream. Therefore, the question of how a technical agreement within the framework of section 28b(3) EnWG should be assessed considering recital 8 of Directive (EU) 2019/692 in the light of Article 49a(3) of Directive 2009/73/EC is not relevant. Recital 8 of Directive (EU) 2019/692 states, "*When such technical agreements are in place, the conclusion of an international agreement between a Member State and a third country or of an agreement between the Union and a third country regarding the operation of the gas transmission line concerned is not required by this Directive*", while Article 49a(3) of Directive 2009/73/EC – as well as section 28b EnWG, which transposes it – explicitly refers only to agreements between the European Union and the third country and does not refer to Article 48a of Directive 2009/73/EC.

2.5. Objective reasons

In accordance with section 28b(1) sentence 1 para 2 EnWG, there must be objective reasons for a derogation, in particular to enable the recovery of the investment made or for reasons of security of supply.

The objective reason of security of supply is present for Nord Stream in this case. (see section 2.5.1.). The applicant further gives the enabling the recovery of the investment made as another objective reason, but it is not possible to confirm its existence here (see section 2.5.2).

The objective reasons listed in section 28b(1) sentence 1 para 2 EnWG are not exhaustive. This is shown directly by the wording of section 28b(1) sentence 1 para 2 EnWG and the term "in particular" in the transposition of Article 49a(1) of Directive 2009/73/EC, which uses the formulation "such as" when referring to the objective reasons. The objective reasons do not need to be fulfilled cumulatively. It is sufficient for one objective reason within the meaning of section 28b(1) sentence 1 para 2 EnWG to be present (see section 2.5.3).

2.5.1. Reasons of security of supply

Nord Stream makes a positive contribution to security of supply. This has been officially confirmed, both at the European level by the TEN-E Decision of the European Parliament and of the Council of 6 September 2006 and at the national level by the planning approval decision of the Stralsund mining authority of 21 December 2009. In addition to this official confirmation, the positive contribution of Nord Stream to security of supply in the Federal Republic of Germany and the European Union is due to the fact that the pipeline helps to meet energy demand in terms of quantity and reliability (see section 2.5.1.3). In particular, it does so by diversifying transport routes and energy sources (see section 2.5.1.3.1) and by creating redundancy for the event of failures of other import lines (see section 2.5.1.3.2) and enabling additional gas volumes to be transported into the relevant markets (see section 2.5.1.3.3). This contribution to security of supply has a positive effect both on the Federal Republic of Germany and on Europe (see section 2.5.1.4).

2.5.1.1. Gas interconnector ensures security of supply

(1) Section 28b(1) sentence 1 para 2(b) EnWG sets out the requirements for a gas interconnector to be granted a derogation for reasons of security of supply. The reasons for a derogation must be fulfilled by the object of the derogation, ie the gas interconnector that is to

be granted the derogation. Thus the reference point for security of supply is the gas interconnector itself.

(2) In this context, the gas interconnector must be viewed as a whole (see section 2.1.1), not just the section of Nord Stream running through the territory of the Federal Republic of Germany. The wording of Article 49a(1) subsection 1 of Directive 2009/73/EC, upon which section 28b EnWG is based, shows that the decision of Member States to derogate is limited to the section of pipeline located in their own territory. However, this restriction arising from section 28b EnWG and Article 49a of Directive 2009/73/EC does not arise for the conceivable objective reasons. The presence of an objective reason can only exist for the interconnector as a whole and not end in the respective territory of a single Member State, as is also shown by the fact that a consultation of Member States has to be carried out when, as in the present case, the interconnector crosses the territory of more than one Member State.

(3) The term "security of supply" in section 28b(1) para 2 EnWG corresponds to the "secure supply" mentioned as a legislative purpose in section 1(1) EnWG. No standard definition has so far become established at the national or international level (see Theobald, in: Danner/Theobald, *Energierrecht Kommentar*, 103th supplement, October 2019, section 1 margin no 17). The term security of supply must be read in the light of Article 194(1)(b) of the Treaty on the Functioning of the European Union (TFEU). This provision states that ensuring security of supply, as one of the four aims of EU energy policy, is focused on meeting energy demand in terms of quantity and reliability (Von der Groeben/Schwarze/Hatje (eds) - Hammer, *Europäisches Unionsrecht*, Baden-Baden: Nomos Verlag, 7th edition 2015, TFEU Art. 194, margin no 15). The determination and assessment of security of supply incorporates aspects such as those specified by section 51(2) EnWG for the relevant monitoring, including the relationship of supply and demand on the relevant market, the expected development of demand and the situation during peaks of demand or if suppliers fail, among other things.

According to a draft working document from the Directorate-General for Energy and Transport of the European Commission (DG TREN) on Article 22 of the gas Directive (EC) No 2003/55 and Article 7 of the electricity trading Regulation (EC) No 1228/2003, any diversification of supply sources enhances the security of supply, in particular by opening up a new source of supply or by opening a new route to the relevant markets (*Commission draft staff working document on Article 22 of Directive (EC) No 2003/55 and Article 7 Regulation (EC) No 1228/2003*, as at 6 November 2008, para 25 et seq). Accordingly, in its response to the Nabucco decision by the Austrian regulatory authority, the European Commission wrote that if an investment provides a new route to the relevant market or connects new upstream sources of gas to the market, it will increase the security of supply (EC statement para 41 et seq). The

relevant perspectives enhancing security of supply are therefore a diversification of energy sources and also the creation of additional transport opportunities. The Legal Service of the Council of the European Union confirmed this assessment again in an Opinion of 27 September 2017. Against the background of potential negotiations of the European Union and the Russian Federation regarding the operation of Nord Stream 2, the Legal Service explicitly states that opening alternative transport routes would enhance the security of supply in the EU. "[...] it is prima facie evident that the opening of alternative routes with augmented capacity would increase [...] the resilience of the Union's external supply networks to international incidents over which it has no direct control."

(4) The objective reason "reasons of security of supply" in section 28b(1) sentence 1 para 2 EnWG requires a positive contribution to security of supply by the interconnector, in this case Nord Stream. The fact that the criterion of security of supply is used twice in section 28b EnWG makes this very clear. Security of supply is not only assessed as regards the gas interconnector in section 28b(1) sentence 1 para 2 EnWG, but also in section 28b(1) sentence 1 para 3 EnWG as a negative criteria relating to the derogation decision: *"the derogation will not be detrimental to (...) or to security of supply in the Union."* While the derogation decision must not have a negative effect in accordance with section 1 sentence 1 para 3, section 28b(1) sentence 1 para 2 EnWG requires reasons of security of supply related to the interconnector, ie a positive contribution. This has already been assessed and confirmed for Nord Stream in other official proceedings (see section 2.5.1.2). The positive contribution of Nord Stream continues and is in particular due to the improvement in security of supply caused by the diversification of natural gas supply and by creating redundancy for the event of failures of other import lines.

2.5.1.2. Contribution to security of supply determined

(1) A Decision of the European Parliament and of the Council of 6 September 2006 in response to a proposal from the Commission (Decision No 1364/2006/EC) determined the positive contribution of Nord Stream to security of supply in the European Union in a binding manner. Nord Stream is classed as a priority project of common European interest in Articles 6 to 8 in conjunction with Annex I (NG.1), Annex II (9) and Annex III (9.3) of the TEN-E decision. As the applicant points out, for a project to be classed as a priority project of common interest it must meet the objectives and priorities for action set out in Articles 3 and 4 respectively of Decision No 1364/2006/EC (Article 6(1b)). Reinforcing the security of energy supplies is a major objective of the Decision (see Article 3(c). In accordance with Article 4 point 3(a) and (b), the priorities for action for gas networks should include the following: "developing natural gas

networks in order to meet the Community's natural gas consumption needs and to control its natural gas supply systems" and "interoperability of natural gas networks within the Community (...) and diversification of natural gas sources and supply routes."

The European legislature thus had to carry out an assessment based on such criteria in order to classify Nord Stream as a project of common European interest, just as here an assessment of security of supply is envisaged by section 28b EnWG and Article 49a of Directive 2009/73/EC.

(2) The fact that Nord Stream was included in the list of projects of common interest (Annex III 9.3 of the TEN-E Decision) proves that the European legislature, having carried out an assessment of the above-mentioned criteria, came to the conclusion that Nord Stream makes a positive contribution to security of supply in the EU. The positive contribution of Nord Stream to security of supply has thus been determined in a manner that is binding under European law.

(3) The 2006 classification of Nord Stream as a project of common interest does not lose its indicative effect due to the subsequent repeal of Decision No 1364/2006/EC by the now valid Regulation (EU) No 347/2013. Although Nord Stream no longer appears on the list of projects of common interest as a result of the revision of Regulation (EU) No 347/2013, no conclusion can be drawn from this fact that Nord Stream is to be classified in a different way than it was in Decision No 1364/2006/EC. Rather, Regulation (EU) No 347/2013 contains for the first time a procedure to remove a project from the list of projects of common interest. Decision No 1364/2006/EC does not contain any such provisions. In this context, recital 24 to Regulation (EU) No 347/2013 makes clear that the list is to be re-established every two years and former projects are just no longer included on it. The list is thus modified on a two-year schedule. It does not provide an indication that these projects are no longer to be classed as projects of common interest in the re-establishing of the list. It is not evident that the European legislature intended to re-assess past projects by adopting Regulation (EU) No 347/2013. Moreover, Nord Stream was already in operation at the time Regulation (EU) No 347/2013 was adopted. There would therefore have been no question of including it in the list of projects of common interest again.

(4) Ultimately, no other legal measure was issued by any of the Community institutions in the time between the issue of Decision No 1364/2006/EC and Regulation (EU) No 347/2013 that revoked the status of Nord Stream as a project of common interest. On the contrary, in its Resolution of 8 July 2008 on the "Environmental impact of the planned gas pipeline in the Baltic Sea to link up Russia and Germany" (Resolution 2007/2118(INI) on petitions 0614/2007

and 0952/2006), the European Parliament explicitly "emphasises that Decision 1364/2006/EC (incorporating the TEN-E guidelines) recognises Nord Stream to be a project of European interest that would help to meet the EU's future energy needs" (see point 1 of Resolution 2007/2118(INI) on petitions 0614/2007 and 0952/2006). While the European Parliament Resolution is not legally binding, it does give an indication of the legislative intention to stand by the classification as a project of common interest.

In conclusion, it may therefore be assumed that the classification of Nord Stream as a project of common interest still applies.

(5) In its planning approval decision of 21 December 2009, the mining authority of Stralsund confirmed the need for Nord Stream as the justification for the plan. It stated that Nord Stream would contribute to the secure supply of line-bound energy by enabling additional volumes of gas to be imported into the Federal Republic of Germany and Europe (Stralsund mining authority, planning approval decision of 21 December 2008, B.4.1.1.1, page 60 et seq).

(6) According to the planning approval decision, Nord Stream improves the security of supply in the Federal Republic of Germany by diversifying supply sources. In line with the European Commission Opinion on Austria's Nabucco decision, the Stralsund mining authority determined that it may be assumed that security of supply is enhanced in particular if new sources of supply are opened up or a new route is opened to the relevant market or new upstream sources of gas are connected to the market. According to the assessment of the Stralsund mining authority, Nord Stream fulfils all the stated requirements, because the pipeline connects new production regions in the Russian Federation, especially Yamal, via a new route through the Baltic Sea. The content of the assessment by the Stralsund mining authority is confirmed by the report from Frontier Economics submitted by the applicant. Having also taken into consideration the applicant's report and the consultation responses from Member States received during the proceedings, the ruling chamber sees no reason to doubt the legal assessment of the mining authority as to Nord Stream's positive contribution to security of supply in the Federal Republic of Germany and the European Union. The security of supply is assessed using the same criteria, so the results may be transferred to the assessment to be undertaken in accordance with section 28b EnWG.

2.5.1.3. Positive contribution to security of supply

There is no indication that the assessments made in the course of the above-mentioned procedures could no longer be made due to changes in the framework conditions.

On the contrary, in accordance with section 28b EnWG, Nord Stream continues to make a positive contribution to the security of supply in the European Union and the Federal Republic of Germany by diversifying supply sources and creating redundancy (see section 2.5.1.3.1), increasing the resilience of the German and European gas supply (see section 2.5.1.3.2) and enabling additional volumes of gas to be transported (see section 2.5.1.3.3).

2.5.1.3.1. Diversification of supply sources and creation of redundancy

(1) Nord Stream contributes to the diversification of supply sources by opening up a new transport option and thus enhances security of supply.

(2) The Nord Stream pipeline creates a new transport route to the relevant markets in the Federal Republic of Germany and the European Union in addition to the existing southern route via the Ukraine and the Yamal route via the Republic of Belarus and enables an additional 55bn m³ of gas to be transported each year. It thus provides an additional transport infrastructure element connecting to an existing source of supply, namely the Russian Federation. This creates redundancy in the event of a disruption to another import route.

(3) As far the diversification of sources of supply are concerned, it is not just individual countries that have to be taken into account but different sources of gas within a country. Nord Stream opens up a more direct connection between the Federal Republic of Germany and the European Union to the natural gas fields of the Yamal peninsula in the north of the Russian Federation, which are likely to increasingly replace the falling volumes from the production regions of western Siberia in future. Operations started at Bovanenkovskoye, the largest gas field in the Yamal peninsula, in 2012. Bovanenkovskoye's design gas production capacity is 115bn m³ per year, although it produced 87.4bn m³ in 2018 (<https://www.gazprom.com/projects/bovanenkovskoye/>), so it has a production capacity many times that of the Yuzhno-Russkoye field (25bn m³ a year), which acts as the primary source for Nord Stream. As well as diversifying transport routes, therefore, Nord Stream contributes to the opening up of new sources of supply and therefore also to meeting the EU's natural gas import needs. This is not contradicted by the view put forward by the Kingdom of Denmark in its statement that, from a geographic perspective, Nord Stream is not the shortest connection between the Russian Federation's gas reserves and the European natural gas market because the borders of the European Union begin formally at the border of any Member State. From this perspective, the Federal Republic of Germany is not the closest Member State. While it is geographically correct that other Member States are closer to the Russian Federation than the Federal Republic of Germany, from the perspective of the gas sector there is no dispute that Nord Stream is the shortest and most direct connection between the major Russian production

regions, in particular the Yamal peninsula, and the main consumption areas of the European Union. The Kingdom of Denmark also acknowledges this when it notes in its statement that Nord Stream is the closest and more directive connection between the gas reserves of the Russian Federation and the major gas-consuming Member States.

(4) According to a draft working document from the Directorate-General for Energy and Transport of the European Commission (DG TREN) on Article 22 of Directive (EC) 2009/73/EC and Article 7 of the electricity trading Regulation 1228/2003, any diversification of supply sources enhances the security of supply, in particular by opening up a new source of supply or by opening a new route to the relevant markets. (*Commission draft staff working document on Article 22 of Directive (EC) No 2003/55 and Article 7 Regulation (EC) No 1228/2003*, as at 6 May 2009, para 25 et seq). Accordingly, in its response to the Nabucco decision of the Austrian regulatory authority, the European Commission wrote that if an investment provides a new route to the relevant market or connects new upstream sources of gas to the market it will typically increase the security of supply (EC statement para 41 et seq). The relevant perspectives enhancing security of supply are therefore a diversification of energy sources and also the creation of additional transport opportunities. The Legal Service of the Council of the European Union comes to the same conclusion in its Opinion of 27 September 2017. Against the background of potential negotiations of the European Union and the Russian Federation regarding the operation of Nord Stream 2, the Legal Service explicitly states that opening alternative transport routes would enhance the security of supply in the EU. "[...] it is prima facie evident that the opening of alternative routes with augmented capacity would increase [...] the resilience of the Union's external supply networks to international incidents over which it has no direct control." At the same time, the Legal Service views it as counter intuitive to claim that the opening of supplementary routes might increase the European Union's dependence on an energy provider. It would not be in line with any concept of security of supply to prevent - or even restrict - recourse to direct supply routes in the event of the occurrence of a crisis affecting the flows of energy on the territory of transit countries (for example, due to a technical problem). This is the case even if the operation of the additional route might reduce the strategic importance of alternative transport routes. "In this respect, the assumption that the opening of supplementary routes or capacities might increase the Union's dependence on its external energy providers is, at the very least, counter intuitive. It cannot be excluded, as the Commission claims, that the operation of new pipelines might reduce the strategic importance of other routes that the Union might wish to preserve, but it would certainly not be in line with any concept of security of supply to prevent - or even restrict - recourse to direct supply routes in the event of the occurrence of a crisis affecting the flows of energy on the

territory of transit countries.” (Opinion of the Legal Service of the Council of the European Union, 27 September 2017 para 10 et seq).

(5) Contrary to the explanations of the European Commission and the Legal Service, the Republic of Poland argues in its statement that creating an additional transport option to a single external source, in this case the Russian Federation, is not sufficient to enhance energy security. It states that for this to be the case, the number of natural gas sources (source countries) must always be increased along with the diversification of supply routes. To support this opinion, the Republic of Poland refers to documents from the Council of the European Union and communications from the European Commission, but without specifying the exact points in the text. However, the relevant documents do not support the opinion put forward by the Republic of Poland at all. For one thing, they do not even deal with the question of in which cases an investment in new infrastructure can lead to an improvement in security of supply or how supply sources are to be defined. For another, the recommendations and descriptions contained in these documents in no way contradict the perspective of the Commission or the Legal Service of the Council of the European Union, described above, that diversifying transport routes contributes to security of supply – a view to which the ruling chamber also subscribes. The fact that diversifying supply sources – as in the case of the opening up of the southern corridor (Republic of Azerbaijan, potentially also Republic of Turkmenistan, Republic of Iraq, Islamic Republic of Iran) discussed in the Communication from the Commission to the European Parliament and the Council of 28 May 2014 (COM(2014) 330) or the connection of one or a few supply sources of dependent markets to LNG in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 25 February 2015 (COM(2015) 80) and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 June 2019 (COM(2019) 285) – leads to an improvement of the supply situation in the relevant markets does not contradict the fact that an additional connection of the relevant market to an existing supply source also enhances the security of natural gas supply on that market. This applies whether it is through the creation of redundant capacity for the event of technical failures on the alternative routes or, as in this case, additionally due to the connection of the relevant market to a further supply source in the form of new production areas on the Yamal peninsula. The question of whether diversifying the supply sources might provide a greater contribution to security of supply than an additional transport route from an existing source, as the Republic of Poland argues in its statement, is not relevant to the assessment of whether infrastructure contributes positively to the security of supply at all. In

particular, the fact that diversifying transport routes makes a positive contribution to security of supply cannot be denied because there might also be other, equally positive or even more positive contributions to security of supply.

(6) In its statement, the Kingdom of Denmark objects that if routes or sources are diversified but in fact the same player controls these sources, it is not really fully compatible with the Gas Directive from a competition point of view, but this does nothing to change the assessment of the diversification as positive for security of supply. Any negative impact caused by the particular situation of the players does not qualify the positive contribution of the additional route or supply source to the security of supply of the market connected by the route, but rather might have to be considered at another point during the assessments under section 28b EnWG. The Kingdom of Denmark does not therefore dispute the positive contribution of Nord Stream to security of supply. The Republic of Latvia actually explicitly mentions in its statement that Nord Stream does not have any negative effects on security of supply on the Latvian market.

2.5.1.3.2. Improving the resilience of German and European gas supply

(1) Nord Stream, as an offshore pipeline, improves the resilience of the German and European gas supply by directly connecting the Russian Federation and the relevant supply markets in the European Union. In contrast to the alternative routes for the supply of Russian natural gas to the European Union, with Nord Stream gas does not have to transit through an additional country (Ukraine or the Republic of Belarus). Moreover, a characteristic of Nord Stream as an offshore pipeline is that it does not require a compressor to transport natural gas from the entry point in the Russian Federation to the landing point in the Federal Republic of Germany. The transport of gas via Nord Stream is thus less vulnerable to technical problems than that of alternative routes. Consequently, the direct connection reduces the risk of transport disruptions, especially ones caused by technical problems, and creates redundancy in case other import pipelines should fail.

(2) By providing an additional transport capacity of about 55bn m³, Nord Stream helps to improve the resilience of the German and European gas supply. This is confirmed by the report from Frontier Economics submitted by the applicant, which analyses the situation in which Nord Stream is available (factual scenario) against a hypothetical situation without the pipeline (counterfactual scenario) and the effects on the resilience of gas supply in the Federal Republic of Germany and the European Union.

(3) One of the indicators used for security of supply is the maintenance of the N – 1 criterion in the factual and counterfactual scenarios. The N – 1 formula describes the ability of the

technical capacity of the gas infrastructure to satisfy total gas demand in the calculated area in the event of disruption of the single largest gas infrastructure during a day of exceptionally high gas demand occurring with a statistical probability of once in 20 years. (Regulation (EU) 2017/1938, Annex II). It is shown that Nord Stream further improves the existing security of supply in the European Union by increasing the capacity buffer to cover peak demand in the European Union should the import infrastructure with the greatest capacity be disrupted. It is not relevant to the result if all technical entry capacity is used to ensure the N – 1 criterion or if the calculations are carried out using assumptions of "typical" storage levels towards the end of the storage withdrawal period (January to March). In the latter calculation scenario, the assumptions merely cause Nord Stream's contribution to be higher, because if the gas volume in storage facilities is assumed to be 30 rather than 100%, there is significantly less withdrawal capacity available. The contribution made by Nord Stream's capacity is thus greater in relative terms.

(4) To answer the question of whether Nord Stream makes a positive contribution to security of the gas supply in the Federal Republic of Germany and the European Union, it is not relevant whether the quantitative effects presented in the report are precisely accurate. The structure of the analyses, in particular the use of the N – 1 formula in accordance with point 2 of Annex II to Regulation (EU) 2017/1938, shows that Nord Stream makes a positive contribution to the resilience of the German and European gas supply by providing an additional infrastructure element with import capacity of about 55bn m³ a year.

2.5.1.3.3. Nord Stream enables additional volumes of gas to be transported

(1) Nord Stream enables additional volumes of gas to be imported into the European market and helps to improve the supply situation in the Federal Republic of Germany and the European Union beyond the simple capacity situation.

(2) Based on current forecasts of gas demand in the EU, most scenarios expect a stable or moderately increasing gas demand up to 2030 (for example, the Stated Policies Scenario and Sustainable Development Scenario developed by the International Energy Agency for the World Energy Outlook 2018 and the Sustainable Transition Scenario, Distribution Generation Scenario and Global Climate Action Scenario from the European Network of Transmission System Operators for Gas (ENTSO-G) for the Ten Year Network Development Plan (TYNDP) 2018). The forecast demand will result in particular from gas power plants' growing share of electricity generation caused by the reduction in coal-fired generation in some Member States. Naturally, forecasts for beyond 2030 are less certain and there is greater variation in the development of gas demand, but the forecasts generally show a falling need for natural gas.

The stable or moderately increasing gas demand for the coming years is accompanying by the increasingly falling production in the EU itself, according to these forecasts.

(3) The scenarios used in the analysis by the applicant are based on the scenarios developed by ENTSOG for the TYNDP 2018 and thus in the same range as the values in the scenario framework for the Gas Network Development Plan 2020-2030 confirmed by the Bundesnetzagentur on 5 December 2019. The transmission system operators also use scenarios from the TYNDP 2018 to determine gas demand in the European Union up to 2030.

(4) Over the last decade, the proportion of gas consumed in Europe that was produced in the EU has fallen and it is likely to continue to do so. This is due not least to developments in the Netherlands, where maximum production volumes were corrected downwards by resolutions of the Netherlands parliament in 2019 following earthquakes in the production regions around Groningen. Gas imports are likely to remain important in the future to meet gas demand in the European Union and to ensure security of supply. Pipelines and LNG imports are possible import options. The necessary infrastructure (import pipelines and LNG terminals) provide capacity for potential imports and, from this point of view, are in principle equally suitable for increasing security of supply.

(5) Apart from the question addressed in the report of whether the underlying sources can indicate differences in how secure the imports via the available infrastructure are, which is ultimately not relevant here, it can be determined for Nord Stream that the utilisation of the Nord Stream pipeline has been increasing each year since it was taken into operation and reached 100% for the first time in 2018. As the pipeline is connected to the gas fields both in western Siberia and in the Yamal peninsula, it may be assumed that the volumes it provides will continue to be available for export to the European Union in future. Unlike in Norway, for example, the Russian gas fields have not yet reached their maximum production and production volumes will probably tend to rise there in the coming years.

(6) Moreover, it is not possible to divert pipeline volumes, possibly at short notice, due to changing prices on the different markets. In the long term, a diversion would be possible. However, it seems unlikely, at least from an economic point of view, due to the necessary investment in transport lines.

It therefore seems reasonable to assume that natural gas totalling about 55bn m³ a year will continue to be supplied to the European market via Nord Stream in future. Nord Stream thus increases the secure gas supply on the European gas market, making a considerable contribution to meeting existing and future import requirements of natural gas in the European Union.

2.5.1.4. Geographical range of contribution to security of supply

(1) Section 28b(1) sentence 1 para 2(b) EnWG does not specifically set forth which geographical area the reasons of security of supply should cover.

(2) As section 28b EnWG transposes Article 49a of Directive 2009/73/EC, which was introduced in the amendment to the Directive on the internal market for natural gas by Directive (EU) 2019/692, the applicant is correct to assume that security of supply always means the security of supply in the internal market for natural gas. As in other provisions of EU law referring to the internal market, this means that security of supply relates to the European Union, including its Member States. As the Member States are an integral part of the internal market, it makes no sense to contrast the European Union with Member States, nor is this the intention of the legislature. The majority of the gas transported via Nord Stream is taken to adjacent Member States in onshore interconnectors (in particular OPAL and NEL). Moreover, the Federal Republic of Germany is a transit country that is very important for security of supply within the European Union, given its central location within the European gas transport system and numerous connections to other Member States at the transmission system level via cross-border interconnection points.

(3) Ultimately, therefore, the security of supply in the European Union and its Member States is always the issue at hand. In the case of a gas interconnector in the Federal Republic of Germany, the Federal Republic of Germany as a Member State is a particular focus.

2.5.2. Enabling the recovery of investment

(1) Section 28b(1) sentence 1 para 2(a) EnWG gives "die Ermöglichung der Amortisierung der getätigten Investitionen"¹, as a further objective reason. "Amortisierung/Amortisation" is a term from the field of economics. It describes the process of recovering value tied up in investments, such as procurement expenditure, from the returns gained (see *Kompakt-Lexikon Wirtschaft*, Wiesbaden: Springer Verlag, 12th ed, 2014, page 19; Lücke, Wolfgang (eds): *Investitionslexikon*, München: Verlag Franz Vahlen, 2nd ed 1991, page 5). It is possible to say that an investment has been recovered when the returns it has gained equal the original procurement expenditure.

(2) The objective reason of section 28b(1) sentence 1 para 2(a) EnWG is based on the understanding that it is necessary to prove causality between circumstances arising subsequently and the occurrence of the (investment) risk so that the investment made cannot be covered by the returns achieved, ie, investment recovery is no longer possible. The cause-

¹ enabling the recovery of investment made

and-effect principle of section 28b(1) para 2(a) EnWG is that precisely that (investment) risk occurs against which section 28b EnWG intends to protect and for which it provides the tool of derogation.

(3) This is so in the present case if it is no longer economically viable to continue to operate the pipeline. The applicant discusses this point in its application and annexes 3, 7 and 9. It explains that relevant for section 28b(1) sentence 1 para 2(a) EnWG is the fact that the planned investment recovery of the specific investment project of the existing pipeline would be jeopardised by a subsequent, comprehensive regulation and that, following the extension of regulation to gas interconnectors with third-country involvement by Directive (EU) 2019/692, the high investment risk could be eliminated or at least noticeably reduced by the derogation for the pipeline section. However, the applicant was not able to convince the ruling chamber of the causal relationship stated at the beginning.

(4) The criterion of enabling the recovery of investment made is not fulfilled merely if the requested derogation would allow the existing financing concept developed before regulation was expanded to gas interconnectors with third-country involvement by Directive (EU) 2019/692 to be maintained, whereas otherwise it would have to be adjusted. On the contrary, the criterion of section 28b(1) sentence 2(a) EnWG, due to its nature as an objective reason, requires the recovery of the investment made in infrastructure to be no longer possible under the conditions of regulation and only to remain possible if a derogation were to be granted. The requirement of an objective reason in section 28b EnWG and Article 49a of Directive 2009/73/EC shows that the possibility of derogation for gas interconnectors completed before 23 May 2019 is in fact not a pure transitional provision introduced to protect legitimate expectations but also requires an objective reason to create an appropriate balance between the aim of the regulation, on the one hand, and the protection of legitimate expectations and vested rights of operators and investors of these gas interconnectors on the other. Neither the European legislature nor the national one, which implements the provisions of Article 49a of Directive 2009/73/EC word for word in section 28b EnWG, introduced a blanket transitional provision for gas interconnectors already completed as at the reference date, but rather viewed recovery of investment as merely one possible objective reason that would need to be proven.

2.5.2.1. Changes in regulatory law

(1) It is not possible to dispute the applicant's argument insofar as the applicant puts forward that Nord Stream is subject to regulation to (at least) the following extent under the new regulatory scope covering gas interconnectors with third-country involvement. The applicant

explains that, were the requested derogation not to be granted for the section of Nord Stream located in German territory, the European provisions would apply in full. The unbundling rules in accordance with sections 8-10e EnWG would have to be complied with. Moreover, under section 20 EnWG, non-discriminatory access to the section of Nord Stream subject to German regulation would have to be ensured. This would comprise observing the provisions of Commission Regulation (EU) 2017/459 establishing a network code on capacity allocation mechanisms in gas transmission systems and marketing capacity on the primary capacity booking platform while setting aside capacity for short-term marketing (reservation quota). It is also correct to state that the following would apply to the section of Nord Stream located in German territory: the general rules on network charges in accordance with sections 21 and 21a EnWG; the Gas Network Charges Ordinance (GasNEV); the Incentive Regulation Ordinance (ARegV); Commission Regulation (EU) 2017/460 establishing a network code on harmonised transmission tariff structures for gas along with the related determinations REGENT and AMELIE. The applicant would only be allowed to impose the regulated charges for transport on the German section, while transport charges would be unregulated on the rest of Nord Stream.

(2) However, the mere fact of subsequently expanding energy regulation does not necessarily, in the view of the legislature, lead to such a severe intrusion in an existing, complex, overall commercial concept that section 28b(1) sentence 1 para 2(a) EnWG must be affirmed for that reason alone, because this circumstance is inherent to any expansion of a regulatory framework to existing structures. Therefore, the fact that legal framework conditions can change for long-term projects and that this has an effect on the original investment planning and duration or calculation of investment recovery is insufficient. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(3) Rather, for the assumption of an objective reason under section 28b(1) sentence 3(a) EnWG there must be the occurrence of a relevant risk within an ex-post assessment (see sections 2.5.2.2 and 2.5.2.3 below).

2.5.2.2. Occurrence of a relevant risk

Section 28b(1) sentence 1 para 2(a) EnWG serves to take account of particular (investment) risks caused by expanding regulation to gas interconnectors with third-country involvement. Section 28a EnWG provides a basis for understanding the relevant risk for new infrastructure.

The possibility of exemption for planned new infrastructure associated with section 28a EnWG assumes that such investment will only be made if the investors/lenders can calculate and ensure for the long term that they can recover their capital. Without this certainty, they might choose not to make major investments. Not every risk can be classed as a relevant risk within an exemption decision under section 28a EnWG, but only those financial risks that go beyond the general credit risk or comparable financing risks because they result from the specificities of the infrastructure. They include, in particular, any capacity utilisation risk. A utilisation risk may exist because investments for pipelines/interconnectors generally lead to sunk costs. There is usually no way of using the lines for any purpose other than the one originally planned. In order to make an economically rational investment decision, it must be possible in principle to make a reliable forecast as to whether the lines will be utilised to a sufficient extent during the investment recovery period and it will be possible to impose transport charges for them, enabling refinancing. This includes the risk of non-use of the investment and the risk of change in cost and/or revenues in future, ie that under these circumstances the project will no longer be economically viable.

2.5.2.3. Ex-post assessment

(1) Unlike section 28a EnWG, section 28b EnWG does not envisage an ex-ante assessment in the sense of a forecast assessment, because both the investment made and the applicable regulatory framework are known. An analysis must therefore be made of the regulatory framework expanded by Directive (EU) 2019/692 and compared with the situation that would exist if a derogation were to be granted in accordance with section 28b EnWG for the pipeline section located in German territory including its territorial sea as regards the risk of non-use of the investment and the risk of change in cost and/or revenues caused by the fact that Directive (EU) 2019/692 expanded regulation to gas interconnectors with third countries, insofar as they run through the territory, with the result that the recovery of investment is only possible with a derogation.

(2) Due to the nature of section 28b(1) sentence 1 para 2(a) EnWG as an objective reason, not every change to the costs and revenues leads to the assumption of the relevant risk; in particular, merely stating that different framework conditions will arise for the investment does not justify the assumption of a relevant investment recovery risk. The amendment clauses in the contracts and the possible reactions of the investors caused by the ex-post assessment are also to be included in the risk assessment.

(3) The decisive point here is evidence that it is no longer possible to recover investment, ie evidence that it would no longer be economically viable to continue to operate the pipeline. It

is therefore necessary to conduct a specific assessment of the impact of regulatory provisions on the investment risk, taking account of amendment options and tools of the existing financing concept for such events. Only if this leads to the conclusion that it would not be possible to recover the investment despite using these tools and the derogation would be absolutely necessary to continue to operate the pipeline in an economically viable manner would the objective reason of section 28b(1) sentence 1 para 2(a) EnWG be present.

(4) The applicant has not provided such evidence.

It does show that possible changes to the ownership structure and the contracts upon which the financing is based could lead to an event of default (see section 2.5.2.5.1) and outlines potential consequences of such an event of default (see section 2.5.2.5.2), but the qualitative demonstration that it would not be possible to recover the investment without a derogation and that it would not be economically viable to continue to operate the pipeline is lacking.

(5) The applicant explains that the regulation now in application has an impact on the investment calculations. It explains that the major investment to construct and operate Nord Stream was made with confidence in an overall commercial concept in an unregulated environment (see page 44 of the application). Accordingly, the investment recovery calculation was made under these framework conditions and, following the implementation of Directive (EU) 2019/692, could only be maintained in its current form in the event of a derogation being granted for the section of Nord Section located in the German coastal area.

(6) The applicant provides various scenarios. It does base them on an ex-post assessment but this is limited to various model calculations. The applicant does not prove successfully that it would no longer be possible to recover investment, ie evidence that it would no longer be economically viable to continue to operate the pipeline.

2.5.2.4. Calculations of investment recovery

(1) The applicant has provided calculations of investment recovery for the purpose of proving that without a derogation, it would not be possible to recover the investment made, or not within the same period. To assess this objective criterion, the applicant has to take into account alternative developments for the pipeline section under regulatory influence, which is located in German territory and is technically and economically not independent.

(2) For this reason, the applicant and the experts it has commissioned anticipate possible consequences of regulation on the agreed contracts and derive three alternative scenarios (comparative scenarios) from them. These are compared with the baseline scenario. The baseline scenario is the representation of the unregulated actual situation, ie before the entry

into force of section 28b EnWG (based on the amendment of the European Gas Directive 2009/73/EC). The applicant makes clear in its application that the section that would be subject to regulation is a section of a whole pipeline that is actually one technical unit. In order to meet regulatory requirements, there must be a notional division of the whole pipeline and the creation of a German section solely for regulatory purposes.

(3) The three scenarios show that the present value of the non-recovered return on equity rises in each case compared to the baseline scenario as the underlying assumptions are intensified. According to the applicant, a fourth scenario in which renegotiations between the applicant and Gazprom export break down, possibly only temporarily, is also possible. In this scenario there would be an additional risk to security of supply.

(4) The applicant makes the point that in general, the subsequent extension of energy regulation to the German section of Nord Stream is an intervention in an existing, complex, overall commercial concept.

The ruling chamber can follow this argument insofar as it is necessary or could to a certain extent be necessary to adjust the calculation of investment recovery. Despite the wide-ranging information provided by the applicant, it is not possible for the ruling chamber to clearly follow individual basic assumptions or the selection of different parameters for the calculation of investment recovery or these do not provide the above-mentioned causal relationship.

(5) For example, following the argument of the applicant it remains unclear which procedure was used and if applicable under which assumptions the amount of investment costs was transferred into the annual revenue caps upon which the calculations of investment recovery are based.

(6) It is not sufficient for the originally planned investment recovery not to be possible or not to be possible within the planned time frame, as the applicant tries to show in the different comparative scenarios. Moreover, it frequently remains unclear why certain assumptions were used.

(7) For example, in the calculation of the third scenario, [REDACTED] of the pipeline costs are given for the part of the gas interconnector located in German territory. This figure is not completely comprehensible for the ruling chamber, given that the section of the pipeline located in German territory is around 50 km long and thus only about 4% of the total length. The ruling chamber does not rule out the possibility that the figure of [REDACTED] is factually correct but it lacks evidence for it.

(8) In addition, a discount rate of [REDACTED] is applied to the calculation of the present values in the alternative scenarios, for which no evidence is provided either. According to the applicant, this discount rate corresponds to the return on equity that the project would achieve from [REDACTED] onwards if the current situation without regulation were to continue. Using the reasoning provided, the ruling chamber is unable to follow or provide a conclusive assessment as to whether the rate was selected correctively for the intended purpose. Rather, it raises the question of whether a discount rate should be used in the present value calculation that is based on an adequate opportunity interest rate of the period in question.

(9) The understanding of the ruling chamber described here is also reflected in the consultation responses of Member States. The Republic of Poland, for example, argues that the applicant should have provided evidence, eg that it would be impossible to provide external financing if the gas interconnector that is the subject of the application were to be subjected to EU regulation and the investor did not have sufficient financial means of its own. The Republic of Poland further states that it has not been shown that it would be impossible to achieve the revenue from ongoing business needed to cover the operating costs of the gas interconnector while complying with EU legislation.

2.5.2.5. Event of default

The ruling chamber cannot derive from the contracts provided that an event of default would necessarily have to be declared. Even if, based on the assumptions mentioned above, the application of regulation to the section of Nord Stream would lead to an event of default, the ruling chamber does not view this as automatic evidence that it would no longer be possible to recover the investment.

2.5.2.5.1. Occurrence of an event of default

(1) An event of default is defined as a chance event leading to a default of a system or system element (see <https://www.spektrum.de/lexikon/mathematik/ausfallereignis/351>, last accessed 22 April 2020). In the field of finance, an event of default is referred to when a creditor is no longer able to meet its liabilities in full or in part (see Stepanova, Maria, *Recovery Risiko in der Kreditportfoliomodellierung*, Wiesbaden: Springer Gabler 2012, chapter 4.1.1, page 23).

(2) The applicant states that the introduction of regulation would likely lead to an event of default. A corresponding evaluation can be found in the NERA report (see NERA report, annex 9 of the application, page 13 et seq), which states several times that the introduction of regulation would *likely* lead to an event of default (emphasis added).

(3) There is a risk that an event of default would make refinancing necessary and lead to additional renegotiations of the outstanding loans. The applicant anticipates that the refinancing terms would be worse than those of the original loans and this would have a significant impact on transaction costs. The higher borrowing costs would jeopardise the recovery of investment from the perspective of the equity providers.

The FSA, GTA and Common Service Agreement (CTA) were analysed by the ruling chamber to assess the assumptions made by the applicant.

(4) A large amount of debt capital was needed to implement the Nord Stream investment project and was made available by numerous providers of debt capital. [REDACTED]

[REDACTED]

(5) The contract that the FSA refers to in this definition is a GTA (see annex 7 of the application) between the applicant and OOO Gazprom Export (now: Gazprom export LLC, "Gazprom export"). It secures the financing for the whole investment project. The income contractually agreed therein by the applicant serves as a basis for the debt capital financing, according to the documents provided. [REDACTED]

[REDACTED] the contract contains a ship-or-pay obligation for Gazprom export that permits the applicant stable revenue from agreed transport charges. [REDACTED]

[REDACTED]

[REDACTED] Gazprom export is the only shipper on Nord Stream, because it has a legal export monopoly for pipeline transports from Russia. In its application (page 44 of the application), the applicant explains that the major investment to construct Nord Stream was made with confidence in an overall commercial concept in an unregulated environment.

(6) In a third contract, the CTA (see additional documents provided for the application on 10 February 2020), the providers of debt capital linked their agreement to provide loans to certain terms. The NERA report (see NERA report, annex 9 of the application, chapter 4.1, page 13 et seq) states that this contract sets out that any deviations from these agreements can result

in an event of default and lead to renegotiations. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(7) The ruling chamber takes the view [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(8) [REDACTED] If the derogation were not granted, Nord Stream would have to comply with the provisions on ownership unbundling in accordance with sections 8-10e EnWG. This could lead to changes in the ownership structure for the section of Nord Stream located in German territory.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2.5.2.5.2. Outlined consequences of a potential event of default

(1) Even if, based on the premises stated above, the application of regulation would lead to an event of default for the section of Nord Stream, it is not fully evident to the ruling chamber from the submitted contracts [REDACTED]

[REDACTED] the application, including the NERA report, only includes the vague formulation that the occurrence of an event of default could lead to renegotiations (see NERA report, annex 9 of the application, page 13 et seq). This does not seem to be an inevitable consequence and the possible content of renegotiations is merely presented as potential scenarios without being backed up further with facts. There is no qualitative discussion of the topic.

(2) The NERA report makes the assumption that renegotiations would always bring disadvantages for the applicant. Before the investment decision, there was an optimal distribution of risk between the applicant and its only shipper, Gazprom export, according to the report. It states that the GTA attained an "optimal" risk allocation. The planning of long-term transport charges is said to have included the secure finding that this had had positive effects on the amount of returns demanded by the equity providers. If renegotiations were to take place, there would be a risk that Gazprom export would renegotiate the GTA to its advantage ex-post, ie, after the investment had already been irreversibly made (see application page 47, NERA report, annex 9 of the application, chapter 4.2, page 15 et seq and chapter 5.5.2, page 39 et seq). The ruling chamber cannot fully follow this argument. In the contractual agreement in the GTA, the agreed ship-or-pay commitment means that a one-sided risk distribution favouring the applicant was negotiated. Utilisation risks that already existed before the entry into force of the new Gas Directive due to the regulation of the pipelines downstream to Nord Stream are borne fully by Gazprom export. Therefore, the ruling chamber takes the view that the risk distribution chosen in the GTA was not "equal", at least with regard to the much-discussed utilisation risk.

(3) [REDACTED]

[REDACTED] For the ruling chamber, this begs the question of what strategic position Gazprom export would take in potential renegotiations. The applicant argues that in potential renegotiations, the utilisation risk would be shifted from Gazprom export to the applicant. The ruling chamber can follow this argument but considers that other results of the negotiations are also conceivable and realistic.

(7) The NERA report states if it were necessary to amend the contractual arrangements of the GTA, the applicant would run the risk of Gazprom export lowering the transport charges. This reduction in transport charges would lead to a risk that it would no longer be possible to service the debts of creditors and might jeopardise the financing structure underlying the investment decision (see NERA report, annex 9 of the application, chapter 2.1 page 6). The ruling chamber cannot follow this argument. [REDACTED]

[REDACTED] These contradictions in the line of argument put forward by the applicant are also addressed in the response of Member States, in this case the Republic of Poland. The Republic of Poland notes that it is important to understand the regulatory requirements to calculate charges in the

European Union. If potential renegotiations were to result in Gazprom export, as the sole shipper, only carrying out 80% of the bookings possible in the long-term, it would not necessarily lead to lower charges, as the applicant claims (see in general statement of the Republic of Poland, page 13). In fact, the transferring of costs to the comparatively low capacity bookings would tend to lead to an increase in transport charges. It should be noted here that, at least for the section of the pipeline that would be subject to regulation, there are clear rules on the how the revenue cap, and thus also the specific charges, are calculated. In each case, the company is subject to individual assessment taking account of its risks, in particular from the amount of the regulatory rates of return on equity allowed, and based on the costs of the regulated infrastructure (and only these).

(8) A further consequence of an event of default outlined by the applicant could be a downgrading of the credit rating. According to the applicant, this could affect both Nord Stream and Gazprom which, in the form of Gazprom export, is the only shipper and thus has a direct impact on Nord Stream. A downgrading of the rating would have a direct, negative effect on potential renegotiations (see application page 45, NERA report, annex 9 of the application, chapter 4.2, page 15 et seq). The ruling chamber is unable to follow this argument. It views these explanations as too one-sided. The assessment of a company acting in a regulated environment is completely neglected. The stability and transparency of regulation has a major influence on the rating, particularly as, under a regulatory regime, there is in principle a "guarantee" that the permitted revenues will actually be achieved – perhaps with a time delay in future regulatory periods, but in that case with an appropriate rate of interest. There is therefore no insolvency risk for a regulated network operator even if the demand for capacity drops, provided the network operation does not cease completely in future. This is not to be expected, as the regulatory account provides security in the event of a drop in capacity demand.

The Republic of Poland also highlights this aspect in its statement. The applicant's negotiating position vis-à-vis Gazprom export in any renegotiations may therefore certainly be seen as positive.

(8) The report (page 14, section 35) gives as a worst case scenario that cannot be ruled out the possibility that if a necessary refinancing were not achieved, write-downs would be necessary both on the part of creditors and equity providers.

(10) The ruling chamber was not provided with evidence in either the application or the accompanying NERA report that a qualitative assessment of this scenario was carried out either by the providers of debt capital or Gazprom export, eg in the form of talks related to the

specific content of potential renegotiations. There were abstract assumptions made about the behaviour of contracting parties and blanket statements about potential consequences.

In conclusion, the objective reason of enabling the recovery of investment made in accordance with section 28b(1) sentence 1 para 2(1) EnWG is not fulfilled.

2.5.3. One objective reason is sufficient

(1) However, this makes no difference to the result as the presence of one objective reason is sufficient and it is not necessary for the reason of enabling the recovery of investment made to exist in addition to the reason of security of supply, which was confirmed above (see section 2.5).

In accordance with section 28b(1) EnWG, gas interconnectors with a third country are granted a temporary derogation for the section located in the territory of Germany from the application of sections 8 to 10e EnWG and sections 20-28 EnWG if, in addition to the other requirements, there is an objective reason for a derogation. Section 28b(1) sentence 1 para 2 EnWG gives as objective reasons *"in particular a) enabling the recovery of investment made or b) reasons of security of supply"*. It is thus only necessary for one objective reason to exist for this criterion to be fulfilled. In detail:

(2) Looking at the wording of the provision, the term "in particular" makes clear that the list is not exhaustive and does not contain all possible cases. That means that other cases, not specifically mentioned, are possible in addition to the specific examples given. The use of the word "or" as a conjunction joining the objective reasons given in section 28b(1) sentence 1 para 2(a) and (b) EnWG makes clear that the possible objective reasons are given as alternatives. They do not have to exist cumulatively; it is enough for one objective reason to be present. This understanding is not called into question by the formulation "objective reasons" in the provision. The use of the plural of objective reason is merely for grammatical reasons and is in line with the listing of several possible examples of an objective reason.

(3) Looking at the structure of the provision, the other subsections of section 28b EnWG show, firstly, that the duration of the derogation in accordance with subsection 4 depends on the "objective reasons". This corresponds to the wording of section 28b(1) sentence 1 para 2 EnWG shown above. If section 28b(1) sentence 1 para 2 EnWG is then compared with section 28a EnWG, it can be seen that, unlike for existing pipelines in section 28b EnWG, for new infrastructure under section 28a EnWG the legislature linked an exemption to the existence of cumulative requirements. In section 28a(1) EnWG, all the requirements are listed and joined with the word "and" and consequently all need to be fulfilled. The legislature, in the

knowledge of the exemption provision of section 28a EnWG/Article 36 of Directive 2009/73/EC, here chose in section 28b(1) sentence 1 para 2 EnWG to use the conjunction "or" with regard to the existence of objective reasons. There is no other conclusion to be drawn here than that one objective reason is sufficient.

(4) A historic and teleological consideration of section 28b(1) sentence 1 para 2 EnWG does not lead to any other conclusion as to the meaning of the provision than the one given above either. Section 28b EnWG was added to the EnWG for the first time in the "Act amending the Energy Industry Act to implement Directive (EU) 2019/692 of the European Parliament and of the Council concerning common rules for the internal market in natural gas" of 5 December 2019. Section 28b EnWG transposes Article 49a of Directive 2009/73/EC, introduced for the first time in amending Directive (EU) 2019/692, into German law. In recital 4, sentence 1 of Directive (EU) 2019/692, the European legislature explains: *"To take account of the lack of specific Union rules applicable to gas transmission lines to and from third countries before the date of entry into force of this Directive, Member States should be able to grant derogations from certain provisions of Directive 2009/73/EC to such gas transmission lines which are completed before the date of entry into force of this Directive."* There is therefore no preceding provision or possible explanations from the legislature that could lead to a different interpretation than the one given here.

(5) The interpretation in line with the Directive also shows that one objective reason is sufficient. The new provision of section 28b EnWG transposes the new provision of Article 49a of Directive 2009/73/EC into German law. The European provision does not give rise to any other understanding than the one shown in the explanations above. Article 49a(1) of Directive (EU) 2019/692, upon which section 28b EnWG is based, uses the wording "(...) for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply." Here, too, the words "such as" make clear the list of possible objective reasons is not exhaustive and consists of examples. The use of the word "or" in this version of the Directive also makes clear that it is a list of alternative, individual, possible objective reasons. With regard to the use of the plural in the list, nothing more can be added to what was argued above about the wording. This understanding is clearly supported by the wording of Article 49a(1) subparagraph 2 of Directive 2009/73/EC, which sets out that the derogation shall be limited in time up to 20 years based on *"objective justification."* It was evidently the intention of the European legislature for the presence of one objective reason to be sufficient to fulfil the criterion.

In this case, it is the confirmed objective reason "reasons of security of supply" in accordance with section 29b(1) sentence 1 para 2(b) EnWG.

2.6. No negative effects

The granting of the derogation does not have any negative effects on the areas mentioned in section 28b(1) sentence 1 para 3 EnWG. The derogation would not be detrimental to security of supply in the European Union (see section 2.6.1) or to competition on or the effective functioning of the internal market in natural gas (see section 2.6.2) in comparison to the fictitious scenario of full regulation for the section of Nord Stream in the German territorial sea.

2.6.1. No detriment to security of supply from the derogation and maintenance of energy solidarity

(1) The applicant has convincingly shown the ruling chamber that a derogation from regulation for Nord Stream would not be detrimental to security of supply in the EU.

(2) With a view to security of supply, a comparison between a scenario with regulation and a scenario with a derogation from regulation does not show any difference in the ability to use Nord Stream. The pipeline continues to present an alternative transport route for the import of 55bn m³ a year of Russian natural gas, leaving the positive contribution of Nord Stream for the security of supply in the Federal Republic of Germany and the European Union unchanged, whether part of the pipeline is subject to regulation or not. Due to the export monopoly in the Russian Federation, the derogation from regulation also has no effect on the fact that Gazprom export is the only shipper that can transport natural gas through Nord Stream. No detriment to the security of supply of the European Union or individual Member States caused by the derogation from regulation is evident.

(3) In its statement, the Republic of Latvia writes that a derogation from regulation for Nord Stream is not compatible with the aim and purpose of the Directive, namely to contribute to security of supply among other things, due to the pipeline's large technical capacity; however, this argument is not further developed in the statement and the ruling chamber is unable to follow it. As explained in sections 2.5.1.2 and 2.5.1.3, it is precisely Nord Stream's huge technical capacity, which permits it to transport an additional 55bn m³ a year into the European gas market, that contributes considerably to diversification and resilience, and thus to security of supply, in the European Union, fulfilling one of the criteria required in section 28b EnWG for a derogation from regulation to be granted. Incidentally, the Republic of Latvia specifically

mentions in its statement that Nord Stream does not have any negative effects on the Latvian natural gas market and security of supply.

(4) The Republic of Latvia further writes that a derogation from regulation for Nord Stream would have a negative effect on the security of supply in the European Union. However, it provides no further details as to this claim, nor does it mention specific negative effects of a derogation from regulation for Nord Stream on the gas market of the Republic of Latvia or the European Union. In the absence of specific arguments, the statement of the Republic of Latvia is unable to change the conviction of the ruling chamber that a derogation for Nord Stream would not have any negative effects on security of supply in the European Union.

(5) The derogation also does not harm solidarity in the energy sector of the European Union. Nord Stream makes a positive contribution to security of supply in the European Union as a whole and the derogation from regulation for the pipeline is not detrimental to security of supply in the European Union or in individual Member States. Based on its important role for the transit of Russian natural gas into the European Union, the applicant analysed in particular the central and eastern European markets (CEE region) in the Republic of Poland, the Czech Republic, the Slovak Republic and the Republic of Hungary in detail with a view to the solidarity principle. It did not find negative effects on security of supply caused by Nord Stream itself or by a derogation from regulation for the pipeline.

(6) As regards the Polish market, it may first be noted that Nord Stream has not led to a replacement of the transit of Russian natural gas through the Republic of Poland. Even after Nord Stream was taken into operation and fully utilised, no negative effects on the utilisation of the Yamal-Europe pipeline could be found, as Frontier Economics states in its report using the example of the first quarter of 2018. It may therefore be concluded that Nord Stream causes no worsening to security of supply in the Republic of Poland.

(7) The Republic of Poland does not in fact suggest that the supply situation in the Republic of Poland is negatively impacted by the derogation for Nord Stream from the application of regulation or indeed by the pipeline itself. Nevertheless, Frontier Economics shows that with the creation of reverse flow capacity from the Federal Republic of Germany, which permits a physical flow from west to east along the Yamal, and the construction of the LNG terminal in Swinoujscie, the Republic of Poland could meet its import needs of about 14bn m³ a year completely without physical imports of Russian natural gas (via the Yamal route). The expected commissioning of the Baltic Pipe in 2022 will reduce the need for gas imports from the Russian Federation even further or eliminate it completely by allowing Norwegian production volumes to be transported to the Republic of Poland via the Kingdom of Denmark (see Frontier

Economics report, annex 8 of the application, page 81-84). This development reflects the Polish strategy of becoming independent from natural gas deliveries from the Russian Federation. Apart from the investments in infrastructure enabling imports from alternative sources, this strategy is also shown in PGNiG's announcement that it would not renew the gas supply agreement with the Russian Federation that expires in 2022 (source:<https://www.energate-messenger.de/news/196664/pgnig-laesst-vertrag-mit-gazprom-auslaufen>).

(8) The Republic of Poland points out in its statement that the applicant put the figure for domestic production in Frontier Economic's report rather too high (5.6bn m³ versus the 4.031bn m³ calculated by the Republic of Poland) and it argues that considering import volumes on a yearly basis is not suitable to determine that there is no risk to security of supply. Nevertheless, the statement does not discuss whether its specified domestic gas production and/or an alternative calculation methodology for consumption and capacity would have led to a different assessment of the effect of the derogation on security of supply in the Republic of Poland.

(9) As traditional transit countries, the Czech Republic and Slovak Republic have many times the import capacity of their domestic demand (see Frontier Economics report, annex 8 of the application, figures 37 and 38). The Czech Republic is connected to the German market via OPAL, which is linked to Nord Stream, and EUGAL, which can also only transport Russian natural gas. In addition, there are connections between the Federal Republic of Germany and the Czech Republic via the cross-border interconnection points at Olbernhau, Deutschneudorf and Waidhaus, which enable physical – and virtual, in the case of Waidhaus – transport from west to east and link the Czech market to the virtual trading points of Gaspool and NCG. For its part, the Slovak Republic has considerable import capacity from the Czech Republic and the Republic of Austria, both of which would be suitable to meet domestic demand for natural gas without recourse to Nord Stream. Moreover, at the Ushgorod/Velke Kapusany cross-border interconnection point there is a connection with Ukraine as part of the Brotherhood import route for Russian natural gas to the EU.

(10) In comparison to the above-mentioned markets, Hungary has relatively low import capacity in the west-east direction. It is to be expected that the onshore extension of the TurkStream pipeline will achieve additional interconnection capacity between Hungary and Serbia in the coming years and the Republic of Hungary will therefore be additionally connected to the southern transit route for Russian natural gas (see Frontier Economics report, annex 8 of the application, page 86-87). Overall, therefore, there is also no indication here that

a derogation from regulation for Nord Stream would have negative effects on security of supply in Hungary. No views to the contrary were brought forward in the course of the consultation.

2.6.2. Competition on and the effective functioning of the internal market in natural gas in the European Union

(1) No negative effects of a derogation on the product and geographic (ie relevant) part of the internal market in natural gas or its effective functioning were found. The granting of a derogation does not lead to an increase in the volumes of gas being transported by Gazprom through Nord Stream and thus does not change the competitive positions of market players and has no influence on the liquidity of the market.

In accordance with section 28b(1) sentence 1 para 3 EnWG, a requirement for the requested temporary derogation from the application of sections 8-10e and sections 20-28 EnWG is that it "would not be detrimental to competition on or the effective functioning of the internal market in natural gas in the European Union." Since the effects of a derogation from regulation on the effective functioning of a market affect competition on that market, at least indirectly (and vice versa), these two criteria of section 28b(1) sentence 1 para 3 EnWG are examined together.

(2) From the perspective of competition law, the assessment of possible effects on competition on and the effective functioning of the internal market in natural gas first requires that the relevant market is defined in terms of product and geography in order to determine the economically relevant market. The objective of defining a market is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure (demand substitutability, Official Journal of the European Communities 97/C 372/03 of 9 December 1997, margin no 2). To compare competition and its functioning on the defined market, differences between the two scenarios, "regulated" and "unregulated" (ie without and with derogation) are worked out and any resulting consequences presented.

(3) The relevant product market is defined on the basis of the definition given in the Official Journal of the European Communities 97/C 372/03: "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use." (Official Journal of the European Communities 97/C 372/03 of 9 December 1997, margin no 7) The Nord Stream pipeline exports natural gas from Russia to Germany and, via connecting pipelines, to other EU countries. The relevant product market is the natural gas supply market, ie the market for the supply of wholesale natural gas via the import stage, which includes pipeline imports, LNG and local production (see also Frontier Economics report, annex 8 of

the application, page 103. Domestic and foreign gas producers and gas wholesalers are on the opposing sides of this market. As part of defining the product market, since 2014 (see Bundeskartellamt B8-69/14, margin no 79 et seq) the Bundeskartellamt has combined the supply of transregional and regional gas transmission undertakings with their traders into one single market on the natural gas supply market for wholesale gas (see Bundeskartellamt B8-22/19, page 1). The supply of regional and local distributors takes place on a market downstream of wholesale, which is no longer part of the market definition used here.

The applicant is correct to state that "in the definition of the product market, it is not necessary to distinguish between the different gas qualities, H-gas and L-gas" (see application, page 50) and that regasified LNG is "also in competition with gas imported in pipelines [...] or locally produced gas in the wholesale market" (see application, page 50).

(4) The relevant geographic market is defined as the area "in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area." (Official Journal of the European Communities 97/C 372/03 of 9 December 1997, margin no 8) The applicant is also correct, in the context of the geographic market definition, to point to the decision-making practice of the Bundeskartellamt, according to which the natural gas supply market and its downstream markets, with the exception of the default supply market, should be defined nationally (see Bundeskartellamt B8-22/19, page 1-2). The Frontier Economics report submitted with the application further contained indications of a geographically larger market that also covers the Kingdom of Belgium, the Netherlands, the Grand Duchy of Luxembourg, the Kingdom of Denmark, the United Kingdom of Great Britain and Northern Ireland and the Czech Republic (see Frontier Economics report, annex 8 of the application, page 105). Ultimately, the relevant natural gas supply market is the one upon which gas wholesalers obtain natural gas from foreign and domestic producers and it covers at least the whole of the Federal Republic of Germany (see also Bundesnetzagentur and Bundeskartellamt, Monitoring Report 2019, page 345).

(5) Regarding the argument of the Republic of Poland that the main objectives of EU energy legislation could only be achieved if the entire import infrastructure were subject to regulation and not just the part of it on the mainland (see statement of Republic of Poland, page 12), reference is made to the market definition under competition law described above. The section of the Nord Stream relevant to the assessment of whether a derogation from regulation is to

be granted runs between the border of the German territorial sea and the landing terminal in Lubmin.

(6) A derogation from regulation for the Nord Stream pipeline will have no negative effects on competition on or the effective functioning of the relevant internal market in natural gas. Even if the pipeline were regulated and fell under the regulatory framework of sections 8-10e and sections 20-20 EnWG, Nord Stream would not have any other usage possibilities, because it can effectively only be used by 100% holding companies of the Gazprom group. This conclusion arises from the comparison of the competition level in a situation with a derogation from regulation (factual scenario) and a situation without a derogation (counterfactual scenario) (see Frontier Economics report, annex 8 of the application, pages 96-97, 106-107). The indicators used to determine the competition level are market shares and the market concentration indices derived from these (see Frontier Economics report, annex 8 of the application, page 106). However, the export monopoly laid down in Russian law means that the Gazprom group is the only shipper with practical, technical, exclusive access to the entry point at the landing terminal in the Russian Federation that can use the capacity of Nord Stream and is simultaneously the owner of the gas volumes exported to Germany using the pipeline (see Gleiss Lutz, application for the granting of a derogation in accordance with section 28b EnWG of 19 December 2019, page 52, Frontier Economic report, annex 8 of the application, page 108). As a result, whether or not the relevant section of the Nord Stream pipeline, which runs from the border of the German territorial sea to the landing terminal in Lubmin, is regulated or granted a derogation from regulation, the Nord Stream pipeline will not be used by competitors, so there will be no change to the market shares, other market concentration indices (Frontier Economic report, annex 8 of the application, page 109) or liquidity on the relevant product and geographical market.

(7) The applicant states that there cannot be a negative competitive effect of the derogation for the German section of Nord Stream because 100% of the natural gas volumes transported using Nord Stream are already subject to regulation under the EnWG (see application, page 51). It justifies this by stating that all the gas transported in Nord Stream is transported further using the two onshore pipelines OPAL and NEL and they in turn are subject to the EnWG in full. The ruling chamber cannot agree with this view, because regulation is the norm and the derogation that is being decided on here can only be granted if derogation from regulation has no negative effects on the relevant market and the effective functioning of it. A prerequisite for this is non-discriminatory access to the relevant markets along the whole relevant value chain. The applicant's contention that regulation has so far not started at the border of the German territorial sea but continues to apply unchanged on the German mainland

(see application, page 51) is not relevant to determining the effects of a derogation from regulation in accordance with section 28b EnWG, because the assessment to be made here does not relate to a change in the status quo, that is, a shift in the previously first regulated point in Lubmin by about 50 km along the Nord Stream pipeline to the border of the German territorial sea, but rather to a comparison of the effects in the scenarios described above, "regulated" and "unregulated". However, the applicant is right to state that for the assessment of negative effects on competition and the market, the section of pipeline under examination must be regarded in isolation (see application, page 51).

(8) The Republic of Poland counters the argument of the applicant by stating that the derogation would cause a de facto monopoly of the entry point at Greifswald (see statement of the Republic of Poland, page 12). Therefore, according to the statement, there can only be the appearance of free competition for capacity on the OPAL and NEL pipelines if in fact, only Gazprom can make use of it. It is said to be unjustifiable for 100% of the Nord Stream capacity to be reserved by a "company with a dominant market position on the EU gas market". However, this line of argument is not an effective justification for negative effects within the meaning of section 28b(1) sentence 1 para 3 EnWG, since the de facto monopoly in the use of the Greifswald entry point results from Gazprom's export monopoly, not the derogation itself. In that respect, no effects on the concentration of competition caused by the derogation are evident. An allocation of transport capacity on the Nord Stream as per Regulation (EU) 2017/459 would also not in effect lead to a change in the gas volumes transported in it in comparison to the scenario without regulation. Even if capacity on the primary capacity booking platform had to be put aside for later marketing or short-term marketing (reservation quota in accordance with Article 8(6) and (7) of Regulation (EU) 2017/459, see also explanations in section 2.5.2.1), the total amount of bookable transport capacity would remain unchanged. In any case, the export monopoly means that it may be assumed that only Gazprom could use the capacity set aside for later marketing or short-term marketing.

(9) With reference to the Frontier report, the applicant further maintains that, from an economic perspective, regulation of the German section of the pipeline would not create any benefit to the economy. Yet since the decision being taken here concerns a derogation from the norm, which is regulation, there is no need to assess in this decision whether there would be any economic benefit, as this is irrelevant, with only the effects of granting a derogation on competition being at issue.

(10) With reference to the Frontier Economics report, the applicant contends that if a derogation were not granted and the section of Nord Stream located in Germany were thus to

come under regulation, it could lead to higher entry and exit tariffs at the German cross-border interconnection points. This could have a detrimental effect on the functioning of the internal market, according to the applicant (see application, page 53, Frontier Economics report, annex 8 of the application, page 110). However, the question that needs to be addressed here is whether the granting of a derogation has negative effects on competition and its effective functioning. It is not necessary to assess these remarks on higher entry and exit tariffs because possible negative consequences of no derogation are not relevant to the decision on granting a derogation.

(11) Finally, the applicant points out that enabling additional imports of natural gas via Nord Stream could lead to an increase in liquidity in the (relevant) internal market in natural gas (see application, page 53). However, this line of argument would only be relevant (and in that case possibly damaging) to the decision on the application under section 28b(1) sentence 1 para 3 EnWG if the additional imports were not caused by the existence of Nord Stream as such but by the derogation from regulation.

(12) The Kingdom Denmark makes the following remarks about the control of gas supply sources and the resulting aspects of competition law: "The very aim and purpose of the liberalisation of the gas market is that a dominant player cannot control prices as it sees fit. This is one of the basic tenets of the regulation of the EU energy market." (statement of the Kingdom of Denmark, page 5). However, the economic regulations and rules regarding Gazprom's export monopoly fall under the national sovereignty of a third country, the Russian Federation, and cannot therefore be the subject of this assessment.

(13) The majority of responses received to the consultation take a critical view of the effects on the concentration of competition of the Nord Stream pipeline itself (inc Kingdom of Denmark and Republic of Poland), but this need not be assessed under section 28b(1) sentence 1 para 3 EnWG because, as explained above, only the effects of the derogation from regulation are relevant.

(14) The Republic of Poland maintains that the applicant's submission and the report do not provide a full analysis of the effects of the derogation on competition and the market. Poland argues that it has not been proven that there are no such negative effects.

No negative effects on the concentration of competition or liquidity of the relevant market from the granting of a derogation can be identified. In particular, the existing Russian export monopoly, with the result that only the Gazprom group can use Nord Stream, means that no negative effects of a derogation from regulation on the internal market in natural gas in the European Union and its effective functioning can exist.

2.7. Operative part rationale

In accordance with section 28b(1) sentence 1 EnWG, the decision of the regulatory authority on the granting of a derogation under section 28b EnWG is a non-discretionary decision. That means that if the applicant fulfils all requirements of the provision, it is in principle entitled to be granted the derogation. The applicant fulfils the requirements of section 28b EnWG and is thus entitled to a derogation from regulation for the section of Nord Stream located in German territory including its territorial sea.

In accordance with section 28b(7) sentence 1 EnWG in conjunction with Article 49a(1) sentence 2 of Directive 2009/73/EC, secondary provisions may be attached to the decision. These may relate to limiting the duration of the derogation and also to conditions contributing to maintaining the requirements of section 28b(1) sentence 1 paras 2 and 3 EnWG.

On this basis, the ruling chamber has issued a series of restrictions on the derogation that satisfy these requirements. Specifically:

Operative part 1: The applicant fulfils the requirements of section 28b EnWG and is thus entitled to a derogation from regulation for the section of Nord Stream located in German territory including its territorial sea.

(1) For clarity, it should be noted that the derogation does not refer to the gas interconnector Nord Stream as a whole from its entry point in Russia to its exit point in Germany, but merely to the section in German territory, which includes the territorial sea within the meaning of the Convention of the Law of the Sea. This takes account of the fact that the applicability of Directive 2009/73/EC as amended by Directive (EU) 2019/692, and consequently the law regulating the internal market, remains confined to the territory of the Member States. Correspondingly, the explanatory note on section 3 para 19(c) EnWG (printed paper 19/13443) states, *"a significant change in the Directive is the application of the law on the regulation of the internal market also to interconnectors with third countries. Its scope is to apply to the section of lines that run in the territory of the Member States or in the territorial sea of that Member State in which the first interconnection point of the line with the network of the Member States is located."*

(2) The derogation will apply retroactively from 12 December 2019, as requested in the application. The clarification made by the applicant in a letter of 24 January 2020 about the start of the derogation as of 12 December 2019 is appropriate. If the applicant had not submitted an application for derogation, Nord Stream, as a gas interconnector within the

meaning of section 3 para 19(c) EnWG, would have been subject to the new regulatory requirements from the entry into force of the EnWG (BGBl I, 2019, 2002 et seq) as amended by Directive (EU) 2019/692, ie from 12 December 2019. At the same time, however, the applicant was only able to prepare and submit an application for derogation from 12 December 2019 to the Bundesnetzagentur, which was also only responsible as of 12 December 2019, within the deadline for applications of 30 days starting from 12 December 2019 set out in section 28b(2) sentence 5 EnWG. A derogation applying retroactively from 12 December 2019 thus takes account of the special character of section 28b EnWG as a transitional provision.

Operative part 2: The derogation is to be granted for the requested period of 20 years in accordance with section 28b(4) EnWG.

(1) The period of the derogation in accordance with section 28b(1) sentence 1 EnWG depends on the objective reasons pursuant to section 28b(1) sentence 1 para 2 and 3 EnWG. The applicant has provided evidence of the objective reason of security of supply and evidence that the granting of a derogation would not have a negative impact on competition in and the effective functioning of the internal market for natural gas in the European Union and that security of supply in the European Union would not be affected. It is justified to make use of the maximum derogation period of 20 years given the pipeline's supply function. Specifically:

(2) As shown in section 2.5.1.3, since it was taken into operation Nord Stream has been making a positive contribution to security of supply in the Federal Republic of Germany and the European Union. For one, the new pipeline route creates a direct connection between the production fields of northern Russia (in particular on the Yamal peninsula) and the relevant markets in the EU and therefore redundant capacity for the supply of the relevant markets with natural gas. For another, Nord Stream permits a diversification of the transport routes for Russian natural gas into the European Union and, by providing an additional infrastructure element, improves the resilience of the European natural gas supply systems. Moreover, Nord Stream has been characterised by a very high degree of utilisation since it was taken into operation, meaning that in addition to its contribution of capacity to the security of supply in Germany and the European Union, additional gas volumes of about 55bn m3 a year are actually transported into the relevant markets.

(3) According to the information available today, in particular on the developments in supply and demand and import requirements on the European natural gas market, there is no indication that Nord Stream's positive contribution to security of supply will not continue for the

next 20 years. In fact, as regards the diversification of transport routes and sources of supply and the creation of redundancy for the natural gas supply, any other assessment at the end of a certain period seems preposterous. On the contrary, Nord Stream's contribution is more likely to be limited by the lifetime of the pipeline – about 50 years – than by the end of a time frame defined in legal and economic terms. Moreover, the applicant shows comprehensibly in the Frontier Economics report that, based on the current assumptions about the development of gas demand and availability in the EU, it is to be expected that Nord Stream will make a positive contribution to security of supply in the EU until at least 2040. The applicant here relies primarily on the European network development plan (TYNDP) 2018 from the European Network of Transmission System Operators for Gas (ENTSO-G) and the TYNDP 2018 Scenario Report that underlies it. The Scenario Report for the TYNDP 2018 was produced by ENTSOG together with the European Network of Transmission System Operators for Electricity (ENTSO-E) and contains, among other things, supply and demand forecasts for natural gas in the European Union for different scenarios for the years 2030 and 2040. As the Scenario Report for the TYNDP 2018 was subject to broad public consultation and agreed upon by the transmission system operators responsible for the planning of the European gas infrastructure and the European electricity transmission system operators, it may be assumed that it appropriately reflects current expectations of future developments on the European gas market.

(4) The relevant scenarios anticipate a moderate rise in gas demand in the European Union until 2030. Between 2030 and 2050, however, most scenarios predict a decline in gas requirements caused by increased efficiency among final consumers and the ongoing decarbonisation of the energy supply (see section 2.5.1.3.3). Correspondingly, demand for gas falls in the long-term scenarios of the TYNDP 2018 from 2030. The extent of the decline depends on the assumptions made in the scenarios and is between 84 TWh/a in the Sustainable Transition scenario and 1,102 TWh/a in the Global Climate Action Scenario compared with the average gas demand in the European Union from 2010 to 2016 of 5,004 TWh/a. However, this decline in demand will be accompanied by a drop in production in Europe, so all long-term scenarios of the TYNDP 2018 assume that in 2040 there will still be a need to import considerable amounts of natural gas into the European Union. According to the TYNDP 2018, Russian imports (including Nord Stream) have the greatest potential to supply the European Union, alongside LNG. These are to compensate for the stable or falling deliveries from other sources such as the Kingdom of Norway (see TYNDP 2018 Scenario Report; chapter 3; https://entsog.eu/sites/default/files/entsog-migration/publications/TYNDP/2018/entsos_tyndp_2018_Final_Scenario_Report.pdf).

(5) No detriment to security of supply is expected from the derogation for the period of 20 years. Due to the export monopoly in the Russian Federation, the derogation from regulation has no effect on the fact that Gazprom export is the only shipper that can transport natural gas through Nord Stream. No detriment to the security of supply of the European Union or individual Member States caused by the derogation from regulation is evident for a time frame of 20 years.

(6) It is not to be expected that the derogation will cause negative effects to competition on and the effective functioning of the internal market in natural gas in the European Union for the period of 20 years, because it may be assumed that the Russian export monopoly will continue during this time and the Russian Federation will remain a third country within the meaning of section 28b EnWG. Therefore, no relevant changes in the market definition and the use of Nord Stream are to be expected.

(7) The protection of the applicant's legitimate expectations is therefore to be given maximum consideration by granting the first derogation for the longest possible period. Initially granting the derogation for a shorter period with the option to extend it, as the Republic of Poland suggests in its consultation response, does not take account of the protection of legitimate expectations to the same extent and is furthermore not within the discretion of the Bundesnetzagentur when, as here, the evidence and forecasts with a view to security of supply permit the derogation to be granted for the applied period.

Operative part 3: This provision of the operative part imposes a notification requirement on the applicant.

(1) The applicant shall inform the ruling chamber of all circumstances, including planned circumstances, that could make it necessary to reassess the derogation requirements. In accordance with section 28b(7) EnWG, the notification requirement refers to the requirements of section 28b(1) sentence 1 para 2 and 3 EnWG present in accordance with this derogation decision, ie the objective reasons and the relationships to competition and security of supply. Unlike the requirement that the gas interconnector be completed before 23 May 2019, for example, these requirements may change over the period of the derogation.

(2) Circumstances may be events over which the applicant has no influence as well as those over which it does. Such circumstances include a change in control at the applicant. They also include planned circumstances, which must be notified before they enter into force or are implemented. Planned circumstances include in particular measures the applicant intends to take. The planned circumstances must be specific enough for their application or

implementation to be sufficiently likely. The idea is not to inform about every initial consideration, but rather, for example, to notify at the latest when the company management has made a decision. The circumstances, including planned circumstances, must be of the sort that could make it necessary to reassess the derogation requirements. A possibility is therefore sufficient for the notification requirement to apply. These circumstances must be notified to the ruling chamber without undue delay, ie, without culpable delay (section 121 of the Civil Code, BGB). The notification will include a fact-finding process that serves to enable the ruling chamber to examine and assess any reassessment of the derogation requirements that is necessary.

Operative part 4: Operative part 4 is related to operative part 3 and permits the ruling chamber, in the event of changed legal and actual circumstances, to amend the derogation decision to the new conditions.

Operative part 5: Operative part 5 sets out that a transfer of ownership of Nord Stream or the network operation for Nord Stream shall have no bearing on the derogation.

(1) Without this operative part, doubt would remain as to whether this would be possible in the above-mentioned cases, since the derogation in accordance with section 28b EnWG, which relates to a specific infrastructure, bears features of an administrative act related to an object but also features of an administrative act related to a person.

(2) This provision of the operative part thus enables the legal acts mentioned but attaches certain requirements to them. It is necessary for the ruling chamber to be notified of the intended change in good time and for a third party to which the network operation is being transferred to commit to complying with the secondary provisions from the derogation approval. This avoids a situation in which only the rights and not the obligations from the derogation would be transferred. It refers in particular to the obligations arising from operative part 3.

Operative part 6: A separate notice of the costs will be issued in accordance with section 91(1) para 4 EnWG.

Information on legal remedies

An appeal may be filed against this decision within one month of service of the decision. The appeal must be submitted to the Bundesnetzagentur (postal address: Tulpenfeld 4, 53113 Bonn, Germany). It is sufficient if the appeal is received by the Higher Regional Court of Düsseldorf within the time limit specified (postal 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
Chair

Dr Antje Peters
Vice Chair

Dr Werner Schaller
Vice Chair