



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

Decision

Ref. BK7-20-004

In the administrative proceedings

concerning: application for derogation from regulation

Parties to the proceedings:

Nord Stream 2 AG, Baarerstrasse 52, 6300 Zug, Schweiz, legally represented by its management board, which is represented by Matthias Warnig

applicant,

- Legal representatives of the applicant:

- 1) Polskie Górnictwo Naftowe i Gazownictwo S.A., ul. M. Kasprzaka 25, 01-224 Warszawa, Poland, legally represented by its management board,

party summoned 1),

- 2) PGNiG Supply & Trading GmbH, Arnulfstraße 19, 80335 München, legally represented by its management board

party summoned 2),

- Legal representatives of the parties summoned 1) and 2): Becker Büttner Held, Rechtsanwälte Dr. Olaf Däuper und Johannes Nohl, Magazinstraße 15-16, 10179 Berlin -

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
its Vice Chair
and its Vice Chair

Barbie Kornelia Haller,
Dr Antje Peters
Dr Werner Schaller

decided on 15 May 2020:

1. The applications are rejected.
2. 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) of the Energy Industry Act (EnWG) for the Nord Stream 2 gas interconnector, with regard to the section of the pipeline located in the territory of the Federal Republic of Germany, for the period of 20 years.

(1) The applicant was founded on 4 July 2015 as a stock corporation in accordance with Article 620 et seq. of the Swiss Code of Obligations with its headquarters in Zug, Switzerland, and was originally called New European Pipeline AG (commercial register of the canton of Zug, CHE-444.239.548). The original sole shareholder of the applicant was [REDACTED]

[REDACTED] which transferred half of its shares on 2 December 2016 and the other half on 3 February 2017 to [REDACTED], which then became the sole shareholder of the applicant. 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 applicant's tasks therefore include the construction and later operation of Nord Stream 2, dispatching, and maintenance of all technical components of the pipeline system.

(2) Nord Stream 2 is a natural gas pipeline through which natural gas produced in the Russian Federation is intended to be transported from the gas fields of the Yamal peninsula in Siberia to the European Union, a distance of around 1,235 km. The pipeline will have two separate, parallel lines (A and B) running 55-100 metres apart and with a joint capacity of 55 billion cubic metres a year. It will run from Ust-Luga in the Russian Federation, through the Baltic Sea to Lubmin in the Federal Republic of Germany, where it is to be connected with the onshore pipeline, the European Gas Pipeline Link (EUGAL). There will also be a link to the North European Natural Gas Pipeline (NEL). Nord Stream 2 crosses the following maritime zones: it starts in the Russian territorial sea, crosses the exclusive economic zone of the Republic of Finland, the Kingdom of Sweden, the Kingdom of Denmark and then runs through the German exclusive economic zone (EEZ) and finally reaches the German territorial sea. The exact route is shown in Figure B I of the file.

Nord Stream 2 enters the German EEZ from the Danish EEZ at kilometre point (KP) 0.¹ In the German zone, it runs from there, through the EEZ to KP 31.065, where it enters the German

¹ The kilometre specifications given by the applicant are used here, as in the approval procedure of the Federal Maritime and Hydrographic Agency (BSH) and the Stralsund mining authority.

territorial sea within the meaning of the United Nations Convention on the Law of the Sea.² The pipeline makes the transition to the landfall section at KP 83.800. From there, the two lines go through two micro-tunnels in the landfall section, run beneath the coastline at MP 84.136 and end at the landing terminal at MP 84.500. The terminal consists of the Pipeline Inspection Gauge (PIG) receiving station, shut-down and emergency shut-down equipment, control stands, buildings for electronic equipment and a gas-flaring system, among other things, and is located west of Lubmin port. The terminal contains the plant border of the pipeline system at the transition of the PIG receiving station to the natural gas receiving station. The construction and operation of the PIG receiving station, in which the gas flows through a T connector and smaller pipes into the neighbouring natural gas receiving station, are covered by the planning approval decision of the Stralsund mining authority of 31 January 2018. However, the natural gas receiving station ("Lubmin 2"), from which gas is directed into the EUGAL and via a link into the NEL, is not part of Nord Stream 2. It is owned by the EUGAL co-owners and operated by GASCADE Gastransport GmbH. Via the EUGAL, Nord Stream 2 is indirectly connected to the NETRA and JAGAL pipelines.

(3) The binding investment decision on the construction and operation of Nord Stream 2 was made in 2016 and implemented by spring 2017 with large-volume contracts made by the applicant, for example for the purchase and acquisition of the necessary pipes and to commission the company to lay the pipes. The obligations entered into up to 23 May 2019 totalled [REDACTED], which had risen to [REDACTED] by the time the application was made on 10 January 2020.

The project is financed by PSJC Gazprom and the European energy utilities Uniper Gas Transportation & Finance B.V. (Uniper), Wintershall Nederland Transport and Trading B.V. (Wintershall), OMV Gas Marketing Trading & Finance B.V. (OMV), Shell Exploration and Production (LXXI) B.V. (Shell) and Engie Energy Management Holding Switzerland AG (Engie),

[REDACTED] The investments needed for the whole project are thus covered as follows: [REDACTED], another [REDACTED] [REDACTED] the applicant [REDACTED] [REDACTED] and the remaining [REDACTED] [REDACTED] [REDACTED] be provided [REDACTED] [REDACTED] The loan must be fully repaid by [REDACTED] at the latest, while the [REDACTED] has to be repaid [REDACTED]. The capital recovery is secured by a [REDACTED] made by the applicant with [REDACTED] [REDACTED] The [REDACTED] provisions [REDACTED]

² Ratified for the Federal Republic of Germany by law on 2 September 1994 (BGBl. II page 1798); entry into force in accordance with publication of 15 May 1995 (BGBl. II page 602) on 16 November 1994. While the term "territorial sea" is often used interchangeably with the "12 (nautical) mile zone", the Federal Republic of Germany has determined detailed coordinates for the seaward boundary of its territorial sea in the Baltic Sea (within the bounds permitted by the Convention on the Law of the Sea).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(4) The applicant started construction work to lay the pipeline and build the landing terminal in the area under German responsibility at the beginning of February 2018 with the construction of the microtunnels in the landing area, into which the pipes of the pipeline system were then installed. The work in the territorial sea and the German EEZ followed, section by section and at different times from mid-2018 onwards. The initial planning work for the construction of Nord Stream 2 started back in 2012 with a feasibility study. Having determined the best route for the pipeline, project promoter Nord Stream AG – the operator of the Nord Stream pipeline, which was put into operation in 2011/2012 – submitted on 22 March 2013 a total of three applications for permission for the project in accordance with the German Federal Mining Act (BBergG) and the EnWG to the Federal Maritime and Hydrographic Agency (BSH) and the Stralsund mining authority. The planning approval procedures in the Federal Republic of Germany thus got underway. The project promoter at that time applied for approval from the BSH with regard to the use of bodies of water above the continental shelf and the air space above these bodies of water in accordance with section 133(1) sentence 1 para 2 BBergG. The Stralsund mining authority simultaneously carried out the approval procedure for the approvals under mining law for the German continental shelf in accordance with section 133(1) sentence 1 para 1 BBergG and the planning approval procedure in the German territorial sea in accordance with section 43 EnWG. The applicant became party to the ongoing procedures and the decisions were issued to it.

In the period between September 2016 and autumn 2017, the applicant also applied for the necessary approvals for the installation and operation of Nord Stream 2 in the Republic of Finland, the Kingdom of Sweden, the Kingdom of Denmark and the Russian Federation.

On 2 November 2017, the Stralsund mining authority issued the "Approval for the installation of the transit pipeline Nord Stream 2" in the region of the German continental shelf (EEZ) of the Baltic Sea in accordance with section 133(1) sentence 1 para 1 BBergG and, on 31 January 2018, it determined the "Plan for the construction and operation of the gas supply line Nord Stream 2" in the section of the German territorial sea (KP 31,065 to KP 84,500), including landfall west of the industrial port of Lubmin in accordance with section 43 sentence 1 EnWG (old version). On 16 March 2018, the Stralsund mining authority further issued the approval for the "Operation of the transit pipeline Nord Stream 2" in the region of the German continental shelf (EEZ) of the Baltic Sea in accordance with section 133(1) sentence 1 para 1 BBergG. In accordance with

section 133(1) sentence 1 para 2 BBergG, the BSH issued the approval for the "Installation and operation of two cross-border, parallel natural-gas high-pressure pipelines" for the region of the German continental shelf (EEZ) of the Baltic Sea on 27 March 2018, amended on 4 May 2018.

The necessary approvals from the authorities responsible under national law in the other countries affected by the plans, the Russian Federation, the Republic of Finland and the Kingdom of Sweden, were issued between 5 April 2018 and 14 August 2018. The approval for the 147-km-long section coming under Danish responsibility (EEZ) was issued by the competent authority, the Danish Energy Agency (DEA) on 30 October 2019 and became legally valid on 28 November 2019.

Due to the delays in the planning and approval in the Danish section, on 23 September 2019 the applicant requested an amendment in the approval regarding the German EEZ dated 27 March and 4 May 2018 from the BSH, particularly with regard to the restrictions on construction time in that approval. On 20 December 2019, the BSH issued an amendment to the approval relating to the uncompleted pipe-laying works between KP 0 and KP 16.5 in the region of the German EEZ in the Baltic Sea.

(5) As at 23 May 2019, the date given as the reference date for completion of the gas interconnector in section 28b EnWG, about ■■■ km of a total of about 1,235 km of line A and about ■■■ km of a total of about 1,235 km of line B had been laid in the Baltic Sea. As the applicant had been working in sections, these figures relate to different sections of the two lines at different points along the whole route in the Baltic Sea. A total of four pipe-laying ships had been laying the pipes, sometimes one after another and sometimes simultaneously and geographically in parallel. Moreover, as at 23 May 2019 the pipes had not yet been laid in Danish waters.

Not all of the sections laid on the sea floor had already been connected using the above water tie-in (AWTI) process as at 23 May 2019. AWTI involves welding together two sections of pipe laid on the sea floor using a connecting seam welded above the water surface on a pipe-laying ship. As at 23 May 2019, this connection work was still outstanding to produce fully connected lines at least in the German territorial sea at KP 54.4 and in the German EEZ at KP 16.5 as well as in Russian waters.

As regards the around 84-km-long section of the project under German responsibility, progress on construction as at 23 May 2019 was as follows, according to the application documents, plus the applicant's notifications of progress to the BSH and the Stralsund mining authority and the applicant's press releases on its company website: Work for the twin pipelines was being carried out, starting from the German landfall in the direction of the border between the German and Danish EEZ (KP 0). The pipe-laying ship *Castoro 10 (C10)* laid sections of pipe for both lines between July and November 2018 from the landfall near Lubmin to KP 54.4, while the pipe-laying ship *Audacia* laid sections of pipe for both lines from October to December from KP 54.4 to KP 16.5 in the German EEZ. As at 23 May 2019, line A had been fully laid between the landfall

and KP [REDACTED]. Work to lay the final piece in the German EEZ from [REDACTED] could not be continued until the amended approval was received from the BSH on 20 December 2019. No pipe had been laid there as at 23 May 2019. Line B was laid on the same route, [REDACTED] as at 23 May 2019

[REDACTED] Work to connect the two sections of pipe using the AWTI process recommenced in August 2019. Rock placement was also carried out where necessary to secure the position of the pipeline.

The PIG receiving station had not been fully constructed as at 23 May 2019; this was carried out during July and August 2019. The PIG traps, which are needed for some stages of the technical safety inspection (esp pre-commissioning) before the pipeline is filled with gas for the first time, had not yet been set up either.

(6) The applicant applied for a derogation from regulatory requirements for the German section of Nord Stream 2 in accordance with section 28b EnWG in a letter dated 9 January 2020 and received 10 January 2020. 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; progress of construction; proof of approvals from the Federal Republic of Germany, the Kingdom of Sweden, the Republic of Finland, the Kingdom of Denmark and the Russian Federation; the company and organisational structure of the applicant; financing contracts for the pipeline project; a legal opinion on the understanding of the term "completion"; a report on the financing structure and the effect of an increase in charges; and an economic report on the effects of Nord Stream 2 on the European gas market. On its website, the applicant publishes regularly updated information, for example on the status of the project and the proceedings and on the technical concept of Nord Stream 2. These proceedings have also drawn on on the applicant's press releases on the progress of construction between 2018 and 2020 and the document published on the applicant's website, "Background: Above Water Tie-In in German Waters", dated August 2019. In response to an enquiry by the ruling chamber, the Stralsund mining authority and the BSH provided information about the applicant's notifications of progress on construction, which, as the addressee of the planning approval under section 43 EnWG and the approvals under section 133 BBergG, it was required to provide to those authorities.

The applicant is of the opinion that the conditions for a derogation in accordance with section 28b EnWG are fulfilled. It puts this view forward with supporting evidence and reports. In particular, it bases its understanding of completion by the reference date of 23 May 2019 set out in section 28b EnWG not on the constructional/technical completion of Nord Stream 2, but on an economically functional consideration based on the investment decision. Moreover, the applicant argues that completion within the meaning of section 28b EnWG only refers to the partial section of Nord Stream 2 located in German territory, the construction of which had already been completed by the reference date of 23 May 2019, according to the applicant. The applicant states that there are

multiple objective reasons for granting Nord Stream 2 a derogation from unbundling, network access and network charge regulation, including ensuring the recovery of the investment made. It also believes that a derogation for Nord Stream 2 is necessary from the perspective of security of supply. Finally, it argues that there are also unwritten objective reasons for the derogation: Nord Stream 2 would lead to a cost-effective gas supply in the EU and make an important contribution to climate protection. Moreover, the applicant is of the view that regulating Nord Stream 2 cannot fulfil the purpose of regulation, since Nord Stream 2 is free of regulation outside the territory of EU Member States and, given the Russian export monopoly favouring [REDACTED], that company is the only possible shipper. The applicant further puts forward that the derogation would not be detrimental to competition 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 2 as a shipper anyway, regardless of any derogation. Any impact made by Nord Stream 2 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 requests

that the gas interconnector Nord Stream 2, as regards the section located in the territory of the Federal Republic of Germany, be granted a complete derogation from the application of sections 8 to 10e and sections 20 to 28 EnWG for the period of 20 years from the day of commercial commissioning of the Nord Stream 2 gas interconnector or alternatively from the issue of the derogation decision.

The Bundesnetzagentur confirmed receipt of the application for derogation in an email on 10 January 2020. The applicant was requested in writing on 16 January 2020 to provide missing documents and information, in particular with relation to a non-confidential version of the application and the annexes. The applicant responded to this request in various letters and emails between 24 January 2020 and 4 February 2020.

Between 10 February and 8 March 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, following the entry into force of the new section 28b EnWG, 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 in the event of derogation proceedings taking place. To carry out the consultation, the ruling chamber then 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.

Statements were received from the following Member States: the Kingdom of Denmark, the Republic of Estonia, the Italian Republic, the Republic of Croatia, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland, Romania, the Kingdom of Sweden and the Slovak Republic. The Netherlands responded in writing that it did not wish to make a statement. The other Member States did not respond at all.

The contributions to the consultation were sent to the applicant by email on 18 March 2020. The applicant, in turn, provided a statement on the responses in writing on 8 April 2020.

The parties summoned 1) and 2) jointly requested to be summoned to the proceedings in accordance with section 66(1) para 3 EnWG in writing on 19 February 2020. The parties summoned 1) and 2) were admitted to the proceedings with a decision of 18 March 2020 (file no BK7-20-004-B1). On 6 April 2020, they received the non-confidential version of the application plus annexes, the consultation responses from Member States, all in non-confidential versions, and the Bundesnetzagentur's notice on applications under section 28(1) EnWG. The parties summoned were also sent the statement of the applicant on the consultation responses of Member States in a non-confidential version on 24 April 2020.

On 24 April 2020, the parties summoned provided a statement, a non-confidential version of which was provided to the applicant on 28 April 2020.

The energy department of the European Commission was notified of the proceedings in an email on 10 February 2020. On the same day and in response to a request by the Commission, it was sent the non-confidential application with annexes. This decision will be notified to the Commission in accordance with section 28b(8) EnWG.

In an email on 30 April 2020, the ruling chamber gave the Bundeskartellamt the opportunity to provide a statement in accordance with section 58(1) sentence 2 EnWG. The Bundeskartellamt did not provide a response.

The parties involved in the proceedings were sent the intended operative part on 30 April 2020, to give them the opportunity to respond. They did not do so.

For further details reference is made to the files.

II.

The applications are admissible but unfounded. The conditions for the granting of a derogation in accordance with section 28b EnWG are not met. The applications must therefore be rejected.

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

Regarding the formal legality of this decision, the general legal provisions governing the proceedings have been adhered to (see section 1.1. below). The applicant also has the right to submit an application (see section 1.2.).

1.1. General procedural requirements

(1) The competence of the Bundesnetzagentur for this decision based on section 28b EnWG in conjunction with Article 49a 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 10 February 2020 to 8 March 2020. Ten Member States – namely the Italian Republic, the Kingdom of Denmark, the Kingdom of Sweden, the Republic of Estonia, the Republic of Croatia, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland, Romania and the Slovak Republic – 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 other Member States did not respond. The ruling chamber took the consultation responses from Member States into account in its assessments, 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) sea 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. 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, apart from the question of being an operator dealt with below, the applicant's headquarters are not located in a federal state of the Federal Republic of Germany.

(4) The parties involved in the proceedings were provided the opportunity to state their views before the proceedings were concluded in accordance with section 67(1) EnWG. Among other things, the intended operative part was sent to the parties involved on 30 April 2020 to give them the opportunity to comment.

1.2. Right to apply and interest in a decision being reached

The applicant has the right to submit an application under section 28b(1) sentence 1 EnWG. The "operator of this gas interconnector with respect to the sections located in the territory of the Federal Republic of Germany" has the right to submit an application. The applicant wishing to be granted an exemption under section 28b EnWG for Nord Stream 2 is Nord Stream 2 AG, with its headquarters in Zug, Switzerland. The applicant is a project company whose purpose is to plan, build and operate the Nord Stream 2 pipeline through the Baltic Sea. In its contribution to the consultation, the Republic of Poland draws on section 3 para 16 EnWG to argue that the applicant is not an operator within the meaning of section 28b EnWG, because the pipeline has not been completed, and therefore has no right to apply. In their joint statement dated 24 April 2020, the

parties summoned also put forward the view that the applicant should be regarded as merely the planner and builder of Nord Stream 2 and not as the operator within the meaning of section 28b(1) EnWG and it therefore has no right to apply.

However, this narrow understanding does not go far enough, especially since the legal definition of operator in section 3 para 16 EnWG relates to gas supply networks and cannot simply be transferred to gas interconnectors within the meaning of section 28b EnWG. In the absence of an explicit legal definition of the operator of a gas interconnector within the meaning of section 3 para 19(c) EnWG and given the nature of the gas interconnector as a special type of transmission line, it seems more appropriate to draw on section 3 para 5 EnWG, which also defines the task of expansion for operators of transmission lines and thus, contrary to what is put forward by the parties summoned, does not only relate to operation in its more narrow sense. Moreover, with regard to section 28b EnWG, were a definition of operator to use the criterion of completion from the provision, there would be an inextricable link between two separate criteria – that of being an operator and that of completion, the former here affecting the permissibility of the application and the latter affecting the merits of the application. With this understanding, it would no longer be possible to examine separately the question of completion by the reference date as a substantive condition. With this in mind, it is not possible to share the opinion of the Republic of Poland regarding the narrow sense of the term operator. On the contrary, under sections 1, 13(1) para 1 of the German Administrative Procedure Act (VwVfG) and section 42(2) of the Code of Administrative Court Procedure (VwGO), the applicant does have a right to make an application, at least by analogy, since it wishes the derogation to apply from the time at which the pipeline goes into operation. Then, at the latest, the applicant will also be the operator. It has, therefore, provided that the future operation is not transferred to a third party, the right to apply under section 28b EnWG for this period, even before the pipeline has started operation.

The understanding taken by the Republic of Poland would mean that it would not be possible to apply for derogation before a pipeline was taken into operation. A derogation under section 28b EnWG would therefore never be possible. On the contrary, the interconnector would first have to be taken into operation – subject to regulation – to then be granted a derogation from regulation. Given the fact that it is only possible to make an application within the narrow time limits set out in section 28b(2) sentence 5 EnWG, the applicant has the right to apply for derogation from the regulatory requirements that would then be applied under section 28b EnWG now, particularly as the provision of section 28b EnWG is not based on the operation but rather on the completion of the gas interconnector.

To have an interest in the decision, it is sufficient for the applicant to be seriously conducting the realisation of Nord Stream 2 which, given the constant progress of construction and the existence of all necessary approvals, is not in doubt.

The period laid down in section 28b(3) EnWG has not yet expired. The application was also submitted on 10 January 2020, within the deadline laid down in section 28b(2) sentence 5 EnWG of 30 days after the 12 December 2019, when the amended EnWG entered into force.

2. Substantive lawfulness of the decision

The decision is also substantively lawful, because the conditions for derogation under section 28b EnWG are not met for Nord Stream 2. Nord Stream 2 is categorised as a gas interconnector within the meaning of section 28b(1) of the EnWG in conjunction with Article 49a(1) of Directive 2009/73/EC (see section 2.1 below). However, based on the constructional/technical understanding of completion (see section 2.2), Nord Stream 2 was not completed as at the reference date of 23 May 2019 (see section 2.2.3). A derogation under section 28b EnWG is therefore not possible and the existence, or not, of objective reasons within the meaning of section 28b(1) para 2 EnWG is not relevant (see section 3).

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

Nord Stream 2 is a gas interconnector within the meaning of section 28b EnWG, because Nord Stream 2 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 2 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 2 is such a gas interconnector running between the Federal Republic of Germany and the third country of Russia (see 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 2 is a gas interconnector that, based on the direction of gas flow, runs from the Russian Federation through Russian waters and through the EEZs 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 2 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 interconnector with the network of the Member States is located.*

The phrase *"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 2 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 2 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.

(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) 2019/692, 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 2 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 – namely EUGAL and NEL – 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 2 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 or construction of Nord Stream 2 is not part of an oil or gas production project, nor will Nord Stream 2 be 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 in future to be transported through Nord Stream 2 will be produced on the gas fields of the Yamal peninsula and, having been processed and compressed in the Slavyanskaya compressor station at the landing terminal in the Nara bay, will be directed into Nord Stream 2, a Russian gas line that is comparable with the pipeline network connected in a narrow sense with gas production, ie, the upstream pipeline network within the meaning of section 3 para 38 EnWG, ends at the Russian landing terminal. From then on, the purpose of Nord Stream 2 cannot be seen in the context of gas production but rather its transportation.

2.2. Completion within the meaning of section 28b(1) of the EnWG

In accordance with section 28b(1) sentence 1 EnWG, a derogation can only be granted to gas interconnectors between the Federal Republic of Germany and a third country within the meaning of Article 49a of Directive 2009/73/EC completed before 23 May 2019.

Nord Stream 2 had not been completed as at the reference date 23 May 2019 because the decisive point for completion is that Nord Stream 2 could be used for the transport of gas. Since, on that day, the pipes had not been fully laid and connected, completion in a constructional/technical sense had not taken place by that day (see sections 2.2.1 and 2.2.3).

The applicant, however, affirms that Nord Stream 2 had been completed on 23 May 2019 and argues that completion should not be understood in a constructional/technical sense, but rather in an economically functional one. It therefore refers to the investment decision to install Nord Stream 2, which was made in 2016/2017 and is final and economically irreversible. In its justification, the applicant argues that this interpretation of the wording and the aim and purpose of section 28b EnWG is imperative to avoid contravening European primary law. Given the importance of the understanding of the term "completion" in these proceedings, the ruling chamber has interpreted the term and also looked in detail at the applicant's understanding of it. The interpretation of the criterion of completion reveals that it must be considered in a constructional/technical sense (see section 2.2.1). On this basis, the view put forward in the application, that the term completion must be based on an economically functional understanding, does not come into question, even taking into account the applicant's explanations about European primary law (see section 2.2.2).

The reference point for completion is the gas interconnector as a whole and not just the part of the gas interconnector located in German territory (see section 2.2.3).

2.2.1. The term "completion"

Nord Stream 2 was not yet completed as at the reference date of 23 May 2019, as at that time only about half of the pipes had been laid on the sea floor (see section 2.2.3). This was the case both for sections of the Nord Stream 2 pipeline outside German waters and the part of Nord Stream 2 located within the area of German responsibility. At the time of making this decision, the construction work is still continuing.

An essential criterion for a derogation under section 28b EnWG is the completion of the gas interconnector before 23 May 2019. Decisive for the interpretation of section 28b EnWG and the term "completion"/the word "completed" is the objectivised will of the legislature as expressed in the legal provision and deriving from the wording of the provision and the context in which it is set. Ascertaining the objective will of the legislature is the purpose of the recognised methods of legal interpretation using the wording of the provision, the structure, its aim and purpose, the legal texts and the background. None of these necessarily take priority over the others. They are not mutually exclusive, but rather complementary. This also applies to the consideration of legal texts, provided they allow conclusions to be drawn as to the objective content of the law. The starting point for interpretation is the wording of the provision (established case law, see eg Federal Constitutional Court (BVerfG), ruling of 17 May 1960 - 2 BvL 11/59 - BVerfGE 11,126 (130); BVerfG; ruling of 19 March 2013 - 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 - BVerfGE 133, 168 (66); BVerwG, ruling of 19 February 2015 - 9 C 10.14 - BVerwGE 151, 255). The subjective opinion of institutions involved in the legislative procedure or of individual members of them is not decisive for the

meaning of the definition. The background to a legal provision is only significant to its interpretation insofar as it confirms the correctness of an interpretation carried out according to the stated principles or removes doubts that could not otherwise be resolved (BVerfG, ruling of 21 May 1952 - 2 BvH 2/52 - BVerfGE 1, 299 (312)). On this basis, the view put forward in the application, that the term completion must be based on an economically functional understanding, does not come into question (see section 2.2.2). Rather, an interpretation of the criterion of completion shows that it must be considered in constructional/technical terms.

The wording of the provision, the structure of the law and the purpose of the provision all indicate this, while given the fact that the wording of Article 49a of Directive 2009/73/EC is identical and section 28b EnWG implements it, the European provision must also always be kept in mind. The responses from the Italian Republic, the Kingdom of Denmark, the Republic of Estonia, the Republic of Latvia and the Republic of Poland, which all discussed the term, also confirm this understanding.

2.2.1.1. Interpretation of wording

(1) "Fertiggestellt" is used in section 28b EnWG and Article 49a of Directive 2009/73/EC in a relative clause in the processual passive. „*Gasverbindungsleitungen (...) die vor dem 23. Mai 2019 fertiggestellt wurden*“. The relative clause and the passive construction, which the parties summoned draw on in their joint statement to support their argument that Nord Stream 2 is not completed, refer to the gas interconnectors that must be completed before 23 May 2019. According to the Duden dictionary, "Fertigstellung" is used in German to mean the process of bringing something to an end or finishing it. Given the reference to the gas interconnector, therefore, the bringing to an end or finishing of the same is required, or, if referring to the activity of completing the pipeline, the conclusion or end of the same. The Kingdom of Denmark also stresses its understanding of the term "fertiggestellt" in the sense of "concluded" or "ended" in its response.

(2) The interpretation of the wording of section 28b EnWG is consistent with the understanding of the wording of Article 49a of Directive 2009/73/EC. In particular, the English and French versions of Article 49a of Directive 2009/73/EC do not give a different impression but are very similar to the German version of the Gas Directive. The English version is *gas transmission lines (...) completed before 23 May 2019*; contrary to the argument of the applicant, it uses "completed" not as a verb but as an adjective in a participle construction meaning "having all necessary parts or appropriate parts" or "with all the parts". "Completed" in the English version of Article 49a of Directive 2009/73/EC also refers to "gas transmission lines", hence "completed" describes requirements of the state of the lines on the reference date, ie that the lines must have all (relevant) parts. Even if the argument of the applicant were to be accepted and the investment decision were to be regarded as a relevant point for completion, considering the meaning of "completed" it could

not be the last necessary component in order to be able to regard the gas line as "having all necessary parts or appropriate parts", ie to be complete. The French version "*En ce qui concerne les conduites de transport de gaz (...) achevées avant le 23 mai 2019*" is similar. It also uses an adjective, "achevées", referring to the gas lines, "les conduites de transport de gaz". It has the meaning "accompli, parfait en son genre, complet" and its synonyms are "consommé", "fini", and "parfait". The French version thus also demands a finished or completed line on the reference date.

2.2.1.2. Systematic interpretation

(1) The systematic interpretation, which is based on the principle that the legal system must be constructed as a whole free of contradictions, supports this understanding and, in particular, does not offer any indications of the economically functional understanding of completion in section 28b EnWG, with reference to the gas interconnector, put forward by the applicant.

It is true that the term completion is not legally defined either in the EnWG or in the Gas Directive or elsewhere in European or national law; nevertheless, use of it in a legal context is usual in both European and German law. In the great majority of instances, it refers to requirements of projects with reference to approval and planning procedures as well as – in German law – to construction work related to the acceptance of work owed and it thus describes the degree of construction progress regarding the project or the construction measure.

(2) The Gas Directive itself uses the term completion in Article 2 point 33 of Directive 2009/73/EC in relation to the term "new infrastructure", introduced in Directive 2003/55/EC of 26 June 2003, which means an infrastructure not completed by 4 August 2003. Article 36 of Directive 2009/73/EC sets out that exemptions from regulation are possible for such infrastructure projects. With regard to the structure of Article 36 of Directive 2009/73/EC, a distinction is made between new, ie not completed, infrastructure and existing infrastructure. In accordance with Article 36(2) of Directive 2009/73/EC, the possibility of exemption for "new infrastructure" within the meaning of Article 36 of Directive 2009/73/EC also applies to *"significant increases of capacity in existing infrastructure and to modifications of such infrastructure which enable the development of new sources of gas supply."* In accordance with Article 36(6) of Directive 2009/73/EC, *"an exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity."* The rules for new infrastructure in Article 36 of Directive 2009/73/EC thus apply directly to new infrastructure in the sense of non-completed infrastructure and also to existing infrastructure where this is expanded by, for example, a significant increase of capacity, so the title of Article 36 of Directive 2009/73/EC, "New infrastructure", is formulated in a more narrow sense than the actual scope of the possible exemption. The meaning of completion in Directive 2009/73/EC may be derived from the distinction made in Article 36 of Directive 2009/73/EC between new, non-completed infrastructure

and existing, expanded/modified infrastructure that comes under the possible exemption of Article 36(2) and (6) of Directive 2009/73/EC. The opposition made between "new" – in the meaning of "non-completed" – and "existing" indicate that, conversely, for infrastructure to be "existing" it must be completed, ie already existing in a constructional/technical sense.

(3) In the European legal context and, because of its direct applicability, in the national legal context as well, Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (TEN-E Regulation) may be drawn on; it regulates trans-European energy infrastructure projects and uses the term completion in a constructional/technical sense in the context of construction-related activities. The TEN-E Regulation contains provisions on the accelerated permit granting process for Projects of Common Interest (PCIs), which, according to Annex II of the Regulation, can include trans-European gas interconnections, so there is certainly a thematic connection between the TEN-E Regulation, on the one hand, and section 28b EnWG and Article 49a of the Gas Directive, on the other. In accordance with the legal definition in Article 2 point 3 of the TEN-E Regulation, projects falling under the infrastructure categories of the TEN-E regulation are technically defined as *"one or several lines, pipelines, facilities, equipments or installations."* The commissioning of such a technical project means, as defined in Article 2 point 11 of the TEN-E Regulation, *"the process of bringing a project into operation once it has been constructed."* The commissioning thus requires that the project within the meaning of Article 2 point 3 of the TEN-E Regulation can be used, which starts with its completion and denotes a constructional work status that has been reached. Article 2 point 8 of the TEN-E Regulation, which defines "works" as *"the purchase, supply and deployment of components, systems and services including software, the carrying out of development and construction and installation activities relating to a project, the acceptance of installations and the launching of a project"*, allows the term completion to be further narrowed down to the extent that completion and acceptance, the stages that immediately precede commissioning, are close in time and closely connected in terms of content as well. The understanding expressed in section 3 para 29a and section 28a EnWG, which are the national provisions transposing Article 2 point 33 and Article 36 of Directive 2009/73/EC, could also support this view. The Kingdom of Denmark and the Italian Republic also point out the close relationship between completion and commissioning in their statements.

(4) In national law, Article 36 of Directive 2009/73/EC is transposed in section 28a EnWG, as was the preceding provision, Article 22 of Directive 2003/55/EC. The definition of new infrastructure in section 3 para 29a EnWG as *"infrastructure that was put into operation after 12 July 2005"* is worded differently to Article 2 para 33 of Directive 2009/73/EC to the extent that "not completed" within the meaning of Article 2 point 33 of Directive 2009/73/EC is transposed as "not yet taken

into operation". Conversely, therefore, with respect to section 28a EnWG completion may be assumed in any case when the infrastructure has been taken into operation.

(5) The EnWG uses the term completion in sections 17b-f EnWG in relation to the offshore transmission links of offshore wind turbines. In accordance with section 17d EnWG, the transmission system operator subject to the grid connection obligation must apply for the offshore transmission link in good time, so that the planned completion deadline stated in the offshore network development plan or in the site development plan can be achieved. The content of the connection obligation under section 17d EnWG is therefore the installation and operation of the transmission link within the time limits set out in subsection 2 of the provision. The link between the two requirements is the expected completion deadline, ie, the date on which the obligation to install and operate the transmission link must have been fulfilled. Therefore, given the relation to "installation and operation", the term completion is based on a constructional/technical understanding in the sense of the completion of construction. At the same time, the expected completion deadline enables the transmission system operator subject to the grid connection obligation and the operator of the offshore wind farm to coordinate on an implementation schedule. This is intended to enable coordination of the offshore transmission link expansion and the offshore wind turbine installation to take place. Here, too, the constructional/technical understanding of completion in a sense of a connection of two construction measures that take place as far as possible at the same time is evident.

(6) The term completion is further used in the national context in section 76 VwVfG, which requires a new planning approval procedure to be carried out if the plan is changed before the project is completed. For many infrastructure projects subject to a planning approval procedure, reference is made to this provision in the respective special law, for example in section 43(4) EnWG for the planning and approval procedure for gas interconnectors to be carried out as a planning approval procedure in accordance with section 43(1) para 5 EnWG. Regarding the question of when, in the context of road works subject to a planning approval procedure, a change in plan "before completion of the project" may be assumed, the Federal Administrative Court (BVerwG, ruling of 16 May 2018 – 9 A 4/17) decided that "project" refers not just to the measure requiring the planning approval decision itself, but also the compensatory and replacement measures that occur after the actual construction. This broad understanding of the project that includes compensatory and replacement measures in contrast to the measure in the more narrow sense – in the case of Nord Stream 2, the construction and operation of Nord Stream 2 applied for and approved with a planning approval decision of 31 January 2018 – also shifts the term completion to a later point that may be after the constructional completion. No decision needs to be taken here as to whether it is not only the measure itself that is the reference point for completion within the meaning of section 28b EnWG but rather, based on the understanding developed by the BVerwG for section 76 VwVfG, the project as a whole, because an understanding of completion encompassing compensatory and replacement measures would shift it to a later date, not in any case an earlier

one as the applicant argues with the economically functional understanding. (7) In the national legal context, this understanding is supported by the rules on the completion notification in construction law. In accordance with section 84(3) of the Building Code of the state of North Rhine-Westphalia (BauO NRW), for example, a structural work is complete when the load-bearing parts, chimneys, firewalls and roof construction have been finished. The subsequent completion then includes the completion of the water supply systems and sewerage systems as well. The completion notification thus documents the specific construction progress of a construction project. The understanding of completion is also a constructional/technical one.

(8) The law governing contracts for work, to which the parties summoned refer in their joint statement of 24 April 2020 to justify their constructional/technical understanding of the term completion, also uses the term completion in its regulation of the assumed acceptance of a work in section 640(2) sentence 1 of the Civil Code (BGB). According to the wording of section 640(2) sentence 1 BGB, acceptance may only be assumed when the work has reached the status of completion. The term itself is not legally defined. However, the explanatory notes to the law explain that completion within the meaning of the provision may be assumed when the work may be regarded as "finished" in accordance with the contractual agreement made between the parties. This is the case when the services mentioned in the contract have been provided, with the existence of defects not being relevant. Completion thus means in this context that the work has been produced largely in accordance with the contract. The decisive factor is the objective assessment of a reasonable – not necessarily expert – average third party (BeckOGK/Kögl BGB section 649 margin no 124). The term completion in section 640(2) BGB is thus primarily understood in the literature as quantitative, ie, it is not the quality of the work that is the subject of assessment or the fact of it being free of defects, but rather the quantity in relation to the manufacturing process. In this respect, the term completion in section 640(2) sentence 1 BGB is distinct from the term "full completion" in section 3(2) sentence 2 para 2 of the property agents and developers ordinance (MaBV), which requires that all work must have been carried out and all major defects rectified and thus requires that the work is ready for acceptance (see Marcks, MaBV, ninth ed 2014, section 3 margin no 42; BGH, ruling of 30 April 1998, VII ZR, 47/97, NJW 1998, 2967).

(9) A comparable understanding underlies the treatment of economic goods in income tax law. While section 6 of the Income Tax Act (EStG) uses the term "production", the Federal Fiscal Court has ruled that production of an economic good ends when it is completed. According to the rulings of the Federal Fiscal Court, completed means an economic good has reached a state in which it can be used as intended without restrictions and according to objective criteria. There may be different requirements according to the economic good; for example, a fixed asset must be suitable for long-term use as intended, while a current asset must be suitable for consumption or sale as intended. According to the rulings on section 6 EStG, an operational building is completed when

the major construction work has been concluded and the building can be used for operations in all its major parts.

(10) The legal contexts show that completion always refers to reaching a state that allows use according to objective criteria. Completion is thus an actual state. Depending on the reference point of completion, there may be other indications of which specific criteria must be met in order to assume that use is possible and that therefore completion exists in the case at hand. If the reference point of completion is a project, work or construction measure, in all cases completion means a state of constructional/technical implementation that permits use. Depending on the respective legal context, completion in individual cases may have different reference points and, as in the aforementioned ruling of the Federal Administrative Court on section 76 VwVfG, under planning law it may even include a phase after the commissioning of the project. However, pure planning phases preceding the measure or reference point – in the case of section 28b EnWG, the gas interconnector – are not sufficient in any case.

2.2.1.3. Aim and purpose

(1) The aim and purpose of section 28b EnWG, and Article 49a of Directive 2009/73/EC, which it is based on, do not provide any indication that for the question of completion as at 23 May 2019, it is not actually the gas interconnector, as the construction project, that is being referred to but rather the investment decision to construct a gas interconnector, ie that the term completion is to be read in an economically functional sense. The structure of section 28b EnWG and also Article 49a of Directive 2009/73/EC show that the investment costs are not necessarily to be considered during an assessment for a derogation, but from the perspective of recovering investment, which in turn can only be one possible objective reason for a derogation. Based on an evaluation of the legislative materials both at the European level and in the legislative procedure to incorporate the European regulations into the EnWG, the purpose of the provision is rather to create a transitional arrangement in the form of a derogation for a limited period for gas interconnectors from and to third countries, which are newly included under regulation, for reasons of proportionality and provided they were completed by the deadline. It is not evident that the starting point should be the investment decision or that gas interconnectors not included in a constructional sense as at the reference date should also be included in the provision.

2.2.1.3.1. Aim and purpose of Article 49a of Directive 2009/73/EC

(1) Recital 4 of Directive (EU) 2019/692 amending Directive 2009/73/EC states, *"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."* The option given to Member

States of a derogation under Article 49a of Directive 2009/83/EC from Articles 9, 19, 11 and 31 as well as Article 41(6), (8) and (10) of Directive 2009/73/EC is intended to make it possible to create a legal framework for these gas transmission lines that largely corresponds to the situation before the extension of the regulatory requirements by Directive (EU) 2019/692. Operation of these gas interconnectors that now come under regulation can thus continue under largely the same framework conditions as before Directive (EU) 2019/692 applied, provided that the other requirements of Article 49a of Directive 2009/73/EC are met, in particular insofar as the derogation decision does not have a negative impact on competition or the internal market. To that extent, Article 49a of Directive 2009/73/EC exists to protect legitimate expectations and vested rights within the framework of a consideration of proportionality. The reference of Article 49a of Directive 2009/73/EC is thus protection from adjustments to the changed framework conditions, as made clear by the European Commission in its Fact Sheet of 8 November 2017 (EC-Fact Sheet, Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC): *"However, in order to take into account the legitimate expectations of existing operators and the previous lack of specific Union rules applicable to gas pipelines to and from third countries, Member States will be able to grant derogations for existing pipelines from certain key requirements of the gas Directive 2009/73/EC."*

(2) In the legal opinion submitted as annex AS 49 to its application, the applicant puts forward that the reference point of legitimate expectations is the "effected" or "existing" investments (annex AS 49, margin no 81). This conclusion, which supports the argument that the term completion should be understood in an economically functional sense, fails to recognise that the recovery of the investment made is only one possible objective reason for a derogation, while a derogation can also be granted for reasons other than those within the sphere of the legal addressees; for example, if the gas interconnector makes a contribution to security of supply. The reference point of legitimate expectations thus arises primarily not from the objective reason of the recovery of investment itself but rather – as shown in recital 4 of Directive (EU) 2019/692 – from the provisions mentioned in Article 49a of Directive 2009/73/EC, from which a derogation may be granted due to the framework conditions already established before this regime. The Commission Proposal of 8 November 2017 takes account of the request to ensure adequate protection of legitimate expectations and vested rights from the perspective of proportionality and thus weighed against the basic attempt to extend regulation to precisely those lines, as it states, *"It includes the possibility for derogations for existing infrastructure to take account of complex legal structures already in place which may require a case-specific approach."* The requirement of an objective reason set out in the course of the legislative procedure without being specified exhaustively implements the case-specific approach in Article 49a of Directive 2009/73/EC. The objective reason of the recovery of the investment made is explicitly mentioned but other objective reasons are also possible. These must be equal to the reasons given as examples in Article 49a of Directive 2009/73/EC in their effect, that is, either with regard to the risk attached to them or with

regard to their positive impact. The objective reason itself does not necessarily have to be the expression of the legal addressee's legitimate expectations that established legal structures are maintained. This is illustrated by the objective reason of security of supply, which may also legitimate a derogation decision and thus the continuance of conditions from before regulation.

According to the ruling of the European Court of Justice (ECJ, ruling of 5 July 1983, C-1/73, p 723 et seq), the expectation of an existing legal situation is only worthy of protection insofar as market participants could assume that the legal environment of their activity would remain for a reasonable length of time, hence there would be no indications for a planned change in the law. This expectation could no longer have been upheld from the time that the European Commission adopted a request to the Council of the European Union for a mandate to negotiate with the Russian Federation the key principles for the operation of Nord Stream 2 on 9 June 2017, since the Commission stated in its press release (accessible at https://ec.europa.eu/commission/presscorner/detail/de/IP_17_1571) that it was seeking to ensure that *"Nord Stream 2 operates in a transparent and non-discriminatory way with an appropriate degree of regulatory oversight, in line with key principles of international and EU energy law."* With reference to this date, the statement from the Republic of Poland emphasises that *"the EU legislative plans"* were known *"well before the financial outgoings were undertaken and before the construction of the physical infrastructure was started."*

At the latest by the time of the Commission Proposal for a Directive amending Directive 2009/73/EC on 8 November 2017, the applicant no longer had an expectation that was deserving of protection, as the applicant states in its legal opinion to its application (AS 49, margin no 85). However, the European legislature did not base its argument on 8 November 2017 as a reference date or on the investment decision, although it did consider the legitimate expectations of the addressees that were newly subject to regulation and also the specific issue of the recovery of investment costs. These criteria cannot, using an economically functional perspective, be read into the reference date of 23 May 2019 chosen for Article 49a of Directive 2009/73/EC before which the line must be completed, as they evidently do not correspond to the understanding of the European legislature.

(3) The starting point for the considerations of proportionality underlying Article 49a of Directive 2009/73/EC is, on the one hand, the applicability of the regulatory requirements and, on the other, the altered legal framework for the addressees of the provision. Starting from this understanding of the European legislature, it is logical to take the date of entry into force as the reference date for a possible derogation decision. Hardship arising for the addressees of the provision from the application of regulation can thus be mitigated by the possible granting a derogation for a maximum of 20 years. Given the decision deadline of 24 May 2020 set out in Article 49a of Directive 2009/73/EC, the decision for such a derogation can only be made in a relatively short transition period and, moreover, it is optional for it to be implemented in national

law, as the European provision addresses the Member State using the word "may" (Article 49a(1) sentence 1 of Directive 2009/73/EC). Regarding "whether" a derogation is made, *"the Member State [...] may decide."* The use of the word "should" in recital 4 of Directive (EU) 2019/692 amending Directive 2009/73/EC – specifically, *"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"* – shows that the European Parliament and the Council leave the decision of whether a derogation provision is implemented in national law up to each Member State. The European legislature did not, therefore, view the derogation in accordance with Article 49a of Directive 2009/73/EC as always mandatory. In the understanding of the European legislature, the primary purpose of Article 49a of Directive 2009/73/EC is to mitigate the consequences for an addressee newly subject to regulation for reasons of proportionality in the event that certain conditions are met, in particular those affecting the interests of the Community, such as that the derogation should not have negative effects on the internal market.

(4) The starting point of the reference date rule is the fact that the gas interconnector is complete on that day. The formulation in the European legislation builds on the differentiation criteria already used for the reference date in Article 2 point 33 of Directive 2009/73/EC. The understanding underlying the term completion arises from the distinction from Article 36 of Directive 2009/73/EC and the rules set out there for new infrastructure within the meaning of Article 2 point 33 of Directive 2009/73/EC, which is *"infrastructure not completed by 4 August 2003."* The Commission Proposal of 8 November 2017 states: *"With the proposed amendments, the Gas Directive (...) in its entirety will become applicable to pipelines to and from third countries, including existing and future pipelines, up to the border of EU jurisdiction." (...). It will also enable new pipelines to and from third countries to apply for an exemption from the above rules pursuant to Article 36 Gas Directive. As regards existing³ pipelines, which fall outside the scope of Article 36, Member States will be enabled to grant derogations from the application of the main provisions of the Directive, provided that the derogation would not be detrimental to competition, effective market functioning or the security of supply in the Union."* As explained in this consideration, existing pipelines are regarded as completed, in contrast to the new, non-completed infrastructure that comes under Article 36 of Directive 2009/73/EC. The Commission Fact Sheet of 8 November 2017 on the proposal to amend the Gas Directive confirms this constructional understanding of the term completion, as it continues: *"The Commission proposal on derogations concerns gas pipelines already in operation."* The Kingdom of Denmark points out in its response that this understanding of the term completion thus underpinned the legislative procedure right from the start.

³ Not underlined in Commission proposal.

(5) However, it does not follow from the context of Article 36 of Directive 2009/73/EC that either one or the other exemption must necessarily be able to be applied to a gas interconnector falling within the scope of regulation for the first time, and that therefore the starting point for completion in an economically functional sense must be brought so far forward that there is no gap between the two regimes. This is shown by the different regulatory frameworks of the two exemption provisions, which is also stressed in the Commission Fact Sheet of 8 November 2017. It states: *"The logic of the derogation (of Art. 49a) is therefore very different than the one used in exemption procedure under Article 36 of the Gas Directive, which aims at exempting pipelines which would not be built otherwise and which bring competitive and security supply benefits."* This illustrates the different objectives of the European legislature. The exemption under Article 36 of Directive 2009/73/EC focuses on supporting investment in new, major infrastructure that would otherwise not be built, in the interest of the Community. A reference date needs to be laid down in the definition in order to define the objective scope of Article 36 of Directive 2009/73/EC, although the possible application of Article 36 of Directive 2009/73/EC to existing infrastructure means that there is no automatic disadvantage conferred by the passing of the reference date. That means, even if infrastructure was not "new" within the meaning of Article 2 point 33 of Directive 2009/73/EC on the relevant day, it could still be eligible for exemption under Article 36 of Directive 2009/73/EC in the event of a new investment decision for this existing infrastructure, eg due to an increase of capacity. The decisive point for Article 36 of Directive 2009/73/EC is investment to be made in infrastructure that would not be made without the exemption. The difference to Article 49a of Directive 2009/73/EC is that Article 36 focuses on investments to be made, to support which the exemption may be made, while Article 49a of Directive 2009/73/EC can focus on the recovery of investments already made – can, not must, because a derogation under Article 49a of Directive 2009/73/EC can also be made without consideration of investment decisions. If the European legislature had had the objective, or even regarded it as essential from the perspective of the protection of legitimate expectations, to provide comprehensive protection for investments already made in gas interconnectors from and to third countries, it would have been more natural to include a corresponding provision for interconnectors newly subject to regulation in Article 36 of Directive 2009/73/EC as a special case, or, alternatively, to extend the possibility of derogation in Article 49a of Directive 2009/73/EC to gas interconnectors under construction on the reference date. Neither of these options were taken, even though the situation of Nord Stream 2 as a gas interconnector that would probably still be under construction at the time of Directive 2009/73/EC coming into force was known during the legislative procedure.

(6) In fact, the design of Article 49a of Directive 2009/73/EC came under intense discussion during the legislative procedure, precisely because of the particular situation of Nord Stream 2. The fact that, in the Commission Staff Working Document (COM (2017) 660) accompanying the Commission proposal only two scenarios are mentioned – *"New pipelines could request exemptions pursuant to Article 36. As existing infrastructure cannot meet the risk criterion of Art*

36, *existing pipelines could not request an exemption but could be subject to derogation*" – does not mean that all conceivable circumstances should necessarily be subsumed into one of these two. The fact that construction was not finished on Nord Stream 2 by the time the Directive entered into force and that its commissioning, originally planned for the third quarter of 2019, would be pushed back further, was already clear for all involved in the course of the legislative procedure. The Nord Stream 2 project was the focus of the European legislative procedure, as shown by the Commission Fact Sheet on the draft Directive as well as the opinions of the Committee of the Regions and the Economic and Social Committee (EESC) and the requests for amendment in the Committee on Industry, Research and Energy (ITRE) of the European Parliament, which explicitly refer to Nord Stream 2.

Those involved assumed that a gas interconnector that was not complete on the reference date but for which an investment decision had already been made would fall neither under Article 36 of Directive 2009/73/EC nor Article 49a of Directive 2009/73/EC. In its opinion of 19 April 2018, the EESC put forward that *"necessary amendments to the Gas Directive should to be adopted without further delay and should not leave any legal uncertainties regarding full applicability of the EU law to existing and planned interconnectors."* The EESC calls for legal clarity, not for a wider scope, as shown by the formulation of point 1.5 of the opinion, *"the Committee considers that one area of regulatory uncertainty (regarding future construction programmes due to lack of clarity about the proposed derogation process) may be a risk to investment security and block free market competition among national and regional authorities in attracting investment(...)"* and by the basic concern to only grant derogations in accordance with Article 49a of Directive 2009/73/EC for a limited period of time.

The amendment proposal no 27 of the European Parliament ITRE also shows that the scenario and the inclusion of circumstances applicable to Nord Stream 2 were discussed as an application case. The proposal states: *"To take account of the previous lack of specific Union rules applicable to gas pipelines to and from third countries, Member States should be able to grant derogations from certain provisions of Directive 2009/73/EC to such pipelines which are completed at the date of entry into force of this Directive or which are already in the process of planning or being built, where major investment has already been made for those purposes. The relevant date for the application of unbundling models other than ownership unbundling should be adapted for gas pipelines to and from third countries."* The same applies to amendment proposal no 111: *"In respect of gas pipelines to and from third countries completed before [PO: date of entry into force of this Directive] or for which on [PO: date of entry into force of this Directive] construction works relating to the investment have started, or the first legally binding commitment to order equipment for the construction of the pipeline has been made, Member States may decide to derogate (...)"* However, these proposed amendments were ultimately not implemented.

(7) There was therefore a conscious decision not to change the reference date so that it would clearly also apply to Nord Stream 2, which was still under construction. This is also shown by the comments of Dominique Ristori, then Director-General for Energy at the Commission in March 2019, who, according to a press report (Zeit-online of 4 March 2019, can be accessed at: <https://www.zeit.de/news/2019-03/04/eu-kommission-neue-gasrichtlinie-soll-fuer-nord-stream-2-gelten-20190304-doc-1e74wj>) stressed on the sidelines of a meeting of EU energy ministers that the new Gas Directive would hopefully come into force "*quickly, meaning definitely before Nord Stream 2 is finished*". Given his role and the occasion on which he made the comments, they should be understood not as primarily his personal opinion but as an indication that the terms used had been chosen deliberately and with an awareness of the particular situation of Nord Stream 2.

In its legal opinion, the applicant expresses the view that the political background is not directly relevant to the interpretation and application of Article 49a of Directive 2009/73/EC. However, when, as in the present case, the understanding of the term completion evolves in the context of a situation with political aspects and its reach and applicability are discussed during the legislative procedure, the final Directive expresses the will of the legislature – in this instance with regard to Article 49a of Directive 2009/73/EC, the understanding of constructional/technical completion. Taking into account the expressed understanding of the Commission of Article 49a of Directive 2009/73/EC as a proportionality provision and the fact that the future addressee of the provision could only have had legitimate expectations of the existing legal situation until 8 November 2017 at the latest, maintaining the term of constructional-technical completion can only mean that, in the case of a gas interconnector not completed as at 23 May 2019 the European legislature did not assume such established structures, because these are, in the view of the Commission, precisely the reference point of the legitimate expectations in Article 49a of Directive 2009/73/EC. Conversely, that means that a gas interconnector that was already in the planning stage and possibly even already under construction at the time of the Commission proposal but was not expected to be finished by the time of the entry into force would, in the view of the legislature, not yet have such established structures or would have sufficient opportunity to adapt its structure to the changed framework conditions. The European legislature thus obviously assumed that it was reasonable for the future operators of such pipelines to comply with regulatory requirements immediately after the entry into force of Directive (EU) 2019/692 and not only once a derogation granted in accordance with Article 49a of Directive 2009/73/EC had come to an end. Such an assumption is not unusual in this context, given that financing plans for the repayment of loans are often linked to commissioning and the company and organisational structure, which is relevant to unbundling, is possibly less complex and well-established for a project company that is not yet operating. This approach is not evidently disproportionate either, since there were no expectations of an unchanged legal situation as of 2017.

In particular, it is evident that the European legislature did not take the view that a pipeline that could not be completed within this timeframe and, in the case of Nord Stream 2, precisely due to

outstanding approvals as a circumstance that is not the expression of a particular regulatory risk, would necessarily have to be included in the derogation provision for reasons of equal treatment. If the structures do nevertheless become more established in the course of the ongoing construction work, this may be regarded as a risk of the future addressee of the provision outside the legitimate expectations worthy of protection, given the proportionality considerations expressed in the legislative procedure.

2.2.1.3.2. Aim and purpose of section 28b EnWG

Section 28b EnWG transposes Article 49a of Directive 2009/73/EC in national law and must therefore be seen in the context of that provision. The national legislature explicitly refrained from using other terms than, for example, completion within the leeway for transposition, but instead based its substantive legal requirements closely on the underlying European provision. Only the structure of the procedure is more detailed than Article 49a of Directive 2009/73/EC as regards the conferring of competence to the regulatory authority, the application requirement, the application deadline and the requirements of the application documents.

In particular, the national legislature did not deviate from the wording of the Directive – as it did in the transposition of Article 2 point 33 of Directive 2009/73/EC in section 3 para 29a EnWG – and did not connect completion more closely with commissioning in the German EnWG, similar to section 3 para 29a EnWG, but instead chose to use identical wording for the transposition. A transposition with an economically functional understanding, for example by adding the criterion of pipelines still under construction or by using the investment decision as a basis, would be an extension of the derogation to gas interconnectors not eligible for derogation under European law. The narrow and very specific requirements of Article 49a of Directive 2009/73/EC did not provide any such leeway for transposition. The same must apply for the interpretation of the term completion in section 28b EnWG within an economically functional approach, because this would mean, according to the applicant, that completion would refer to the investment decision having been made and gas interconnectors still under construction could be regarded as completed. The term completion in section 28b EnWG cannot therefore be interpreted differently than in European law, ie, in a constructional-technical sense.

The recommendation for a decision by the Committee for Economic Affairs and Energy of 6 November 2019 (Bundestag printed paper 19/14878), which contained amendments to section 28b EnWG and led to an amended draft law being adopted, does not lead to any other conclusion. In the draft decision, the committee proposed putting the reference date of 23 May 2019 in a different position in section 28b EnWG. The draft of section 28b(1) EnWG was originally as follows: *"Die Regulierungsbehörde stellt Gasverbindungsleitungen mit einem Drittstaat zwischen Deutschland und dem Drittstaat im Sinne des Artikels 49a der RL 2009/73/EG auf Antrag des Betreibers dieser Gasverbindungsleitung in Bezug auf die im Hoheitsgebiet*

*Deutschlands befindlichen Leitungsabschnitte von der Anwendung der §§ 8 bis 10e sowie der §§ 20 bis 28 befristet frei, wenn (...) 2. die Leitung vor dem 23. Mai 2019 fertiggestellt wurde, (...)*⁴ but as a result of the recommendation the date was moved to the beginning of the provision, as it is in the currently applicable version of section 28b EnWG. The explanatory notes state that this change was for reasons of clarity. They further state, *"against this background (...) all circumstances of the individual case must be taken into consideration when determining whether the pipeline was completed before the entry into force."* The consultation process showed that the parliamentary parties followed the recommendation because *"the addition and clarifications serve to create legal certainty"* and *"the position of the determination date, which was changed in the request for amendment, is based on the wording of the Directive"*. The moving of the completion date to a different position in section 28b EnWG did not cause a substantive change in the legal text compared to the version in the original draft law. The remark in the explanatory notes to the recommendation that all circumstances should be taken into account as regards completion does nothing to change this. In particular, this addition cannot alter the reading of the clear wording to the law against the background of its connection to the understanding set out in Article 49a of Directive 2009/73/EC. It is not possible to create room for discretion as to completion in this way, which is also not intended under European law, nor does the term completion gain an economically functional understanding. Given the clear aim of an unchanged transposition and the creation of legal certainty, this reference to the circumstances of the individual case can only be understood in the systematic context with other provisions (see 2.2.1.2) in such a way that the constructional completion assumes that the gas interconnector can be used. There is room for a consideration of individual cases insofar as when exactly the gas interconnector was actually usable. In complex building projects, it may be true that the project implementation might vary depending on the project, so there may indeed be room to look at the individual stages of the specific case. However, the completion – the decision when the project is actually usable – is not subject to a case-by-case examination.

2.2.2. No economically functional assessment required

Contrary to the argument of the applicant, an economically functional assessment does not apply in this instance. The term completion does not have to be interpreted in an economically functional sense because of the alleged contravention of EU primary law or German constitutional law – insofar as it would even be possible to draw on the latter in the case of a word-for-word transposition of a European Directive. Limits are placed on the interpretation of a provision by its

⁴ The regulatory authority shall grant a derogation for gas interconnectors with a third country between Germany and the third country within the meaning of Article 49a of Directive 2009/73/EC upon application by the operator of that gas interconnector with respect to the section of the line in the territory of Germany from the application of sections 8 to 10e and sections 20 to 28 for a limited period, if (...) 2. the line was completed before 23 May 2019 (...).

explicit wording and by the evident will of the legislature (see section 2.2.2.1). Furthermore, national authorities do not have competence to reject or suspend European secondary legislation or corresponding national law implemented on the basis of it (see section 2.2.2.2).

The applicant here puts forward the view that an economically functional interpretation of section 28b EnWG is required because a constructional/technical understanding of the term completion within the meaning of Article 49a of Directive 2009/73/EC as amended by Directive (EU) 2019/692 would breach the principle of the protection of legitimate expectations under EU primary law and the European basic rights to equal treatment, protection of property and protection of the freedom to conduct a business. With regard to section 28b EnWG, the applicant states that the requirement to interpret the term completion in an economically functional sense arises from Articles 12 and 14 of the German Basic Law (GG) and from the principle of equality set out in Article 3(1) GG and the principle of a state governed by the rule of law, specifically, the prohibition of retrospectivity and the protection of legitimate expectations.

2.2.2.1. Economically functional interpretation not possible within the limits of the interpretation of the law

Contrary to the applicant's argument that the term completion must be interpreted in an economically functional way because a constructional/technical understanding is not compatible with the Basic Law or European primary law, it is not possible to understand completion in this way within the interpretation of the law.

The limit of interpretation is the point at which it would conflict with the wording and the evident will of law (see BVerfG, ruling of 14 June 2007, 2 BvR 1447/05). It is not possible to give a law that is clear in wording and meaning an opposite meaning in the course of interpretation or to completely redefine the legislative content of the provision being interpreted (BVerfG, ruling of 22 October 1985, 1BvL 44/83; BVerfGE 54, 277 (299-300) with further references).

In the absence of a legal definition, it is both possible and necessary to interpret the term completion with regard to its legal significance (see section 2.2.1 above); however, it must always be regarded in the context of the relevant circumstances and taking into account the specific reference point. Assessing the completion of, say, a literary work requires different conditions to the completion of a building project. In this case, only a constructional/technical interpretation comes into question as the completion – as shown in section 2.2.1.1 – relates to a gas pipeline, ie construction work. The assumption that a piece of construction work can be classed as complete because of commercial decisions, in particular because of investment decisions made at an early stage, is not logical and thus not compatible with the wording of the provision.

In fact, the applicant's argument mixes up the different conditions for the granting of a derogation, which are clearly delineated in Article 49a of Directive 2009/73/EC as amended by Directive (EU) 2019/692 and in section 28b EnWG, by bringing the aspect of the protection of investments

made into the interpretation of the criterion of a completed pipeline. It is not correct to consider the protection of investments made in this context because the criterion of completion must be assessed independently of the question of whether the other conditions for a derogation are met.

Moreover, an economically functional interpretation must be ruled out as incompatible with the will both of the European legislature and the national legislature, because, in view of the principle of the separation of powers, it is not possible to undertake an interpretation that contradicts the evident legislative intention (BVerfG, ruling of 22 October 1985, 1 BvL 44/83).

It has been shown in detail in section 2.2.1.3.1 above that the European legislature based the criterion on a constructional/technical understanding. The constructional/technical understanding of the Commission with regard to the condition that the pipeline must be completed before the reference date is shown in particular in the European Commission Fact Sheet, Questions and Answers on the Commission proposal to amend GS Directive of 8 November 2017, in which the answer to question 6 states: "The Commission proposal on derogations concerns gas pipelines *already in operation*." As a gas pipeline must be complete in a constructional/technical sense for it to be brought into operation, it may be ruled out that the Commission wanted to rely on an economically functional understanding with respect to the completion.

As explained in section 2.2.1.3.2, the national legislative procedure also clearly shows the legislative intention to regulate the term completion as a constructional-technical condition.

The German legislature transposed the wording of the Directive accurately in section 28b EnWG and pointed out several times that the intention of the draft law was to implement the Directive in a legally secure manner and to implement it "word for word" (Bundestag printed paper 18/14878, p 5). In view of the understanding of Article 49a of Directive 2009/73/EC as amended by Directive (EU) 2019/692, no interpretation of the term completion in section 28b EnWG can be made within an economically functional approach.

The recommendation of the Committee for Economic Affairs and Energy to change the position of the criterion of completion does nothing to change this conclusion. The explanatory notes specifically state that the amendment is based on the text of the Directive being implemented (Bundestag printed paper 19/14878, p 5) and its purpose is merely clarification (Bundestag printed paper 19/14878, p 6). Contrary to the opinion of the applicant, the Committee's indication that the assessment of completion "should take account of all circumstances of the individual case" does not permit the conclusion that circumstances not connected with the building work should be considered.

In its response to the consultation contributions from Member States, the applicant cites Bundesnetzagentur President Jochen Homann as writing to the then Director-General for Energy at the European Commission on 3 March 2017, "*it would constitute a discriminatory practice if other requirements were to apply to Nord Stream 2 without the existence of an adequate legal*

basis for them in the third internal market package" and extrapolates a general principle of equality for all interconnectors with third countries, but in doing so it neglects the context of the letter. At the time of writing that letter, Directive (EU) 2019/692 did not yet exist, so the regulation had not yet been extended to include gas interconnectors falling under the definition of section 3 para 19(c) EnWG or Article 2 point 17 of Directive 2009/73/EC. If the regulatory provisions of the law at that time had indeed (only) been applied to Nord Stream 2, this would certainly have been discriminatory and would have lacked a legal basis. However, this principle and the remarks of Mr Homann cannot be transferred to the extension of regulation by Directive (EU) 2019/692 to gas interconnectors between the Federal Republic of Germany and third countries; on the contrary, the focus must be on the specific provisions and their interpretation (see 2.2.1).

The ruling of the ECJ of 11 March 2020 (C–454/18) does not indicate that an economically functional assessment must be made either. The case mentioned does not deal with the question of how a specific term may be normally understood – as in, how an objective, reasonable third party would understand the word – but rather the additional interpretation of the wording as required by EU law, ie ultimately the application of the provision of an EU Regulation on a case that had apparently not been considered or not clearly regulated. On the basis of the above interpretation of the term completion (see section 2.2.1), there is no need to use an additional interpretation of the wording to extend the scope of section 28b EnWG to those gas interconnectors that were not complete in a constructional/technical sense before 23 May 2019, regardless of what would be possible in terms of legal competence (see section 2.2.2.2). As has been shown, this is particularly evident in the light of the origin, aim and purpose of both Article 49a of Directive 2009/73/EC as amended by Directive (EU) 2019/692 and of section 28b EnWG (see from section 2.2.1) and, among other things, of the use of the term in the sector-specific provisions of both the EnWG and European law.

2.2.2.2. No rejection or suspension of European secondary law or national legislation implemented on the basis of it

Moreover, no breach of EU primary law or German constitutional law by these provisions may be determined that would justify the rejection or non-application of them by the Bundesnetzagentur in these proceedings, including based on a constructional/technical understanding of the criteria of the completed gas pipeline in section 28b EnWG and Article 49a of Directive 2009/73/EC as amended by Directive (EU) 2019/692.

In its fundamental decision in the Granaria case, the ECJ ruled (on 13 February 1979, C – 101/78) that only the ECJ is competent to determine the legality of Regulations and that every Regulation which is brought into force in accordance with the treaty must be presumed to be valid as long as a competent court has not made a finding that it is invalid. It has confirmed this principle in numerous rulings and expanded to the effect that measures of the Community institutions (thus

including Directives) are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (ECJ, judgment of 5 October 2004, C – 475/01). This monopoly on rejection seeks to provide legal certainty, as it is intended to ensure that EU law is applied uniformly (ECJ, judgment of 14 June 2012, C – 533/10).

It is therefore precluded for national authorities to reject or suspend the application of European secondary law, such as Article 49a of Directive 2009/73/EC as amended by Directive 2019/692 on the grounds of a possible breach of European primary law. The same applies for the incorporation in identical wording in national law, in this case section 28b EnWG, as its rejection by a national authority would be the equivalent of circumventing ECJ case law. It is therefore not necessary to address whether section 28b EnWG is compatible with the Charter of the European Union or the Basic Law, as the fundamental rights affected here cover largely similar areas of protection in German and European law.

According to the judgement of the ECJ (ECJ, judgment of 15 June 1994, C – 137/92P, paragraph 50), an exception to this principle is only to be made in extremely exceptional cases: measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent (ECJ, judgement of 5 October 2004, C – 475/01). The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality (ECJ, *loc cit*). For reasons of legal certainty, such unusual cases may only be assumed in the event of very obvious and grave (ECJ, judgment of 15 June 1994, C – 137/92P, paragraph 52) procedural or formal deficiencies (EuGH, Joined Cases C-15–33, 52, 53, 57–109, 116, 117, 123, 132 and 135–137/73, [1974], paragraph 33), which is not the case here.

It should further be noted that, even if it were to be assumed that substantive aspects, as put forward by the applicant, could lead to a "non-act" in the sense of the ECJ case law cited above, the aspects presented in this case would not represent this kind of unusual and grave error. This would only be conceivable in the event of obviously arbitrary behaviour. As already shown in section 2.2.1.3.1 above, considerations of legitimate expectation and proportionality were both taken into account in a comprehensible way in the creation of the conditions for derogation in Article 49a of Directive 2009/73/EC as amended by Directive (EU) 2019/692.

2.2.3. No completion on the reference date

(1) Nord Stream 2 was not complete as at the reference date of 23 May 2019, because major pipe-laying work had not yet taken place. Since there were still gaps in the construction of the

pipeline on the reference date, the construction work that had taken place up to 23 May 2019 was not sufficient to assume the usability of the pipeline for the transport of gas necessary for completion as a constructional/technical term. Almost a year after the reference date, Nord Stream 2 was still not finished. The applicant's CFO, Paul Corcoran, explained in an interview about progress on construction work for Nord Stream 2 on 7 April 2020, *"What I can say is this: we're looking at all the options to complete the pipeline. We don't have a definitive solution yet. I can't say anything about the options or the timeframe. There is still 6%, or 150 km missing. (...)"* (see energate messenger plus, 7 April 2020). In an interview on 8 May 2020, he further stated: *"As I said, we're working on various options to get the laying finished as quickly as possible. That's in Europe's interest as well. There is only 6% of the pipeline missing. (...)"* (see energate-gasmarkt, May 2020).

(2) The reference point for completion before 23 May 2019 under section 28b EnWG is the gas interconnector within the meaning of section 3 para 19(c) EnWG and thus the gas interconnector as a whole. The statements of the Kingdom of Denmark, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and Romania are based on this understanding. The Kingdom of Sweden also stresses that Nord Stream 2 is not complete, but without differentiating between sections. The Republic of Lithuania points out that the applicant itself has announced that the pipeline will not be completed until 2021.

It is not possible to share the applicant's view that the construction phase of Nord Stream 2 as at the reference date of 23 May 2019 outside the German territorial sea is immaterial to its completion, since the addition *"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 2 located in German territory, but merely takes account of recital 9 of Directive (EU) 2019/692, which clarifies that the amended Directive 2009/73/EC, ie the law on the regulation of the internal market, remains restricted to the territory of Member States (see 2.1.1). Consequently, the whole of Nord Stream 2 must have been completed as at the reference date of 23 May 2019 and not just the section of the pipeline located in German territory including its territorial sea, although it was not finished on the reference date either.

The fact that Nord Stream 2 must be considered as a whole is supported by the constructional/technical understanding underlying the term completion (see 2.2.1) as something actual and based on usability; it is only possible to determine the usability of a gas interconnector by looking at the pipeline as a whole, ie, as a technical unit, because a basic requisite for the flow of gas between an entry and an exit point – the intended use of the gas interconnector – is that there is a continuous connection between these two points. The usability required for the assumption of completion thus exists when it is possible to transport gas with the gas interconnector, ie, it has reached a state that allows use according to objective criteria (see section 2.2.1.2). Given that the two lines of Nord Stream 2 are joined as one project in the planning

and approval procedure in accordance with section 43 EnWG and section 133 BBergG and the impact assessment always refers to the total capacity, both lines must have been fully connected as at 23 May 2019. However, this is not the case.

(3) On 23 May 2019, Nord Stream 2 still had construction gaps making it unusable. This relates to both lines, but given that the two lines are joined as one project in the planning and approval procedures in accordance with section 43 EnWG and section 133 BBergG and the impact assessment always refers to the total capacity, it would not have been enough for just one line to be fully connected to state that the pipeline was complete. As at the reference date of 23 May 2019, there were no pipes on the seabed on about half the pipeline route. One of these gaps was the 147-km-long section of both lines running through the Danish EEZ, because on the reference date the Danish authorities had not yet issued approval for the pipes to be laid and their exact position in the Danish EEZ. This work could only be started after the approval was issued on 30 October 2019; it became final on 28 November 2019. In the German EEZ, too, not all the pipes for both lines had been laid on the seabed on the reference date. After work on a 16.5 km-long section did not take place within the time window foreseen in the original BSH approval, the applicant had to apply for an amendment of the 2018 approval on 23 September 2019 to be able to carry out the pipe-laying work in the winter months of 2019/2020, which was issued on 20 December 2019. There were also other gaps on the reference date in the sections under Swedish, Finnish and Russian responsibility. In this area, the pipes for the two lines are laid working in opposite directions towards each other, ie line A is laid from the landing point in the Russian Federation towards the south west and line B is laid from the Danish/Swedish EEZ border towards the north east, but neither of the two lines was finished as at 23 May 2019.

(4) Moreover, the pipe sections that had been laid on the seabed by 23 May 2019 had largely not been connected on the reference date by means of the AWTI process or the similar process planned for Russian waters. This is also contrary to completion as at 23 May 2019. AWTI involves the sections of pipe laid on the seabed being taken up by a special pipe-laying ship, shortened and welded together above the surface of the water and then being put back on the seabed in an arc. As the parties summoned explain in their joint statement dated 24 April 2020, the pipeline is only fully connected and thus usable when it has been connected by this process, which the applicant itself includes as a standard construction measure – specifically, part of the laying phase – in the documents it submitted as part of the planning process (see eg A.01 - Project and approvals for the area under German responsibility, sections 3.3.2.1. and 3.3.2.2.4, and C.01 Technical explanatory report, section 3.3.7.3). The AWTI process is thus not downstream work, because without connecting the pieces of line that have already been laid, it is not possible to transport gas from an entry point to an exit point. In assessing the status of the pipeline, the reference in this context is the technical possibility of gas transport, while all downstream work, such as rock placement at AWTI points, the refilling of pipe trenches or the restoration of the surface of the seabed does not necessarily have to be completed. Finally, it should be noted that

regardless of whether actual proof of usability is required in the form of a technical safety inspection including pre-commissioning (see statement from the parties summoned), this would not even have been possible as at 23 May 2019, because the major plants of the PIG receiving station near Lubmin, including the PIG traps, were only installed in the period up to August 2019. On the reference date, the connection of the landing offshore pipes to the natural gas receiving station, which is essential for gas flow, and the installation of the PIG traps, which according to documentation published by Nord Stream 2 AG took place in August 2019, were still outstanding.

(5) Even according to the narrow understanding put forward by the applicant that only the section of Nord Stream 2 in German territory, ie in German territorial sea and on the landing area, should be taken into account as regards the reference date, there was still no completion as at 23 May 2019, because on that day pipe-laying work was still taking place for line B at KP 54.4 in German territorial sea in summer 2019 and thus after 23 May 2019, as shown by the information published on the applicant's website, "Background: Above Water Tie-In in German Waters", dated August 2019.

2.3. No assessment of objective reasons in the absence of completion as at 23 May 2019

Because Nord Stream 2, as a gas interconnector within the meaning of section 28b EnWG, had not been completed before the reference date of 23 May 2019 set out in section 28b EnWG, an essential criterion for the derogation is missing. There is therefore no scope for the assessment of other conditions for the derogation.

2.4. Operative part rationale

Operative part 1: The applicant's applicant for derogation for Nord Stream 2 in accordance with section 28b(1) EnWG from the provisions of sections 8-10e and 20-28 EnWG with respect to the sections of pipeline located in the territory of the Federal Republic of Germany for the period of 20 years from the day of commercial commissioning of the Nord Stream 2 gas interconnector must be rejected. In the absence of completion before 23 May 2019, Nord Stream 2 does not fulfil the requirements of section 28b(1) sentence 1 EnWG and there is therefore no possibility of granting a derogation pursuant to this provision. For the same reason, the alternative application submitted by the applicant to alternatively grant the derogation from the issue of the derogation decision must be rejected as well.

Operative part 2: 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 complaint is received by the Higher Regional Court of Düsseldorf within the time limit specified (postal address: Cecilienallee 3, 40474 Düsseldorf).

The complaint must be accompanied by a written statement setting out the grounds for complaint. The written statement must be provided within one month of filing the complaint. The period begins with the lodging of the complaint 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