EN

Case No COMP/M.6910 - GAZPROM / WINTERSHALL / TARGET COMPANIES

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 03/12/2013

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EUROPEAN COMMISSION

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Brussels, 3.12.2013
C(2013) 8848 final

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties

Dear Sir/Madam,

Subject: **Case No COMP/M.6910 – GAZPROM / WINTERSHALL / TARGET COMPANIES**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004

(1) On 30.10.2013**,** the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation[1] by which: (*i*) JSC Gazprom ("Gazprom", Russian Federation) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole ownership and control of the whole of the undertakings Wingas GmbH ("Wingas", Germany) and of Wintershall Erdgas Handelhaus GmbH & Co. KG ("WIEH", Germany), and (*ii*) Gazprom and Wintershall Holding GmbH ("Wintershall", Germany) acquire joint control of Wintershall Noordzee B.V. ("WINZ") and Wintershall Services B.V. ("Wintershall Services", both of the Netherlands and together referred to as the "Target Companies") by way of an asset swap. Wingas and WIEH are currently jointly controlled by Gazprom and Wintershall, while WINZ and Wintershall Services are currently solely controlled by Wintershall[2] (Gazprom and Wintershall are designated hereinafter as the 'notifying parties' or 'parties to the proposed transaction').

1 OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

2 Publication in the Official Journal of the European Union No C 321, 07.11.2013, p. 7.

1. THE PARTIES

(2) **Gazprom** is a publicly listed company that is majority owned by the Russian Federation. Its principal activities are the exploration, production, transportation, supply, trading, distribution, and storage of natural gas.

(3) **Wintershall** is a wholly-owned subsidiary of BASF SE ("BASF") and engages in the exploration and production of crude oil and natural gas in particular in Europe, Northern Africa, South America and Russia, as well as in natural gas pipeline operation, investment and natural gas supply and storage.

(4) **Wingas** is a wholly-owned subsidiary of W&G Beteiligungs-GmbH & Co KG ("W&G") which is currently jointly controlled by Wintershall and Gazprom. Wingas is active in the downstream gas supply in Germany, Austria, the Czech Republic and several other Western European countries. Wingas also offers natural gas storage in Germany and Austria through its subsidiary astora GmbH & Co. KG.

(5) **WIEH**, currently jointly controlled by Wintershall and Gazprom, purchases gas from [details of WIEH's suppliers] for supply to [details of WIEH's customers].

(6) **WINZ** and **Wintershall Services** are wholly owned subsidiaries of Wintershall. WINZ is engaged in oil and gas exploration and production in the North Sea, principally in the Dutch sector but also in Denmark and the United Kingdom. Wintershall Services, in turn, provides platform staff and related services for WINZ.

2. THE OPERATION

(7) The proposed transaction consists of the acquisition by Gazprom of sole control of Wingas and WIEH, as well as of the acquisition of joint control by Gazprom and Wintershall of WINZ and Wintershall Services. This proposed transaction is based on a Basic Swap Agreement of 14 November 2012 by which Wintershall will be granted a 25% plus one share stake in Areas IV and V in the Achimov Formation of the Urengoy gas field in Western Siberia.

(8) Wintershall and Gazprom also jointly own and control a German gas transmission business, which is conducted through the transmission operators GASCADE Gastransport GmbH, OPAL Gastransport GmbH & Co. KG, and NEL Gastransport GmbH. This transmission business is not included in the Transaction and will remain jointly owned and controlled by Wintershall and Gazprom.

3. THE CONCENTRATION

(9) The proposed transaction will result in Wingas and WIEH being solely controlled by Gazprom, as opposed to the pre-merger situation, in which both companies are jointly controlled by Gazprom and Wintershall. Also, WINZ and Wintershall Services will be jointly controlled by Gazprom and Wintershall, as opposed to the current sole control exerted over these companies by Wintershall. Both the acquisition by Gazprom of sole control of Wingas and WIEH as well as the acquisition by Gazprom and Wintershall of joint control of WINZ and Wintershall Services are legally

interdependent and therefore constitute a single concentration within the meaning of the Merger Regulation.[3]

(10) The acquisition by Wintershall of a 25% plus one share stake in Areas IV and V in the Achimov Formation of the Urengoy gas field in Western Siberia (the "Siberian Assets") does not, in itself, constitute a concentration within the meaning of the Merger Regulation. Even if the minority interests were to confer joint control over the aforementioned assets on Wintershall, the requirements for constituting a full-function joint venture will not be met. The Siberian Assets are currently not in commercial production and therefore they do not have access to the market. Also, post-merger, [details on sales arrangements of the future output of the Siberian Assets][4].[5] Accordingly, given that this particular joint venture will neither play an active role on the market post-merger, nor involve a structural change in the market, it cannot be considered a full-function joint venture within the meaning of Article 3(4) of the Merger Regulation.[6]

Joint control – WINZ and Wintershall Services

(11) WINZ and Wintershall Services will be jointly controlled by Gazprom and Wintershall. The Basic Swap Agreement prescribes that Gazprom and Wintershall will have "equal control and other rights with regard to WINZ and Wintershall Services".[7] The Parties also indicate that none of the provisions that will ultimately be incorporated into the shareholders agreements of WINZ and Wintershall Services respectively will prevent either Gazprom or Wintershall from exercising joint control over WINZ and Wintershall Services.[8]

Joint to sole control – Wingas and WIEH

(12) Gazprom and Wintershall currently (indirectly) hold 49.98% and 50.02% respectively of the share capital of Wingas, while both hold 50% of the share capital of WIEH. As will be explained below, the Parties therefore currently exercise joint control over both Wingas and WIEH.

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3 All transactions form part of the same swap agreement that underpins the proposed transaction and which was signed between the Parties on 14 November 2012 (the "Basic Swap Agreement"). Accordingly, all the acquisitions of control are linked by mutual conditionality, or *de jure*. Indeed, pursuant to Section 2.1 and Recital B of the Basic Swap Agreement, the transfer to Gazprom of the "Wintershall Assets" [description of certain provisions in the Basic Swap Agreement], and the transfer to Wintershall of the "Gazprom Asset" [description of certain provisions in the Basic Swap Agreement] will all be "*conditional on, and in consideration of, the other*."

4 The sales are intended to be made for the duration of Gazprom's exploitation license, therefore until at least [...].

5 Basic Swap Agreement, sections 4.1.2-4.1.5.

6 Cf. Commission's Jurisdictional Notice, recitals 91 and 98.

7 Basic Swap Agreement, section 5.6.1(b).

8 Form CO, footnote 23 to paragraph 3.1. The Parties e.g. indicate that, although 'mechanisms for resolution of a deadlock' are foreseen to be incorporated into the shareholders agreements of WINZ and Wintershall Services respectively, they do not intend for any such mechanism to confer on either Wintershall or Gazprom any casting vote that would confer sole control within the meaning of the Merger Regulation.

(13) WIEH currently constitutes a 50/50 joint venture between Gazprom and Wintershall. The proposed transaction foresees the acquisition by Gazprom of the remaining 50% stake in WIEH.[9]

(14) Although currently the respective shareholdings of Wintershall and Gazprom in Wingas differ slightly, both companies are equally represented on both the management as well as the advisory board.[10] The fact that Wintershall has a casting vote at the level of the management board does not impair on the current existence of joint control on the part of Gazprom and Wintershall, given that all decisions that relate to the strategic conduct of Wingas are subject to approval of the advisory board, at which level no party holds any casting vote.[11] Although in the event of a deadlock all decisions of the advisory board can ultimately be referred to the shareholders' meeting, Gazprom still holds a veto right at the latter level as regards strategic decisions relating to [description of Wingas' strategic decision-making process]. As a practical matter, the Parties have confirmed that [details on Wingas' decision-making process]. Finally, in practice, Gazprom plays a central role in the effective operation of Wingas as it supplies over […]% of Wingas' overall gas sourcing portfolio, while its executives on Wingas' executive board are in charge of the core fields [details on Wingas' decision-making process].

Full-functionality

(15) WINZ and Wintershall Services both constitute pre-existing legal entities to which a turnover can be clearly attributed[12] and which perform all of the functions which are normally carried out by undertakings operating on the same market. Moreover, even if the aforementioned companies would no longer be considered full-function after the transaction, the acquisition of joint control of these by Gazprom will in any case lead to a structural change in the market.[13]

(16) In light of the above, the transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

4. EU DIMENSION

(17) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Gazprom: EUR […] million; BASF: EUR 72 129 million; WINZ/Wintershall Services: EUR […] million; Wingas: EUR […] million; WIEH: EUR […] million).[14] Each of them has an EU-wide turnover in excess of EUR 250 million (Gazprom: EUR […] million; BASF: EUR […] million;

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9 Basic Swap Agreement, Section 2.1 and Recital B.

10 For completeness sake, the Commission notes that [details on Wingas' and W&G's corporate structures and decision-making processes]. However, the statutes of W&G and Wingas GmbH provide for a mechanism conferring [details on W&G's and Wingas' decision-making processes].

11 Paragraph 8 of the Statutes (*Satzung*) of Wingas provides that its advisory board is composed of ten members, with each party entitled to appoint five members. Paragraph 10 of the Statutes and paragraph 3(2) of the Rules of Procedure (*Geschäftsordnung für den Beirat*) of the advisory board provide that decisions are taken [details on Wingas' decision-making process].

12 In 2012, WINZ produced […] billion cubic metres of gas and [details on WINZ's production quantities], achieving net sales of EUR […] million, cf. Financial Statements & Annual Report 2012 of Wintershall Nederland B.V.

13 Cf. Commission's Jurisdictional Notice, recitals 24 and 91.

14 Turnover calculated in accordance with Article 5 of the Merger Regulation.

WINZ/Wintershall Services: EUR […] million; Wingas: EUR […] million; WIEH: EUR […] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

5. COMPETITIVE ASSESSMENT

(18) Gazprom is primarily active in the exploration and production of gas, as well as in the upstream supply of natural gas, with more limited activities in downstream gas supply and gas storage. Wingas is mainly active in downstream wholesale gas supply, retail gas supply to large industrial end-customers and power plants, and gas storage.

(19) The proposed transaction gives rise to a number of horizontally and vertically affected markets in Germany, Austria and the Czech Republic.

5.1. Overview of relevant markets in the gas supply chain

(20) Given that Parties are active in storage and in several levels of the gas supply chain, a brief overview of the main general features of those markets is outlined below.

(21) Gazprom is active in the exploration and production of natural gas resources, [description of Gazprom's exploration and production activities]. These can be distinguished depending on the method of production.[15] In addition, depending on its origin, natural gas may have a high calorific value ("H-gas") or a low calorific value ("L-gas").

(22) Both Parties also own gas storage facilities which are used as a flexibility tool to balance fluctuations in demand of natural gas. Other such tools are for example flexible supply contracts and flexible purchasing contracts. Regarding storage, there can be pore and cavern storage facilities. Pore storage refers to storage in underground layers of porous rock, which usually are located in depleted natural gas fields. These depleted fields are, after the completion of certain technical conversion steps, artificially re-filled with natural gas volumes for storage. Cavern storage facilities are underground cavities which have been artificially created.

(23) Gazprom is active in the upstream supply of gas and, together with other upstream producers like Gasterra, Statoil, Dong, Eni and Shell, typically supplies volumes of gas to wholesalers, which acquire said volumes for onward sale into downstream markets.

(24) On the downstream markets, wholesalers, such as E.ON, Wingas, RWE, VNG, Exxon Mobil and Erdgas Münster, that procure natural gas from producers, sell the natural gas volumes on to (i) other resellers (wholesale supply), which in turn supply end-customers (retail supply) and may also sell directly to (ii) end-customers.

(25) The downstream supply markets can entail several levels and/or sub-segments. For example, in Germany the supply chain was traditionally considered to comprise two wholesale levels and several retail segments. In fact, the market participants on the wholesale downstream supply markets of gas (the supply to resellers) have traditionally

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15 Conventional natural gas and shale gas have the same product properties and are used for identical purposes.

been split into (i) supra-regional wholesalers; (ii) regional wholesalers and (iii) distributors, as will be described in detail below.

(26) Natural gas is either shipped to wholesalers through high-pressure transmission pipelines or by boat in the form of liquefied natural gas ("LNG"). LNG is transported over long distances, where pipelines are often neither economic nor feasible. At the receiving location, liquid natural gas is re-gasified and then fed into transmission pipelines.

(27) It is also important to note that supply relationships between upstream producers and wholesalers on the upstream wholesale market are historically characterized by long-term contracts ("LTCs") including large Take-or-Pay (ToP) volumes, which need to be off-taken by the customer irrespective of market conditions. For example, in Germany most of Gazprom's non-Wingas supplies are [details on the term and pricing structure of Gazprom's LTCs with German customers].

(28) At the same time, increasingly liquid trading hubs are developing in various North Western European countries, such as in Germany. The German gas trading hubs NCG and GASPOOL are virtual market places, each covering one market area, where gas is physically delivered and off-taken, as well as financially traded, both bilaterally (OTC) and at the exchange (EEX-Exchange). At these hubs, gas producers, downstream gas wholesalers and retailers as well as certain industrial customers can both physically as well as financially trade gas. Following increased liquidity during the last years, gas prices at the German virtual trading hubs have been below LTC prices, exerting pressure on German wholesalers that are committed to off-take their respective ToP-volumes. This, in turn, has led those wholesalers to making pressure to re-negotiate the terms of their LTCs with upstream suppliers.

5.2. Horizontal relationships

(29) The Parties' activities overlap in a number of product market segments and therefore, the proposed transaction gives rise to horizontally affected markets in the markets for the supply of gas storage capacity in (a) Germany, and in (b) Austria.

5.2.1. Gas storage

5.2.1.1. Relevant product and geographic market

(30) The Commission has previously defined a separate relevant product market for the storage of natural gas,[16] while considering a further distinction between pore and cavern storage facilities[17] as well as between storage facilities suited for the storage of H-gas and storage facilities suited for the storage of L-gas. The Commission has however ultimately left the latter questions open.[18][19]

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16 COMP/M.5549 *EDF/Segebel*, of 12 November 2009, para 167-168; COMP/M.3696 *E.ON/MOL*, of 21 December 2005, para 99; COMP/M.3410 *Total/Gas de France*, of 8 October 2004.

17 COMP/M.3410 *Total/Gaz de France*, of 8 October 2004, para 18; COMP/M.3086 *Gaz de France / Preussag Energie*, of 25 April 2003, para. 14-15.

18 COMP/M.5467 *RWE Essent*, of 23 June 2009; COMP/M.3410 *Total / Gaz de France*, of 8 October 2004.

19 See Section 5.3.5.1for a full definition of H-gas and L-gas.

(31) The Parties argue that the relevant product market for natural gas storage encompasses all types of storage facilities, if not all flexibility tools, and should not be further segmented.[20]

(32) Insofar as the possible distinction between pore and cavern storage facilities is concerned, the market investigation carried out by the Commission showed that the respondents on both the supply as well as the demand side of the market appear to consider these two types of storage facilities as belonging to the same relevant product market. In any event, for the purposes of this decision, the exact delineation of the gas storage market can be left open as the proposed transaction will not give rise to serious doubts as to its compatibility with the internal market, irrespective of the market definition retained.

(33) As regards a possible distinction between storage facilities suited for H-gas and those suited for L-gas, the market investigation provided some indications that the interchangeability of H-gas storage facilities with L-gas storage facilities in Germany and Austria follows the existing degree of interchangeability between H-gas and L-gas. The overall interchangeability of H-gas and L-gas is dealt with in more detail in section 5.3.5.1, below.

(34) As regards the interchangeability of H-gas and L-gas storage facilities in particular, the majority of respondents believed that in the absence of a conversion fee for quality conversion between H-gas and L-gas, storages of both gas qualities would belong to the same relevant product market. Given that in Germany this conversion fee will cease to exist as of 2016, due to its incorporation into the general transmission (entry/exit) tariff charged to all operators, storage facilities of both types may indeed belong to the same relevant product market in the near future.

(35) As regards the geographic scope of the market for the storage of natural gas, the Commission previously defined it to be either national or regional, while keeping account of a potential broadening in view of the liberalization of this sector in Europe.[21] As regards Germany, the Commission specifically considered the geographic market to encompass an area with a radius of (i) 200 km around the storage facility for pore storages and (ii) 50 km around the storage facility for cavern storages.[22]

(36) The Parties claim that the market for storage is least national in scope[23] and, in the case of Germany, should include the Haidach and 7 fields facilities which are located in Austria but which are connected to the German grid.[24] This view was confirmed by the large majority of the respondents as regards both Germany and Austria.

(37) In any event, for the purposes of this decision, the exact delineation of the relevant product markets can be left open as the proposed transaction will not give rise to

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20 Mainly because both pore and cavern storage serve the same purpose, are offered by the same suppliers and can accommodate H- and L-gas, therefore being in the same price range.

21 COMP/M.3696 *E.ON/MOL*, of 21 December 2005, para 130.

22 COMP/M.3086 *Gaz de Frace/Preussag Energie*, of 25 April 2003, para 16; IV/M.1383 *Exxon/Mobil*, of 29 September 1999, para. 262-263.

23 This conclusion was also recently reached by the FCO (BKartA B8-116/11 *Gazprom/VNG*, of 31 January 2012).

24 Such facilities are physically located in Austria, but are connected to the German grid. To account for this, the full capacity of both facilities was attributed to the German as well as the Austrian market.

serious doubts as to its compatibility with the internal market, irrespective of the market definition retained.

5.2.1.2. Competitive assessment

(38) Taking into account the various possible delineations of the relevant product and geographic markets set out above, the proposed concentration would give rise to several horizontally affected markets for the supply of gas storage capacity in both Germany and Austria. Following the proposed transaction, both the Parties' combined market share as well as the increment in their existing significant market shares in Germany and Austria respectively would be most significant in the markets for: (i) H-gas pore storage in Germany[25], and; (ii) H-gas storage in a 200 km radius around the Haidach facility in Austria (serving Austrian demand)[26]. The Parties combined presence in these markets would amount to (i) [40-50]% (Gazprom: [10-20]%; Wingas: [30-40]%), and to (ii) [50-60]% (Gazprom: [30-40]%; Wingas: [10-20]%). In Germany, the Parties' competitors on the H-gas pore storage market include E.ON Gas Storage ([20-30]% market share), Storengy ([5-10%]% market share), VNG Gasspeicher ([5-10]% market share) and RWE ([0-5]% market share). In Austria, the Parties' competitors on the market for the H-gas storage in a 200 km radius around the Haidach facility in Austria (serving Austrian demand) are RAG ([20-30]%), EON ([20-30]%) and OMV ([5-10]%). As will be explained below, the proposed transaction however does not give rise to serious doubts as to its compatibility with the internal market and the precise definition of the relevant product and geographic markets can, therefore, be left open.

(39) The Parties submit that these horizontal overlaps are unlikely to give rise to competitive concerns. They argue that Gazprom did not receive any third-party bookings for its storage capacity in neither Germany nor Austria during at least the period 2010-2013, while only offering […]% of its total capacity to the market. Indeed, Gazprom indicates that it used […]% of its German and Austrian storage capacity internally during the period mentioned. Similarly, Wingas used around […]% of its overall German and Austrian storage capacity internally during the same period. The competitive pressure exerted between the Parties is therefore currently highly limited.[27]

(40) The market investigation provided some indications to support the Parties' claims in this regard; firstly, the majority of the Parties' German and Austrian customers explained that they generally source storage capacity from multiple storage operators and that they are capable of switching between suppliers, depending on the terms of the

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25 In a market limited to the storage of H-gas in pore and/or cavern facilities in a 200 km radius around the Rehden facility in Germany, the Parties indicate that their activities would not overlap. Also, the Parties submissions show that in a market limited to the storage of H-gas within a 200 kilometer radius (including storage facilities in Thann, Puchkirchen, Aigelsbrunn, 7fields, Haidach, Bierwang, Inzenham-West, Schmidhausen, Wolfersberg and Breitbrunn-Eggstätt) around their Haidach facility (located in Austria but also serving German demand), their post-merger market share would amount to [30-40]%.

26 In Austria, only pore storage facilities exist, as explained by the Austrian regulator (http://www.e-control.at/en/market_players/natural-gas/natural-gas-market/storage). Accordingly, the potential distinction between pore and cavern storage facilities is not relevant for the Commission's assessment in this regard. Also, given that the Parties' only storage facility is the Haidach facility, no further potential regional gas storage markets in Austria have to be assessed.

27 The Parties indeed claim that their combined market share would not exceed ~[0-5]% based on existing merchant supply and freely available capacity in Germany, which it expects to be similarly low in Austria.

contract; secondly, the market investigation only identified one customer in Austria and two customers in Germany that actively sourced storage capacity from both the Parties during the past 3 years. Both of the aforementioned customers however considered the Parties' storage capacity interchangeable with other operators' German facilities, and that switching between suppliers is feasible.

(41) Also, respondents on both the supply and the demand side of the market generally considered demand for gas storage to currently be low, with the large majority of the Parties' competitors expecting this situation to continue for the relevant timeframe for EU merger control purposes, due for example to excess capacity and a limited spread between the price for gas in summer and its price in winter.[28] The low demand for storage further reduces the significance of the Parties' already limited freely available storage capacities in Germany and Austria.

(42) Furthermore, some competitors will, post-merger, continue to exert competitive pressure on the Parties in both Germany and Austria. The majority of respondents to the market investigation confirmed the existence of excess capacity and low demand for the gas storage sector in Germany and Austria.

(43) Finally, none of the supply- and demand-side respondents to the market investigation expect the proposed transaction to have any negative impact on either the price or the availability of natural gas storage capacity, neither in - H-gas, pore facilities – Germany nor in Austria.

(44) Given the limited share of customer demand that is attributable to the Parties' respective storage facilities, the limited overlap between the Parties' commercial gas storage activities and the excess capacity and currently limited demand in both Austria and Germany, the proposed transaction is unlikely to give rise to serious doubts as to its compatibility with the internal market, insofar as the horizontal relationship between the Parties' gas storage activities is concerned.

5.3. Vertical relationships

(45) The proposed transaction would give rise to vertically affected markets involving (i) the exploration of oil and gas and the upstream wholesale supply of gas, (ii) Gazprom's German gas infrastructure and the supply of gas, (iii) the supply of gas storage capacity and the supply of gas, (iv) the upstream supply of gas and the downstream wholesale and retail supply of gas in (a) Austria and (b) the Czech Republic, and (v) the upstream supply of gas and the downstream wholesale and retail supply of gas in Germany.

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28 A limited summer-winter gas price spread at the gas trading hubs limits the premium paid for gas storage, given that the costs of storage can likely not be covered by the difference in the price of gas in winter and summer.

5.3.1. Exploration of oil and gas - Upstream wholesale supply of gas

5.3.1.1. Product and geographic market definition

(46) In its previous decisional practice, the Commission concluded that a single product market for the exploration of crude oil and natural gas exists, as the contents of underground reservoirs cannot be known at the stage of the exploration.[29]

(47) This market is generally taken to be worldwide in scope, given that the companies engaged in exploration do not tend to limit their activities to a particular geographical area.[30]

(48) In any event, for the purposes of this decision, the exact delineation of the relevant product markets can be left open as the proposed transaction will not give rise to serious doubts as to its compatibility with the internal market, irrespective of the market definition retained.

5.3.1.2. Competitive Assessment

(49) The vertically affected markets involving the worldwide market for exploration of oil and gas and the upstream wholesale gas supply markets are unlikely to give rise to serious doubts as to their compatibility with the internal market, given that these vertical relationships are almost entirely pre-existent to the proposed transaction. The addition of WINZ by the proposed transaction only involves a highly limited increment in Gazprom's current share ([0-5]%) of the exploration market, only amounting to [0-5]%.

5.3.2. Gazprom's German gas infrastructure – Supply of gas in Germany

(50) Gazprom is involved in the transmission of gas in Germany,[31] which is carried out by the transmission system operators GASCADE Gastransport GmbH ("GASCADE"), OPAL Gastransport GmbH & Co. KG ("OPAL") and NEL Gastransport GmbH ("NEL", and together: the "Transmission Business").

(51) Although the transportation of gas can be considered vertically related to the (wholesale and retail) supply of gas, the proposed transaction will not alter the degree of control exerted by Gazprom over the Transmission Business, following a carve-out. At the same time, Wintershall, which owns the Transmission Business together with Gazprom, will no longer be active in the German gas supply markets post-transaction. The Proposed Transaction should therefore, if anything, reduce the incentive of GASCADE, OPAL and NEL to offer any form of preferential treatment to Wingas.

(52) The proposed transaction cannot, therefore, give rise to serious doubts as to its compatibility with the internal market, insofar as any potential vertically affected market involving the Transmission Business is concerned.

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29 COMP/M.6801 *Rosneft/TNK-BP*, of 8 March 2013; COMP/M.5585 *Centrica/Venture Production*, of 21 August 2009; COMP/M.3294 *ExxonMobil/BEB*, of 20 November 2003; COMP/M.2681 *Conoco/Philipps Petroleum*, of 6 March 2002; COMP/M.1532 *BP Amoco/Arco*, of 29 September 1999.

30 COMP/M.3294 *ExxonMobil/BEB*, of 20 November 2003; COMP/M.2681 *Conoco/Philipps* Petroleum, of 6 March 2002; COMP/M.1532 *BP Amoco/Arco*, of 29 September 1999.

31 Through its joint ownership of W&G Beteiligungs-GmbH & Co. KG.

5.3.3. Supply of gas storage capacity – Supply of gas

(53) As explained in paragraph (31) – (37) above, given that the gas storage capacity constitutes a flexibility-tool which can be used by gas (wholesale and retail) suppliers to address fluctuations in demand, it can be considered an input to (wholesale and retail) gas supply operations. Potential concerns in relation to the horizontal increment in market shares in gas storage have been dealt with above under points 5.2.1.2. However, the strengthened position in gas storage, as well as the move from joint to sole control over Wingas's supply activities, also needs to be considered in view of their vertical relationship. Any potential concern of a vertical nature involving the Parties' gas storage facilities would either relate to (i) input foreclosure, or (ii) customer foreclosure.

(54) As indicated above, only […]% and around […]% of Gazprom's and Wingas' respective gas storage facilities in Germany and Austria are available for third party bookings, with Gazprom not having received any such bookings during 2010-2013. The Parties' available gas storage capacity thus maximally represents [5-10]% of overall storage capacity in Austria[32] and [0-5]% of overall H-gas storage facilities in Germany[33]. The size of the storage capacity that the Parties could therefore, hypothetically, foreclosure access to is very limited. The Parties also indicate that their main competitors on the downstream gas supply markets in Germany and Austria are similarly self-sufficient as regards their gas storage requirements and do not source any gas storage capacity from the Parties. The respondents to the Commission's market investigation also pointed to the existence of a regulatory regime requiring non-discriminatory and transparent access to gas storage facilities, which applies to the Parties' gas storage activities in both Germany and Austria.

(55) Regardless of whether one takes account of available storage capacity only or overall existing storage capacity, the proposed transaction does not involve a significant competitive overlap nor does it significantly increase the degree of concentration, given Gazprom's existing joint control over Wingas combined with the fact that Gazprom did not have any third-party bookings for its storage capacity in either Austria or Germany during 2010-2013.

(56) The current and expected future low demand and combined excess capacity in both the German and Austrian gas storage market furthermore indicate that gas storage facilities currently do not constrain the ability to conduct downstream gas supply operations.[34]

(57) As regards the potential for the Parties to engage in customer foreclosure in Germany, it is important to note that in Germany in 2012, the Parties only sourced a very limited amount of gas storage capacity (around […] mcm, or less than […]% of overall German storage capacity) from third parties. Accordingly, the Parties cannot be

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32 Overall gas storage capacity in Austria stood at 7.5 bcm at the end of 2011; http://www.e-control.at/en/market_players/natural-gas/natural-gas-market/storage [website accessed on 20 November 2013].

33 Based on a market total of 24 319 mcm provided by the Parties.

34 Indeed, several respondents to the market investigation indicated that the spread between the gas price in summer and the gas price in winter is currently limited. This limited summer-winter spread determines how much downstream operators are willing to pay for gas storage and is thus a proxy for the perceived importance of having gas storage facilities at one's disposal for conducting gas supply operations.

considered an important customer on the gas storage markets in Germany, as required for customer foreclosure to be of concern.[35] Furthermore, as regards Austria, Gazprom only sourced storage capacity from [details of third-party suppliers] between at least 2010 and 2012. Notwithstanding the size of Gazprom's third-party gas storage capacity bookings, the Parties' unbooked storage capacity in Austria is insufficient to accommodate Gazprom's gas storage sourcing requirements. In other words, even if Gazprom would post-merger attempt to rely on Wingas for its gas storage requirements in Austria, it would still need to source most of its current demand from third-parties.[36]

(58) Finally, as already indicated above, none of the respondents to the market investigation expect the proposed transaction to have any (negative) impact on either the price or the availability of natural gas storage capacity, neither for H-gas, pore facilities in Germany nor in Austria.

(59) Based on the foregoing, the vertical relationships related to the Parties' gas storage activities in Austria and Germany do not give rise to serious doubts as to their compatibility with the internal market.

5.3.4. Upstream wholesale gas supply - downstream wholesale and retail supply of gas – Austria and the Czech Republic

5.3.4.1. Product and geographic market

Downstream wholesale gas supply - Austria and the Czech Republic

(60) As described above, the downstream wholesale supply of gas means the business activity of wholesalers procuring gas from producers for resale to other wholesalers or distributors. However, the Commission has left open the question of the sub segmentation of the product market definition in the case of the Czech Republic.[37]

(61) The Parties submit that the product market in both these countries should be the wholesale supply of natural gas to resellers and that no further sub-segmentation should be considered.[38]

(62) As to the geographic market, the Commission has generally considered downstream wholesale gas markets to be delineated along existing (regional) grid areas, by market area or at a national level.[39] However, the Commission has left the geographic market definition open in the case of the Czech Republic.[40]

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35 Cf. Commission's non-horizontal guidelines, OJ-C 265/6, recitals 60 and 61.

36 The Parties indicate that Gazprom's Austrian third-party gas storage bookings amounted to […] mcm, while Wingas' total unbooked capacity in Austria would only amount to […] mcm.

37 COMP/M.4238 *E.On/Prazská Plynárenská*, of 11 July 2006, para 16.

38 The Parties submit that a 2005 sector inquiry by the Austrian Federal Competition Authority found that the Austrian wholesale market is not divided into first level and second-level wholesalers. All resellers procure their natural gas volumes directly from wholesale suppliers, without an additional intermediary trade level. As to the Czech Republic, the Parties submit that all wholesalers compete for the same group of customers without an additional intermediary trade level.

39 COMP/M.5467 *RWE/Essent*, of 23 June 2009; COMP/M.5220 *ENI/DISTRIGAZ*, of 15 October 2008; COMP/M. 5802 *RWE Energy/Mitgas*, of 17 June 2010.

40 COMP/M.4238 . *E.On/Prazská Plynárenská*, of 11 July 2006, p.16.

(63) The Parties submit that the geographic market comprises at least the territory of each Member State given the fully interconnected gas infrastructure, the fact that wholesalers are active across the whole of each country and no physical or other barriers exist to distribute gas within the national territories, as well as no material price differences across the national territories.

(64) In any event, for the purposes of this decision, the exact delineation of the relevant product and geographic markets can be left open as the proposed transaction will not give rise to serious doubts as to its compatibility with the internal market, irrespective of the market definition retained.

Retail gas supply - Austria

(65) The Commission has previously generally distinguished between the following types of gas supplies: (i) the supply of gas to gas-fired power plants, (ii) the supply of gas to large industrial customers, (iii) the supply of gas to small industrial and commercial customers, and (iv) the supply of gas to household customers.[41]

(66) The Parties submit that it may be appropriate to define two distinct markets for gas supply to (i) large industrial customers with annual demand exceeding 500 000 m^3 and (ii) to power plants.[42]

(67) As to the geographic market definition, the Commission generally held the view of considering retail gas supply as national in scope,[43] whilst also considering a sub-national regional[44] delineation, depending on the specific Member State. As regards household customers only, the Commission has generally considered sub-national regional markets.[45] The Parties agree with a national delineation.

(68) In any event, for the purposes of this decision, the exact delineation of the relevant product markets can be left open as the proposed transaction will not give rise to serious doubts as to its compatibility with the internal market, irrespective of the market definition retained.

5.3.4.2. Competitive Assessment

(69) As regards both Austria and the Czech Republic, it is important to note that Gazprom is already vertically integrated as regards its upstream and downstream

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41 COMP/M.4180 *Gaz de France/Suez*, of 14 November 2006; COMP/M. 3868 *Dong/Elsam/Energi*, of 14 March 2006; COMP/M. 3440 *EDP/ENI/GDP*; COMP/M.5740 *Gazprom/A2A/JV*, of 16 June 2010.

42 The reasons for selecting customers whose annual demand exceeds 500 000 cm are that, according to the findings of the Austrian regulator, gas supply to those customers is characterised by a wider range of products than for those below this consumption threshold and therefore they benefit from a more diversified supply structure in comparison with smaller customers.

43 COMP/M.6068 *ENI/ACEGASAPS/JV*, of 11 April 2011; COMP/M.5740 *Gazprom/A2A/JV*, of 16 June 2010; COMP/M.5496 *Vattenfall/Nuon Energy*, of 22 June 2009; COMP/M.4672 *E.on/Endesa Europa/Viesgo*, of 6 August 2007; COMP/M. 4110 *EON/Endesa*, of 25 April 2006; COMP/M.3230 *Statoil/BP/Sonatrach/In Salah JV*, of 19 December 2003; COMP/M.3007 *E.on/TXU Europe Group*, of 18 December 2002.

44 COMP/M.5467 *RWE/Essent*, of 23 June 2009; COMP/M.4890 *Arcelor/Ferngas*, of 22 November 2007.

45 COMP/M.6068 *ENI/ACEGASAPS/ JV*, of 11 April 2011; COMP/M.4180 *Gaz de France/Suez*, of 14 November 2006.

wholesale supply activities. Indeed, in Austria Gazprom is already active at the downstream wholesale supply level through its wholly owned subsidiary GWH Gashandel, while in the Czech Republic Gazprom already operates at the downstream wholesale level through Vemex.[46] Furthermore, Gazprom today already exercises joint control over Wingas. The proposed transaction therefore only marginally increases the existing degree of vertical integration. Given that the shares of GWH Gashandel and Vemex furthermore will account for the largest part of the merged entity's downstream presence in both Austria and the Czech Republic, these vertical relationships are almost entirely pre-existent to the proposed transaction.

(70) As regards Austria in particular, Wingas is currently only marginally active in the downstream wholesale supply of gas and in the retail supply of gas to large industrial customers, achieving respective market shares of [0-5]% and [0-5]% in 2011. The increment brought about by the proposed transaction is therefore very limited. Moreover, although Wingas' and GHW Gashandel's combined share of the market for the downstream wholesale supply to resellers amounts to [10-20]%,[47] this segment is led by the incumbent Econgas, which has a market share of around [60-70]%. Moreover, post-merger, several additional competitors will continue to exercise some competitive pressure on the Parties, such as E.ON ([10-20]%) and OMV ([10-20]%).

(71) With respect to the Czech Republic and based on 2011 data provided by the Parties[48], Wingas currently only accounts for a marginal share of the downstream wholesale gas supply market, amounting to less than [0-5]%. Again, the increment brought about by the proposed transaction is therefore very limited. Moreover, Wingas' and Vemex's combined share of the market for the downstream wholesale gas supply to resellers only amounts to [5-10]% while this segment is led by the incumbent RWE Group, which has a [60-70]% market share.[49]. Finally, post-merger, several other competitors that together account for around [30-40]% of the market will continue to exercise competitive pressure on the Parties.

(72) In light of the foregoing and the fact that Wingas was already jointly controlled by Gazprom, the proposed transaction is unlikely to give rise to serious doubts as to its compatibility with the internal market, as regards the vertical relationships between the Parties' Austrian and Czech gas supply activities.

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46 The Parties indicate that Gazprom currently exercises joint control over Vemex, through its 50.14% shareholding. The Parties furthermore indicate that the reason Gazprom does not solely control Vemex is due to [details on Vemex's decision-making process]. Indeed, the Parties indicate that 33% of Vemex' shares are held by Centrex which the Parties indicate is in turn controlled by Gazprombank. Gazprombank would ultimately not be controlled by any other natural or legal person.

47 The other downstream market, where Wingas is active in Austria, namely the retail supply to load-metered customers in excess of 500,000 cm/year, shows a negligible market share significantly below [0-5]% for Wingas.

48 Figures for 2011; See Czech Republic National Reports on Electricity and Gas Industries 2009 and 2010; OTE 2011 Yearly Report on Natural Gas Supply and Consumption in the Czech Gas System, Czech Energy Regulatory Office

49 The Commission notes that more recent data (See: National Report of the Energy Regulatory Office of the Electricity and Gas industries in the Czech Republic for 2012) indicate a decrease of RWE's market share and a (small) increase of VEMEX' market share.

5.3.5. *Upstream supply of gas - Downstream wholesale and retail supply of gas in Germany*

5.3.5.1. Product and geographic market

H- and L-gas

(73) Two types of natural gas are consumed in Germany, France, Belgium and the Netherlands: H-gas and L-gas. H-gas is produced around the world, whereas L-gas is only produced in the Netherlands and in Northern Germany.

(74) H-gas has higher methane content and thus a higher calorific value than L-gas. Due to this difference in heating value, H-gas and L-gas are not directly interchangeable. Pipelines can only carry either H-gas or L-gas at any one time. This has resulted in distinct transmission networks for the two types of gas. However, should it be necessary, H-gas can be physically converted into L-gas and vice versa.

(75) The Commission has previously considered a distinction between high calorific value gas ("H-gas") and low calorific value gas ("L-gas") at each level of the gas supply chain, as well as in respect of gas transmission and gas distribution services.[50] The market definition was however ultimately left open, save with respect to Belgium and France, where the Commission found that H-gas and L-gas do not belong to the same product market.[51]

(76) The Parties submit that on none of the gas supply markets in Germany a distinction between H- and L-gas would be warranted, given that the use of L-gas is rather limited, as both types of gas are only used in 4 countries throughout the entire EEA[52] and only produced in Germany and the Netherlands. The Parties claim that, even though the two types of gas have somewhat different specific technical characteristics, they serve the same purpose, can be easily converted, and are subject to the same competitive conditions. In addition, their argumentation is based on a recent Federal Cartel Office ("BKartA") Decision, which found for L- and H-gas to be part of the same relevant product markets in Germany.[53]

(77) Currently, there exist two market areas for gas in Germany, which are both cross-quality, meaning that there are transmission grids both for H- as well as L-gas. If a market participant wants to convert the gas quality supplied, this incurs a conversion fee, which differs depending on the market area. The current conversion fees amount to 0.6 EUR/MWh in the NetConnect Germany ("NCG") market area[54] and 1.18 EUR/MWh in the GASPOOL market area[55] and will be gradually reduced until full socialization, meaning that the overall cost of conversion will be integrated into the transmission tariffs.

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50 COMP/M.4180 *Gaz de France/Suez*, of 14 November 2006; COMP/M.5467 *RWE/Essent*, of 23 June 2009; COMP/M. 5802 *RWE Energy/Mitgas*, of 17 June 2010; COMP/39.317 – *E.ON Gas*, of 4 May 2010; COMP/39.316 – *Gaz de France*, of 3 December 2009.

51 COMP/M.4180 *Gaz de France/Suez*, of 14 November 2006.

52 Germany, the Netherlands, France and Belgium

53 BKartA B8-116/11 *Gazprom/VNG*, of 31 January 2012.

54 http://www.net-connect-germany.de/cps/rde/xchg/SID-00228200-37B94BF6/ncg/hs.xsl/2557.htm?rdeLocaleAttr=en

55 http://www.gaspool.de/konvertierungsentgelt.html?L=1

(78) According to the majority of the Parties' upstream competitors, downstream wholesale as well as retail competitors, wholesale and retail customers, and the TSOs in Germany, H-gas and L-gas are generally interchangeable. Indeed, a majority of wholesale as well as retail gas supply customers expressed that they would consider partially switching between the two types of gas for their German gas requirements in case of a non-transitory price increase of 5 – 10%.

(79) The market investigation showed that currently there are still some factors that limit the interchangeability of H-gas and L-gas in Germany, since there is little evidence of past switching on the demand side of the wholesale gas supply[56] and there are indications that some technical constraints exist that could limit the interchangeability.[57]

(80) The market investigation also showed that technical conversion for gas already occurs both at converter stations located on the Dutch-German border, by the Dutch TSO, as well as in the NCG market area, by Open Grid Europe [...].[58] However, most German TSOs indicated that although technical conversion is possible in theory, the overall technical conversion capacity in Germany is currently limited.[59] Virtual conversion also occurs both in GASPOOL and NCG.[60]

(81) In any event, the market investigation showed strong indications that H-gas and L-gas will be considered interchangeable by 2016, given that the majority of the Parties' upstream competitors, downstream wholesale as well as retail competitors and customers, and the TSOs in Germany foresee that the entire conversion fee is to be included into the standard transmission fee charged to all operators.

(82) Overall, there are strong indications that H-gas and L-gas do have slightly different technical characteristics, but in light of declining L-gas production and the socialization of the German conversion fee in 2016, the two types of gas are likely to be part of the same product market at that point in time. Whether they already form a single product market, can however be left open, as even under the narrowest conceivable market definition, there are no serious doubts as to the compatibility of the transaction with the internal market.

Upstream gas supply

(83) In previous decisions, the Commission has defined a single product market for development, production and upstream supply of natural gas to large importers/wholesalers and has found that such a market is distinct from the market for

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56 None of the respondents on the demand side of the downstream wholesale gas supply have actually switched their sourcing from H-gas to L-gas or vice-versa during the past 5 years.

57 This was mentioned by the majority of the Parties' German upstream competitors, German downstream wholesale as well as retail competitors and customers, and the German TSOs.

58 […].

59 This is determined by the overall conversion capacity of the existing conversion plants as well as by the available H-gas volumes to replace the declining L-gas production in Germany.

60 The total virtual conversion of H-gas into L-gas in GASPOOL in 2012 and 2013 amounted to 297 GWh, or […]% of total gas transported in the GASPOOL market area. As regards the virtual conversion of L-gas into H-gas, this amounted to 24 GWh or 0.000015% of total gas transported in the GASPOOL market area. The same activities in NCG amounted to 1 790 GWh of virtual H-gas into L-gas conversion and 11 094 GWh of virtual L-gas into H-gas conversion during 2011-2013.

the exploration of oil and natural gas.[61] Furthermore, the Commission has considered, whether piped gas and LNG should be part of distinct markets[62]. With regard to LNG, the Commission has previously concluded that in countries where import infrastructures for LNG are present, LNG would constitute a direct competitive constraint to gas imported via pipelines.[63]

(84) The Parties submit that the upstream gas supply market comprises the development, production and upstream supply of natural gas both from conventional and unconventional sources and that no further distinctions should be made between piped gas and LNG, basing themselves on a recent BKartA decision's finding of a single product market without further distinctions.[64]

(85) In the market investigation, the majority of respondents on both the demand as well as the supply side confirmed that the upstream wholesale gas supply is a separate market.

(86) With respect to the geographic market, in recent decisions the Commission has considered that the markets could be defined as national from a supply side perspective, due to limited interconnection infrastructure or lack of available cross-border capacity.[65] To assess the relevant geographic market, the Commission takes into account that a market may be narrower in scope due to the technical, commercial and regulatory constraints of transporting gas from one area to a neighbouring one.

(87) The Parties submit that the market is EEA-wide, including all imports, but that, given the absence of competition concerns, the market definition can be left open.

(88) The majority of respondents from the market investigation, on both the supply as well as the demand side of the upstream wholesale gas supply market, indicated that Germany forms part of a regional geographic market rather than the entire EEA territory. Most respondent considered this regional market to encompass several EEA Member States (in particular Germany, Belgium the Netherlands and the United Kingdom).

(89) Also, participants active in Germany on the demand side of the upstream wholesale gas supply market indicated a capability of sourcing their gas directly from at least one

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61 COMP/M.6801 *Rosneft/TNK-BP*, of 8 March 2013; COMP/M.5585 *Centrica/Venture Production*, of 21 August 2009; COMP/M.4545 *Statoil/Hydro*, of 3 May 2007.

62 COMP/M.6477 *BP/Chevron/ENI/Sonangol/Total/JV*, of 16 May 2012; COMP/M.5585 *Centrica/Venture Production*, of 21 August 2009; COMP/M.5220 *ENI/DISTRIGAZ*, of 15 October 2008; COMP/M.4545 *STATOIL/HYDRO*, of 3 May 2007.

63 COMP/M.6477 *BP/Chevron/ENI/Sonangol/Total/JV*, of 16 May 2012; COMP/M.4545 *STATOIL/HYDRO*, of 3 May 2007.

64 BKartA B8-116/11 *Gazprom/VNG*, of 31 January 2012.

65 COMP/M.4545 *Statoil/Hydro*, of 12 June 2007, paragraphs 13-16 (in which technical constraints such as absence of pipelines or import capacity are mentioned); COMP/M.6801 *Rosneft/TNK-BP*, of 13 April 2013, paragraph 12; COMP.39.315 *ENI*, of 29 September 2010, paragraph 28; COMP/M.3696 *E.ON/ Mol*, of 16 September 2006, paragraph 131 (in which the various gas supply markets are defined national in scope); COMP/M.3440 *ENI/EDP/GDP*, of 19 November 2005, paragraphs 25-28 (for each of the gas supply markets identified in that decision, Portugal was considered the relevant geographic market); COMP/M.1383 *Exxon/Mobil* of 29 September 1999, paragraph 134-152 (regional for Germany); COMP.39315 *ENI*, paragraph 28, with reference to e.g.: COMP/IV/M.713 *RWE/Thyssengas*, of 25 November 1996, paragraphs 15-19 and COMP/M.2822 *EnBW/ENI/GVS*, of 17 December 2002.

of the United Kingdom, the Netherlands or Norway. At the same time, upstream producers confirmed that they would divert volumes to Germany, away from at least the Netherlands, in the event of a non-transitory, significant increase of German gas prices.

(90) Finally, there are no indications of restricted interconnection capacity restraining the amount of gas that can flow between the Netherlands, Norway and Germany and there appears to be an increasing price convergence between the gas prices quoted at the gas trading hubs located in this putative regional gas market.[66]

(91) In any event, for the purposes of this decision, the exact delineation of the relevant product and geographic market can be left open as the proposed transaction will not give rise to serious concerns as to its compatibility with the internal market, irrespective of the precise product and geographic market definition retained.

Downstream wholesale gas supply

(92) Within the downstream wholesale gas supply in Germany, the Commission has traditionally identified two levels: (i) the long-distance wholesale supply to regional wholesalers, (ii) the supply to distributors, which is sub-segmented into (a) long-distance and (b) short-distance.[67]

(93) The Parties generally concur with the distinction of levels, but do not agree on the sub-segmentation of the market for the supply to distributors into long-distance and short-distance supplies.

(94) Although the majority of the respondents to the market investigation on the upstream and downstream wholesale gas supply levels considered the downstream wholesale gas supply to constitute a separate relevant market, some indications pointed towards the existence of one overall wholesale gas supply market in Germany, on which both producers and non-producers compete.

(95) The vast majority of customers and competitors both at the upstream wholesale and downstream wholesale gas supply levels indicated that a distinction between (i) supra-regional wholesale supply to regional wholesalers and (ii) supra-regional wholesale supply to distributors (following market liberalisation) no longer applies.

(96) With respect to the geographic market, the Commission has traditionally considered this to be a regional market comprising the existing (regional) grid areas

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66 This convergence is supported by the Parties econometric analysis of the correlation between the prices of gas at the NCG, GASPOOL, TTF and Zeebrugge hubs. The Parties looked at the correlation of day-ahead and month-ahead prices through the 2010-2013 period. The correlation coefficient of both the day-ahead and the month-ahead prices exceeded 0.9 and the high correlation values were not found to be driven by a common trend (i.e. the case of "spurious correlation" can be excluded). A correlation coefficient is a measure of the degree to which two variables are linearly related. It takes values between -1 and 1, with positive values indicating a positive relationship between the two variables, and vice-versa. A correlation coefficient with a value close to 1 (e.g. 0.9 and above) indicates a very strong positive relationship between the two variables.

67 COMP/M. 5802 *RWE Energy/Mitgas*, of 17 June 2010; COMP/M.5604 *DONG/KOM-STROM*, of 15 September 2009; COMP/M.5467 *RWE/Essent*, of 23 June 2009.

(established sales regions).[68] Recently, it has also considered a delineation by market area and by country, ultimately leaving this question open.[69]

(97) The Parties submit that the market is national in scope. They claim that the traditional approach should be revised in light of recent regulatory changes.[70] They also point to a recent decision by the German FCO, indicating a national market delineation, even though the question was finally left open.[71]

(98) In the market investigation, the large majority of competitors and customers active on the upstream and downstream wholesale gas supply as well as the competitors on the retail gas supply markets considered the geographic scope of the downstream wholesale gas supply market to at least encompass the entire German territory.

(99) The product and geographic market definition can however be left open, as with respect to the present transaction no competition concern arises under any conceivable market definition.

Retail gas supply

(100) The retail sale of natural gas refers to the sale of natural gas to final customers. The Commission has previously defined two distinct retail gas supply markets: retail gas supply to (i) small customers (including households) and (ii) large customers with a possible further sub-segmentation of the latter into (a) industrial customers and (b) power plants.[72]

(101) The Parties agree that distinguishing between small customers (standard-load profile customers) and large customers (load-metered customers) can be justified. They submit, however, that no further distinction should be made within the large customers market.

(102) In the market investigation, all upstream and downstream wholesale supply competitors, retail competitors and the majority of wholesale gas supply customers did not make a distinction between large industrial customers and power plants.

(103) The Commission has previously indicated that retail supply to large customers can be national or regional, but has ultimately left this question open.[73]

(104) The Parties submit that the market is national in scope, basing themselves on the same reasoning as with respect to wholesale supply. They evoked that the FCO, in its

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68 COMP/M.5467 *RWE/Essent*, of 23 June 23 2006; COMP/M.5220 *ENI/Distrigaz*, of 15 October 2008.

69 COMP/M. 5802 *RWE Energy/Mitgas*, of 17 June 2010.

70 Various measures have been implemented to achieve open and non-discriminatory third-party access to gas transportation networks and obliged German TSOs to reduce market areas from 28 to currently 2.

71 BKartA B8-116/11 *Gazprom/VNG*, of 31 January 2012.

72 COMP/M.4180 *Gaz de France/Suez*, of 14 November 2006; COMP/M. 3868 *Dong/Elsam/Energi*, of 14 March 2006; COMP/M. 3440 *EDP/ENI/GDP*; COMP/M.5740 *Gazprom/A2A/JV*, of 16 June 2010.

73 COMP/M.6068 *ENI/ACEGASAPS/JV*, of 11 April 2011; COMP/M.5740 *Gazprom/A2A/JV*, of 16 June 2010; COMP/M.5496 *Vattenfall/Nuon Energy*, of 22 June 2009; COMP/M.4672 *E.on/Endesa Europa/Viesgo*, of 6 August 2007; COMP/M. 4110 *EON/Endesa*, of 25 April 2006; COMP/M.3230 *Statoil/BP/Sonatrach/In Salah JV*, of 19 December 2003; COMP/M.3007 *E.on/TXU Europe Group*, of 18 December 2002; COMP/M.5467 *RWE/Essent*, of 23 June 2009; COMP/M.4890 *Arcelor/Ferngas*, of 22 November 2007.

recent Gazprom/VNG decision, left the geographic scope of the German retail supply to large customers open, but considered a national, market area and grid-wide scope[74].

(105) In the market investigation, the large majority of competitors and customers active on the upstream and downstream wholesale gas supply markets as well as the competitors and customers active on the retail gas supply market considered the geographic scope of the retail gas supply market to at least encompass the entire German territory.

(106) As there are no competition concerns under any conceivable market definition, the exact delineation of the relevant product and geographic market can, however, be left open.

5.3.5.2. Competitive Assessment

(107) In the investigation, the Commission has assessed whether the proposed transaction would be likely to confer on Gazprom the ability and incentive to engage in either input or customer foreclosure. Given that the transaction does not bring about any horizontal overlaps either at the upstream level (where Gazprom is active) or on the downstream level concerning the wholesale supply of German customers (where Wingas is active), the transaction does not lead to changes in the structure of those markets in horizontal respect. On this basis, horizontal unilateral effects or horizontal coordinated effects were not the focus of the investigation, but the Commission's investigation focused on the relation between Gazprom's upstream activity and Wingas' downstream activity and therefore on vertical theories.

(108) The German gas market is currently showing increases in hub liquidity which in turn enhances the reliability of gas price signals. In particular, given that a successful input foreclosure by an upstream gas supplier could also have an impact on hub liquidity and on prices in Germany, the Commission's assessment mainly focused on whether the proposed transaction would lead to Gazprom having the ability and incentives to engage in input foreclosure post-merger.

(109) Despite some concerns expressed by certain demand-side respondents to the Commission's market investigation relating to a possible ability of Gazprom to, post-merger, engage in input foreclosure, the results of the market investigation have not confirmed that such input foreclosure would be likely to take place. The large majority of respondents to the market investigation did not consider that the transaction will have an impact on the availability and/or the price of gas in Germany.[75]

(110) The table below gives an overview over the 2011 shares of Gazprom and the most important competitors for the upstream supply of gas in Germany:

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74 BKartA B8-116/11 *Gazprom/VNG*, of 31 January 2012.

75 Responses to Questionnaires Q3 Upstream wholesale gas supply Germany competitors of 30 October 2013, question 71; Q4 Upstream wholesale gas supply customers, downstream wholesale gas supply competitors, retail gas supply competitors (Germany) of 30 October 2013, questions 75 and 76; Q5 Downstream wholesale gas supply Germany customers of 30 October 2013, questions 52 and 53, and; Q6 Retail gas supply Germany customers of 30 October 2013, questions 35 and 36.

Upstream wholesale supply in Germany (2011)

Company	Upstream wholesale supply (H-gas)[76]
Gazprom	[40-50]%
Statoil	[20-30]%
GasTerra	[0-5]%
Shell	[5-10]%
ENI	[5-10]%
ExxonMobil	[0-5]%
Dong	[5-10]%

Source: Gazprom[77]

(111) Wingas' market share on the various potential relevant downstream wholesale and retail H-gas supply markets in Germany is modest, ranging between [10-20]% and [20-30]% and would be even lower, if markets are considered to comprise L-gas as well. The below tables give an overview of the 2011 shares of Wingas' and its main competitors on the various downstream wholesale and retail gas supply markets in Germany:

Downstream wholesale supply in Germany (2011)

Company	Supra regional wholesale supply to regional wholesalers (H-gas)[78]
Wingas	[10-20]%
E.ON	[30-40]%
VNG	[10-20]%
ExxonMobil	[5-10]%
Shell	[5-10]%
RWE	[5-10]%
Erdgas Münster	[0-5]%

76 If upstream wholesale supply were to comprise H- and L-gas, shares in Germany for 2011 would amount to [30-40]% (Gazprom), [10-20]% (Statoil), [10-20]% (GasTerra), [5-10]% (Shell), [5-10]% (ENI), [5-10]% (ExxonMobil) and [0-5]% (Dong) (cf. Form CO, p.122).

77 Annex 7.3.2 to the Form CO.

78 If H- and L-gas are taken together, 2011 market shares in the supra-regional wholesale supply to regional wholesalers are as follows: E.ON [30-40]%, VNG [10-20]%, Wingas [10-20]%, ExxonMobil [5-10]%, Shell [5-10]%, RWE [0-5]%.

Company	Supra regional wholesale supply to distributors (H-gas)[79]
Wingas	[10-20]%
E.ON	[30-40]%
VNG	[10-20]%
ExxonMobil	[10-20]%
Shell	[5-10]%
RWE	[5-10]%
Erdgas Münster	[5-10]%

Source: Gazprom[80]

Retail supply in Germany (2011)

Company	Retail supply to load-metered Industry and Corporate customers (H-gas)[81]
Wingas	[10-20]%
RWE	[10-20]%
E.ON	[40-50]%
VNG	[10-20]%
ExxonMobil	[0-5]%
Shell	[0-5]%
ErdgasMünster	[0-5]%

79 If H- and L-gas are taken together, 2011 market shares in the supra-regional wholesale supply to distributors are as follows: E.ON [30-40]%, VNG [10-20]%, ExxonMobil [10-20]%, Wingas [5-10]%, Shell [5-10]%, RWE [5-10]%.

80 Form CO, pages 128 and 130 and Annex 7.3.3.

81 If H- and L-gas are taken together, 2011 market shares in retail supply to load metered industry and corporate customers are as follows: E.ON [40-50]%, VNG [10-20]%, ExxonMobil [0-5]%, Wingas [10-20]%, RWE [10-20]%, Shell [0-5]%.

Company	Retail supply to Power Plants (H-gas)[82]
Wingas	[10-20]%
RWE	[10-20]%
E.ON	[50-60]%
VNG	[5-10]%
ExxonMobil	[0-5]%
Shell	[0-5]%
ErdgasMünster	[0-5]%

Source: Gazprom[83]

(112) For anti-competitive input foreclosure to be a likely concern, at least two cumulative conditions need to be in place. First, the merged entity needs to have the ability to foreclose its competitors downstream (for example by increasing their input costs, or otherwise worsen their access to the upstream input). Second, the merged entity needs to have sufficient incentives to foreclose its downstream competitors. Therefore, as part of the market investigation, these conditions were examined in detail.and it was found that they are not present in the case at hand.

A. Ability to engage in input foreclosure

(113) Gazprom's 2012 share of the German upstream H-gas supply market was [40-50]%, which corresponded to […] bcm of gas sold to Germany. On a broader market including both H- and L-gas, Gazprom's 2012 market share was just slightly above [30-40]%.[84]

(114) Gazprom's ability to foreclose its downstream competitors in Germany would depend on (i) to what extent its customers can rely on their LTCs with Gazprom, and (ii) whether and to what extent Gazprom's gas volumes sold in Germany can be replaced with additional gas volumes from its competitors in the event that it were to withhold part of its supplies from downstream rivals.

(115) LTCs can in general protect customers from input foreclosure as they do not allow the upstream supplier to unilaterally increase prices. However, the market investigation has shown that most of the LTCs that Wingas' downstream competitors currently have with Gazprom have generally resulted in prices that exceed the market price, i.e. the hub price, which thus cause losses to and impose an additional risk on these competitors.[85] As a result, in principle and without changes in market conditions, some of these competitors would be interested in a reduction of the ToP volume obligations

82 If H- and L-gas are taken together, 2011 market shares in retail supply to power plants are as follows: E.ON [50-60]%, VNG [5-10]%, ExxonMobil [0-5]%, Wingas [10-20]%, RWE [10-20]%, Shell [0-5]%.

83 Form CO, page 134 and Annex 7.3.5.

84 [description of Gazprom's share of the upstream H- and L-gas supply market in 2012].

85 This finding does not apply to [details of certain LTCs between Gazprom and German customers].

in these LTCs ([description of price revision mechanisms contained in Gazprom's LTCs with German customers]). The pressure that its LTCs place on its German customers could thus offer Gazprom an opportunity to reduce sales to Wingas' competitors and to try to attract (via Wingas) the ultimate consumers of these volumes of gas (i.e. the industrial and residential customers).

(116) However, during the market investigation it was confirmed that in case Gazprom were to attempt to, post-merger, foreclose Wingas' downstream competitors by not supplying them, the H-gas volumes subject to such an attempted foreclosure could be replaced with additional H-gas volumes from Gazprom's competitors. It was also confirmed that issues such as (i) a potential increased gas demand in Germany, (ii) differences in monthly consumption patterns due to seasonality, and (iii) the amount of available firm transport capacity, do not change this conclusion.

(117) In particular, the additional gas volumes from other upstream suppliers that could replace Gazprom volumes subject to an attempted input foreclosure include:

i. redirected current gas exports out of Germany by downstream wholesalers of gas in Germany (for example, the gas which used to be purchased by a wholesaler at the German hub and exported to France would remain in Germany),

ii. redirected gas currently sold at hubs outside Germany (for example, a Norwegian producer would reduce deliveries at the Dutch hub and increase deliveries at the German hub).

iii. current unused volumes in existing LTCs with Gazprom's upstream competitors,

iv. moreover, a limited amount of redirected gas that normally transits through Germany (for example, the Norwegian gas that flows through Germany to Italy would be sold in Germany and Italy would source more from Algeria or Libya).

(118) Based on the availability of these additional volumes, it appears that Gazprom would not have the ability to engage in input foreclosure to the detriment of Wingas' competitors in Germany.

B. Incentive to engage in input foreclosure

(119) Even assuming that Gazprom would have some ability to engage in input foreclosure, there appears to be no incentive to do for at least three reasons.

(120) First, as Gazprom already (jointly) controls Wingas, it already owns a channel to the downstream market. This existing access to the ultimate buyers of the gas is not altered by the merger.

(121) Second the potential medium to long-term gains (through raising downstream prices) would most likely not compensate the short-term losses of foregoing the current upstream revenue derived under Gazprom's German LTCs.

(122) It must also be noted that a LTC price above the hub price is necessary for Gazprom's downstream customers (see paragraph (115)) to be willing to reduce their ToP commitments under the LTCs. Naturally, the greater the divergence between LTC prices and hub prices, the more likely the interest for the downstream customer to reduce its ToP commitments. This means that Gazprom's ability and incentive to

foreclose are inversely correlated, as the conditions for Gazprom to have the ability to foreclose are those that would limit its incentive to do so. In other words, a higher LTC price increases the ability of Gazprom to foreclose (since downstream customers would willingly reduce ToP volumes) but conversely reduces the attractiveness of such a decision for Gazprom (since the higher the LTC price vis-à-vis the hub price, the higher the loss for Gazprom of reducing the ToP volumes).

(123) Furthermore, Gazprom/Wingas would also find it difficult following a hypothetical foreclosure strategy to significantly increase downstream prices in order to render the strategy profitable.[86] Hub prices provide an effective cap on retail prices, given that industrial customers and wholesalers can source gas from what are now relatively liquid hubs in Germany and in surrounding regions. Gazprom/Wingas would therefore need to increase hub prices in Germany in order to increase downstream profits. Given the increasing convergence of prices across hubs in North-West Europe, a significant increase in hub prices across a much wider region would be required for a foreclosure strategy to be successful.[87]

(124) Finally, the market investigation also confirmed that there have been new entrants on the downstream supply markets in Germany within the past five years and that these entrants are already exercising pressure on local incumbents and contributing to a general increase of competition and low margins in these segments. Based on the above, it appears that Gazprom would not have an incentive to engage in input foreclosure, to the detriment of Wingas' competitors in Germany.

C. Existence of minority interests

(125) The Commission notes that Gazprom and Wintershall have respective pre-existing minority interests in VNG of 10.52% and 15.79%. Although a certain commonality of interests may currently exist between Gazprom and Wintershall, as noted by the BKartA in a recent decision,[88] it is important to note that the proposed transaction does not concern at all the shares held by Gazprom and Wintershall in VNG.

(126) The proposed transaction seemingly involves a weakening of any commonality of interests. First of all, the existing link between Gazprom and Wintershall in the downstream wholesale and retail gas supply markets in Germany, through their respective shareholdings in both Wingas and VNG, is weakened by the proposed transaction, due to Wintershall's exit from Wingas. The fact that the proposed transaction involves Wintershall acquiring a minority stake in certain upstream gas fields in Western Siberia is, at the same time, merely a continuation of an existing relationship between these companies at the upstream gas exploration and production level.[89] Therefore, the proposed transaction would seem to lessen the commonality of

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86 Downstream margins are already low in the market. Data provided by Wingas suggests that margins in Germany are currently in the order of […]% of the hub price, [development of Wingas' margins in relation to hub prices since 2010].

87 Cf. footnote 66.

88 BKartA B8-116/11 *Gazprom/VNG*, of 31 January 2012; and: § 103 Abs. 1 AktG.

89 "*Together with Gazprom, the company operates two projects in Siberia, Achimgaz and Yuzhno Russkoye. In 2007, the Russian Yuzhno Russkoye gas field was officially commissioned, marking the first time a German company was able to produce gas directly from Western Siberia. With recoverable natural gas reserves of more than 600 billion cubic meters, the Yuzhno Russkoye field is around three times the size of the Achimgaz joint venture established in 2003. In addition, in the*

interests between Gazprom's and Wintershall's with regard to their respective minority interests in VNG.

(127) Gazprom's 10.52% minority stake in VNG cannot be understood to confer upon it control over VNG. Firstly, the Parties indicate that the 10.52% stake only allows Gazprom to have two representatives and therefore a small minority of VNG's supervisory board, while it also does not have a majority at the level of the shareholders' meeting. Second, even under the assumption (although the present transaction lessens the commonality of interests between the two undertakings, see above) that Gazprom's and Wintershall's stakes should be taken together, they would still only have a minority of representatives on the supervisory board and would merely hold around 26% of the capital together. The other shareholders in VNG are not widely dispersed, but include the German energy company EWE with a stake of around 48% and East German municipalities with a stake of slightly more than 25%. On this basis, even the combined stakes of Gazprom and Wintershall would not confer control.

(128) In any event, as indicated before, the distribution of shares within VNG is untouched by the present transaction. Gazprom's existing stake in VNG does not make it more likely that Gazprom – via the increased stake in Wingas - would engage in input foreclosure vis-à-vis the downstream wholesalers in the German market. If anything, Gazprom would have an incentive to protect the value of its minority stake in VNG and therefore it would seem unlikely to foreclose the necessary gas supply for VNG.

(129) Therefore, Gazprom's minority stake in VNG is unlikely to change the analysis on input foreclosure set out before.

D. Ability and incentive to engage in customer foreclosure

(130) Finally, the proposed transaction does not raise concerns of customer foreclosure with respect to the German gas supply markets.

(131) Firstly, it must be noted that Wingas currently acquires only a limited amount of gas from upstream wholesale gas suppliers other than Gazprom. Indeed, it has supply contracts in place with third party suppliers for a total Annual Contract Quantity (i.e. the maximum amount of gas that a customer can demand under the relevant supply agreement) of […] bcm.[90] Therefore, the supply from third party suppliers constitutes less than 5% of the German consumption. At the same time, Wingas in 2012 received […] bcm from Gazprom [details on the Annual Contract Quantities contained in Wingas' contracts with Gazprom]. Moreover, Wingas' third-party supplies are covered by a number of different supply contracts […]. This also shows that Wingas is not a key customer for third party suppliers.

(132) Secondly, it has to be noted that many of Gazprom's competing upstream gas suppliers are themselves vertically integrated, meaning that they are simultaneously active at the upstream wholesale gas supply as well as the downstream wholesale and/or retail gas supply markets in Germany. In the market investigation, the majority

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Volgograd region, Wintershall has been producing oil together with Lukoil for twenty years." Cf. http://www.wintershall.com/en/worldwide/russia.html.

90 Out of this quantity, approximately […] bcm is actually encompassed by gas swap agreements with delivery at the UK gas trading hub (NBP).

of respondents at the upstream wholesale supply level submitted that they are active on the downstream wholesale gas supply markets in Germany. In addition, half of the respondents explained that they have gone even further downstream and are active on the market for retail supply of gas to large customers in Germany.

E. Conclusion on input and customer foreclosure

(133) Given the above, it does not seem likely that the proposed transaction, which would consist in the change from joint to sole control by Gazprom over Wingas, would likely lead to input or customer foreclosure on the German wholesale gas supply market.

6. CONCLUSION

(134) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

For the Commission

(Signed)
Joaquín ALMUNIA
Vice-President