

***CASE AT.39816 – Upstream gas supplies  
in Central and Eastern Europe***

(Only the English text is authentic)

**ANTITRUST PROCEDURE  
Council Regulation (EC) 1/2003**

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Article 9 Regulation (EC) 1/2003

Date: 24/05/2018

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Brussels, 24.5.2018  
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**COMMISSION DECISION**

**of 24.5.2018**

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the  
European Union (TFEU) and Article 54 of the EEA Agreement**

**Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe**

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## COMMISSION DECISION

of 24.5.2018

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement**

**Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe**

Only the English text is authentic

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of TFEU<sup>1</sup>, in particular Article 9(1) thereof,

Having regard to the Commission decision of 31 August 2012 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 22 April 2015,

Having regard to a complaint filed on 10 March 2017 by Polskie Górnictwo Naftowe i Gazownictwo S.A. ('PGNiG') against Gazprom ('the Complaint') pursuant to Article 5 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty ('Regulation 773/2004').

Having regard to the observations submitted by PGNiG on 5 March 2018 on the letter rejecting the Complaint pursuant to Article 7(1) Regulation 773/2004,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

## **1. SUBJECT MATTER**

- (1) The present Decision is addressed to PJSC Gazprom<sup>2</sup> and its wholly-owned subsidiary Gazprom export LLC<sup>3</sup> (hereinafter jointly referred to as 'Gazprom').
- (2) In its Statement of Objections ('SO') of 22 April 2015, which constitutes a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003, the Commission came to the provisional conclusion that Gazprom is dominant on the markets for the upstream wholesale supply of natural gas (hereinafter 'gas') in each of the eight Central and Eastern European Member States, namely in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia (hereinafter jointly referred to as 'CEE'). Further, the Commission came to the provisional conclusion that Gazprom engaged in the overall strategy of fragmenting and isolating the CEE gas markets and restricting the free flow of gas across CEE with a view to be able to maintain higher prices in some CEE countries.
- (3) The SO mentions, as part of the alleged overall anticompetitive strategy, three potentially abusive practices that raised concerns as to their compatibility with Article 102 of TFEU. First, Gazprom may have included territorial restrictions such as destination clauses and export bans in all its supply agreements with wholesalers and with some industrial customers. Gazprom may have also hindered the cross-border sale of gas via equivalent measures having the same effect such as metering requirements and a restrictive policy regarding changes of gas delivery points. The purpose may have been to segment the internal market along national borders in order to protect Gazprom's national pricing policy in CEE. Second, Gazprom may have pursued an unfair pricing policy by charging prices to some wholesalers in CEE (Bulgaria, Estonia, Latvia, Lithuania and Poland) that may have been excessive when compared with Gazprom's costs or to benchmark prices, while using price formulae based on oil indexation in these countries that may have contributed to the excessive prices. Third, Gazprom may have leveraged its dominance by conditioning gas supplies and gas prices in Bulgaria and Poland on obtaining certain non-related infrastructure commitments from the respective Bulgarian and Polish partners.
- (4) Gazprom disagrees with the Commission's preliminary assessment. Nevertheless, on 15 March 2018 it offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed by the Commission. This Decision makes the commitments binding on Gazprom.

## **2. THE UNDERTAKING CONCERNED**

### **2.1. The addressees of this Decision**

#### *2.1.1. PJSC Gazprom*

- (5) Public Joint Stock Company Gazprom (hereinafter 'PJSC Gazprom') is a parent company of the Gazprom Group.

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<sup>2</sup> In the Statement of Objections dated 22 April 2015, PJSC Gazprom was referred to as OAO Gazprom. For the avoidance of doubt, PJSC Gazprom and OAO Gazprom refer to the same legal entity.

<sup>3</sup> In the Statement of Objections dated 22 April 2015, Gazprom export LLC was referred to as OOO Gazprom Export. For the avoidance of doubt, Gazprom export LLC and OOO Gazprom Export refer to the same legal entity.

- (6) Gazprom is a Russian-based energy group active in the exploration, production, transportation, refining and marketing of natural gas and petrochemical products. On 31 December 2016, PJSC Gazprom shareholding was split as follows: 38.37% held directly by the Russian Federation represented by the Federal Agency for State Property Management, 10.97% held by AO Rosneftgaz (itself wholly-owned by the Federal Agency for State Property Management), 26.86% held by American Depositary Receipt (ADR) and 23.80% by other shareholders.<sup>4</sup>
- (7) Gazprom holds the world's largest natural gas reserves and is the only undertaking permitted to export natural gas by pipelines from Russia. In 2016, Gazprom produced approximately 420 billion cubic meters of natural gas out of which approximately 180 billion cubic meters of natural gas were exported to Europe making Gazprom Europe's key natural gas supplier.<sup>5</sup> Gazprom had a global turnover of approx. EUR 86 billion in 2016.<sup>6</sup>

#### 2.1.2. *Gazprom export LLC*

- (8) Gazprom export LLC (hereinafter 'Gazprom Export') is a wholly-owned subsidiary of PJSC Gazprom, with headquarters in Saint Petersburg. It is an open joint-stock company with limited liability, which is governed by Russian law and was formerly known as OOO Gazexport, VEP Gazexport and GVP Gazexport and Zarubehgaz Moscow. Gazprom Export is the export arm of PJSC Gazprom and takes part in the development and implementation of Gazprom's gas and energy investment projects, both in Russia and abroad.

### 3. PROCEDURAL STEPS UNDER REGULATION NO 1/2003

- (9) Between 2011 and 2015, the Commission carried out a number of *ex-officio* investigative steps in relation to the gas markets in CEE. These included on-the-spot inspections under Article 20(4) of Regulation (EC) No 1/2003 as well as requests for information sent to Gazprom, its customers and other market players.
- (10) On 31 August 2012, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (11) On 22 April 2015, the Commission adopted an SO which set out the Commission's competition concerns.
- (12) On 29 September 2015, Gazprom submitted its reply to the SO. An Oral Hearing took place on 15 December 2015 during which Gazprom made known its views on the Commission's assessment as set out in the SO.
- (13) On 14 February 2017, Gazprom submitted commitments ('Initial Commitments') while continuing to dispute the Commission's preliminary assessment as set out in the SO.
- (14) On 16 March 2017, a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003<sup>7</sup>, summarising the case and the Initial Commitments and inviting interested third parties to give their

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<sup>4</sup> <http://www.gazprom.com/f/posts/11/885774/gazprom-annual-report-2016-en.pdf>

<sup>5</sup> <http://www.gazprom.com/about/production/extraction/>

<sup>6</sup> <http://www.gazprom.com/about/>. The 2016 sales were RUB 6,111.1 billion.

<sup>7</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2017:081:TOC>



observations on those Initial Commitments within seven weeks following the date of the publication of the notice.

- (15) The Commission has informed Gazprom of the observations received from third parties following the publication of the notice. On 15 March 2018, Gazprom offered revised commitments ('Commitments').
- (16) On 2 May 2018, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 4 May 2018, the Hearing Officer issued his final report.
- (17) At a late stage of the procedure, on 10 March 2017, PGNiG filed a Complaint against Gazprom pursuant to Article 5 of Regulation 773/2004. The Complaint partially overlaps with the investigation carried out under case AT.39816. On 5 March 2018, PGNiG submitted its observations on the letter rejecting the Complaint pursuant to Article 7(1) Regulation 773/2004. The Commitments address the main allegations of the Complaint that mirror the Commission's competition concerns with regard to the alleged unfair pricing policy and alleged hindering of cross-border gas sales.

#### **4. PRELIMINARY ASSESSMENT**

##### **4.1. Relevant markets**

###### *4.1.1. Product market*

- (18) The Commission has in the past defined a market for the supply of natural gas (by domestic and foreign producers) to various customers.<sup>8</sup>
- (19) The product market for the supply of gas is to be distinguished from the market for the transportation of gas.<sup>9</sup>
- (20) Whereas there is one joint market for the exploration of oil and gas,<sup>10</sup> the supply of gas is a distinct market from the supply of oil. Oil and gas have different characteristics and are subject to different cost and pricing constraints and therefore belong to two distinct product markets.<sup>11</sup> Oil is mainly used for transportation, whereas gas is mainly used for power generation and by industry.

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<sup>8</sup> See Commission decision of 3 December 2009 in Case No COMP/39.316 *Gaz de France*, paragraphs 11 et seq., Commission decision of 21 December 2005 in Case COMP/M.3696 - *E.ON/MOL*, paragraph 100, Commission decision of 29 September 2010 in Case COMP/39.315 - *ENI*, paragraphs 23 and 25; in Commission decision of 14 March 2006 in Case No COMP/M.3868 - *DONG/Elsam/Energi*, paragraph 17 it was also made clear that supplies also covered sales by importers; Commission decision of 11 April 2011 in Case No COMP/M.6068 *ENI/ACEGASAPS/JV*, paragraph 15.

<sup>9</sup> See Commission decision of 4 May 2010 in Case No COMP/39.317 - *E.ON Gas*, paragraph 13, with reference to other precedents. See also Commission decision of 3 December 2009 in Case No COMP/39.316 - *Gaz de France*, which distinguishes between supply and infrastructure markets, paragraph 11 and Commission decision of 8 October 2004 in Case COMP/M.3410 - *Total Gas de France*, paragraphs 15-16.

<sup>10</sup> At the exploration stage it is not obvious, whether gas will be discovered. See Commission decision of 23 January 2003 in Case No COMP/M.3052 - *Eni/Fortum*, paragraph 11, OJ C 36, 15.2.2003, p. 26, with reference to COMP/M.1532 *BP Amoco/Arco*, paragraph 14, as well as Commission decision of 19 November 2007 in Case NO COMP/M.4934 *Kazmunaigaz/Rompetrol*, paragraph 3 with reference to Commission decision of 29 September 1999 in Case No COMP/M.1383 *Exxon/Mobil*, paragraph 16, OJ L 103, 7.4.2004, p. 1.

<sup>11</sup> See COMP/M.1532 - *BP Amoco/Arco*, paragraph 14 as well as COMP/M.1383 - *Exxon/Mobil*, paragraph 16.

- (21) The supply market is limited to what is actually consumed in a given geographic market. The supply market comprises domestic production and imports. The market for the supply of gas does not cover gas transiting through that geographic area.
- (22) The question whether a further market distinction is to be made according to gas quality (e.g. high-calorific vs. low-calorific gas in Germany<sup>12</sup>) can be left open.
- (23) Within that supply market, the Commission has in previous decisions made a distinction between gas sales to wholesalers and gas sales to final customers (retail).<sup>13</sup> This will be further discussed below.

#### 4.1.1.1. The market for the upstream supply of gas to wholesalers and importers

- (24) The wholesale supply market may be divided into an upstream and a downstream wholesale market.
- (25) On the upstream wholesale market producers and exporters sell large quantities of gas to wholesalers and importers. The decision regarding the Gazprom/Wintershall merger confirmed that market participants define upstream wholesale gas supply as a separate market.<sup>14</sup> Such upstream sales also cover indirect sales in which the gas is sold by the producer/exporter to the wholesaler/importer on a hub or through an intermediary.<sup>15</sup>
- (26) The downstream wholesale level, which concerns the onward sales by the wholesalers and importers to retailers or other downstream wholesalers (e.g. distribution companies), is not considered part of the market.<sup>16</sup>

#### 4.1.1.2. The market for the supply of gas to final customers (retail)

- (27) Within the market for the supply of gas to end customers, a distinction is traditionally made between the supply to (large) industrial customers, power plants and to small customers (households and commercial customers).<sup>17</sup>
- (28) As to the market for large industrial customers, the Commission's practice has established that large industrial customers have different needs and consumption

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<sup>12</sup> Commission decision of 4 May 2010 in Case No COMP/39.317 - *E.ON gas foreclosure*, paragraph 15; COMP/39.316 - *Gaz de France*, paragraph 15 and Commission decision of 14 November 2006 in Case No COMP/M.4180 - *Gaz de France/Suez*.

<sup>13</sup> See COMP/39.315 *ENI*, cited above, paragraph 25.

<sup>14</sup> See Commission decision of 3 December 2013 in Case No COMP/M.6910 - *Gazprom/Wintershall/Target companies*, paragraphs 23, 45, 84 and 85. See also Commission decision of 20 November 2012 in Case No COMP/M.6984 - *EPH/Stredoslovenska Energetika*, paragraphs 21-23.

<sup>15</sup> Indirect sales can occur in supply chains, e.g. when a producer sells the gas to a wholesaler, which sells the entire gas quantity on to the national wholesaler which deals with various customers. This situation would be considered to be an indirect sale of the producer/exporter to the national wholesaler and form part of the upstream wholesale market definition.

<sup>16</sup> See on downstream wholesale level COMP/M.6910 - *Gazprom/Wintershall/Target companies*, cited above, paragraph 24.

<sup>17</sup> COMP 39.315 - *ENI*, cited above, paragraph 27 with reference to Commission decision of 9 December 2004 in Case No COMP/M.3440 - *EDP/GDP/ENI*, paragraph 25; Commission decision of 21 December 2005 in Case No COMP/M.3696 - *E.ON/MOL*, as of paragraph 116 and Commission decision of 14 March 2006 in Case No COMP/M.3868 - *DONG/Elsam/Energi*, paragraph 56 (wholesale) and as of paragraph 70 (final customers).

patterns and has made a distinction e.g. as to whether the customer is connected to the transmission or distribution grid.<sup>18</sup>

- (29) The sale to large industrial customers may also be carried out by vertically integrated importers or producers. These companies would then act as retailers by supplying large industrial customers directly. The contractual conditions for gas supplies to these customers are largely similar to those for upstream wholesale supplies. Gazprom has been directly supplying industrial customers in parts of CEE. The Commission considers that the question whether sales to large industrial customers form part of the upstream wholesale market or constitute a separate retail market for large industrial customers can be left open in this case.

#### 4.1.1.3. Conclusion on the relevant product market

- (30) The Commission's preliminary assessment is that the relevant product market is the market for the upstream wholesale supply of natural gas by producers and exporters to importers and wholesalers. As stated above, the question whether sales to large industrial customers form part of this upstream wholesale market or constitute a separate retail market can be left open.

#### 4.1.2. Geographic market

- (31) According to established case-law and Commission practice, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different.<sup>19</sup> Although the Commission did in some previous cases consider that the geographic market for the upstream supply of gas could potentially be defined as EEA-wide, its analysis in those cases was undertaken from the demand-side perspective only and has not taken into consideration the supply side constraints of transporting gas.<sup>20</sup> More recently, the Commission considered that from the supply side perspective, due to limited interconnection infrastructure (lack of interconnectors between markets) or lack of available cross-border capacity, markets can be defined nationally.<sup>21</sup>

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<sup>18</sup> COMP/39.316 *Gaz de France*, cited above, paragraph 13.

<sup>19</sup> Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p.5, paragraph 8). Commission decision of 21 May 2003 in Case COMP/37.451 - *Deutsche Telekom AG*, paragraphs 92-93; and Commission decision of 16 July 2003 in Case COMP/38.233 - *Wanadoo Interactive*, paragraph 205. See also Judgment of the Court of Justice of the European Union of 14 February 1978, *United Brands v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 44; Judgment of the Court of Justice 9 November 1983, *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 26; Judgment of the Court of Justice of 5 October 1988, *Alsatel v Novasam*, C-247/86, ECLI:EU:C:1988:469, paragraph 15.

<sup>20</sup> See COMP/M.1383 - *Exxon/Mobil*, cited above, paragraph 18 or COMP/M.1532 - *BP-Amoco/Arco*, cited above, paragraphs 16-17, Commission decision of 5 July 1999 in Case No COMP/M.1573 - *Norsk Hydro/Saga*, paragraph 15.

<sup>21</sup> COMP/M.6910 - *Gazprom/Wintershall/Target companies*, cited above, paragraph 86, Commission decision of 3 May 2007 in Case/M.4545 - *Statoil/Hydro*, paragraphs 13-16, in which technical constraints such as absence of pipelines or import capacity are mentioned; Commission decision of 8 March 2013 in Case/M.6801 - *Rosneft/TNK-BP*, paragraph 12; COMP 39.315 - *ENI*, cited above, paragraph 28; COMP/M.3696 - *E.ON Mol*, cited above, paragraph 131, in which the various gas supply markets are defined national in scope; Commission decision of 9 December 2004 in Case

- (32) The Commission's preliminary assessment is that the markets are national in scope. The Commission came to this preliminary conclusion based on a number of factors. First, the markets for the upstream wholesale gas supply are characterised by the fact that generally only one major national wholesaler is present in each country. This wholesaler is a different company for each of the CEE countries concerned. Historically, that domestic incumbent wholesaler has been providing gas to the domestic market. Gazprom has concluded gas supply contracts with each of such national incumbents. Second, the contractual clauses included territorial restrictions coupled with the take-or-pay obligations often matching the national demand. This led to no or very little cross-border sale of gas. Third, the technical transportation capacity and the number of interconnection points between the gas grids of the investigated CEE countries at the time of the infringement were insufficient to enable the free flow of gas across borders to offer customers alternative supplies from neighbouring gas markets.

#### 4.1.3. Conclusion on the relevant market

- (33) The Commission's preliminary assessment, as set out in the SO, is that the relevant markets should be defined as the national markets for the upstream wholesale supply of natural gas.

## 4.2. Dominant position

- (34) The Commission's preliminary assessment is that Gazprom holds a dominant position on each of the relevant markets in CEE, namely in Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary and Bulgaria. This preliminary assessment is reached on the basis of Gazprom's high and stable market shares on each of the relevant markets. For the years 2004-2013, Gazprom's estimated market shares are as follows: Bulgaria (80-100%); the Czech Republic (75-100%); Estonia (80-100%); Hungary (50-70%); Latvia (70-100%); Lithuania (100%); Poland (40-65%); Slovakia (70-100%). Other competitors may not have the strength and may not be numerous enough to effectively constrain Gazprom's dominant position.<sup>22</sup> On all the markets concerned Gazprom may have a pivotal role which means that, without its supplies in the short to mid-term, customers may not be able to cover their demand for gas. Not least because of its large gas reserves, Gazprom may also be considered an unavoidable trading partner for large parts of the national consumption of CEE countries.
- (35) The Commission's preliminary assessment is that there are barriers to entry that protect Gazprom's alleged dominant position across CEE. These alleged barriers to entry stem to some extent from the available gas connecting infrastructure that could give alternative gas suppliers real access to the market. Furthermore, the Commission's preliminary view is that Gazprom's own behaviour may also create

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COMP/M.3440 - *EDP, ENI, GDP*, paragraphs 25-28; for all gas supply markets identified in that decision Portugal was considered the relevant geographic market, OJ L 302, 19.11.2005, p. 69; Commission decision of 29 September 1999 in Case COMP/M.1383 - *Exxon Mobil*, paragraphs 134 et seq., 152 (regional for Germany), OJ L 103, 7.4.2004, p. 1; Commission decision COMP in Case 39315 - *ENI*, cited above, paragraph 28 with reference to Commission decision of 25 November 1996, in Case IV/M.713 - *RWE/Thyssenagas*, paragraphs 15-19; Commission decision of 17 December 2002 in Case COMP/M.2822 - *EnBW/ENI/GV*, paragraphs 16-21.

<sup>22</sup> Regarding the relevance of the number and strength of competitors see Case C-27/76 *United Brands Company v Commission*, cited above, paragraphs 108-110.

barriers to entry. Gazprom's long-term contract, coupled with the take-or-pay obligation, may also further cement its dominant position. The Commission considers on a preliminary basis that the take-or-pay obligation, which often covers [...] of the country's gas consumption, may mean that other suppliers have no opportunity to enter the market during the contract term.

- (36) On that basis, the Commission's preliminary assessment is that Gazprom is dominant on all eight CEE markets for the upstream wholesale supply of gas.

### **4.3. Substantial part of the Internal Market**

- (37) The Commission's preliminary assessment is that the abuse covers the territories of eight Member States and therefore a substantial part of the Internal Market within the meaning of Article 102 of TFEU.

### **4.4. Practices raising concerns**

#### *4.4.1. Gazprom's overall strategy of market segmentation*

- (38) The Commission's preliminary assessment, as set out in the SO, is that Gazprom may have been abusing its dominant position on the upstream wholesale gas markets across CEE, namely in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia contrary to Article 102 of TFEU.

- (39) The preliminary assessment is that Gazprom may have abused its dominant position by preventing the free flow of gas across CEE and thereby fragmenting and isolating the investigated CEE gas markets. This restriction of the free flow of gas across CEE borders may have enabled Gazprom to charge higher prices since Russian gas could not compete with Russian gas in Member States with higher prices.

- (40) The Commission's preliminary view is that the market segmentation and the free flow of gas restrictions were implemented by explicit contractual export bans and destination clauses as well as by other contractual and non-contractual means with an equivalent effect to contractual territorial restrictions (see Section 4.4.2 below). This alleged overall market segmentation strategy may have led to higher prices compared with competitive price benchmarks, in particular with prices quoted at liquid competitive Western European gas hubs (see Section 4.4.3 below). Furthermore, by the alleged prevention of the free flow of gas across CEE borders, Gazprom remained the key supplier of gas to CEE and may have therefore also conditioned its gas supplies on it obtaining infrastructure-related advantages from its customers (see Section 4.4.4 below).

#### *4.4.2. Territorial restrictions in the form of contractual export bans or destination clauses and other contractual or non-contractual restrictions with an effect equivalent to territorial restrictions*

- (41) The Commission's preliminary assessment, as set out in the SO, is that the first aspect of Gazprom's alleged abuse consists of partitioning the internal market through different forms of territorial restrictions contrary to Article 102 of TFEU.

- (42) Gazprom's gas supply contracts contain (or contained) clauses that prevent the wholesalers from re-selling the gas outside their country (re-export bans or re-sale restrictions) as well as destination clauses that oblige the wholesalers to use the gas only in their own country or, in some instances, to only sell to certain customers within their own country.

(43) The preliminary assessment also indicates that at least some gas supply contracts contained clauses that without constituting export bans or destination clauses may have had the effect of preventing re-export of gas and hence may have had an effect equivalent to an explicit territorial restriction. Furthermore, the Commission's preliminary assessment also indicates that market segmentation and the restriction to the free flow of gas across CEE may have also been achieved by Gazprom's refusal to change gas delivery points or the location where the gas is metered.

#### 4.4.2.1. Principles

(44) Territorial restrictions on resale constitute a breach of Union competition law. Commission Regulation (EU) No 330/2010<sup>23</sup> classifies restrictions of the territory into which a buyer may sell the contract goods, as restrictions under Article 101 of TFEU that remove the benefit of the block exemption.<sup>24</sup>

(45) In addition, the case-law of the Court of Justice of the European Union indicates that a contract that imposes on the purchaser restrictions on the use to which it can put goods or the territory into which goods can be resold may be regarded as a restriction on competition, contrary to Article 101 of TFEU.<sup>25</sup> A clause requiring a buyer to sell goods only outside a given territory or outside a Member State (that is to say, an 'obligation to export') has as its object the partitioning of markets along national lines by protecting that territory from the competition that would result from that buyer's direct sales into the territory or from resales into the territory by third parties re-importing the goods.

(46) Further, the Court of Justice has ruled that a clause prohibiting exports (namely, an obligation to sell on the domestic market), by its very nature, constitutes a restriction on competition.<sup>26</sup> It is settled case-law that, by its nature, a territorial restriction clause in a supply agreement designed to prevent a buyer from exporting goods to other Member States is liable to partition markets within the Union, contrary to Article 101 of TFEU.<sup>27</sup>

(47) It is also settled case-law that a dominant undertaking may commit an abuse by entering into anticompetitive agreements.<sup>28</sup> In *Hoffmann-La Roche*, the Court of Justice explained that in such cases '*the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market or markets in which they operate to*

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<sup>23</sup> Article 4(b) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1)

<sup>24</sup> See paragraph 51 of the Guidelines on vertical restraints (OJ C 130, 19.5.2010, p. 1).

<sup>25</sup> Judgment of the Court of Justice of 14 December 1983, *Société de vente de ciments v Kerpen & Kerpen*, C-319/82, ECLI:EU:C:1983:374, paragraph 6.

<sup>26</sup> Judgment of the Court of Justice of 1 February 1978, *Miller v Commission*, C-19/77, ECLI:EU:C:1978:19, paragraph 7.

<sup>27</sup> Judgment of the General Court of 19 May 1999, *Accinauto v Commission*, T-176/95 ECLI:EU:T:1999:100, paragraph 104; Joined judgments of 20 January 1994 *Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECLI:EU:C:1993:120, paragraph 76.

<sup>28</sup> Case C-27/76 *United Brands Company v Commission*, cited above, paragraph 161.

*proceed on the basis of Article 85 [now Article 101] or Articles 86 [now Article 102]’.*<sup>29</sup>

- (48) The Court of Justice has also applied Article 102 of TFEU to territorial restrictions practiced by dominant companies. In the *Suiker Unie* Case, a dominant sugar refinery was found to have violated Article 102 of TFEU by threatening to stop sugar supply unless the distributors complied with its restrictive export policy.<sup>30</sup> In the *United Brands* Case the Court of Justice stated, regarding a contractual provision imposed by United Brands on wholesalers not to sell bananas while they were still green, that ‘*to impose on the ripener the obligation not to resell bananas so long as he had not had them ripened and to cut down the operations of such a ripener to contacts only with retailers is a restriction of competition*’, notably because it had the effect of partitioning the market along national lines.<sup>31</sup> The Court of Justice considered that the clause at issue in that case infringed Article 102 of TFEU (then Article 86).<sup>32</sup>
- (49) In the energy sector, the Commission took the view that a clause in a gas transport agreement between GDF and ENI that precluded ENI from selling in France the gas that was being transported through France was a restriction of competition contrary to Article 101 of TFEU on the grounds that it prevented customers in France from purchasing that gas.<sup>33</sup> The Commission also accepted legally binding commitments from EDF in response to its concerns that resale restrictions included in the supply contracts EDF entered into with large industrial customers could infringe Article 102 of TFEU.<sup>34</sup>
- (50) Market partitioning can also be achieved by more indirect means than explicit export bans or destination clauses. In this regard, what counts for establishing a measure’s anti-competitive object is whether such measure - by artificially altering the conditions of competition - is obviously capable of inducing traders to give priority to the national market over exports, thereby giving rise to a compartmentalisation of the internal market in contrast to the economic interpenetration desired by the Treaty.<sup>35</sup> Ensuring compliance with the territorial restriction can be achieved by different means, e.g. by reducing discounts or by charging additional fees in the event of sales outside the destination territory.<sup>36</sup> The Vertical Restraint Guidelines

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<sup>29</sup> Judgment of the Court of Justice of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 116.

<sup>30</sup> Judgment of the Court of Justice of 16 December 1975, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission*, joined cases C-40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECLI:EU:C:1975:174, paragraph 396 to 401.

<sup>31</sup> Case C-27/76 *United Brands Company v Commission*, cited above, paragraphs 157 and 159.

<sup>32</sup> Case C-27/76 *United Brands Company v Commission*, cited above, paragraph 161.

<sup>33</sup> See Commission decision of 26 October 2004 in Case No, COMP/38662 - *GDF/ENI*, paragraphs 66 to 69.

<sup>34</sup> Commission decision of 17 March 2010 in Case No, COMP/39.386 *Long-term contracts France*, paragraphs 36 to 39.

<sup>35</sup> Opinion of Advocate General Tizzano delivered on 25 October 2005, *General Motors v Commission*, C-551/03 P, ECLI:EU:C:2005:639, paragraph 71.

<sup>36</sup> For the exclusion from a bonus system, see Judgment of the General Court of 9 July 2009, *Automobiles Peugeot SA, Peugeot Nederland NV v Commission*, T-450/05, ECLI:EU:T:2009:262, paragraph 47. See paragraph 50 of the Guidelines on Vertical Restraints, C 130 of 19.5.2010, p. 1. In the *DUC/Dong* case a use restriction under which the buyer had to report to his suppliers the volumes sold to certain customer groups in order to benefit from a special price formulae, has been considered such hard-core restriction. The case was settled between the Commission and the parties, IP 03/566.

stipulate at paragraph 50 that such indirect measures are more likely to constitute hard-core restrictions if the supplier has mechanisms in place to monitor or verify the destination of the products in question.<sup>37</sup>

- (51) Moreover, the fact that an agreement with an anti-competitive object pursues also other legitimate purposes is of no relevance for the assessment of the anti-competitive nature of the agreement.<sup>38</sup> Likewise it is irrelevant at whose instigation the clause was adopted and whether the clause was strictly enforced. The very existence of such clauses may create a ‘*visual and psychological background*’ that satisfies customers and contributes to a more or less rigorous division of the markets.<sup>39</sup>
- (52) The Court confirmed that an agreement that was found to have an anti-competitive object and affects trade between Member States constitutes, by its very nature and independently of any concrete effect that it may have, an appreciable restriction of competition.<sup>40</sup>

#### 4.4.2.2. Application of the principles to the case

- (53) Territorial restrictions in the form of contractual export bans or destination clauses may be, or may have been present in the contracts that Gazprom entered into with its CEE customers. The Commission considers that it nonetheless is appropriate to assess these practices under Article 102 of TFEU. The Commission's preliminary assessment is that the alleged dominant position occupied by Gazprom on the relevant markets means that Gazprom may have been in a position to impose such conditions on its gas customers.
- (54) The Commission's preliminary assessment, as set out in the SO, is that territorial restrictions were formulated in different manners in Gazprom's gas supply contracts. In some contracts, the relevant clauses explicitly prohibit the resale of gas outside the country or states. In other contracts, the territorial restrictions are formulated as a destination clause stipulating that the buyer could only use the gas within the country of destination.
- (55) The preliminary assessment is that gas supply contracts with incumbent wholesalers in CEE included (or may still include) either destination clauses, export bans or a combination of both. These restrictions may have continued to apply after the accession of the CEE Member States to the EU, i.e. May 2004 and January 2007 (Bulgaria). Some clauses were removed in 2011, the majority even later. Some territorial restrictions may still be included in relevant gas supply contracts. In addition, the Commission's preliminary assessment indicates that two gas supply contracts also contained resale restrictions which prevented the buyer from re-selling to other customers within the country. The preliminary assessment is that all of the

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<sup>37</sup> Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

<sup>38</sup> Judgment of the Court of Justice of 8 November 1983, *IAZ v Commission*, joined cases C-96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, ECLI:EU:C:1983:310, , paragraph 25.

<sup>39</sup> Case C-85/76 *Hoffmann La Roche v Commission*, cited above, paragraph 89, finding that tying is an abuse, even if it is done on the request of the customers of the dominant undertaking, Case C-19/77 *Miller v Commission*, cited above, paragraph 7, for a situation of Article 101 of TFEU.

<sup>40</sup> Judgment of the Court of Justice of 13 December 2012, *Expedia Inc v Autorité de la Concurrence and Others*, C-226/11, ECLI:EU:C:2012:795, paragraph 37.



territorial restrictions in the eight CEE Member States may have had an anticompetitive object of fragmenting and isolating the relevant CEE gas markets.

- (56) The Commission's preliminary assessment also indicates a number of other indirect contractual or non-contractual measures that may have prevented the free flow of gas and may have fragmented CEE gas markets. The preliminary assessment is that such measures may have had a restrictive object and may have been abusive under Article 102 of TFEU. They may also have been capable of having restrictive effects. The main examples of such indirect measures are provided below.
- (57) In [...], Gazprom's gas supply contract contains an expansion clause whereby Gazprom has a right to increase the minimum annual quantities of gas (the take-or-pay obligation) in case a customer was to re-export some of the annual gas quantity. The increase of the minimum annual quantity matches the amount of gas re-exported by a customer. This clause is also accompanied by an obligation to inform Gazprom about all export quantities. The expansion clause may thereby significantly reduce or even eliminate the customer's economic incentive to export gas it purchases from Gazprom.
- (58) In Bulgaria, a gas supply contract prevents the re-export of gas by containing a requirement that Gazprom needs to agree on the use of certain gas metering points each time gas is to be exported from Bulgaria. While appearing technical in nature, the Commission's preliminary assessment shows that under the gas supply contract, these gas metering requirements may have prevented the export of gas from Bulgaria. At gas metering points the protocols for delivered and off-taken gas quantities under the contract are to be signed. These protocols, signed by both Gazprom and the customer demonstrate the customer's compliance with its contractual obligations vis-à-vis Gazprom in terms of off-taken gas quantities. Depending on whether the gas will stay in Bulgaria or will be exported, the gas metering points change. However, without Gazprom's consent on the use of gas metering points where exported gas can be metered the customer is unable to document to Gazprom that it has fulfilled its contractual off-take obligations. The gas metering arrangements may, therefore, make Gazprom stay in *de facto* control of the Bulgarian gas flows and may prevent any export of gas from Bulgaria.
- (59) The Commission's preliminary assessment, as set out in the SO, also indicates that Gazprom refused to change a gas delivery point on gas supply contracts and thereby prevented the importation of gas into Poland during the 2009 gas crisis. In general, the location of the contractual delivery point is important for a wholesaler's ability and business incentive to export gas to other countries. By refusing to change gas delivery points, Gazprom made it more difficult for wholesalers to bring gas to another gas market. Such a refusal may not have been objectively justifiable (e.g. congestions, absence of capacities) but may have resulted from Gazprom's overall strategy of maintaining unfair pricing policy by ensuring that Russian gas would not compete with Russian gas.
- (60) At the time of the 2009 gas crisis, there was no technical or contractual possibility of reverse flows from Germany to Poland on the Yamal pipeline. At that time, the Polish gas market was insufficiently connected with the neighbouring gas markets. This infrastructure isolation of Poland meant that the change of a gas delivery point, or a change of the gas metering station, was the most effective way of importing gas into Poland from other wholesalers of Russian gas. The Commission's preliminary assessment shows that Gazprom refused to comply with requests to change gas

delivery points or metering stations on gas contracts and thereby prevented the import of gas into Poland. Faced with the impossibility to import gas during the 2009 gas crisis, Gazprom's customer had no choice but to cover the gas shortage by acquiring more gas from Gazprom.

#### 4.4.2.3. Conclusion

(61) The Commission's preliminary concern is that, for the reasons set out in recitals (44) to (60), territorial restrictions in the form of contractual export bans or destination clauses and other contractual or non-contractual restrictions with an effect equivalent to territorial restrictions may have prevented the free flow of gas across the investigated CEE gas markets and have fragmented and isolated CEE markets along national borders.

#### 4.4.3. Excessive pricing

(62) The Commission's preliminary assessment, as set out in the SO, is that Gazprom may have pursued an unfair pricing policy by charging prices in Bulgaria, Estonia, Latvia, Lithuania and Poland (hereafter 'the five CEE countries') that may have been excessive compared with Gazprom's costs, as well as compared with other relevant competitive price benchmarks.

(63) As part of this alleged unfair pricing policy, Gazprom has applied oil-indexation price formulae in the supply contracts in these five CEE countries which may have contributed to the alleged excessiveness of the prices charged by Gazprom. Furthermore, the Commission's preliminary assessment indicated that the absence in price revision clauses of a well-defined, competitive and publicly available price benchmark such as prices at competitive gas hubs was one of the main factors that may have resulted in unfair prices in the five CEE countries.

#### 4.4.3.1. Principles

(64) Article 102 a) TFEU prohibits the imposition, directly or indirectly, of unfair purchase or selling prices or of other unfair trading conditions. In *United Brands*, the Court considered that "*charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse*".<sup>41</sup>

(65) In practice, the Court proposed a test with two limbs to assess the relation between price and economic value and to establish unfair pricing. According to this cumulative test: (1) the Commission should assess "*whether the difference between the costs actually incurred and the price actually charged is excessive*", and (2) if the answer is yes, the Commission should assess "*whether a price has been imposed which is either unfair in itself or when compared to competing products*".<sup>42</sup> The first limb of the test can be interpreted as a screening exercise to assess whether the price charged is suspiciously high. With the second limb of the test, the Court effectively proposes two alternative options to establish whether the price actually bears no reasonable relation to the economic value of the product: either by carrying out a comparison with a competitive price benchmark (which can be seen as a proxy of the economic value of the product), or if no appropriate price benchmark exists, by

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<sup>41</sup> Case C-27/76 *United Brands Company v Commission*, cited above, paragraph 250.

<sup>42</sup> Case C-27/76 *United Brands Company v Commission*, cited above, paragraph 252.

directly estimating the economic value of the product ('unfair in itself'). The Court also clarified that other methods could be used to establish unfair pricing.<sup>43</sup>

- (66) To apply the second limb of the test, several price benchmarks could be used, as long as these benchmarks are selected in accordance with objective, appropriate and verifiable criteria; and the comparison is made on a consistent basis.<sup>44</sup> In practice, this means that the benchmark prices are competitive and the comparison takes into account relevant differences such as differences in product quality and/or distribution costs. A comparison could be carried out for instance with the price charged by the same company for the same product in different geographic markets that are considered competitive. Alternatively a comparison can be carried out with prices charged for the same product sold by competitors on the same or other geographical markets.
- (67) The Court stated that there is "*no minimum threshold above which a rate must be regarded as appreciably higher*" than benchmarks, in order to find prices excessive; but that the "*difference between rates may be qualified as 'appreciable' if it is both significant and persistent on the facts, with respect, in particular, to the market in question*".<sup>45</sup> Neither the Courts nor the Commission have established which level of price difference can be regarded as unfair as this depends very much on the product and the market in question. In the *Deutsche Post* decision, a price 25% higher than the company's estimated costs was found to be unfair by the Commission.<sup>46</sup>
- (68) The Court's case law acknowledges that unfair prices can result from the application of a contractual pricing method by a dominant supplier.<sup>47</sup> In certain circumstances, a pricing method might be unfair within the meaning of Article 102 a) TFEU, if the method has no reasonable relation to the economic value of the product and other methods exist which quantify the value of the good more precisely, while capable of achieving the same legitimate aim to protect the interests of the parties.

#### 4.4.3.2. Application of the principles to the case

- (69) In its preliminary assessment, as set out in the SO, the Commission compared Gazprom's prices with its costs actually incurred in order to establish whether, in line with the *United Brands test*,<sup>48</sup> the difference between Gazprom's actual costs and the prices charged by Gazprom to CEE wholesalers was excessive (first limb of the *United Brands test*). This preliminary comparison demonstrates that this may indeed have been the case. The comparison for the years 2009-2013 shows that Gazprom's average prices net of the export duties in the five CEE countries exceeded its costs by a large margin, the weighted average mark-up above costs being 170%.

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<sup>43</sup> Case C-27/76 *United Brands Company v Commission*, cited above, paragraph 253.

<sup>44</sup> Judgment of the Court of Justice of 14 September 2017, *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome*, C-177/16, ECLI:EU:C:2017:689, paragraph 44.

<sup>45</sup> Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome*, cited above, paragraph 55.

<sup>46</sup> See Commission decision of 25 July 2001, COMP/C-1/36.915 *Deutsche Post AG – Interception of cross-border mail*, paragraph 166.

<sup>47</sup> See Judgment of the Court of Justice of 11 December 2008, *Kanal 5 Ltd TV 4 AB v Foreningen Svenska Tonsättares Internationella Musikbyrå*, C-52/07, ECLI:EU:C:2008:703, paragraph 35 and 40, Judgment of the Court of Justice of 13 July 198, *Ministère Public v Tournier*, C-395/87, ECLI:EU:C:1989:319, paragraph 45.

<sup>48</sup> Case C-27/76 *United Brands Company v Commission*, cited above, paragraph 252.

- (70) In line with the second limb of the United Brands test, the Commission then compared Gazprom's long-term contract prices in the five CEE countries with competitive price benchmarks. The objective of such comparison is to assess whether the high profit margins observed under the first limb of the test result from Gazprom making use of its dominant position or instead are in line with competitive prices and could therefore be considered legitimate.
- (71) The Commission selected two price benchmarks: Gazprom's long-term contract prices in Germany and European hub prices.
- (72) The Commission considers that the comparison of Gazprom's long-term contract prices in the five CEE countries with European hub prices may be the most relevant benchmarking method. Some of the European gas hubs are liquid market places and have become the main competitive price signal for gas wholesale markets. They therefore provide the best indication of what customers are paying for gas in a competitive market and what its economic value is. Although hub contracts and long-term contracts may offer different attributes (i.e. mainly in terms of flexibility for customers and outlet security for Gazprom), it should be noted that Gazprom itself (as well as other upstream gas suppliers) is selling on gas hubs and through long-term contracts that are priced in line with gas hub prices. Gas hub prices consequently may constitute an appropriate benchmark to assess whether Gazprom's long-term contract prices are excessive.
- (73) The Commission therefore compared Gazprom's long-term contract prices in the five CEE countries with the Dutch TTF hub and German NCG hub 'front month' forward prices. Both hubs are mature, liquid and competitive and their prices move very closely together. The Commission's preliminary finding was that Gazprom's long-term contract prices in all of the five CEE countries may have significantly and persistently exceeded both hub prices (price differences are very similar for both hubs). For instance, compared with TTF 'front month' forward price, prices in the five CEE countries were on average between 22% and 40% higher over the period 2009-2014. Considering the homogenous nature of gas and the very large contractual quantities at stake, the Commission preliminarily considers that such price differences may be indicative of unfair prices.
- (74) German long-term contract prices may also be relevant competitive price benchmarks. Germany is more competitive than the five CEE gas markets as Germany is supplied by several upstream suppliers (Gazprom, GasTerra, Statoil and some German production). While the price differences vary from one country to the other, Gazprom's long term contract prices in all five CEE countries significantly exceeded the German long term contract prices during the relevant period (between 9% and 24% on average over 2009-2014). The Commission preliminarily considered that such price differences may be indicative of unfair prices, especially given that gas delivered by Gazprom in Germany and in the five CEE countries is perfectly homogenous, while transportation costs for gas delivered in the five CEE countries and the standard of living in these countries are lower.
- (75) With regard to oil-indexation, the Commission notes that Gazprom's long-term supply contracts in the five CEE countries all contain a price formula which indexes the price of gas to the price of fuel oil and gasoil. The Commission notes that contracting parties may choose to link (index) gas contract prices to the prices of other products. This is not considered in itself abusive, even if the original reasons for oil-indexation have largely disappeared.

- (76) However, as demand and supply for oil and gas have become largely independent over the years (with prices moving largely independently) when oil prices reached higher levels, oil indexation artificially increased the price of gas in the five CEE countries, irrespective of the underlying supply and demand fundamentals. As a result, gas prices in the five CEE countries – with very few exceptions – significantly and persistently exceeded competitive price benchmarks over the period 2009-2014.<sup>49</sup>
- (77) The Commission therefore considers on a preliminary basis that the price formulae based on oil price indexation used by Gazprom in the five CEE countries may not have appropriately captured the economic value of the gas sold in these countries and therefore may have contributed to the excessiveness of the prices charged by Gazprom in these countries.
- (78) The Commission's preliminary assessment indicated that the absence in price revision clauses of a well-defined, competitive and publicly available price benchmark such as prices at competitive gas hubs may have been one of the main factors for higher prices in the five CEE countries. The absence of a clear reference to competitive price benchmarks, especially hub prices, may have made it impossible for customers to prevent gas prices from becoming unfair during the relevant period.

#### 4.4.3.3. Conclusion

- (79) In view of the above, the Commission's preliminary assessment, as set out in the SO, is that Gazprom may have pursued an unfair pricing policy under Article 102 a) TFEU in the five CEE countries by charging excessive prices compared with different competitive Western European price benchmarks. The oil price indexation formulae used by Gazprom in these countries and the absence of a clear reference to competitive price benchmarks in the context of price revision clauses may have contributed to the unfairness of these prices.

#### 4.4.4. *Gas supplies made conditional on infrastructure commitments in Bulgaria*

- (80) The Commission preliminary assessment, as set out in the SO, is that Gazprom leveraged its position of a dominant gas supplier in Bulgaria to obtain a commitment by the Bulgarian gas incumbent, Bulgarian Energy Holding (BEH),<sup>50</sup> to participate in the Gazprom driven South Stream project.
- (81) Due to its alleged dominance, Gazprom may have been able to condition the supply of gas and gas prices upon BEH's investment commitment to the project, which was later abandoned. The Commission is concerned that this leveraging may have been in contravention of Article 102 of TFEU in the form of making gas supplies and prices conditional upon supplementary obligations and in the form of imposing unfair trading conditions.

#### 4.4.4.1. Principles

- (82) Article 102 d) TFEU applies where the dominant undertaking forces its customers to accept other types of distinct 'supplementary obligations' or commitments in order to

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<sup>49</sup> With the drop in oil prices as from the second half of 2014, gas prices in the five CEE countries progressively converged with those competitive price benchmarks in the course of 2015-2016.

<sup>50</sup> BEH is a state owned company. It is the sole parent company of the Bulgarian gas wholesaler, Bulgargaz and of the Bulgarian transmission system operator for gas (TSO), Bulgartransgaz.

obtain the product with respect to which the supplier is dominant. The tying behaviour can concern products but also other services or obligations.<sup>51</sup>

- (83) Conditioning unrelated products or services upon unfavourable contractual clauses can also constitute an abuse in the form of an imposition of an unfair trading condition under Article 102 a) TFEU. In *Tetra Pak*, the Court found that a tied sale and other contract clauses were 'unfair' and hence abusive. The clauses went beyond their ostensible purposes, were intended to strengthen the dominant position and unreasonable as they could not be explained by any legitimate interest of the dominant supplier to protect its commercial interests.<sup>52</sup> In line with the special responsibility of a dominant company not to impair competition, practices of a dominant company need to be proportionate to the objective they seek to achieve.<sup>53</sup>

#### 4.4.4.2. Application of the principles to the case

- (84) The Commission's preliminary assessment is that in Bulgaria Gazprom made the conclusion of a new gas supply contract and lower gas prices conditional upon the distinct and unconnected supplementary obligation on the part of BEH to participate in the Gazprom driven South Stream infrastructure project.
- (85) Gazprom used the dependence of BEH on its gas supplies to ensure progress on the various stages of South Stream, including BEH's final investment commitment to the project. Due to lack of alternative supply sources, approaching expiry of its supply contracts and high gas prices, BEH had little choice but to accept the obligations for South Stream, requested by Gazprom. BEH committed to the project despite incurring significant financial liabilities on top of the financial difficulties it was already experiencing.
- (86) While balancing the interests of the dominant company and its contract partner the Commission preliminarily concluded that for achieving the objective of constructing the South Stream pipeline it was neither necessary nor proportionate for Gazprom to impose on BEH to commit to the project. The conditioning, therefore, may have allowed Gazprom to gain benefits that it could not attain if functioning competition for gas supplies was in place in Bulgaria.
- (87) The announced termination of South Stream changed neither Gazprom's past leveraging practice nor BEH's potential liabilities, arisen out of the forced decision to participate in the project.

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<sup>51</sup> In *British Sugar*, the dominant company tied the sale of sugar to the transport of the sugar to the final destination, *Napier Brown/British Sugar*, OJ L 284/41, 18.7.1988. In *London European-Sabena*, access to a computer reservation system was made conditional on using ground-handling services, Commission Decision of 4 November 1988 (*London European v Sabena*), 88/589/EEC, OJ 1988 L 317/47. Also see Case 311/84 [1985] ECR 3261, *Centre Belge d'Etudes de Marche-Télémarketing v CLT*. Also see Commission Decision of 24 July 1991, *Tetra Pak II*, 92/163/EEC, OJ L 72/1, paragraphs 108 and 116; confirmed by the judgement of the General Court of 6 October 1994, *Tetra Pak International SA v Commission*, T-83/91, ECLI:EU:T:1994:246 (tying of maintenance services).

<sup>52</sup> Case T-83/91, *Tetra Pak International SA v Commission*, cited above, paragraph 140.

<sup>53</sup> Judgment of the General Court of 30 September 2003, *Atlantic Container Line and others v Commission* ('TACA'), joined Cases T-191/98 and 212 to 214/98, ECLI:EU:T:2003:245, paragraph 1120, as well as Judgment of the Court of Justice of 30 January 1974 *Belgische Radio en Televisie and société belge des auteurs v SABAM*, C-127/73, ECLI:EU:C:1974:6, paragraph 11; Commission Decision of 20 April 2001, COMP/34.493, upheld by Judgment of the General Court of 24 May 2007, T-151/01, ECLI:EU:T:2007:154 and Judgment of the Court of Justice of 16 July 2009, *Duales System Deutschland v Commission*, C-385/07 P, ECLI:EU:C:2009:456.

#### 4.4.4.3. Conclusion

- (88) The Commission's concern is that, for the reasons set out in paras (84)-(87), Gazprom may have leveraged its alleged dominant position on the wholesale gas supply market of Bulgaria in contravention of Article 102 of TFEU.

#### 4.4.5. *Single and continuous infringement*

- (89) The Commission's preliminary concern is that Gazprom engaged in pursuit of an overall strategy to fragment and isolate the CEE gas markets in order to charge unfair prices and to obtain unrelated infrastructure-related commitments from its customers.
- (90) The Commission's preliminary assessment is that different types of potentially abusive behaviour were carried out in pursuit of the same overall plan. On that basis, the Commission's preliminary assessment is that there may be objective reasons to qualify such different types of alleged behaviour (as described in Sections 4.4.1 - 4.4.4 ) as one single and continuous infringement of Article 102 of TFEU and Article 54 of the EEA Agreement. In any event, and in the alternative, each of these practices may also potentially constitute separate infringements of Article 102 of TFEU and Article 54 of the EEA Agreement.

#### 4.5. **Absence of objective justification or efficiencies**

- (91) Conduct which *prima facie* constitutes an abuse can escape the prohibition of Article 102 of TFEU if the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant undertaking.<sup>54</sup> It is for the company to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied.<sup>55</sup>
- (92) Such objective justification can in particular encompass arguments by the dominant undertaking that its behaviour was an objective necessity. Further, dominant companies may provide evidence that the exclusionary effects resulting from its behaviour are counterbalanced or outweighed by advantages in efficiency which also benefit the consumer.<sup>56</sup>
- (93) The Commission's preliminary assessment is that Gazprom has not provided sufficient evidence that its conduct could be objectively justified or that it is necessary for the achievement of efficiency gains which could counteract any likely negative effects on competition, without eliminating effective competition.

#### 4.6. **Effect on trade between Member States**

- (94) The Court of Justice has held that '*Article 82 [now 102 of TFEU] does not require it to be proved that abusive conduct has in fact appreciably affected trade between*

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<sup>54</sup> Judgment of the Court of Justice of 27 March 2012, *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, paragraphs 41-42.

<sup>55</sup> See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Article 101 and 102 of TFEU], OJ L 1, 4.1.2003, recital 5 and article 2; Case C-209/10 *Post Danmark*, cited above, paragraphs 41-42.

<sup>56</sup> Judgment of the Court of Justice of 15 March 2007, *British Airways v Commission*, C-95/04 P, ECLI:EU:C:2007:166, paragraph 86; Judgment of the Court of Justice of 17 February 2011, *Telia Sonera*, C-52/09, ECLI:EU:C:2011:83., paragraph 76.

*Member States, but that it is capable of having that effect*'.<sup>57</sup> The Court of Justice has also clarified that it follows from well-established case-law that the interpretation and application of the condition relating to effects on trade between Member States laid down in Articles 101 and 102 of TFEU must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by European Union law and the law of the Member States. Thus, European Union law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the Internal Market.<sup>58</sup>

- (95) The Commission's preliminary conclusion is therefore that, to the extent that Gazprom may have raised artificial barriers to trade and may have been inhibiting the free flow of gas across CEE, its behaviour may be regarded as having an effect on trade between Member States.

## **5. PROPOSED INITIAL COMMITMENTS**

- (96) In order to address the Commission's competition concerns, Gazprom tabled a set of commitments ('Initial Commitments') to ensure the free flow of gas at competitive prices across CEE. The key elements of the Initial Commitments offered by Gazprom on 14 February 2017 were as follows.

### **5.1. The Initial Commitments dealing with market segmentation**

- (97) The overall purpose of the Initial Commitments dealing with market segmentation was to address the Commission's preliminary anticompetitive concerns by overcoming the alleged isolation and fragmentation of CEE gas markets along national borders and enabling the free flow of gas across CEE. The Initial Commitments contained a general commitment dealing with the alleged market segmentation elements (see Section 5.1.1 below) as well as two more specific commitments dealing with the Bulgarian gas metering (see Section 5.1.2 below) and the mechanism for the change of gas delivery points (see Section 5.1.3 below).

#### *5.1.1. The Initial Commitment dealing with export bans, destination clauses and other measures having an equivalent effect*

- (98) To overcome the alleged isolation and fragmentation along national borders and to ensure the free flow of gas across borders, Gazprom committed that it would refrain from using, and that it will not introduce in the future, any export bans or destination clauses or any measures of equivalent effect in their contracts for the sale of gas, including gas sold at auctions, that would directly or indirectly limit or prohibit the customer's ability to resell all or parts of the gas quantity acquired from Gazprom or

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<sup>57</sup> Case C-322/81 *Michelin v Commission*, cited above, paragraph 104; see also Judgment of the Court of Justice of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, joined cases C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98, paragraphs 69 and 70.

<sup>58</sup> Judgment of the Court of Justice of 31 May 1979, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission*, C-22/78, ECLI:EU:C:1979:138, paragraph 17; Judgment of the Court of Justice of 25 October 2001, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz*, C-475/99, ECLI:EU:C:2001:577, paragraph 47; Judgment of the Court of Justice of 25 January 2007, *Dalmine SpA v Commission*, C-407/04 P, ECLI:EU:C:2007:53, paragraph 89.



to move it to another territory. The Initial Commitment contained a non-exhaustive list of such restrictive clauses that Gazprom committed to remove and not re-introduce in the future.

#### *5.1.2. The Initial Commitment dealing with the Bulgarian gas system*

- (99) To put an end to the contractual metering and gas monitoring provisions in Bulgaria, that may have resulted in the isolation of the Bulgarian gas market from the neighbouring gas markets (in particular the Greek gas market), Gazprom committed that it would make changes to the relevant gas supply and gas transport contracts in order to enable the conclusion of interconnection agreements at the interconnection points between the Republic of Bulgaria and other EU Member States and to enable the adjustment of the current gas allocation method (allocated-as-measured) to the modern gas allocation method (allocated-as-nominated). The change of gas allocation methods and the conclusion of interconnection agreements aim to put the Bulgarian TSO in full control of gas flows in Bulgaria and to enable the free flow of gas across the Bulgarian borders.

#### *5.1.3. The Initial Commitment dealing with the changes of gas delivery points*

- (100) To achieve the free flow of gas across CEE and to put an end to the alleged market segmentation and isolation, it is important that in addition to being contractually free to flow gas across CEE borders, CEE customers also have access to gas infrastructure in order to ship the gas. While the gas connecting infrastructure (including the availability of reverse flows and interconnectors) has greatly increased in the Czech Republic, Hungary, Poland and Slovakia, the gas markets in the Baltic States and in Bulgaria are still very much isolated from the rest of CEE. This infrastructure isolation makes it impossible to flow gas, therefore leaving Gazprom as the only supplier of pipeline gas to those gas markets.
- (101) To overcome the infrastructure isolation of the Baltic States and Bulgaria, Gazprom committed to offer to its relevant CEE customers the possibility to request that all or parts of their contractual gas volumes delivered at certain delivery points in the CEE could be delivered to Bulgaria or the Baltic States. Gazprom committed to offer this swap-like operation for as long as the customer is unable to arrange itself for the transport of gas from the relevant contractual delivery point to Bulgaria or the Baltic States. Since a gas swap is a commercial transaction for which a fee is charged by the provider, Gazprom would be allowed to charge a fixed and transparent service fee in line with what it would typically charge for such services in the market.

### **5.2. The Initial Commitment dealing with prices**

- (102) The overall purpose of the Initial Commitments dealing with prices was to address the Commission's preliminary pricing concern, by preventing Gazprom's long term contract prices in the five CEE countries from becoming again unfair in the future compared with competitive Western European benchmarks.
- (103) To achieve this goal, Gazprom committed to either propose to introduce a price revision clause in the contracts with its customers that do not already contain such a clause or amend existing contractual price revision clauses to ensure competitive gas prices in the Bulgarian, Estonian, Latvian, Lithuanian and Polish gas markets. The new price revision clause would allow each contractual party to request a revision of the gas prices if either the economic circumstances in the European gas markets have changed and/or the contract price does not reflect amongst other things, the development of the border prices in Germany, France and Italy and/or the

development of the gas prices at liquid gas hubs in Continental Europe. The revision of the contract price could be requested by either party every two years (plus one extraordinary price review every 5 years). Gazprom's commitment also provided that, when revising gas prices, the parties should take into account the price level in the European gas markets (including the average weighted import border prices in Germany, France and Italy and the prices at liquid gas hubs in Continental Europe). The commitment finally provided that in the absence of an agreement on the price revision within 120 days, each of the parties could refer the matter to arbitration.

### **5.3. The Initial Commitment dealing with making of gas supplies conditional on infrastructure commitments in Bulgaria**

- (104) To undo the alleged unjustified advantages achieved as a result of the practice of making gas supplies and gas prices conditional upon infrastructure commitments in Bulgaria Gazprom committed to allow its Bulgarian partners to leave the South Stream project without incurring liabilities such as damages claims. In the context of the announced cancelation of the South Stream project Gazprom undertook that neither it nor any of its subsidiaries will claim damages on the basis of this cancelation. Gazprom also committed not to reclaim the gas price rebates it granted its Bulgarian customer for the participation in the South Stream project.
- (105) The commitment was initially offered by Gazprom for a period of eight consecutive years.

## **6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)**

- (106) In response to the publication on 16 March 2017 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received forty four responses from interested third parties. The main issues raised by third parties in response to the Market Test were as follows.

### **6.1. Respondents' views on the Initial Commitments dealing with market segmentation**

#### *6.1.1. The Initial Commitment dealing with export bans, destination clauses and other measures having an equivalent effect*

- (107) Some respondents questioned the value of the general commitment dealing with the alleged market segmentation in a situation where a number of territorial restrictions have already been removed from Gazprom's gas supply contracts.

#### *6.1.2. The Initial Commitment dealing with the Bulgarian gas system*

- (108) With a view to putting the Bulgarian TSO in full control of the gas flows in Bulgaria and to enable the change of the gas allocation method as well as to enable the conclusion of an interconnection agreement with Greece, some respondents have pointed out a number of technical elements to be reflected in the commitments.
- (109) Some respondents pointed out that Gazprom should remain liable for gas quality at the entry point to the Bulgarian gas system in line with the Bulgarian gas transit contract. It is only from that point onwards that the Bulgarian TSO could in principle be responsible for ensuring that the gas transported through the territory of Bulgaria complies with the quality requirements of the downstream TSO.

- (110) Some respondents pointed out that the commitments may also involve the necessary changes on quality requirements with regard to the supply contracts that are applicable at the Bulgarian-Greek interconnection point.

### *6.1.3. The Initial Commitment dealing with the changes of gas delivery points*

- (111) Overall, the respondents to the Market Test Notice considered that the change of delivery points mechanism could be an effective tool to overcome the infrastructure-isolation of the gas markets in the Baltics and Bulgaria from the rest of Central and Eastern European gas markets.
- (112) It was pointed out that the mechanism should operate on a bi-directional basis, namely that, for the pairs of delivery points under the mechanism, the eligible customers from the Baltic States and Bulgaria should also have a possibility to request a change of a delivery point to the relevant delivery points located in the rest of Central and Eastern Europe.
- (113) Some respondents noted that the change of delivery point mechanism would only be offered to those customers who are Gazprom's customers at the time of the notification of the commitment decision to Gazprom. In the context of bi-directional flows, it was pointed out that this would exclude from the scope of the commitment a number of customers from the Baltic States whose gas supply contracts with Gazprom have expired since the adoption of the SO but who were Gazprom's customers at the time of the SO.
- (114) Some respondents pointed out that the minimum gas volume requirements for the change of delivery point mechanism (e.g. minimum volume of gas to be shifted and lead-time) are too stringent given the size and gas consumption in the Baltic States and Bulgaria.
- (115) Some respondents claimed that the commitment ought to cover more delivery points in CEE to ensure that there is sufficient volume of gas eligible for the change under the mechanism and to avoid the risk of infrastructure congestion.
- (116) It was pointed out that Gazprom's right to refuse a change of delivery point was not clear and that the possibility to refuse a request for 'lack of resources' was not fully defined in the Initial Commitments. Furthermore, some respondents pointed out that the Monitoring Trustee ought to be given adequate powers to verify the availability of free firm transmission capacity, both in the European Union and in third countries.
- (117) It was pointed out that the change of delivery point shall not remove Gazprom's liability for delivery of gas to a new delivery point.
- (118) Some respondents questioned the need for and the methodology behind the service fee that Gazprom could charge for a change of a delivery point.

## **6.2. Respondents' views on the Initial Commitment dealing with pricing**

- (119) Overall, the replies to the market test have suggested that relying on a price revision clause could be a potentially effective way of preventing prices from becoming excessive in the future. At the same time, a number of improvements to the clause have been suggested.

### *6.2.1. Respondents' views on the scope of the Initial Commitment dealing with pricing*

- (120) The Initial Commitments provided that the price review clause would be offered only to existing customers as well as past customers who had a contract with Gazprom at

the time of the adoption of the SO if they decide to sign a new contract with Gazprom in the future. Only contracts of more than 4 years would be covered.

- (121) Some respondents to the market test underlined the fact that increasing volumes of gas sold in the Baltic countries are sold under short-term contracts or auctions. They therefore asked to cover all short term contracts or at least reduce the minimum duration for eligibility. Further, to ensure a level playing field in the CEE, some respondents requested to extend the scope of the pricing commitment to cover also new customers.

#### 6.2.2. *Respondents' views on the trigger and the substantive guidance of the price revision clause*

- (122) In the Initial Commitments, the trigger and the substantive guidance were criticised for leaving too much room for interpretation.

- (123) First, it was pointed out that one of the two benchmarks explicitly referred to in the trigger and in the substantive guidance – i.e. "*prices at the relevant generally accepted liquid hubs in Continental Europe*" – was not sufficiently specified. Some respondents proposed to refer specifically to TTF, NCG and/or Gaspool, while others proposed to define liquid hubs by reference to well-defined indicators.

- (124) Second, it was generally pointed out that the substantive guidance was too broad to ensure fair prices. In particular, some respondents were concerned that the overall reference to "*the price level in the European gas markets*" left too much leeway for Gazprom to insist on price benchmarks which are not necessarily competitive, e.g. prices in other CEE countries.

#### 6.2.3. *Respondents' views on the frequency and timing of the price revision clause*

- (125) The Initial Commitments provided for the possibility of a review once every two years plus a joker once every five years. It was however not entirely clear as to the timing of the first review and whether the new price should be applied retroactively.

- (126) Some respondents to the market test asked to specify that the new price would apply retroactively. Some respondents also highlighted that customers should be allowed to trigger a price revision as soon as the new price review clause is included in the contract. According to them, this was necessary for the commitments to be effective at addressing the Commission's concerns in a timely manner.

- (127) Finally, some respondents claimed that the proposed frequency of price reviews was not sufficient to prevent prices from becoming excessive, while some other respondents considered that the market tested proposal already allowed unreasonably frequent price revisions which are both impractical and unrealistic.

#### 6.2.4. *Respondents' views on the arbitration part of the price revision clause*

- (128) The Initial Commitments foresaw the possibility to refer the dispute to arbitration if no agreement is reached within 120 days. Some respondents asked to specify the guiding principles to be followed by arbitrators.

### **6.3. Respondents' views on the Initial Commitment dealing with conditioning of gas supplies on infrastructure commitments in Bulgaria**

- (129) Respondents to the Market Test generally welcomed Gazprom's commitment to waive claims for payments that may arise following the termination of the South Stream project in Bulgaria. They interpreted the commitment as a positive and encouraging step towards greater legal certainty.

- (130) At the same time respondents pointed out that based on the nature of the commitment, Gazprom's obligation to restrain from bringing any claims related to the cancellation of the South Stream project should be excluded from the general eight-year period of duration of the commitments.

#### **6.4. Other comments made in reply to the Market Test**

- (131) Some comments made in reply to the Market Test Notice concern matters that were either outside the scope of the present investigation or cannot be regarded as validly question the general balance of the commitments proposed by Gazprom to address the Commission's competition concerns and to bring about the free flow of gas at competitive prices across CEE.
- (132) On a more general level, some respondents have argued that the Commission should, instead of accepting the commitments from Gazprom, adopt a decision under Article 7 of Regulation 1/2003 and ought to sanction Gazprom with a fine.
- (133) European Courts' judgments confirm that the Commission has a broad margin of discretion whether or not to accept the commitments offered by an undertaking to address the Commission's competition concerns.<sup>59</sup> In order to address the Commission's concerns Gazprom offered a set of forward-looking commitments addressing those concerns and, in some important aspects, going beyond what the Commission could potentially impose on Gazprom in the context of an Article 7 Regulation 1/2003 decision. The Commission considers that the commitments can remedy the competition concerns immediately and provide for a forward-looking framework to ensure that Gazprom will not engage in the same abusive market behaviour in the future. Unlike a prohibition decision, a commitment decision is also not predominantly confined to dealing with Gazprom's past behaviour, some of which may have already ceased.
- (134) In relation to the commitments dealing with market segmentation, some respondents have stated that Gazprom should also commit to not hinder the free flow of gas in non-EU countries clearly not covered by the investigation (e.g. Ukraine, Belarus, Moldova and Turkey), including via reverse flows. It was also pointed out that Gazprom should commit not to hinder any gas supply diversification measures in CEE (e.g. construction of the Baltic Pipe) and that it should commit not to book any gas capacity, whether in CEE or elsewhere in the EU, for a period longer than 5 years. Some respondents have also asked for Gazprom to commit to a maximum take-or-pay obligation of 75%. The Commission considers these comments to fall outside the scope of the investigation and to not relate to the competition concerns as communicated to Gazprom in the SO.
- (135) In relation to the pricing commitment, some respondents have requested that gas prices in CEE should be directly linked with hub prices. The Commission considers that this comment does not address the Commission's competition concerns. The Commission's objections against Gazprom concern unfair prices in CEE and not the absence of uniform hub-linked prices. The Commission's objective is to ensure that Gazprom's customers are given clear contractual rights to ensure that their gas prices remain fair and competitive in the future,

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<sup>59</sup> Judgment of the Court of Justice of 29 June 2010, *Commission v Alrosa*, C-441/07 P, ECLI:EU:C:2010:377,, paragraph 94; Judgment of the General Court of 15 September 2016, *Morningstar v Commission*, T-76/14, ECLI:EU:T:2016:481, paragraphs 40-43 and 78.

- (136) Some respondents have also requested that the pricing commitment obliges Gazprom to compensate its wholesalers for any unfair pricing they paid in the past. As clarified by the Court, the Commitments do not prevent national courts and national authorities from finding an infringement of Art. 102 TFEU and sanctioning allegedly anticompetitive behaviour.<sup>60</sup>
- (137) In relation to the infrastructure-related abuse, some respondents have questioned the absence of a specific commitment dealing with the ownership and operation of the Polish section of the Yamal pipeline. The Commission notes that its preliminary objection against Gazprom, as set out in the SO, was that Gazprom may have made gas supplies conditional upon maintaining Gazprom's control over investment decisions concerning one of Poland's key transit pipelines (Yamal). This pipeline is one of the main infrastructures that could allow gas from suppliers – other than Gazprom – to enter the Polish market.
- (138) However, following further investigation, the Commission has concluded that its preliminary competition law concern regarding the Yamal pipeline, as set out in the SO, has not been confirmed. First, the certification decision issued by the Polish Energy Regulator on 19 May 2015 concludes that it is Gaz-System, an independent TSO of the Polish section of the Yamal pipeline, that has decisive control of the investment decision and their implementation on the Yamal pipeline. On that basis, neither EuRoPol, as the pipeline's owner, nor Gazprom, as EuRoPol's shareholder, appear to be able to block the investment decisions on the Polish section of the Yamal pipeline. The certification decision also states that the cooperation between the relevant parties takes place with no interruptions and that the necessary investments on the Yamal pipeline were fully implemented as planned.<sup>61</sup> Furthermore, the Commission notes the intergovernmental character of the gas relations in Poland, especially relating to the construction and operation of the Polish section of the Yamal pipeline, may have to a large extent determined the parties' behaviour.

## **7. COMMITMENTS**

- (139) In response to the comments received pursuant to the Article 27(4) Notice, Gazprom modified its Initial Commitments with a revised proposal on 15 March 2018 ('Commitments'). The main changes made by Gazprom in the Commitments, as compared with the Initial Commitments, are summarised below.

### **7.1. Commitments dealing with market segmentation**

#### *7.1.1. The Commitment to remove territorial restrictions and measures of an effect equivalent to such restrictions*

- (140) The Commitments no longer contain a reference to the commitment being made only for the duration of the commitments.

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<sup>60</sup> Judgment of the Court of Justice of 23 November 2017, *Gasorba et al. v. Repsol*, C-547/16, ECLI:EU:C:2017:891, paragraphs 27-29.

<sup>61</sup> Polish Energy Regulator Certification Decision of Gaz-System, 19 May 2015 - Prezes Urzedu Regulacji Energetyki, Decyzja, DRG-4720-2(28)/2014/2015/6154/KF, pages 118-120.

### *7.1.2. The Commitment dealing with the Bulgarian gas system*

- (141) In order to enable the Bulgarian TSO to integrate the Bulgarian gas market with its EU neighbours and to put the TSO in control of the gas flows in Bulgaria and across the Bulgarian borders, Gazprom has introduced a number of important changes into the Commitments.
- (142) First, Gazprom committed to remain liable for gas quality at the entry point to the Bulgarian gas system in line with the contract for transportation of natural gas through the territory of Bulgaria.
- (143) Second, Gazprom committed to ensure that gas quality in gas supply contracts in EU gas markets downstream from Bulgaria do not become obstacles to the conclusion of interconnection agreements between Bulgaria and other EU Member States and to adjustment of the current allocation-as-measured methodology at such interconnection points to the allocation-as-nominated methodology.

### *7.1.3. The Commitment dealing with the changes of gas delivery points*

- (144) To better integrate CEE gas markets, especially with the infrastructure gas markets of the Baltics and Bulgaria, Gazprom has improved its Initial Commitments to address the Commission's concerns and to bring about the free flow of gas across the entire CEE.
- (145) First, Gazprom committed to offer the change of delivery points on a bi-directional basis enabling gas to be shifted in both directions between, on the one hand, the Baltic States and Bulgaria and, on the other hand, a number of delivery points in the rest of Central and Eastern Europe. Such bi-directional mechanism will mimic the existence of gas connecting infrastructure before it is physically put in place. The minimum conditions and the service fee charged for such a bi-directional swap are the same irrespective of the direction of the swap.
- (146) Second, Gazprom committed to extend the scope of the change of delivery point mechanism to also cover those customers in the Baltics who had a gas supply contract with Gazprom on 23 April 2015, the date on which the SO was adopted. Under the bi-directional mechanism, this extension enables a number of customers from the Baltic States to become also eligible under the change of delivery point mechanism if they were to sign new long-term contracts with Gazprom.
- (147) Third, Gazprom reduced the minimum requirements attached to the change of delivery point mechanism. The minimum volume of gas to be shifted was reduced from 100 to 50 million cubic meters per year and the lead-time was shortened from 6 months to 4 months.
- (148) Fourth, Gazprom committed to add two new delivery points in the Baltic States, Izborsk and Varska, and one delivery point in Poland, Wysokoje. The added new delivery point aim to remove the risk of any gas grid congestion in the Baltic States and make more gas volume eligible to be sent to the Baltic States from Poland.
- (149) Fifth, with regard to the right to refuse a change of the delivery point, Gazprom removed the 'lack of resources' exception leaving the lack of free transmission capacity exception as the only ground under which it could refuse to change a gas delivery point. In this context, Gazprom also committed to provide the Monitoring Trustee with all necessary confidential information (e.g. with regard to capacity availability and bookings) to enable full and effective monitoring of the Commitments.

- (150) Sixth, Gazprom committed to remain liable for non-delivery of gas to a new delivery point except for instances of force majeure and/or maintenance work carried out by the relevant TSOs.
- (151) Seventh, for some of the change of delivery pairs, Gazprom reduced the service fee it is entitled to charge its customers for a swap-like operation. For instance, the service fees for the swaps between, on the one hand, Slovakia and, on the other hand, Baltics and Bulgaria were reduced by a range of 25-35%. For the bi-directional flows, Gazprom also proposed that the same amount of the service fee is charged irrespective of the direction of the swap.

## **7.2. Commitment dealing with pricing**

- (152) Gazprom has made a number of changes to address respondents' concerns in relation to the price revision clause and ensure fair prices going forward.
- (153) First, Gazprom committed to extend the scope of the price revision clause (1) by offering the price review clause also to new customers, and (2) by covering contracts with a total duration of at least 3 years (instead of 4 years).
- (154) Second, Gazprom specified what is meant by "*generally accepted liquid hubs in continental Europe*" by listing two examples of liquid hubs: the TTF gas hub in the Netherlands and the NCG gas hub in Germany (these two hubs were used as benchmarks in the legal test to assess whether Gazprom's prices were excessive).
- (155) Third, Gazprom made clear that only "*competitive Continental Western European gas markets*" should be taken into account when reviewing the price. This clarification aims at ensuring that the substantive guidance is sufficiently precise to prevent prices from becoming excessive.
- (156) Fourth, on the timing, Gazprom committed to introduce a clause providing for a retroactive application of the new price from the date of the notification of the request. Gazprom also specified that the parties will be allowed to trigger a price revision immediately after the introduction of the new price review clause in their contracts. The frequency of price revisions allowed under the initial commitments (i.e. every 17 months when considering the jokers) was considered sufficient and therefore not changed.
- (157) Fifth, Gazprom specified that the arbitrators shall also be guided by the substantive guidance spelled out in the commitment text and that the place of arbitration should be within the EU.

## **7.3. Commitment dealing with conditioning of gas supplies on infrastructure commitments in Bulgaria**

- (158) To ensure the full effect of the commitment and to allow its Bulgarian partners to leave the South Stream project without incurring liabilities, Gazprom has undertaken an obligation to restrain from bringing any claims related to the cancellation of the project in Bulgaria for a period of fifteen years. The Commitment is to guarantee that no limitation period that is relevant for potential claims for payments could run beyond the duration of the Commitments.



## **8. EFFECTIVENESS OF THE COMMITMENTS**

### **8.1. Principles**

(159) In the context of Article 9 of Regulation No 1/2003, the Commission must ensure that the commitments in question address its competition concerns and, second, that the undertakings concerned have not offered less onerous commitments that would also address those concerns adequately.<sup>62</sup> When carrying out that assessment, the Commission must take into consideration the interests of third parties.<sup>63</sup> In this context, judicial review relates solely to whether the Commission's assessment is manifestly incorrect.<sup>64</sup>

### **8.2. Application in the present case**

(160) The Commission has been concerned that Gazprom may have engaged in the overall anticompetitive strategy of isolating and fragmenting the CEE gas markets in order to prevent Russian-on-Russian gas competition. By sealing the CEE gas markets from alternative gas supplies, Gazprom may have been able to charge unfair prices to its CEE customers and may have also leveraged its dominance to extract certain unrelated infrastructure commitments.

(161) The objective of the Commitments is to bring Gazprom's market behaviour in line with EU competition law and to ensure that CEE businesses and consumers can benefit from increasing gas competition between different gas suppliers and supply sources. Such competition is already benefiting consumers in Western Europe, especially within the markets where there is access to liquid and competitive gas hubs (e.g. Germany or the Netherlands).

(162) The Commission is fully mindful of the market developments that have taken place since the time period investigated under the SO. The Commission notes that following the beginning of the investigation, Gazprom has already taken some action to bring its behaviour more in line with EU competition law (e.g. some territorial restrictions have been removed) and that the state of the gas infrastructure in CEE has improved in some Member States (the Czech Republic, Hungary, Poland and Slovakia), making cross-border gas flows possible, but the gas markets in the Baltics and in Bulgaria still remain very much isolated from the rest of the European Union's gas markets. It is also noted that, due to the fall in the price of oil, some of Gazprom's long-term gas prices charged under the oil-indexed contracts have decreased.

(163) Within these recent market developments, the Commission considers that the Commitments, in addition to being strictly prohibitive in respect of certain types of behaviour (e.g. territorial restrictions), also impose positive forward-looking obligations on Gazprom to facilitate the free flow of gas across CEE (e.g. the change of delivery point mechanism).

(164) With regard to pricing, the Commitments aim to ensure that the gas price under the oil-indexed contracts in CEE remain in line with the competitive price benchmarks, especially Western European gas hubs. The oil-indexation of the price of gas may have contributed in the past to the significant divergence between CEE gas prices and the prices of gas quoted at liquid and competitive Western European gas hubs.

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<sup>62</sup> Case C-441/07 P *Commission v Alrosa*, cited above, paragraph 41.

<sup>63</sup> Case C-441/07 P *Commission v Alrosa*, cited above, paragraph 41.

<sup>64</sup> Case C-441/07 P *Commission v Alrosa*, cited above, paragraph 42.

By introducing a clear contractual right to refer to competitive price benchmarks, including gas hubs, the Commitments aim to protect CEE customers against the consequences of any future increase in the price of oil.<sup>65</sup> With more frequent and streamlined price revisions based on the competitive benchmarks, Gazprom's customers will be put in a position where they can themselves react when the price of gas starts diverging from the competitive benchmarks.

#### 8.2.1. *Commitments dealing with market segmentation*

##### 8.2.1.1. The Commitment dealing with export bans, destination clauses and other measures having an equivalent effect

(165) The Commission notes that while, following the beginning of the investigation, a number of territorial restrictions have been removed from Gazprom's gas supply contracts, the Commission's preliminary view is that there may still be a number of clauses that directly or indirectly prevent the free flow of gas across CEE and that segment and isolate CEE gas markets.

(166) The Commitment therefore addresses the Commission's concern relating to market fragmentation by ensuring that all types of clauses, whether direct or indirect, that make the free flow of gas across CEE impossible or financially less attractive are no longer applied and will not be introduced in the future. The Commitment is accompanied by a non-exhaustive list of prohibited clauses that include profit-splitting mechanisms, rebate schemes, expansion clauses and monitoring and metering provisions that restrict the re-sale of gas. The Commitment also extends to gas auction contracts.

##### 8.2.1.2. The Commitment dealing with the Bulgarian gas system

(167) The Commission's preliminary concern, as set out in the SO, is that by relying on gas metering provisions, Gazprom has isolated the Bulgarian gas market from its EU neighbours and has prevented the free flow of gas across the Bulgarian borders. This has led to a situation where Bulgarian customers could only buy gas from Gazprom and other wholesalers could not access the Bulgarian gas market.

(168) Under the Commitment, Gazprom will take a positive action to amend its relevant gas contracts to enable the conclusion of interconnection agreements at the interconnection points between Bulgaria and other EU Member States, especially Greece, and to adjust the allocated-as-measured gas calculation method to the modern method of allocated-as-nominated. As a result of these changes, the Bulgarian gas market is supposed to become accessible to wholesalers other than Gazprom.

(169) The conclusion of the interconnection agreement at the Bulgarian-Greek border will enable the possibility of reverse flows from Greece to Bulgaria offering Bulgarian customers an alternative source of gas. The Commitments also ensure that Gazprom remains liable for gas quality at the entry point to the Bulgarian gas system.

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<sup>65</sup> In this respect, the Commission notes that in the context of Article 9 of Regulation 1/2003, undertakings may offer commitments that may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the Regulation. Case C-441/07 P *Commission v Alrosa*, cited above, paragraph 48.

### 8.2.1.3. The Commitment dealing with the changes of gas delivery points

- (170) The Commission notes that the technical possibilities of moving gas across borders of the Czech Republic, Hungary, Poland and Slovakia have very much improved in recent years. Owing to the construction of new gas interconnectors and the introduction of virtual and physical reverse flows, gas can nowadays be delivered to those four Central and Eastern European gas markets from other Member States (e.g. from Germany).
- (171) However, the gas markets in the Baltic States and in Bulgaria remain still very much isolated from the rest of the European Union's gas markets. Due to the absence of gas connecting infrastructure, there is no physical possibility for wholesalers from the Czech Republic, Hungary, Poland and Slovakia to transport gas to the Baltic States or Bulgaria, or the other way round, leaving the latter markets isolated from the rest of the European Union's gas markets. This physical infrastructure isolation would remain irrespective of the Commitment to remove all contractual territorial restrictions or equivalent measures having an equivalent effect.
- (172) The Commission considers that the swap-like mechanism whereby Gazprom will offer its relevant customer a possibility to bi-directionally move gas between the selected delivery points will be an effective means to further integrate Central and Eastern European gas markets and to overcome the infrastructure isolation of the gas markets in the Baltic States and in Bulgaria. Moreover, the possibility to move gas bi-directionally will also offer wholesalers from the Baltics and Bulgaria the possibility of finding outlets for their gas in the rest of CEE. The mechanism is a positive step that will create new opportunities for the free flow of gas across borders before the physical gas connecting infrastructure is built.
- (173) The Commission considers that the minimum requirements attached to the mechanism and the conditions under which a swap can take place make the mechanism both effective to remove the isolation of the gas markets of the Baltic States and in Bulgaria and remain proportionate given the technical aspects of implementing a gas swap (e.g. new capacity bookings, re-routing of gas, etc.) and the size of the gas markets at stake.
- (174) With regard to the service fee that Gazprom can charge for the swaps, the Commission notes that gas swaps are not offered for free in competitive gas markets but are treated as commercial transactions that are implemented at a fee. To make the mechanism effective and to ensure that customers could take advantage of the swaps in case prices were to significantly diverge between the gas markets, Gazprom committed to significantly reduce its service fee, compared with the Initial Commitments.

### 8.2.2. *Commitment dealing with pricing*

- (175) The Commission's concern, as set out in the SO, is that Gazprom may have charged excessive prices in the five CEE countries compared with competitive Western European price benchmarks. Due to the fall in oil prices in 2015-2016, the prices charged by Gazprom under its ongoing oil-indexed contracts in the five CEE countries have recently been roughly in line with competitive Western European price benchmarks.
- (176) Gazprom's Commitment aims at preventing prices under these contracts and possibly under new long term contracts (of at least 3 years) with past or new customers in the five CEE countries from becoming unfair again compared with these competitive

Western European benchmarks. The Commission considers that the price revision tool offered by Gazprom is an effective way to achieve this goal without the need for the Commission to start prescribing specific gas prices for individual gas contracts. A price revision is a market based mechanism that is well established in long-term gas contracts. If well-designed, it can be expected to ensure that prices remain aligned with competitive benchmarks.

- (177) In this respect, the Commission noted in its investigation that the absence in price revision clauses of a well-defined, competitive and publicly available price benchmark such as prices at competitive gas hubs may have been one of the main factors for higher prices in the five CEE countries.
- (178) The Commitment specifically addresses this shortcoming. Customers in the five CEE countries will, on the basis of the Commitment, be able to trigger a renegotiation of their gas prices if they diverge from competitive Western European price benchmarks, including transparent prices at liquid gas hubs such as TTF and NCG. When renegotiating their price, the relevant benchmark will be "*the price level in the competitive Continental Western European gas markets*", with an explicit reference to "*liquid gas hubs in continental Europe*" such as TTF and NCG. If, within 120 days of the request, Gazprom has not agreed to revise prices in accordance with the price level in the competitive Continental Western European gas markets, including amongst others the price level at liquid gas hubs, then customers can refer the matter to binding arbitration, which is supposed to revise prices on the basis of the same guiding principles. The Commitments require the arbitration proceedings to take place within the European Union. This obliges the arbitral tribunals to respect and apply EU competition law as a matter of public policy irrespective of the private interest of the parties to the arbitration.<sup>66</sup> In relation to this obligation on the arbitration tribunals, the Commission, as the guardian of EU law, may decide to intervene as *amicus curiae* in the arbitration proceedings, especially so if the arbitration concerns a matter covered by the Commission's commitment decision.
- (179) The Commitments thus aim to ensure that prices in the five CEE countries will, when revised, be set in line with competitive Western European price benchmarks. As customers will be allowed to trigger a first price revision immediately after the introduction of the new price review clause and the new price will apply retroactively from the date of the request, Gazprom's commitment will address the Commission's excessive pricing concern in a timely manner. Moreover, the frequency of price revisions allowed by the commitments – i.e. every 17 months on average (every two years plus one extraordinary price review every 5 years) – is aimed to ensure that prices in the five CEE countries will never diverge for more than a very short time interval from competitive Western European price benchmarks. Effectively, the Commitments are supposed to break up the existing link between gas prices and oil prices in these countries and to ensure that prices charged by Gazprom in the five CEE countries will not become unfair again in the future.

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<sup>66</sup> Judgment of the Court of Justice of 1 June 1999, *Eco-Swiss v Benetton International*, C-126/97, ECLI:EU:C:1999:269, paragraphs 36 and 39.

### 8.2.3. *Commitment dealing with making gas supplies conditional on infrastructure commitments in Bulgaria*

- (180) The Commission concern, as set out in the SO, is that Gazprom conditioned the supply of gas and gas prices on unrelated infrastructure commitments in Bulgaria. This allowed Gazprom to gain benefits that it could not attain if functioning competition for gas supplies was in place in Bulgaria. Furthermore, following the announced termination of South Stream, Gazprom's contract partner in Bulgaria became potentially exposed to damages claims.
- (181) Given the alleged exploitative nature of Gazprom's conditioning practice, the Commission considers that the proposed waiver of the unjustified gains achieved by Gazprom is an appropriate commitment to effectively remedy the competition concern and offer Gazprom's Bulgarian business partners much needed business and legal certainty.

### 8.2.4. *Conclusion*

- (182) The Commission considers that the Commitments effectively remove its competition concerns and comply with the principle of proportionality.
- (183) The Commission has taken into consideration the interests of third parties, including those that have responded to the Article 27(4) Notice. The Commission has carefully analysed all the comments received in reply to the Article 27(4) Notice. To the extent that they related to the objections presented to Gazprom in the SO and were proportionate, those comments were discussed with Gazprom and are reflected in the Commitments. The Commission has also carefully analysed all the arguments presented by PGNiG in its Complaint against Gazprom pursuant to Article 5 of Regulation 773/2004 as well as in PGNiG's observation on the letter rejecting the Complaint.

## 9. CONCLUSION

- (184) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the Commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. The Commitments, as set out in the Annex, form an integral part of the decision. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the Commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (185) In the light of the Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (186) The Commission retains full discretion to investigate and open proceedings under 102 of TFEU and Article 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

*Article 1*

The Commitments as listed in the Annex shall be binding on PJSC Gazprom and Gazprom export LLC, and any legal entity directly or indirectly controlled by it for a period of eight years, except for the Commitments listed in paragraph 21 of the Annex for which the period shall be fifteen years, from the date set out in the Commitments.

*Article 2*

It is hereby concluded that there are no longer grounds for action in this Case.

*Article 3*

This Decision is addressed to:

PJSC Gazprom, 16 Nametkina St., Moscow, GSP-7, 117997, Russian Federation

Gazprom export LLC, Ostrovskogo Sq. 2a Litera "A", St.Petersburg, 191023 Russian Federation

Done at Brussels, 24.5.2018

*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*

