



EUROPEAN COMMISSION
Competition DG

CASE AT.39849 – BEH Gas

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 17/12/2018

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Brussels, 17.12.2018
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COMMISSION DECISION

of 17.12.2018

**relating to proceedings under Article 102 of the Treaty on the Functioning of the
European Union**

(AT.39849 - BEH Gas)

(Only the English text is authentic)

TABLE OF CONTENTS

1.	Introduction	4
2.	The addressees of the Decision	5
2.1.	Bulgarian Energy Holding	5
2.2.	Bulgargaz	6
2.3.	Bulgartransgaz.....	7
3.	Procedure.....	7
4.	The services concerned by the Decision	9
4.1.	Natural gas	9
4.2.	The gas supply chain.....	9
4.3.	Infrastructure	10
4.4.	The Bulgarian Gas Sector	12
4.4.1.	Regulatory framework	12
4.4.2.	Market players.....	13
4.4.3.	Gas infrastructure	15
4.4.4.	Gas consumption and sources of supply	19
5.	Practices which are subject of the Decision.....	23
5.1.	Access to Gas Infrastructure in/to Bulgaria	23
5.2.	The Bulgarian transmission network	23
5.2.1.	The characteristics of the Bulgarian transmission network	23
5.2.2.	Capacity utilisation.....	24
5.2.3.	Regulatory framework for granting third party access to the Bulgarian transmission network.....	26
5.2.4.	Bulgartransgaz' approach towards granting access to the Bulgarian transmission network.....	30
5.2.4.1.	Examples of the lenient approach towards Bulgargaz	30
5.2.4.2.	Examples of access refusals or access made difficult.....	31
5.3.	Storage: UGS Chiren.....	45
5.3.1.	The characteristics of the gas storage at UGS Chiren and possible alternatives	45
5.3.2.	Regulatory framework for granting third party access to UGS Chiren	46
5.3.3.	Bulgartransgaz' approach toward granting access to UGS Chiren	51
5.3.3.1.	Allocation of storage capacity.....	51
5.3.3.2.	Examples of refusal to grant access or access made more difficult.....	63
5.4.	Import infrastructure: the Romanian Transit Pipeline 1	72
5.4.1.	Characteristics of the import pipelines.....	72

5.4.2.	Alternatives to the Romanian Transit Pipeline 1 for bringing gas to Bulgaria.....	73
5.4.3.	Regulatory framework for third party access to the Romanian Transit Pipeline 1	75
5.4.4.	The BEH group's approach towards access to the Romanian Transit Pipeline 1	75
5.4.4.1.	Capacity bookings and third party restrictions.....	76
5.4.4.2.	Examples of access refusals or access made more difficult.....	81
6.	Legal and economic assessment.....	92
6.1.	Relevant Market	92
6.1.1.	Relevant Product Market.....	92
6.1.1.1.	Gas infrastructure markets	92
6.1.1.2.	Gas supply markets	94
6.1.2.	Relevant Geographic Market	95
6.1.3.	Conclusion on the Relevant Market.....	96
6.2.	Conditions for the application of Article 102 TFEU	98
6.2.1.	Undertaking.....	98
6.2.2.	The BEH group forms a single economic unit.....	99
6.2.2.1.	The BEH group corporate structure	99
6.2.2.2.	BEH's close control over the actions of its subsidiaries.....	100
6.2.2.3.	BEH's direct participation in the access refusals and capacity hoarding	105
6.2.3.	Dominance	109
6.2.3.1.	Gas transport infrastructure.....	110
6.2.3.2.	Storage.....	110
6.2.3.3.	Downstream wholesale supply in Bulgaria.....	111
6.2.3.4.	Retail supply in Bulgaria.....	111
6.2.3.5.	Conclusions on dominance	112
6.2.4.	Abuse of the BEH group's dominant position.....	113
6.2.4.1.	Application to the present case	116
6.2.4.2.	Obligation to provide access	118
6.2.4.3.	Refusals to allow access.....	120
6.2.4.4.	Preventing, restricting and delaying access to the Bulgarian transmission network	121
6.2.4.5.	Preventing, restricting and delaying access to the UGS Chiren.....	125
6.2.4.6.	Capacity hoarding on the Romanian Transit Pipeline 1.....	132
6.2.4.7.	Conclusion.....	138
6.3.	The BEH group's strategy and BEH's direct involvement.....	138
6.3.1.	The strategy	138
6.3.1.1.	The nature of the strategy.....	138

6.3.1.2.	The infringement was consistent over time	139
6.3.1.3.	The comparable nature and complementarity of the practices in question	139
6.3.1.4.	The practices were able to foreclose competitors	140
6.3.1.5.	Other indirect evidence of the BEH group's strategy	140
6.3.2.	BEH's involvement	142
6.4.	Single and continuous infringement	145
6.5.	The conduct was capable of having anticompetitive effects	146
6.6.	Objective justification	149
6.7.	Substantial part of the internal market	150
6.8.	Capability to affect trade between Member States	151
6.9.	Conclusion on the infringement to Article 102 TFEU	152
6.10.	Duration of the infringement	152
6.10.1.	The Bulgarian transmission network	153
6.10.2.	The UGS Chiren	153
6.10.3.	The Romanian Transit Pipeline 1	153
6.10.4.	Conclusion	154
7.	Liability for the infringement	156
8.	Remedies and Fines	158
8.1.	Article 7(1) of Regulation (EC) No 1/2003	158
8.2.	Fines under Article 23(2) of Regulation (EC) No 1/2003	159
8.2.1.	Basic amount of the fine	160
8.2.1.1.	Calculation of the value of sales	160
8.2.1.2.	Percentage for gravity	161
8.2.1.3.	Other factors	161
8.2.1.4.	Duration	162
8.2.1.5.	Conclusion on the basic amount of the fine	162
8.2.2.	Adjustment of the basic amount of the fine	162
8.2.3.	Conclusion on the final amount of the fine	164
9.	Conclusion	164

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relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union

(AT.39849 - BEH Gas)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU)¹,

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 the Treaty², and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission Decision of 4 July 2013 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 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 Treaty³,

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

Having regard to the final report of the hearing officer in this case⁴,

Whereas:

1. INTRODUCTION

- (1) This Decision concerns an abuse of dominance by Bulgarian Energy Holding EAD ('BEH'), and its wholly owned subsidiaries Bulgargaz EAD ('Bulgargaz') and Bulgartransgaz EAD ('Bulgartransgaz') (together referred to as 'the BEH group') by refusing to grant other undertakings access to key gas transport and storage

¹ OJ C 115, 9.5.2008, p. 47.

² 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 TFEU and 102 TFEU, respectively. 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 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 is used throughout this Decision.

³ OJ L 123, 27.4.2004, p. 18.

⁴ Hearing Officer Report dated 12 December 2018.

infrastructure controlled by the BEH group, thereby protecting the dominant position of its supply arm (Bulgargaz) on the gas supply markets in the Republic of Bulgaria (“Bulgaria”).⁵ The infringement began with the refusal of the first access request on 30 July 2010 and continued until 1 January 2015 when the BEH group started granting objective, transparent and non-discriminatory access. The refusal to grant access included three distinct elements, including offering conditional access, and:

- (a) refusal to grant access to the domestic Bulgarian transmission network;
 - (b) refusal to grant access to the only gas storage facility in Bulgaria, namely Underground Gas Storage Chiren (‘UGS Chiren’); and
 - (c) capacity hoarding (reserving capacity that consistently is not used, without releasing it to the market) on the only viable gas import pipeline into Bulgaria, the Romanian Transit Pipeline 1.
- (2) The behaviour described at recital (1) resulted in the foreclosure of gas supply markets in Bulgaria, in violation of Article 102 TFEU.

2. THE ADDRESSEES OF THE DECISION

- (3) This Decision is addressed to three legal entities, namely BEH, Bulgargaz and Bulgartransgaz, which for the purpose of this Decision, form part of a single undertaking (see also Section 6.2.2).

2.1. Bulgarian Energy Holding

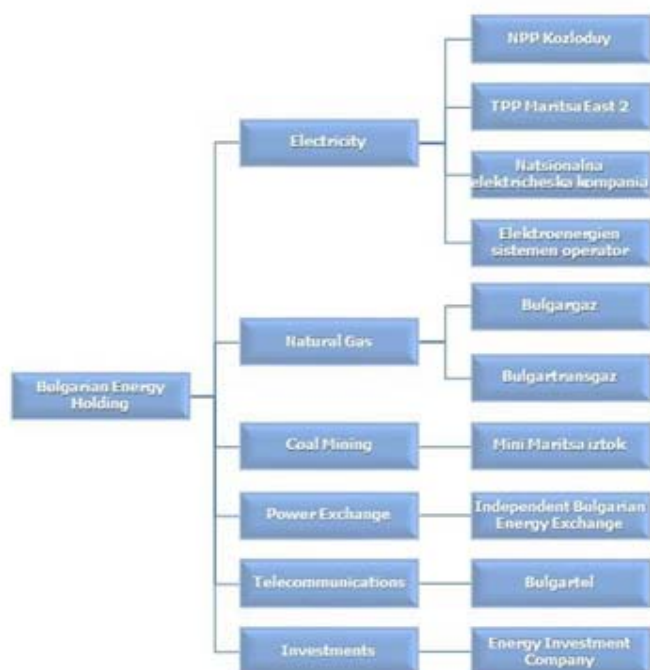
- (4) BEH is an undertaking active in the energy sector in Bulgaria; it is the successor to the state-owned oil and gas undertaking that was originally incorporated in 1973 and restructured as a joint stock undertaking in 1990. On 18 September 2008, the undertaking was renamed Bulgarian Energy Holding EAD. The Bulgarian State is the sole owner of BEH's capital. Rights of ownership are exercised by the Minister of Energy.⁶
- (5) BEH controls several Bulgarian energy undertakings, including the main electricity and natural gas incumbents. BEH is active at all levels of the energy supply chain, including power generation, lignite (brown coal) production, transmission, storage, and supply of electricity and natural gas. In the gas sector, BEH acts via its wholly-owned subsidiaries Bulgargaz and Bulgartransgaz.⁷ An illustration of BEH's ownership structure is provided in Figure 1.

⁵ As it will be explained in recital (351) the gas supply markets for the purpose of this Decision refers to (a) the market for the downstream wholesale supply of gas in Bulgaria and (b) to the retail supply of gas to large end customers connected to the Bulgarian transmission network in Bulgaria, except for supplies to customers in the South West of Bulgaria.

⁶ See BEH's Annual Consolidated Management Report Independent Auditor's Report and Consolidated Financial Statements dated 31 December 2015, [page 10], [...]. See also BEH's web site explaining its ownership structure, 1743.

⁷ See Bulgargaz' Financial Statements dated 31 December 2015, [page 3], [...] and Bulgartransgaz' Annual Financial Report dated 31 December 2015, [page 10], [...].

Figure 1: Ownership structure of the BEH group of undertakings⁸.



- (6) BEH's assets in 2014 and 2015 amounted to approximately BGN 15.5 billion (EUR 7.9 billion) and BGN 17.4 billion⁹ (EUR 8.9 billion)¹⁰, respectively, and its total consolidated turnover in 2014 and 2015 was approximately BGN 6.2 billion (EUR 3.2 billion) and BGN 6.7 billion¹¹ (EUR 3.4 billion), respectively.¹²

2.2. Bulgargaz

- (7) Bulgargaz is the main supplier of gas at the downstream wholesale level in Bulgaria (see Section 4.2). It is also the main supplier to final customers connected directly to the Bulgarian transmission network (see Section 4.4.3 below for a description of the networks). During the period from 2013 until 2016 Bulgargaz delivered gas to most large end customers (industrial customers and power / heating plants) and to all but few local distribution suppliers (see recital (45)(a)).¹³

⁸ See for BEH's undertaking structure, [...].

⁹ Bulgarian Energy Holding EAD, Annual Consolidated Management Report and Independent Auditor's Report Consolidated Financial Statements, 31 December 2015, p. 15, [...], available at: http://www.bgenh.com/OTCHETI/BEH/2015/BEH_AR_2015_CONSOL_EN.pdf.

¹⁰ Values in EUR on the basis of the European Central Bank reference average exchange rate for 2014 and 2015, i.e. BGN/EUR = 1.9558, available at: https://sdw.ecb.europa.eu/quickview.do?jsessionid=490E5A543DC06B033C744E9567215867?SERIES_KEY=120.EXR.A.BGN.EUR.SP00.A, [...].

¹¹ Bulgarian Energy Holding EAD, Annual Consolidated Management Report and Independent Auditor's Report Consolidated Financial Statements, 31 December 2015, p. 15, [...].

¹² Values in EUR on the basis of the European Central Bank reference average exchange rate for 2014 and 2015, i.e. BGN/EUR = 1.9558, [...]. See footnote 10.

¹³ Until 2013, Bulgargaz supplied gas to all large industrial customers, except for a large chemical producer partially supplied by [COMPANY 1]. From 2013 until the end of 2015, Overgas supplied its

- (8) Until January 2013, Bulgargaz was the sole importer of gas into Bulgaria. Between January 2013 and December 2015, Overgas Inc. AD ('Overgas') also imported small quantities of Russian gas into Bulgaria (see recitals (45) and (65)).
- (9) Bulgargaz purchases almost all of the limited amounts of gas produced within Bulgaria (see recital (66)).
- (10) In 2014 and 2015, Bulgargaz' total turnover amounted to BGN 1.5 billion (approx. EUR 767 million) and BGN 1.4 billion¹⁴ (approx. EUR 715 million), respectively.¹⁵

2.3. Bulgartransgaz

- (11) Bulgartransgaz is the only licensed gas Transmission System Operator ('TSO') in Bulgaria and operates the Bulgarian transmission network, the Bulgarian transit pipeline, and the only underground gas storage facility in Bulgaria (UGS Chiren, see recitals (71) and (160)).
- (12) In 2014 and 2015, Bulgartransgaz' total turnover amounted to BGN 360 million (approx. EUR 184 million) and BGN 359 million (approx. EUR 183 million)¹⁶ respectively.¹⁷

3. PROCEDURE

- (13) The Commission carried out a number of investigative measures between 2010 and 2018 in relation to the gas markets in Bulgaria. These included Requests for Information (RFIs) to the BEH group, several third parties and the Bulgarian energy regulator (the Energy and Water Regulatory Commission, 'EWRC')¹⁸. In addition, the Commission has received spontaneous submissions from Overgas.

subsidiary Toplofikacia Razgrad. See Overgas' reply to the Commission's request for information, dated 15 March 2016, question 2 [pages 2-3] [...]. In 2015, Overgas concluded contracts with some large industrial customers, however, as of 1 January 2016, Bulgargaz has been supplying all large industrial customers of Overgas. ([COMPANY 1]'s reply to the Commission's request for information, dated 22 May 2012, question 6(a) and 6(d), [page 3-4], [...]. Overgas' reply to the Commission's request for information, dated 18 September 2013, question 6 [page 8] [...]. Overgas' reply to the Commission's request for information, dated 15 March 2016, question 2 and 6 [pages 2 and 6] [...]). As regards local distribution companies, until the end of 2012, Bulgargaz was the sole supplier of natural gas to those companies. In the period 2007-2012, its sales to distribution companies amounted to less than 0.5 bcm/year (see Bulgargaz' reply to the Commission's request for information, dated 3 July 2012, question 9(i), [page 1], [...], as well as Bulgargaz' reply to the Commission's request for information, dated 16 September 2013, question 3, [...]).

¹⁴ See Bulgargaz' Annual Financial Statements, 31 December 2015, [page 26], [...], available at: http://www.bgenh.com/OTCHETI/Bulgargaz/Bulgargaz%202015/BGAZ_AR_2015_BG.pdf.

¹⁵ Values in EUR on the basis of the European Central Bank reference average exchange rate for 2014 and 2015, i.e. BGN/EUR = 1.9558, [...]. See footnote 10.

¹⁶ See Bulgartransgaz' Annual Financial Statement, 31 December 2015, [page 5], [...], available at: http://www.bgenh.com/OTCHETI/Bulgartransgaz/Bulgartransgaz%202015/BTGAZ_AR_2015_BG.pdf

¹⁷ Values in EUR on the basis of the European Central Bank reference average exchange rate for 2014 and 2015, i.e. BGN/EUR = 1.9558, [...]. See footnote 10.

¹⁸ In line with the amendment to the Bulgarian Energy Act, in State Gazette of the Republic of Bulgaria, issue No 17 of 06.03.2015, the name of the regulator has changed from 'the State Energy and Water Regulatory Commission' into 'Energy and Water Regulatory Commission'.

- (14) Between 27 and 30 September 2011, the Commission, assisted by the Bulgarian National Competition Authority ('NCA'), carried out on-the-spot inspections under Article 20(4) of Regulation (EC) No 1/2003 at the premises of BEH, Bulgargaz and Bulgartransgaz respectively in Sofia, Bulgaria. In the same period, the Commission also carried out inspections at the premises of Overgas under Article 20(3) of Regulation (EC) No 1/2003.
- (15) On 4 July 2013, the Commission initiated proceedings in this case within the meaning of Article 2(1) of Council Regulation (EC) No 773/2004 and Article 11(6) of Regulation (EC) No 1/2003.
- (16) Prior to issuing the Statement of Objections ('SO'), the Commission held the meetings with the BEH group on 19 June 2013, 15 September 2013, 15 October 2013, 16 December 2013 and 13 May 2014.
- (17) On 23 March 2015, the Commission notified the SO to BEH, Bulgargaz and Bulgartransgaz. The Commission took the preliminary view that the BEH group abused its dominant position in breach of Article 102 TFEU. More specifically, in the SO, the Commission took the view that the BEH group employed a strategy of refusing other undertakings access to key gas transport and storage infrastructure controlled by the BEH group, notably to: (a) the Bulgarian transmission network, (b) the only gas storage facility in Bulgaria, UGS Chiren and (c) the Romanian Transit Pipeline 1. Thereby, the BEH group protected the dominant position of Bulgargaz on the market for the downstream wholesale supply of natural gas and the retail supply of gas to large end customers directly connected to the Bulgarian transmission network.
- (18) Following the SO, access to the Commission's file was granted to Bulgargaz and Bulgartransgaz on 2 April and to BEH on 8 April 2015.
- (19) BEH, Bulgargaz and Bulgartransgaz submitted their replies to the SO respectively on 9 July, 10 July and 17 July 2015, within the set time limits.
- (20) An Oral Hearing was scheduled for 6 October 2015 at the BEH group request. The BEH group withdrew their request by letter of 4 September 2015. Instead they asked for a technical meeting at case team level, which took place on 6 October 2015 at the Commission's premises. The Commission also met with the BEH group on 2 December 2015, 20 April 2016, 6 July 2016, 7 October 2016 and 15 March 2017.
- (21) In March 2016, the Commission sent additional RFIs to the BEH group and other market participants in order to update the information used in the SO.
- (22) On 26 September 2016, the Commission sent to the BEH group a letter drawing the BEH group's attention to a number of specific items of evidence relating to the Commission's existing objections ('Letter of Facts').
- (23) The BEH group submitted their written reply to the Letter of Facts on 9 December 2016, in which the BEH group requested the Commission to convene an Oral Hearing. The Commission rejected this request on 22 December 2016, in view of BEH's unconditional withdrawal of its request for an Oral Hearing following the receipt of the Statement of Objection (see recital (20)).

- (24) BEH also submitted to the Commission the following spontaneous submissions: (a) 13 October 2016 concerning arguments on the duration of the alleged infringement,¹⁹ (b) 20 October 2016 on the revised value of sales²⁰, (c) on 13 December 2017 concerning arguments on the mitigating circumstances²¹, (d) on 12 March 2018 concerning comments on the documents obtained via access to file²² and (v) on 13 June 2016, a supplement to the BEH group defence in light [of another investigation of the Commission]²³.
- (25) On 28 June 2018, the BEH group via its external advisors obtained access to a Data Room where it obtained access to the confidential versions of the minutes of meetings held between the Commission and Overgas throughout the entire investigation. The external advisors participating in the Data Room expressed their views and conclusions over the content of the minutes in two reports, one confidential and one non-confidential. The non-confidential report was shared with the BEH group on 10 July 2018.
- (26) On 23 November and on 12 December, the Commission consulted the Advisory Committee on Restrictive Practices and Dominant Positions.

4. THE SERVICES CONCERNED BY THE DECISION

4.1. Natural gas

- (27) Natural gas is a primary source of energy consisting of hydrocarbons (mainly methane). It is mainly used for: (a) fuel and raw material in industrial processes, (b) electricity generation, and (c) heating and cooking by households.

4.2. The gas supply chain

- (28) The natural gas supply chain contains different steps from exploration, development and production to sales on wholesale and retail markets.
- (29) First, the finding of new gas reserves is generally described as on-shore or off-shore exploration, undertaken by exploration companies or governments.
- (30) Second, development concerns the setting up of adequate infrastructure for future production. Exploration and development are both very time and capital intensive.
- (31) Third, gas production is the extraction of gas from the subsurface, as well as the collection and treatment of gas for transportation. Without this treatment, gas could not be transported through the pipelines.

¹⁹ A non-paper of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on duration of the alleged infringement dated 12 October 2016.

²⁰ A submission of Bulgargaz EAD on the revised value of sales dated 20 October 2016, [...]. This submission was later supplemented by Bulgargaz' reply to the Commission's request for information dated 30 January 2017 [...].

²¹ A Submission of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on the mitigating circumstances that should reduce the final amount of the fine dated 13 December 2017.

²² Response to the evidence contained in document [...].

²³ Supplement to the BEH group's Defence and request to further access to information in the Commission's possession dated 13 June 2018.

- (32) Finally, gas supply means the contractual sale, including resale, of natural gas to customers.²⁴ A distinction can be made between the wholesale supply of gas and the retail supply to final customers. At wholesale level, the following distinction can be made:
- (a) at the upstream wholesale level, gas is mainly supplied to a wholesaler or importer by a producer or exporter for onwards sale to customers in downstream markets. Gas supply chains may also exist within the upstream wholesale level, whereby the gas is contractually sold via intermediaries to the national wholesaler; and
 - (b) at the downstream wholesale level, the wholesalers or importers supply gas to retail suppliers (for example distribution companies) or other wholesalers, mainly within the geographic area.
- (33) At retail level, gas is supplied to final customers, including large end customers and households.

4.3. Infrastructure

- (34) Gas can be transported over long distances via pipelines.²⁵ Pipelines can be mono or bidirectional depending on whether they can physically flow gas in one direction or both directions (physical reverse flow).²⁶ Pipeline companies install compressor stations along the route as natural gas needs to be pressurized in order to flow through the pipeline. The transport capacity of a pipeline mainly depends on its diameter and the amount of compressor stations installed. The construction of gas pipelines, stretching across countries or continents, is very capital and time intensive.
- (35) Capacity on a pipeline can be provided either as firm or interruptible. Firm capacity provides a right to a network user to transport gas on a guaranteed basis. Interruptible capacity, on the other hand, means that gas delivery may be subject to interruptions by the network operator. Since interruptible capacity is not guaranteed by the network operator, suppliers cannot normally rely on such capacity in order to respect their supply obligations to customers.
- (36) Transmission is the long distance transport of gas, mainly through high pressure networks.²⁷ Transmission networks are connected to local distribution networks, as well as to certain large end customers. Distribution networks distribute gas locally to

²⁴ See the definition in Article 2(7) of Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas, OJ L 211, 14.8.2009, p. 94.

²⁵ Gas can also be transported via a ship (in the form of liquified natural gas (LNG)) or on a smaller scale via train or lorry.

²⁶ There are two types of reverse flows, physical and virtual (also called contractual). The physical reverse flow requires gas transport in the usual direction to be stopped. Gas could then flow physically in the opposite direction. By virtual reverse flow the same effect is achieved as in physical reverse flow, but the gas does not actually flow in the opposite direction. Instead, the gas requested in the opposite direction is withdrawn and subtracted from the gas flowing in the usual direction.

²⁷ Transmission ‘means the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply’. See Article 2 (3) of Directive 2009/73/EC.

smaller final customers, in particular households. Gas transmission networks are operated by a TSO.

- (37) Natural gas can be stored for later use in underground gas storage facilities.²⁸ Such facilities can serve as a tool to balance demand and supply, mainly in view of seasonal variations of demand for gas.²⁹ Moreover, especially when there is a high dependence on a single source of supply, such facilities may provide important back-up possibilities in case of disruption of supply. Storage facilities contain two types of gas, namely working gas (gas regularly injected and withdrawn from the storage) and cushion gas (gas that remains at all times in the reservoir to allow for a minimum level of pressure).³⁰
- (38) The amount of gas that can be taken from the storage per time unit is referred to as 'withdrawal rate' or 'deliverability'. In general, a facility's withdrawal rate is directly linked to the total amount of gas in the reservoir.³¹ The amount of gas that can be injected into the storage per time unit is referred to as 'injection rate' or 'injectability'. The injection rate varies inversely with the total amount of gas in storage.³² A 'multi-cycle' storage allows for gas to be injected and withdrawn multiple times per year. Other storage facilities can only have gas injected in summer and withdrawn in winter, and cover seasonal variations of demand. Underground gas storage facilities are often converted from, for example, depleted gas fields or salt cavities.³³ Gas storage facilities are operated by Storage System Operators³⁴ ('SSOs').

²⁸ Storage facilities can also be located above ground, which can be the case for liquefied natural gas ('LNG') storage facilities, see Daniel J. Duann, 'Gas Storage: Strategy, Regulation, and some Competitive Implications', The National Regulatory Research Institute, September 1990, p. 3, 45-47 and 58, [...], <http://www.ipu.msu.edu/library/pdfs/nrri/Duann-Nagler-Gas-Storage-90-14-Sept-90.pdf>. They have different storage characteristics and are usually much smaller and more costly to build than underground gas storage facilities, see Chris Le Fevre, Gas storage in Great Britain, January 2013, Oxford Institute for Energy Studies, <http://www.oxfordenergy.org/wpcms/wp-content/uploads/2013/01/NG-72.pdf>, [pages 9-10], [...].

²⁹ Some flexibility could also be provided by other tools and measures, such as interruptibility or other modulation of customer demand, flexible supply contracts, flexible gas trading or line-pack (that is storage in transport pipelines by increasing or decreasing the gas pressure in those pipelines), see Commission Decision COMP/M.3868 *Dong/Elsam/Energi*, recital 55.

³⁰ See Kashy Aminian, Shahab D. Mohaghegh, (2008), Natural Gas Storage Engineering, <http://www.lopdf.net/preview/5oh8T8uOQEPmXrwmYlPcO2B2l-nwXxqxRlkaUBI-Kw/NATURAL-GAS-STORAGE-ENGINEERING-Shahab-Dean.html?query=WV-Oil-and-Gas-Permits> [pages 3-4], [...].

³¹ It is at its highest when the reservoir is the most full and declines as working gas is withdrawn. See Annex to Guidelines for Good TPA Practice for Storage System Operators ('GGPSSO'), point 3, published by ERGEG in 2005 and updated in 2011 [...], http://www.ceer.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Gas/2005/ERGEG_GGPSSO_Approved2005-03-02%20updated%202011_07_14%20Clean.pdf.

³² It is at its lowest when the reservoir is most full and increases as working gas is withdrawn. See Annex to GGPSSO, point 7, [...], http://www.ceer.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Gas/2005/ERGEG_GGPSSO_Approved2005-03-02%20updated%202011_07_14%20Clean.pdf.

³³ However, both are very expensive to build. For example, the capital cost for developing a storage facility from a depleted field amounts to 0.4-0.7 Euro per cubic meter of working capacity (that is, for a storage facility with a working capacity of 0.8 billion cubic meters ('bcm'), the cost will amount to

4.4. The Bulgarian Gas Sector

4.4.1. Regulatory framework

- (39) The primary legislation governing gas markets in Bulgaria is the Energy Act (the 'Bulgarian Energy Act').³⁵ The provisions of the Bulgarian Energy Act are complemented by secondary legislation.
- (40) Under the Bulgarian Energy Act, the EWRC is vested with regulatory powers in the sector.³⁶ The EWRC has the power to issue licenses with regard to activities in the energy sector, adopting the rules for trade of natural gas and setting the rules for access to the gas transmission and distribution networks, as well as for gas storage facilities. It also supervises the TSO and the SSO and has the power to issue binding decisions and impose sanctions in case of violation of the regulatory framework.
- (41) The liberalization of the gas market in Bulgaria, with an immediate effect on the provision of third party access to the gas transmission and transit networks, took place as from 1 January 2007 (for non-household customers) and as of 1 July 2007 for all consumers.³⁷ As of 1 July 2007, SSOs are also obliged to grant all users access to gas storage facilities under equivalent terms and conditions (see recital (166)).
- (42) Regulated prices in gas supply still apply in Bulgaria when buyers have not opted for the free market. The Bulgarian Energy Act lays down that regulated prices apply to gas sold by:³⁸
- (a) a public provider (that is, Bulgargaz)³⁹ to customers connected directly to the gas transmission network;
 - (b) a public provider (Bulgargaz) to end suppliers;⁴⁰ and
 - (c) end suppliers to customers connected to a distribution network.

EUR 320-560 million). The capital cost is higher with salt cavities, see Chris Le Fevre, Gas storage in Great Britain, January 2013, Oxford Institute for Energy Studies, <http://www.oxfordenergy.org/wpcms/wp-content/uploads/2013/01/NG-72.pdf>, [page 12], [...].

³⁴ See Article 2 (10) of Directive 2009/73/EC.

³⁵ Bulgarian Energy Act, promulgated in the State Gazette of the Republic of Bulgaria (SG) No 107 of 9.12.2003 'the Bulgarian Energy Act' with amendments.

³⁶ Article 21 of the Bulgarian Energy Act.

³⁷ See Article 4 of the Rules for granting access to the gas transmission or gas distribution networks adopted by EWRC's decision No II-2 [P-2] of 14 May 2007 and promulgated in State Gazette of the Republic of Bulgaria, issue No 45 of 8 June 2007.

³⁸ Article 30, recital 1 (points 7 and 8) of the Bulgarian Energy Act.

³⁹ A public provider is an undertaking, which obtained a license from EWRC to sell gas at regulated prices to end suppliers or to customers connected directly to the transmission network. Bulgargaz has a status of a public provider, on the basis of a license issued by EWRC. (Article 43 of the Bulgarian Energy Act).

⁴⁰ An end supplier is a retail supplier which operates at the level of the distribution networks. A license issued by the EWRC is necessary for its activity. Only one license of end supplier can be issued within the territory of the relevant distribution network (Article 43, recitals 2 (points 1 and 2a), 5 and 6 of the Bulgarian Energy Act). An end supplier supplies gas to customers connected to the relevant distribution network if they have not chosen another supplier (Paragraph 1, point 28a of the Additional Provisions of the Bulgarian Energy Act).

- (43) Apart from the cases set out in recital (42), which in practice constitute the majority of sales of natural gas in Bulgaria, sales take place at freely negotiated prices, including sales of gas by local producers and sales of gas by or between traders.⁴¹
- (44) Sections 5.2.3, 5.3.2 and 5.4.3 below set out the regulatory framework with regard to third-party access to the Bulgarian transmission network, UGS Chiren and Romanian Transit Pipeline 1 respectively.

4.4.2. *Market players*

- (45) The activities of Bulgargaz and Bulgartransgaz are set out in Section 2.2 and Section 2.3 respectively. Other major market players include undertakings active on the gas supply markets, in Bulgaria such as:
- (a) Overgas:⁴² operating in Bulgaria via its subsidiaries, it is the largest undertaking operating distribution networks and supplying gas to households and small undertakings connected to these networks (59.4% of all sales at distribution level).⁴³ Until December 2012, Overgas also purchased Russian gas on the Ukrainian/Romanian border (Isaccea) and resold it immediately to Bulgargaz at the same delivery point. Until January 2013 Bulgargaz was therefore the sole importer of gas into Bulgaria. Between 2013 and 2015, Overgas imported small quantities of Russian gas into Bulgaria.⁴⁴ Between 2013 and 2015 and after obtaining limited access to the Bulgarian transmission network, Overgas sold gas directly, mainly to its own subsidiaries,⁴⁵ which are gas distribution undertakings and the central heating undertaking in the city of Razgrad, Toplofikacia Razgrad EAD, ('Toplofikacia Razgrad').⁴⁶ In 2015 Overgas also supplied large industrial customers.⁴⁷ As of 1 January 2016 Overgas does not supply directly any large industrial customers in Bulgaria.⁴⁸

⁴¹ Article 176, recital 1 of the Bulgarian Energy Act. Traders are companies that can sell gas without a license and under freely negotiated prices.

⁴² Until 2016 Overgas' shares were held by Overgas Holding AD (50%), Gazprom Export OOO ('Gazprom Export') (49.51%) and Gazprom OAO ('Gazprom') (0.49%), see Overgas' Briefing Paper for DG Competition and DG Energy, [pages 7 and 9], [...]. Despite the recent organizational changes in Overgas' distribution business, it appears that Gazprom continues to be Overgas shareholder, see <http://www.capital.bg/biznes/kompanii/2016>, [...].

⁴³ Figures for 2014. See Bulletin on the State and Development of the Energy Sector in the Republic of Bulgaria, 2015, http://www.me.government.bg/files/useruploads/files/eoos/buleti_-energy- 2015-eng.pdf, [pages 8 and 14], [...].

⁴⁴ Overgas' reply to the Commission's request for information dated 26 April 2013, question 1 [page 4], [...]. See Overgas' Briefing Paper for DG Competition and DG Energy [page 11], [...].

⁴⁵ Most of these subsidiaries' networks are connected to the Bulgarian transmission network, see Overgas' Reply to the Commission's Request for Information, dated 28 August 2014, [page 2], [...].

⁴⁶ Overgas acquired Toplofikacia Razgrad on 30 September 2004, [page 1] [...], <http://toplo-razgrad.com/%D0%B7%D0%B0-%D0%BD%D0%B0%D1%81/%D0%B8%D1%81%D1%82%D0%BE%D1%80%D0%B8%D1%8F/>.

⁴⁷ Overgas' reply to the Commission's request for information dated 15 March 2016, questions 2 and 6 [pages 2 and 6], [...].

⁴⁸ Overgas' reply to the Commission's request for information, dated 15 March 2016, question 6 [page 6] [...].

- (b) Wintershall Erdgas Handelshaus Zug AG ('WIEE'):⁴⁹ the undertaking mainly operated on the upstream wholesale gas market where it purchased Russian gas on the Ukrainian/Romanian border (Isaccea) and resold it immediately to Bulgargaz at the same delivery point. WIEE also has a Bulgarian subsidiary, WIEE Bulgaria EOOD ('WIEE Bulgaria'), created in 2008 after a merger with a local gas trader.⁵⁰ Neither WIEE nor WIEE Bulgaria operates at the distribution level in Bulgaria (see recitals (62) and (63)).⁵¹
- (c) [COMPANY 1]: the undertaking is a small independent trader that in the past supplied one large end customer, a chemical producer, for part of its consumption.⁵² Currently [COMPANY 1] does not itself deliver gas to customers in Bulgaria; however it acts as an intermediary for the provision of technical and operational assistance for all the activities related to the transportation of natural gas to its customers.⁵³
- (46) At the level of the distribution networks, gas supply is conducted by regional and local (predominantly private) gas companies, working under a licensing regime and bound by price regulation (the end suppliers).⁵⁴
- (47) Domestic gas production is negligible (see recital (66) and is mainly carried out by two distinct undertakings: [COMPANY 2],⁵⁵ which produces the vast majority of domestically produced Bulgarian gas (see further recitals (66)-(67)), and [COMPANY 3], which only produces negligible quantities of gas.⁵⁶ Some limited

⁴⁹ Following a proposed transaction announced in November 2012, Wintershall completely transferred the natural gas trading and storage business jointly operated by Wintershall, Germany (BASF Group) (50%) and Gazprom (50%) to Gazprom. See Commission Decision of 3 December 2013, COMP/M.6910 *Gazprom/Wintershall/Target Companies*.

⁵⁰ This trader previously operated under the name 'Dexia Bulgaria OOD' - not to be confused with the current undertaking bearing the same name [confidential].

⁵¹ See WIEE's Reply to the Commission's Request for Information, dated 28 August 2014, Question 1, [page 1] and Annexes 1 and 2 [pages 12 to 43], [...]. WIEE's Reply to the Commission's Request for Information, dated 23 March 2016, Question 1 [page 1], [...]. See also <http://www.dker.bg/PDOCS/Gas-companies.pdf>, [...].

⁵² [COMPANY 1]'s reply to the Commission's request for information, dated 22 May 2012, question 6(a) and 6(d), [pages 3-4], [...].

⁵³ [COMPANY 1]'s reply to the Commission's request for information, dated 23 March 2016, questions 1 and 2 [page 2-3], [...].

⁵⁴ The subsidiaries of Overgas accounted for 59.4% market share of all sales at distribution level, Citygas Bulgaria EAD accounted for 16.2% and Black Sea Technology Company EAD accounted for 10.7% in 2014. See Bulletin on the State and Development of the Energy Sector in the Republic of Bulgaria, 2015. http://www.me.government.bg/files/useruploads/files/eoos/buleti_-energy- 2015-eng.pdf, [pages 8 and 14], [...].

⁵⁵ In 2013, [COMPANY 2] became part of Petroceltic International Plc, a publicly listed oil and exploration and production undertaking, headquartered in Dublin. See [COMPANY 2]'s reply to the Commission request for information, dated 18 September 2013, question 6, [page 10], [...]. In 2011 and 2012, the total annual gas production from all the fields exploited by [COMPANY 2] amounted to 437 million cubic meters ('mcm') and 383 mcm respectively, see [COMPANY 2]'s reply to the Commission request for information, dated 18 September 2013, Annex 2, [page 2], [...].

⁵⁶ In 2011 and 2012, the total annual gas production from all the fields exploited by [COMPANY 3] amounted to roughly 5 mcm, see [COMPANY 3]'s reply to the Commission's request for information, dated 19 September 2013, question 2, [page 2], [...].

quantities are also produced by [COMPANY 4] (see further recitals (66)-(67)).⁵⁷ The vast majority of gas supplied from local gas production was sold to Bulgargaz.⁵⁸

4.4.3. *Gas infrastructure*

- (48) Gas is imported to Bulgaria from Russia, via Ukraine and Romania.
- (49) There exist three pipelines for bringing natural gas to Bulgaria, namely Romanian Transit Pipelines 1, 2 and 3. These pipelines, the so-called 'Balkan Corridor' or 'the Trans-Balkan Pipeline', were commissioned in the 1970s, 1980s and 2000s respectively.

⁵⁷ [COMPANY 4]'s reply to Commission's request for information, dated 10 October 2013, question 3, [page 2], [...].

⁵⁸ For example, from all the gas extracted by [COMPANY 2] in 2013, [60-70]% was sold to Bulgargaz, the remaining gas was sold to [COMPANY 5], see [COMPANY 2]'s reply to Commission request for information, dated 28 August 2014, Questions 1 and 2, [page 1], [...]. In 2012, 79-96% was sold to Bulgargaz, the remaining 11-14% was sold to [COMPANY 5]. In 2011, the sales amounted to between 83-100% and 6-8% respectively and in 2010 to 71-89% and 15-22% respectively, see [COMPANY 2]'s reply to Commission's request for information, dated 18 September 2013, Appendix no 2, [pages 2-3], [...].

Figure 2: Map of transit pipelines.⁵⁹



- (50) In Bulgaria, gas transmission takes place on two different pipeline systems, a purely domestic one - the Bulgarian transmission network - and a system of transit pipelines – ‘the Bulgarian Transit Pipeline’, the latter used for limited supplies in the South West of Bulgaria and mainly transporting Russian gas flowing through Romania to Turkey, Greece and the former Yugoslav Republic of Macedonia.⁶⁰

⁵⁹ Transmission capacity map, ENTSG, 2015,
https://www.entsog.eu/public/uploads/files/maps/transmissioncapacity/2015/ENTSG_CAP_MAY2015_A0FORMAT.pdf.

⁶⁰ EWRC's reply to the Commission's request for information dated 17 July 2012, questions 18 and 29, [pages 11, 13 and 23], [...]. See also: <http://www.bulgartransgaz.bg/bg/pages/gaz-infra-54.html> Bulgartransgaz' cross-border exit points – capacity used in 2009-2013 - Turkey (10-13 bcm), Greece (2-2.8 bcm) and the former Yugoslav Republic of Macedonia (0.1 bcm), [...], also available at: http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/trans_exit_used_2009_2013.pdf.

Figure 3: Bulgarian pipeline systems – the Bulgarian transmission network (in red) and the Bulgarian Transit Pipeline (in blue). See Annex 1.



Source: Bulgartransgaz' reply to the Commission's request for information, dated July 2012, Annex 1, [...]

- (51) The Romanian Transit Pipeline 1, (at least until April 2016), was the only viable route for bringing gas to Bulgaria with the aim of further supply in (most parts of) Bulgaria (see recital (56)).⁶¹ The pipeline connects gas metering stations ('GMS') Isaccea 1 on the Ukrainian/Romanian border with GMS Negru Voda 1 on the Romanian-Bulgarian border. The pipeline is connected to the Bulgarian transmission network with entry point Negru Voda 1.⁶² As set out in more detail in Section 5.4.1 below, Bulgargaz has for many years reserved the full capacity of this pipeline for itself.
- (52) On Bulgarian territory, the Romanian Transit Pipeline 2 (connecting GMS Isaccea 2 and 3 on the Ukrainian/Romanian border with GMS Negru Voda 2 ('Negru Voda 2') on the Romanian/Bulgarian border) and Romanian Transit Pipeline 3 (connecting GMS Isaccea 4 on the Ukrainian/Romanian border with GMS Negru Voda 3 ('Negru Voda 3') on the Romanian/Bulgarian border) merge into one single pipeline forming the Bulgarian Transit Pipeline. The pipeline has the following exit points: Koula

⁶¹ As explained in recitals (53)(57) gas can be brought to the Bulgarian border via the Romanian Transit Pipelines 2 and 3 and then transported further through the Bulgarian Transit Pipeline. However, at least until April 2016 gas could not be supplied to most customers in Bulgaria via the Bulgarian Transit Pipeline, except for customers in the South-West of Bulgaria.

⁶² See EWRC's reply to the Commission's request for information, dated 17 July 2012, question 18, [page 11], [...].

(Kulata) (Bulgaria)/Sidirokastro (Greece), Malkoclar (Turkey) and Jidilovo (the former Yugoslav Republic of Macedonia).⁶³

- (53) The Bulgarian Transit Pipeline and the Bulgarian transmission network have two different working regimes (for example, they have different gas pressure) and they operate separately. In relation to the metering of gas transported through Bulgaria to neighbouring countries all physical connections between the Bulgarian Transit Pipeline and the Bulgarian transmission network have been decommissioned.⁶⁴ There are two exceptions, namely: (a) the connection at compressor station Lozenetz, which was not decommissioned but sealed during the entire period of the infringement and (b) the connection at compressor station Ihtiman (operational since January 2014).⁶⁵
- (54) Nevertheless, at least until April 2016 the Bulgarian Transit Pipeline could not be used to import gas to Bulgaria apart from the South West region. First, the connection at compressor station Lozenetz, although having been restored, at least until the end of 2016 was not commercially operational.⁶⁶ Second, the connection at compressor station Ihtiman became operational on 1 January 2014, but no firm capacity was offered until April 2016 in the direction from the Bulgarian Transit Pipeline towards the Bulgarian transmission network.⁶⁷
- (55) On 15 April 2016 Bulgartransgaz announced on its website 1 mcm/day⁶⁸ available firm capacity at compressor station Ihtiman in the direction from the Bulgarian Transit Pipeline towards the Bulgarian transmission network.⁶⁹ This represented around 12% of Bulgaria's gas consumption in 2015.

⁶³ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, [page 1], [...]. See also Overgas' submission of 19 July 2012, [page 3] and Enclosure 2, [page 10], [...]. The Bulgarian Transit Pipeline total technical capacity amounts to 20 bcm/year (see Section 5.4) it was fully booked between 2009 and 2014 and the maximum usage of the pipeline reached between 89 and 100% each winter. See Minimum and maximum capacity use for 2009, 2010, 2011, 2012 and 2013 at cross-border entry and exit points, [...], http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/min_max_2009_2013.pdf. For the year 2014, see also <http://www.bulgartransgaz.bg/en/pages/aktualni-godishni-danni-2014-105.html> [...].

⁶⁴ See Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 5, [pages 1 and 2], [...], and Overgas' submission of 19 July 2012, page 5, [...].

⁶⁵ The seals were regularly controlled by Bulgartransgaz and Gazprom Export (being the main shipper and owner of the gas transported through Bulgaria to neighbouring countries). See Bulgartransgaz' reply to the Commission's request for information, dated 9 July 2012, question 5, [pages 2 and 3], [...] and Bulgartransgaz' reply to the Commission's request for information, dated 16 September 2013, question 17, [page 18], [...].

⁶⁶ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 12 [pages 19-20], [...].

⁶⁷ Bulgartransgaz' reply to the Commission's request for information, dated 16 September 2013, question 17, [page 17], [...]. See also Bulgartransgaz 2014-2013 Ten Year Network Development Plan, [page 55], [...], http://www.bulgartransgaz.bg/files/useruploads/files/financial_reports/tyndp_2014_2023_bg.pdf.

⁶⁸ Mcm refers to million cubic meters.

⁶⁹ See also Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, Question 12 [page 19], [...]; <http://www.bulgartransgaz.bg/bg/pages/aktualni-godishni-mesechni-danni-2016-g--122.html> [...].

- (56) The lack of free capacity on the Bulgarian Transit Pipeline (see recital (78)) and the lack of firm capacity (at least until April 2016) offered from the Bulgarian Transit Pipeline to the Bulgarian transmission network means that the Bulgarian Transit Pipeline was not a viable supply route to customers on the Bulgarian transmission network.
- (57) Against this background, at least until April 2016, the Bulgarian Transit Pipeline and the Bulgarian transmission network effectively operated separately from each other and the Bulgarian Transit Pipeline could not be considered a viable alternative way for supplying gas into Bulgaria.⁷⁰
- (58) Moreover, at least until July 2016, the Bulgarian transmission network was not connected to the gas networks of neighbouring countries. As explained in more detail in Section 5.4.2 below, there are projects for the construction of interconnectors with Romania (connecting Ruse and Giurgiu, Project Reverse Flow), Greece (IGB, connecting Komotini and Stara Zagora), Turkey (ITB) and Serbia none of which was operational during the investigated period. Finally, at least until July 2016 there were no realistic possibilities of using reverse flow from other countries for commercial purposes (see recital (269)).
- (59) Against this background, at least until April 2016 the Romanian Transit Pipeline 1 was the only viable route for bringing gas to Bulgaria with the aim of further supply in (most parts of) Bulgaria.⁷¹ Seasonal fluctuation of domestic consumption is balanced via UGS Chiren, which is the only storage facility in Bulgaria and has a working capacity of around 0.5 bcm. UGS Chiren is connected to the Bulgarian transmission network (see recital (160)).

4.4.4. *Gas consumption and sources of supply*

- (60) Bulgarian gas consumption is split according to industrial customers (ca 47 % of total consumption), central heating plants (ca 35% of total consumption) and residential and small commercial customers connected to local distribution networks (ca 17% of total consumption).⁷²
- (61) Since 2009, domestic gas consumption in Bulgaria has been slightly above 2.5 bcm/year (2.9 bcm/year⁷³ in 2011, 2.8 bcm/year in 2014⁷⁴ and almost 3 bcm/year in 2015⁷⁵). However, domestic consumption has fallen considerably since the late '80s

⁷⁰ Bulgartransgaz reply to the Commission's request for information dated 28 August 2014, question 2, [pages 2-4], [...].

⁷¹ Bulgartransgaz reply to the Commission's request for information dated 28 August 2014, question 2, [pages 2 and 4], [...].

⁷² EWRC's reply to the Commission's request for information dated 17 July 2012, question 25, figures for 2009-2011, [page 5], [...]. See also EWRC Annual Report to the European Commission dated July 2015, [page 46], [...].

⁷³ See EWRC's Annual Activity Report for 2012, [page 40], [...], http://www.dker.bg/PDOCS/ann_rep_12.pdf.

⁷⁴ See National Statistical Institute in Bulgaria, [...], <http://www.nsi.bg/en/content/5024/production-and-deliveries-natural-gas>; http://www.nsi.bg/sites/default/files/files/pressreleases/Energy2014-12_IKMXQ0X.pdf, [...].

⁷⁵ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 4 [page 8], [...].

- (when it reached 6-7 bcm).⁷⁶ The Bulgarian transmission network is therefore dimensioned to carry considerably higher volumes than it does today.
- (62) At least during the infringement period, Bulgaria almost fully depended on gas imports from Russia to satisfy domestic demand. The domestic gas production is negligible (see recital (66)) and as explained in recital (63), the main importers of natural gas to Bulgaria were Bulgargaz and between 2013 and the end of 2015, Overgas.
- (63) Bulgargaz has imported Russian gas to Bulgaria under contracts with Overgas, WIEE and Gazprom Export:
- (a) As mentioned in Section 4.4.2, until the end of 2012, Bulgargaz purchased gas at the Ukrainian/Romanian border from Overgas and WIEE, both companies in turn having purchased the gas from Gazprom Export.⁷⁷ From 2009 to 2012, Bulgargaz purchased approximately [1.5 – 3.5] bcm of gas per year from these two companies.⁷⁸ In 2009 and 2010, Bulgargaz purchased approximately [1 – 3] bcm/year from Overgas and approximately [0 – 1.5] bcm/year from WIEE. As from 2011, following the expiry of part of its contract with Bulgargaz, Overgas instead started selling its surplus gas to Bulgargaz via WIEE.⁷⁹ Overgas initially contemplated using the surplus gas for direct supplies to customers in Bulgaria, but failed to gain access to the necessary transport infrastructure (see Section 5.2.4.2 below);⁸⁰
 - (b) Until the end of 2012, Bulgargaz also purchased small quantities of gas (approximately [0 – 0.5] bcm per year) directly from Gazprom Export, with delivery at the Romanian/Bulgarian border, for supplies to customers in the South West of Bulgaria through the Bulgarian Transit Pipeline;⁸¹ and
- (64) On 15 November 2012, Bulgargaz and Gazprom Export signed a direct gas supply contract, which *de facto* eliminated Overgas as an intermediary for the supply of gas to Bulgaria as from the start of 2013. Under this contract, Bulgargaz purchases [2.5 – 3.5] bcm of gas per year until 31 December 2022. The new contract also covers the supply of gas to the South West of Bulgaria, shipped via the Bulgarian Transit

⁷⁶ The maximum annual quantities transported through the Romanian Transit Pipeline 1 were above 7 bcm in 1988, see Romanian TSO Transgaz SA's presentation, [page 26], [...].

⁷⁷ See Overgas' Briefing Paper for DG Competition and DG Energy, [pages 9 and 11], [...] and Overgas' reply to the Commission's request for information dated 26 April 2013, question 1 [page 4], [...].

⁷⁸ See EWRC's reply to the Commission's request for information dated 17 July 2012, question 23, [page 3], [...]; Gas Supply Agreements, Inspection documents AAT 1003 – AAT 1020, [page 6], [...]; [pages 3-4, 8-9 and 13], [...]; [pages 3 and 22], [...], and AAT 1029 – AAT 1046, [pages 15-16], [...]; [pages 3-4], [...]; [pages 13-15], [...] and [pages 2-4], [...].

⁷⁹ In 2011, the surplus gas which Overgas sold to WIEE amounted to approximately 1 bcm.

⁸⁰ Overgas' submission of 20 January 2011, [page 27], [...]. In 1998 the contract was concluded with Topenergy but was replaced by Overgas as contract partner in 2003, see Addendum No 9, of 28 July 2003 to the contract.

⁸¹ See contract between Gazprom Export and Bulgargaz of 8 October 2003, Inspection documents AAT 1021, [page 8], [...], see also Addendum No 7 to the same contract from December 2010, [page 11], [...]; See also EWRC's reply to the Commission's request for information dated 17 July 2012, question 23, [page 3], [...]. Delivery point: Gas Metering Station (GMS) Negru Voda 2 and GMS Negru Voda 3.

Pipeline.⁸² In 2013 and 2014 WIEE Bulgaria also acted as an intermediary for the sale of certain small amount of gas to Bulgargaz.⁸³

- (65) As from January 2013 Overgas had an agreement with Gazprom Export for the purchase of [0-0.5] bcm of gas with delivery points at the Ukrainian/Romanian border as well as the Romanian/Bulgarian border.⁸⁴ However, in 2013 Overgas imported only [0.2-0.3] bcm (see recital (110)).⁸⁵ Moreover, without access to storage, Overgas was limited in the amount of gas that it could bring to the market.⁸⁶
- (66) Only a small percentage of the gas demand in Bulgaria is satisfied from local gas production. Domestic gas production amounted to roughly 2 % of Bulgarian consumption in 2010 and grew to 11 % in 2012, but has thereafter decreased to around 7 % in 2014.⁸⁷ As previously mentioned, Bulgargaz purchases the majority of available domestic gas.⁸⁸

⁸² Bulgargaz' reply to the Commission's request for information dated 9 April 2013, Annex 2, [pages 12-14], [...].

⁸³ See WIEE's reply to the Commission's request for information dated 28 August 2014, question 1, [page 1] [...] and WIEE reply to the Commission's request for information dated 23 March 2016, question 1, [page 1], [...].

⁸⁴ Overgas had contracts with Gazprom Export, as of January 2013 and as of January 2014. Overgas' reply to the Commission's request for information dated 26 April 2013, Annex 3.1, [page 16] (letter from Gazprom Export), [...] and Overgas' reply to the Commission's request for information dated 28 August 2014, Annex 2, [pages 6 and 10-11], [...].

⁸⁵ Overgas' reply to the Commission's request for information dated 26 April 2013, Annex 3.2, [page 6], [...].

⁸⁶ Overgas Inc.'s reply to the Commission's request for information dated 18 September 2013, question 5, [pages 7-8], [...].

⁸⁷ In 2012, the local extraction amounted to 336 mcm, 11% of the domestic consumption. The production was due to two new gas deposits in Kaliakra and Kavarna. However, in 2014, there has been a significant decrease in the local production as it amounted to 182 mcm. According to publicly available figures from Bulgartransgaz, domestic gas production provided for only 6.5% and imports for 93.5% of total supplies in 2014. See EWRC's Annual Report to the European Commission, dated July 2015, [pages 6 and 45], [...], <http://www.dker.bg/PDOCS/ann-rep-ec-2015-en.pdf>. Bulgartransgaz' '2015-2024 Ten-Year Network Development Plan of Bulgartransgaz EAD', [page 12], [...].

http://www.bulgartransgaz.bg/files/useruploads/files/financial_reports/TYNDP_2015_2024_EN.pdf

⁸⁸ For example, as described in footnote 58 from all the gas extracted by [COMPANY 2] in 2013, [60%-70%] was sold to Bulgargaz, the remaining gas was sold to [COMPANY 5], see [COMPANY 2]'s reply to Commission request for information dated 28 August 2014, question 1, 2 [page 1], [...]. In 2012, [79-96%] was sold to Bulgargaz, the remaining [11-14%] was sold to [COMPANY 5]. In 2011, the sales amounted to between [83-100%] and [6-8%] respectively and in 2010 to [71-89%] and [15-22%] respectively, see [COMPANY 2]'s reply to Commission's request for information dated 18 September 2013, Appendix no 2, [pages 2-3], [...]. The contracts between [COMPANY 2] and Bulgargaz generally have a [duration] and certain of these contracts and contract riders contain [provisions] in favour of Bulgargaz. In fact, some of [COMPANY 2]'s total production was supplied to Bulgargaz under [provisions]. See [COMPANY 2]'s reply to Commission request for information dated 28 August 2014, question 1 [page 1], [...] and [COMPANY 2]'s reply to Commission's request for information dated 18 September 2013, Appendix no 3 [pages 1-2], [...]. Bulgargaz has also secured 80% of the small quantities of gas produced by [COMPANY 4] until 31 December 2016. See [COMPANY 4]'s reply to the Commission's request for information dated 19 September 2013, question 4, [page 3], [...]. Finally, although [COMPANY 3] sells natural gas to a broader range of customers, its production is very limited and has been steadily decreasing over the past 5 years. See [COMPANY 3]'s reply to Commission's request for information dated 19 September 2013, question 2, [pages 2 and 3], [...]. See

(67) Several production concessions for the exploitation of gas fields have been granted. For example:

- (a) In 2001, [COMPANY 2] signed a concession agreement entitling it to produce natural gas from the Galata gas field up to 2026.⁸⁹ However, production from Galata was suspended in order to convert the gas field into gas storage between January 2009 and October 2011⁹⁰ (with an estimated future working capacity of up to 1 bcm).⁹¹ Since then at least until 2015 the gas production from Galata nevertheless resumed as [COMPANY 2] still has not obtained the required agreement of the Bulgarian Government and no progress has to date therefore been made in converting the field into a gas storage.⁹² At least until 2015 Galata continued to be classified as 'gas storage conversion ready'.⁹³
- (b) In 2010, [COMPANY 2] was granted concessions for gas production from the currently exploited gas fields Kavarna and Kaliakra for a period of ten and seven years respectively (after which the gas fields are expected to be depleted);⁹⁴
- (c) In 2012, a concession was granted to [COMPANY 4] for gas production from a new gas field, Koynare, where the target was to start extraction in the second half of 2013.⁹⁵ However, at least until 2015 commercial extraction had not yet started⁹⁶; and

also EWRC's Annual Report to the European Commission dated July 2015, [page 6] <http://www.dker.bg/PDOCS/ann-rep-ec-2015-en.pdf>, [...].

⁸⁹ See [COMPANY 2]'s reply to the Commission request for information dated 18 September 2013, question 4, [page 2], [...].

⁹⁰ [COMPANY 2]'s reply to the Commission request for information dated 18 September 2013, questions 4 and 6, [pages 2 and 3-5], [...].

⁹¹ Overgas' submission of 19 July 2012, [page 7], [...].

⁹² See [COMPANY 2]'s reply to Commission request for information dated 28 August 2014, Question 3 [page 1], [...]. See also See Bulgartransgaz' 2015-2024 Ten-Year Network Development Plan, dated 30 April 2015, [page 13], [...], http://www.bulgartransgaz.bg/files/useruploads/files/financial_reports/TYNDP_2015_2024_EN.pdf.

⁹³ See [COMPANY 2]'s reply to the Commission request for information dated 18 September 2013, questions 4 and 6, [page 2-6], [...]. See also See Bulgartransgaz' 2015-2024 Ten-Year Network Development Plan dated 30 April 2015, [page 13], [...], http://www.bulgartransgaz.bg/files/useruploads/files/financial_reports/TYNDP_2015_2024_EN.pdf.

⁹⁴ State Gazette of the Republic of Bulgaria, issues No 65 of 20 August 2010 and No 80 of 12 October 2010. See also [COMPANY 2]'s reply to the Commission request for information dated 18 September 2013, question 5, [page 2], [...].

⁹⁵ State Gazette of the Republic of Bulgaria, issue No 93 of 27 November 2012; Stenographic record of meeting of the Bulgarian Council of Ministers No 43, 14 November 2012, point 46 on [page 34-35], [...], http://pris.government.bg/prin/document_view.aspx?DocumentID=MWsvxSLdK1rqIbG9jUXPLQ.

⁹⁶ See Bulgartransgaz' 2015-2014 Ten-Year Network Development Plan, dated 30 April 2015, [page 13], [...], http://www.bulgartransgaz.bg/files/useruploads/files/financial_reports/TYNDP_2015_2024_EN.pdf.

- (d) In 2013, [COMPANY 2] was granted a concession for another gas field, Kavarna East, for a period of 6 years from which certain small quantities of gas are currently extracted.⁹⁷
- (68) Gas imports are, however, likely to continue to be prevalent as domestic gas production is likely to remain limited.

5. PRACTICES WHICH ARE SUBJECT OF THE DECISION

5.1. Access to Gas Infrastructure in/to Bulgaria

- (69) Section 5 demonstrates that the BEH group, from 30 July 2010 until 1 January 2015, consistently engaged in preventing or attempting to prevent third party access to key infrastructure in order to protect its gas supply arm (Bulgargaz).
- (70) New (potential) entrants on the gas supply markets in Bulgaria requested access to the following key infrastructure:
- (a) the Bulgarian transmission network, to which customers are directly or indirectly (via local distribution networks) connected;
 - (b) UGS Chiren, the only gas storage facility, which allows to cover seasonal variations in gas consumption; and
 - (c) the Romanian Transit Pipeline 1, which was, at least until April 2016, the only viable option to transport gas to Bulgaria with the aim of further supply in (most parts of) Bulgaria (see Section 4.4.3).

5.2. The Bulgarian transmission network

5.2.1. The characteristics of the Bulgarian transmission network

- (71) The Bulgarian transmission network is the only domestic transmission network in Bulgaria. It is owned and operated by Bulgartransgaz.⁹⁸ The majority of large end customers and distribution networks are connected to the Bulgarian transmission network.
- (72) The majority of customers in Bulgaria are supplied through the Bulgarian transmission network, which in turn connects to the local distribution networks.⁹⁹ Network users are connected at 115 exit points.¹⁰⁰ However, in the South West of Bulgaria, customers (including local distribution networks) are not connected to the

⁹⁷ State Gazette of the Republic of Bulgaria, issues No 65 of 20 August 2010 and No 80 of 12 October 2010. See also [COMPANY 2]'s reply to the Commission request for information, dated 18 September 2013, question 5, [page 3], [...]. See also See Bulgartransgaz' 2015-2014 Ten-Year Network Development Plan, dated 30 April 2015, [page 13], [...], http://www.bulgartransgaz.bg/files/useruploads/files/financial_reports/TYNDP_2015_2024_EN.pdf

⁹⁸ Bulgartransgaz' 2013-2022 Ten Year Network Development Plan, [page 8], [...].

⁹⁹ According to the contracted capacities reported by Bulgartransgaz for 2013, the customers connected to this network account for over 97% of the overall capacity contracted in Bulgaria. In 2015, the technical capacity of the exit points on the Bulgarian Transit Pipeline for supply of customers in Bulgaria represents 1.3% of the technical capacity of the exit points on the Bulgarian transmission network, see [...], column (D), row (329) and [...], column (D), row (27).

¹⁰⁰ See [...], <http://www.bulgartransgaz.bg/en/pages/unfrastruct-1-95.html>.

Bulgarian transmission network but instead are directly connected to the Bulgarian Transit Pipeline.

- (73) As explained in recitals (51)-(54), the Bulgarian transmission network was not connected to the gas networks of neighbouring countries at least until July 2016 and at least until April 2016 there was no firm capacity offered from the Bulgarian Transit Pipeline towards the Bulgarian transmission network. Therefore, at least until April 2016, the only possibility to bring gas to Bulgaria was via the Romanian Transit Pipeline 1 (see recitals (51) and (55)-(57)).

5.2.2. *Capacity utilisation*

- (74) According to a 2015 report by the EWRC, there was no congestion on the Bulgarian transmission network, since the projected capacity of the transmission system was 8 bcm and the consumption was less than 40% of the maximum projected consumption.¹⁰¹
- (75) This is also demonstrated by information published on Bulgartransgaz' website, which shows spare capacity on the Bulgarian transmission network with respect to the entry point Negru Voda 1.¹⁰² For instance, and as illustrated in Figure 4, the maximum monthly level of usage in the winter period (December-March) was below 66% of the total capacity for the period 2009-2013 at entry point Negru Voda 1.¹⁰³ During the rest of the year (April-November), the capacity used was in the range of 50% of the total monthly capacity.¹⁰⁴

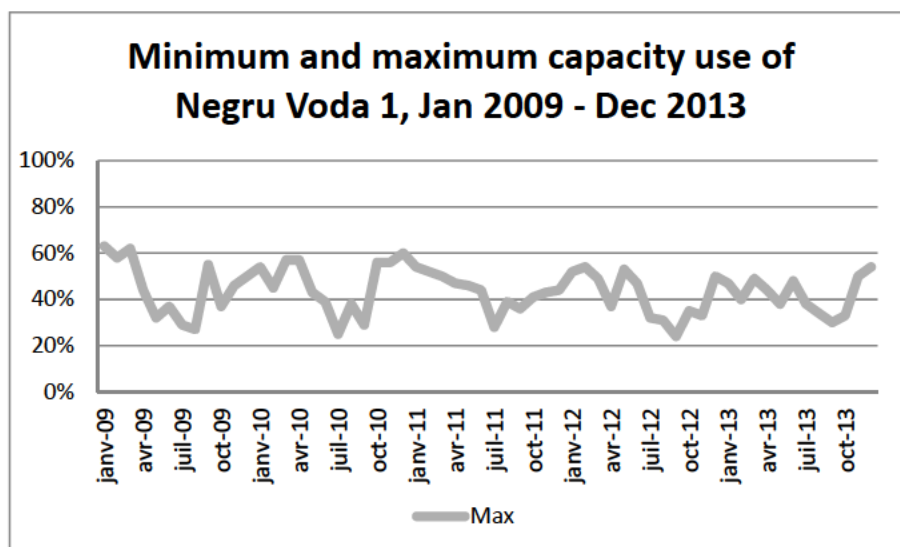
¹⁰¹ See EWRC Annual Report to the European Commission dated July 2015, [page 44], [...] <http://www.dker.bg/PDOCS/ann-rep-ec-2015-en.pdf>.

¹⁰² See Minimum and Maximum Capacity use for 2009, 2010, 2011, 2012 and 2013 at Cross-border entry and Exit Points, [...]. Anyone booking capacity at the entry point Negru Voda 1 must also book capacity at one of the 115 exit points. For the year 2014, please see <http://www.bulgartransgaz.bg/en/pages/aktualni-godishni-danni-2014-105.html>, [...].

¹⁰³ See Minimum and Maximum Capacity use for 2009, 2010, 2011, 2012 and 2013 at Cross-border entry and Exit Points, [...].
http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/min_max_2009_2013.pdf.
For the year 2014, please see <http://www.bulgartransgaz.bg/en/pages/aktualni-godishni-danni-2014-105.html>, [...].

¹⁰⁴ Minimum and Maximum Capacity use for 2009, 2010, 2011, 2012 and 2013 at Cross-border entry and Exit Points, [...].
http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/min_max_2009_2013.pdf.
For the year 2014, please see <http://www.bulgartransgaz.bg/en/pages/aktualni-godishni-danni-2014-105.html>, [...].

Figure 4: Maximum capacity use of entry point Negru Voda 1, Jan 2009 - Dec 2013, on a monthly basis



Source: Bulgartransgaz' Cross-border entry and exit points – used capacity¹⁰⁵

- (76) According to Bulgartransgaz' data, the maximum used capacity at entry point Negru Voda 1 was 61 % in 2014¹⁰⁶ and 65.6 % in 2015¹⁰⁷.
- (77) In this respect, the Commission also notes that Bulgartransgaz appears to have started publishing certain data on its website regarding transmission capacity following a decision of the EWRC of 17 August 2009.¹⁰⁸ However, despite a regulatory obligation requiring TSOs to do so¹⁰⁹, Bulgartransgaz did not publish, on a regular and rolling basis, information which would enable third parties to properly assess how much capacity was available on the network at different points in time.¹¹⁰

¹⁰⁵ Minimum and Maximum Capacity use for 2009, 2010, 2011, 2012 and 2013 at Cross-border entry and Exit Points, [...]. http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/min_max_2009_2013.pdf.

¹⁰⁶ See Technical, contractual firm and available firm capacity at entry and exit points of the National gas transmission network in 2014, [...].

¹⁰⁷ See Technical, contractual firm and available firm capacity at entry and exit points of the National gas transmission network in 2015, [...].

¹⁰⁸ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 13, [page 15], [...].

¹⁰⁹ See Article 6 of Regulation (EC) 1775/2005 and Article 18 of Regulation (EC) No 715/2009.

¹¹⁰ RWE having requested access to Bulgartransgaz' network in February 2011, underlined that the published information on available capacities was of a very poor quality, constituting a major obstacle for third parties attempting to access the Bulgarian transmission network (see further Section 5.2.4.2). See RWE's reply to Commission's request for information, dated 27 April 2012, Question 11, [page 6] [...]. Already in January 2010, the EWRC confirmed that Bulgartransgaz by then had complied with some of the requirements for making information on the network's capacity available, but it had not complied with all the requirements (for example, it had failed to provide regular/daily updates on available short-term services and long-term forecasts on unused capacity). See Bulgartransgaz' reply to Commission's Request for Information, dated 13 September 2013, question 13, [pages 15-16], [...]. See also Bulgartransgaz' reply to Commission's Request for Information, dated 13 September 2013, Annex 7, [page 7], [...]. See also Commission Decision of 10 November 2010 2010/685/EU amending Chapter

- (78) As to the Bulgarian Transit Pipeline, Negru Voda 2 and 3 (entry points for bringing gas from the Romanian Transit Pipeline 2 and 3), they have been operating at or close to full capacity (e.g. in 2014, 100 % of the capacity was used).¹¹¹ In parallel, at the border exit points to Turkey, Greece and the former Yugoslav Republic of Macedonia, in 2014 there was no available capacity as the entire capacity was contracted.¹¹²
- 5.2.3. *Regulatory framework for granting third party access to the Bulgarian transmission network*
- (79) The rules with regard to third party access to the Bulgarian transmission network are set at both the Union and national level.
- (80) First, at the Union level, Directive 2009/73/EC of the European Parliament and of the Council¹¹³ requires in particular that transmission system operators are unbundled from natural gas producers and suppliers and also lays down the right of third parties to non-discriminatory access to transmission systems.¹¹⁴
- (81) In addition, Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks,¹¹⁵ in force until 3 March 2011, and Regulation (EC) No 715/2009, set out, in particular, specific requirements for non-discriminatory rules with regard to access conditions to the national gas transmission systems. For example, operators need to ensure that equivalent contractual terms are applied to different users.¹¹⁶ Regulation (EC) No 1775/2005 and Regulation (EC) No 715/2009 also require that the TSO publishes detailed information regarding the services it provides and the relevant conditions applied in order to facilitate the application of third-party access.¹¹⁷

3 of Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks, OJ L 293, 11.11.2010, p. 67–71.

¹¹¹ See Bulgartransgaz, Entry points of the transmission system - capacity used 2009, 2010, 2011, 2012 and 2013, [...].

http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/entry_used_2009_2013.pdf.

See also Bulgartransgaz, Entry points – technical, contracted and unused capacity for 2013, [...],

http://www.bulgartransgaz.bg/files/useruploads/files/entry_en.pdf.

<http://www.bulgartransgaz.bg/en/pages/aktualni-godishni-danni-2014-105.html>, [...].

¹¹² See Bulgartransgaz, Cross-border exit points – capacity used in 2009, 2010, 2011, 2012 and 2013, [...], http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/trans_exit_used_2009_2013.pdf; see also Cross-border exit points and exit zone the South West of Bulgaria- technical, contracted and available capacity for 2013, [...] - the technical capacity of all 3 cross border exit points was 100% contracted for 2013. For the year 2014, see <http://www.bulgartransgaz.bg/en/pages/aktualni-godishni-danni-2014-105.html>, [...].

¹¹³ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

¹¹⁴ See Article 9 and Article 32 of Directive 2009/73/EC.

¹¹⁵ OJ L 289, 3.11.2005, p. 1, in force until 3 March 2011.

¹¹⁶ See Article 4 of Regulation (EC) 1775/2005 and Article 14 of Regulation (EC) No 715/2009.

¹¹⁷ See Article 6 of Regulation (EC) 1775/2005 and Article 18 of Regulation (EC) No 715/2009.

- (82) Second, at national level, Article 172 of the Bulgarian Energy Act stipulates that the TSO shall provide third-party access to its network on non-discriminatory terms in compliance with the rules set out by the regulator, and shall provide third parties the information necessary to access the network.
- (83) Further, at the level of the regulator, rules adopted by the EWRC in 2007, namely the Rules for granting access to the gas transmission or gas distribution networks (the '2007 Access Rules for Transmission'),¹¹⁸ established the relevant procedures to be followed by the TSO. These rules were replaced in 2013 by new rules (the '2013 Access Rules for Transmission') which were subsequently amended in August 2015 (the '2015 Access Rules for Transmission').

The 2007 Access Rules for Transmission

- (84) The principle for capacity allocation has traditionally been *'first come, first served'*. The TSO could also reallocate unused capacity after having informed the undertaking that initially booked the capacity.¹¹⁹
- (85) In addition, the following rules applied:
- (a) the TSO had to publish the general conditions of the transmission contracts which were subject to approval by the EWRC ('harmonised contract').¹²⁰ However, according to the EWRC, the lack of such harmonised contract by EWRC should not have prevented the TSO and a third party from negotiating access conditions and concluding a contract;¹²¹
 - (b) an applicant needed to submit a written application following a template provided by the TSO, which in turn had to assess the application. If all necessary documentation had not been provided, the TSO had to request in writing any additional data, which was to be provided by the applicant within 14 days;¹²² and
 - (c) Having received a complete application, the TSO then had one month to issue a written opinion on the conditions for access or a reasoned rejection.¹²³

¹¹⁸ Promulgated in State Gazette of the Republic of Bulgaria, issue 45, dated 8 June 2007.

¹¹⁹ EWRC's reply to the Commission's request for information dated 9 July 2012, question 1, [page 3], [...].

¹²⁰ See Article 5 recital 1, point 2 of the 2007 Access Rules for Transmission.

¹²¹ See [...] – letter from EWRC to Overgas [18.10.2010]. EWRC's Statement of findings Nr. Γ-10/14.06.2010; see EWRC's reply to the Commission's request for information dated 9 July 2012, Appendix 2, [page 5], [...]. The general conditions of the transmission contracts were finally approved by the Board of Directors of Bulgartransgaz on 3 October 2012. See BEH's submission of 8 July 2014, [pages 2 and 3] [...].

¹²² See Articles 8 and 9 of the 2007 Access Rules for Transmission. EWRC's reply to the Commission's request for information dated 9 July 2012, question 1, [page 4], [...].

¹²³ The opinion needed to address each single site (e.g. large industrial customer) and cover the following parameters: (a) allowed capacity, including maximum and minimum hourly consumption; (b) profile of the loading in annual terms and (c) points of measurement at the entry and exit from the Bulgarian transmission network. EWRC's Statement of findings Nr. Γ-10/14.06.2010; EWRC's reply to the Commission's request for information, dated 9 July 2012, Appendix 2, [page 4], [...].

- (86) According to the 2007 Access Rules for Transmission, an applicant for access had to provide a preliminary contract for secured gas quantities from the public supplier, shippers or production companies, within or outside the country.¹²⁴
- (87) With regard to a possible prolongation of a previous contract, a new request for access needed to be specifically submitted by the interested shipper.¹²⁵

The 2013 Access Rules for Transmission

- (88) On 14 March 2013, the EWRC adopted the 2013 Access Rules for Transmission, repealing the 2007 Access Rules for Transmission.¹²⁶
- (89) According to the new rules, the allocation of available capacity is based on the following principles: (a) proportional¹²⁷ capacity allocation (based on available capacity on the Bulgarian transmission network), (b) tender procedure and (c) open application (in case of new gas infrastructure).¹²⁸
- (90) The 2013 Access Rules for Transmission also required proof of a concluded contract for secured gas quantities within or outside the country.¹²⁹
- (91) In addition, the 2013 Access Rules for Transmission explicitly stated that the application needed to include the following information: (a) the requested capacity at entry and exit point(s) on a daily basis, whereas the requested entry and exit capacities have to be equal; (b) a time frame for the access and transmission¹³⁰, as well as (c) information about the secured/booked transmission capacity through the network of a neighbouring TSO.¹³¹
- (92) These rules were revised on 4 August 2015.¹³² This new version no longer required from an applicant to submit proof of a concluded contract for secured gas quantities within or outside the country or information on secured capacity through the network of a neighbouring operator at the time of submitting the application for access to the Bulgarian transmission network. Such information could be submitted only if

¹²⁴ See Article 2(2) of the 2007 Access Rules for Transmission.

¹²⁵ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 11, [page 7], [...].

¹²⁶ Adopted by Decision No P-1 of 14 March 2013.

¹²⁷ i.e. proportionally to the capacity allocation requests of all requesting parties.

¹²⁸ Article 11 (2) of the 2013 Access Rules for Transmission.

¹²⁹ Article 2 (6) of the 2013 Access Rules for Transmission.

¹³⁰ Article 4 (3) of the 2013 Access Rules for Transmission.

¹³¹ Article 4(4) of the 2013 Access Rules for Transmission. The latter requirement does not appear to be in line with the EU rules as established by the Second and Third energy package. See Recital 19, Article 12, Article 13 and Annex 1, point 2.1 of Regulation (EC) No 715/2009 and Article 3 and Annex 1, point 2.1 of Regulation (EC) No 1775/2005.

¹³² Rules for access to the gas transmission and/or gas distribution networks and the natural gas storage facilities approved with Decision No. P-1 of 14.03.2013 of the State Energy and Water Regulatory Commission published SG issue 36 of 16.04.2013, amended and supplemented, issue 59 of 04.08.2015, effective as of August 4, 2015.

available. In any event, such information had to be provided at the latest at the start of execution of the concluded gas transmission contract.¹³³

The Rules for Trade of Natural Gas of 2007¹³⁴

- (93) In a second stage, once a (positive) opinion on the conditions for access has been issued by the TSO¹³⁵ based on the Access Rules for Transmission, the EWRC's Rules for Trade in Natural Gas (the 'Market Rules')¹³⁶ apply. They detail the steps for the conclusion of a gas transmission contract. According to these rules, gas extraction companies, gas traders and eligible consumers¹³⁷ send to the TSO a written notification of contracts they have concluded between each other.¹³⁸ Within two days the TSO has to offer a transmission contract or a reasoned rejection.¹³⁹
- (94) The relevant legal provisions also set out the conditions for refusal of access to the Bulgarian transmission network. These conditions are as follows:
- (a) at Union level, according to Directive 2009/73/EC (and Directive 2003/55/EC)¹⁴⁰, the TSO can refuse access to the networks on the basis of (a) lack of capacity, (b) where the access to the system would prevent it from carrying out the public service obligations, or (c) serious economic and financial difficulties with take-or-pay provisions. The TSO shall also give duly substantiated reasons for any such refusal.¹⁴¹ Similarly, the Bulgarian Energy Act foresees that access can be refused under these conditions. Moreover, access can be refused as a result of non-compliance of the gas qualities with the requirements set by the TSO or following a breach of the access contract;¹⁴² and

¹³³ Article 4 (4) and (5) of the 2015 Access Rules for Transmission.

¹³⁴ New Rules for Trade of Natural Gas were adopted on 4 August 2015.

¹³⁵ See EWRC's reply to Commission's request for information dated 9 July 2012, questions 1, 8, 9, 11, 12, 13, [...], [pages 4, 7, 8, 9] and [...], [page 4].

¹³⁶ Promulgated in State Gazette of the Republic of Bulgaria, issue 45, dated 8 June 2007.

¹³⁷ As of 1 July 2007 these are all consumers, see § 2 Transitional and Final provisions of the 2007 Access Rules for Transmission.

¹³⁸ Articles 14 and 15 (1) of the Market Rules.

¹³⁹ Article 15 (5) of the Market Rules.

¹⁴⁰ See footnote 114.

¹⁴¹ With respect to take-or-pay provisions, Directive 2009/73/EC envisages that a natural gas undertaking, which encounters serious economic and financial difficulties because of its take-or-pay commitments accepted in one or more gas purchase contracts, may apply to the designated authority for a temporary derogation from the third party access obligations. The derogation may be granted under strict conditions listed in Directive 2009/73/EC and is subject to review by the Commission. In May 2010, based on Article 172a of the Bulgarian Energy Act, Bulgargaz applied before EWRC for derogation from the third party access obligations of the TSO because of the take-or-pay provisions under Bulgargaz' gas supply contracts. However, by formal decision of August 2010 the regulator refused to provide such derogation and, subsequently in 2011 and 2012, its decision was upheld by the Bulgarian court. See [...], as well as Decision No 1546 of 31 January 2012 of the Supreme Administrative Court of the Republic of Bulgaria.

¹⁴² Article 172 (2) and (4) of the Bulgarian Energy Act.

- (b) According to the EWRC's 2007 and 2013 Access Rules for Transmission, the TSO can refuse access if the applicant does not fulfil the conditions for application or if it has not submitted all necessary documentation as required by the rules.¹⁴³ Based on the 2013 Access Rules for Transmission, the TSO also has the right to refuse access if the applicant has an outstanding financial liability towards the TSO.¹⁴⁴

5.2.4. *Bulgartransgaz' approach towards granting access to the Bulgarian transmission network*

- (95) As set out in recitals (98)-(159), there is a clear pattern in Bulgartransgaz' behaviour to prevent or attempt to prevent third party access to the Bulgarian transmission network. This behavioural pattern is evidenced by Bulgartransgaz:

- (a) failing to act in a transparent manner and to reply to access requests, for example taking several years to process requests made by third parties;
- (b) making unreasonable requests with regard to access, for example imposing supplementary conditions without any obvious reason or link to the request as such; and
- (c) justifying its failure to grant access based on a deliberate misinterpretation of information or on incorrect requirements.

- (96) On the other hand, a far more lenient approach has been applied towards Bulgargaz, which belongs to the same corporate group as Bulgartransgaz. Bulgargaz, in contrast to other undertakings, enjoyed exclusive access to the Bulgarian transmission network. Applications for access were processed without any delays, without signed contracts, and at times Bulgartransgaz even took the initiative to renew Bulgargaz' access to the network.

5.2.4.1. Examples of the lenient approach towards Bulgargaz

- (97) Bulgargaz was granted access without a signed contract in 2009, and was also granted access between January and August 2010 as follows:

- (a) in December 2008 Bulgartransgaz approached Bulgargaz in view of the need to renew the transmission contract (which was about to expire at the end of 2008 and the renewal of which should have been Bulgargaz' responsibility). Eleven days later, Bulgartransgaz sent, on its own initiative and after securing the approval of its Board of Directors, a new draft contract to Bulgargaz for comments. In the cover letter, Bulgartransgaz explicitly stated that the contract must be returned, with comments and corrections, within a very short time-frame. However, Bulgargaz made its first comment only substantially later, on 27 May 2009.¹⁴⁵ During this period (December 2008 to May 2009), and without having signed a contract, Bulgargaz was granted access to the

¹⁴³ Article 13 of the 2007 Access Rules for Transmission, Article 10 of the 2013 Access Rules for Transmission and Article 10 of the 2015 Access Rules for Transmission.

¹⁴⁴ Article 2 (3) of the 2013 and 2015 Access Rules for Transmission.

¹⁴⁵ See a report by [Bulgartransgaz's employee] to the Bulgartransgaz Board of Directors of 12 June 2009, [...].

Bulgarian transmission network.¹⁴⁶ It should also be noted that Bulgartransgaz itself considers that obtaining transmission access without having signed a contract to that effect is contrary to the Bulgarian Energy Act.¹⁴⁷

- (b) the transmission contract between Bulgartransgaz and Bulgargaz for 2010 was signed only in August 2010 with a retroactive effect for the preceding eight months.¹⁴⁸ Moreover, there are other examples of contracts signed with retroactive effect between the two sister-undertakings, showing that this was not an exceptional occurrence.¹⁴⁹

5.2.4.2. Examples of access refusals or access made difficult

- (98) At least three undertakings (two shippers and one industrial customer) have requested access to the Bulgarian transmission network, namely Overgas, Toplofikacia Razgrad and RWE Supply & Trading GmbH. All of them encountered major problems, as explained in recitals (100)-(159).
- (99) In addition, [COMPANY 1] initially experienced some delays in obtaining access to the Bulgarian transmission network. However, on 3 November 2010, it obtained access with which it was satisfied.¹⁵⁰

Overgas

- (100) Overgas had been in discussions with Bulgartransgaz about access to the Bulgarian transmission network since early 2010. The undertakings had several meetings, during which Overgas also provided comments on Bulgartransgaz' draft harmonised contract for natural gas transmission. However, it took Overgas close to three years from its initial request sent on 30 July 2010 to obtain, initially limited, access to the network. According to Overgas, this delayed access resulted in the undertaking losing several customers that showed a potential interest in obtaining direct gas supplies from Overgas since 2009/2010.¹⁵¹
- (101) Overgas submitted numerous letters between 2010 and 2011 requesting access to the Bulgarian transmission network. None of these letters resulted in Bulgartransgaz granting Overgas access to the Bulgarian transmission network. Moreover,

¹⁴⁶ See a report by [Bulgartransgaz's employee] to the Bulgartransgaz Board of Directors of 12 June 2009, [pages 1-5] [...].

¹⁴⁷ See a report by [Bulgartransgaz's employee] to the Bulgartransgaz Board of Directors of 12 June 2009, [...].

¹⁴⁸ Contract between Bulgargaz and Bulgartransgaz signed on 9 August 2010 for the period 1 January 2010 – 31 December 2010 - Bulgargaz' reply to the Commission's request for information, dated 3 July 2010, Annex 2 to Question 5, [page 6], [...].

¹⁴⁹ For example, a contract between Bulgargaz and Bulgartransgaz signed on 31 March 2009 for the period 1 January 2009 – 30 June 2009 - Bulgargaz' reply to the Commission's request for information, dated 3 July 2010, Annex 2 to Question 5, [page 1], [...].

¹⁵⁰ On 3 November 2010 [COMPANY 1] started flowing its gas via the Bulgarian transmission network based on nominations by [COMPANY 1] to Bulgartransgaz and on invoices issued by Bulgartransgaz to [COMPANY 1]. [COMPANY 1]'s reply to the Commission's request for information dated 18 September 2013, question 2 [page 3], [...]. See also Bulgartransgaz' reply to the Letter of Facts dated 26 September 2016, recital 66.

¹⁵¹ See Overgas' reply to the Commission's request for information dated 18 September 2013, question 6, [page 9], [...].

Bulgartransgaz failed to request additional information within the deadlines set by the 2007 Access Rules for Transmission. The main sequence of events of these requests was as follows:

- (a) on 30 July 2010, Overgas requested the transmission of 1 bcm of natural gas from entry point Negru Voda 1 to a number of exit points not specifically set out by Overgas ('the first letter').¹⁵²
- (b) on 24 August 2010, and subsequent to representatives of Bulgartransgaz and Overgas having met to explore the possibility of concluding a transmission contract (and the gas delivery schedule), Overgas sent another letter to Bulgartransgaz, explicitly listing the exit points ('the second letter').¹⁵³
- (c) according to Overgas, during a meeting on 26 August 2010, Bulgartransgaz refused to provide the contractual terms and conditions for transmission (and storage), allegedly because these had not yet been approved by the EWRC.¹⁵⁴ This excuse was dismissed in October 2010 by the EWRC in a letter to Overgas, explaining that the regulator had not yet received the final draft harmonised contracts from Bulgartransgaz but that, in any event, the parties were free to enter into an agreement even if these contracts had not yet been approved.¹⁵⁵
- (d) on 24 September 2010, Bulgartransgaz informed Overgas that its access request as expressed in the second letter was incomplete and that additional information therefore was required. In particular, Overgas was asked to provide (a) the relevant entry point for the Bulgarian transmission network, (b) delivery schedules for volumes entering from this point, and (c) a confirmation that the qualitative characteristics of the gas to be imported corresponded to the characteristics published on Bulgartransgaz' website.¹⁵⁶
- (e) as a result, on 29 September 2010, Overgas sent a new detailed application listing entry point Negru Voda 1 together with 43 specific exit points, the monthly quantities and a clarification about the gas quality ('the third letter'). Overgas requested transmission of a total gas volume of roughly 1 bcm, of which 596 mcm was to be supplied to customers connected to 42 exit points and 480 mcm was to be transported to UGS Chiren.¹⁵⁷

¹⁵² Overgas submission of 20 January 2011, Exhibit II, [page 27], [...].

¹⁵³ Inspection document VEMA 1017, [...] [pages 37-53].

¹⁵⁴ Overgas submission of 9 February 2011, Exhibit VII, [page 8], [...].

¹⁵⁵ Inspection document ALDI 1029, [18.10.2010], [...] – letter from EWRC to Overgas; Overgas submission of 20 January 2011, Exhibit III, [pages 44-45], [...].

¹⁵⁶ See doc VEMA 1015, [...] [page 7], see also Overgas submission of 9 February 2011, Exhibit VII, [page 8] [...].

¹⁵⁷ See Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 12, [page 2-86], [...].

- (f) the third letter was supplemented on 4 October 2010 by another letter where Overgas again specified as entry point Negru Voda 1 and submitted a gas transmission schedule.¹⁵⁸
- (g) however, as Overgas did not receive a reply from Bulgartransgaz to its access request within the stipulated one month period, on 11 November 2010 it sent a new letter requesting access for the same gas quantities to see whether they could instead be transported to the 43 exit points (including UGS Chiren) with Negru Voda 2 and 3 (connected to the Bulgarian Transit Pipeline) as entry points ('the fourth letter').¹⁵⁹ Overgas' letter read as follows: *'More than three months Overgas Inc. is trying to conclude a transmission contract on the transmission network of Bulgartransgaz. Until now we do not have even a proposal for a draft of such a contract.... by letter of 29.09.2010 we sent you requests for access to the transmission network. Despite that the one month period for reply already expired, we still have not received this reply.... enclosed we are sending more requests for access to Bulgartransgaz' transmission network with entry point Negru Voda 2, 3. We expect your reply on the conditions of access to the transmission network to the requests enclosed to the present letter, as well as to those sent by our letter of 29.09.2010.'*¹⁶⁰
- (102) An expert working group within Bulgartransgaz assessed the applications submitted by Overgas, correctly linking the relevant entry and exit points as set out in Overgas' requests. The working group recommended issuing written opinions approving access.¹⁶¹ In a note of 17 December 2010 to the undertaking's Board of Directors, [Bulgartransgaz's employee] (in line with the working group's suggestions) stated that Overgas fulfilled all the conditions for access (except with regard to access to UGS Chiren, on which Bulgartransgaz did not take a position) and therefore recommended that the matter be sent for approval to BEH's Board of Directors (for the BEH group corporate governance structure see Section 6.2.2.1).¹⁶² However, the discussion of this point of the agenda was scheduled to be discussed again at Bulgartransgaz' next Board of Directors' meeting.¹⁶³ According to Bulgartransgaz, Overgas' application was, nevertheless, never discussed at board level.¹⁶⁴ It can at

¹⁵⁸ See doc VEMA 1014, [...] [page 30-31]; Overgas submission of 20 January 2011, Exhibit II, [page 37], [...].

¹⁵⁹ Overgas reply to the Commission's request for information dated 26 April 2013, Annex 3.1, page 2, [...], see doc ALDI 1029, [...]; see doc VEMA 1004, [...], see Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, Annex 12, [...].

¹⁶⁰ Inspection document ALDI 1029, [10.11.2010], [...].

¹⁶¹ Inspection document VEMA 1016, [...].

¹⁶² See doc ALDI 1029, [...].

¹⁶³ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 28, [...], [page 29] and Annex 11, [page 2], [...].

¹⁶⁴ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 28, [...], [page 29] and Annex 11, [page 2], [...].

this point also be noted that BEH does not have any minutes of internal meetings in which BEH discussed the possibility of granting Overgas access.¹⁶⁵

- (103) At a meeting which took place at the beginning of December 2010, Bulgartransgaz informed Overgas that it was processing all of its requests with regard to the Bulgarian transmission network, including to UGS Chiren.¹⁶⁶ However, Overgas accused Bulgartransgaz of not having dealt properly with these requests, stating that it would refer the case to the EWRC, the national competition authority and to the European Commission.¹⁶⁷
- (104) In January 2011, Overgas submitted a formal complaint against Bulgartransgaz to the EWRC, arguing that its access request had been tacitly refused. However, by the time Bulgartransgaz replied to the Commission's Statement of Objections, the regulator had not reached any conclusion on the matter as it was waiting for the final decision by BEH's Board of Directors on Overgas' access request.¹⁶⁸
- (105) Overgas also sent a copy to the Energy Minister¹⁶⁹, who in turn, on 18 January 2011, requested that BEH's Board of Directors and subsidiaries prepare a statement on Overgas' complaint.¹⁷⁰ BEH never formally replied to the Energy Minister.¹⁷¹
- (106) On 19 June 2012, and despite the statement of [Bulgartransgaz's employee] of 17 December 2010 that Overgas fulfilled the access criteria, Bulgartransgaz finally sent a reply to Overgas explaining that access would not be granted as:
- (a) Overgas had not provided gas supply contracts signed with end customers. However, it should be noted that there is no such requirement under the 2007 Access Rules for Transmission. According to the Market Rules (see recital (93)), these contracts needed to be provided only at the second stage of the procedure once access to the Bulgarian transmission network has been granted;
 - (b) The requested volumes exceeded the real consumption at the exit points.¹⁷² In this respect, it appears that Bulgartransgaz had aggregated the volumes in Overgas' access request as presented in the third letter and the fourth letter in support of its refusal instead of considering them as largely being the same request repeated twice or at least, instead of asking Overgas for clarification; and

¹⁶⁵ BEH's reply to the Commission's request for information dated 3 July 2012, question 5(c) and 6, [pages 3 and 4], [...] and annex 3, [page 1], [...] and annex 3a, [page 1], [...].

¹⁶⁶ Inspection document VEMA 1003, [01.12.2010], [...].

¹⁶⁷ Inspection document VEMA 1003, [01.12.2010], [pages 1-2], [...].

¹⁶⁸ EWRC's reply to the Commission's request for information dated 9 July 2012, question 22, [pages 17 and 21], [...]. Overgas' reply to the Commission's supplementary questions dated 26 September 2014, [...]. See also Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 118 and Bulgartransgaz' reply to the Commission Letter of Facts dated 26 September 2016, recitals 62-63.

¹⁶⁹ Overgas submission of 19 July 2012, [pages 12-13], [...].

¹⁷⁰ BEH's reply to the Commission's request for information dated 3 July 2012, question 4, [page 2], [...].

¹⁷¹ BEH's reply to the Commission's request for information dated 3 July 2012, question 4, [page 2], [...].

¹⁷² Bulgartransgaz also claimed that the requested quantities for transmission to UGS Chiren exceeded the technical capacity of the storage facility, Overgas reply to the Commission's request for information dated 26 April 2013, [page 3], [...].

- (c) With regard to Overgas' request in which Negru Voda 2 and 3 were requested as entry points, Bulgartransgaz explained that access could not be granted because these are entry points to the Bulgarian Transit Pipeline, to which the majority of customers are not connected. In other words, customers belonging to the Bulgarian transmission network could not be supplied from Negru Voda 2 and 3 through the requested exit points. Although Bulgartransgaz correctly pointed out that the Bulgarian transmission network could not be supplied from Negru Voda 2 and 3, as explained in recital (101), in Overgas' three initial letters Overgas correctly requested Negru Voda 1 as the relevant entry point (see recital (101)).¹⁷³
- (107) In this context, it can be noted that one of Overgas' customers, Toplofikacia Razgrad, also tried to obtain access to the network in order to obtain gas supplies after its supplier (Overgas) had failed to gain access. However, Bulgartransgaz made clear that it was for Overgas to ensure access to the network, and not for its customers, see recitals (151)-(159) concerning Bulgartransgaz' refusal to grant access to Toplofikacia Razgrad.
- (108) In 2013, Overgas finally obtained conditional and limited access to the Bulgarian transmission network. The main sequence of events leading up to Overgas' request being granted was as follows:
- (a) by letter of 23 November 2012, Overgas submitted a new application for the Bulgarian transmission network with regard to 2013. The underlying agreements for the requested quantity with Overgas' final customers were also attached;¹⁷⁴
 - (b) three weeks later, on 12 December 2012, Bulgartransgaz informed Overgas that it would be granted access only if it could provide evidence on the delivery of the requested quantities at Negru Voda (which would require access to Romanian Transit Pipeline 1, so far blocked by Bulgargaz, see Section 5.4.4.1), as well as a delivery schedule reflecting the same quantities and deadlines as the requested ones;¹⁷⁵ and
 - (c) in order to comply with Bulgartransgaz' requirements, Overgas subsequently informed Bulgartransgaz by letter of 22 January 2013 that it had reached an agreement with Bulgargaz for the access to Romanian Transit Pipeline 1.¹⁷⁶ Overgas also attached its supply contract with Gazprom Export for the first quarter of 2013.¹⁷⁷ Moreover, upon Bulgartransgaz' request, Overgas submitted a copy of the agreement of 31 January 2013 with Bulgargaz for the transit

¹⁷³ Overgas' reply the Commission's request for information dated 26 April 2013, Annex 3.1, [pages 2-4], [...]. Overgas reply to the Commission's request for information dated 26 April 2013, [page 2], [...], see doc ALDI 1029, [...]; see doc VEMA 1004, [...].

¹⁷⁴ Overgas' reply the Commission's request for information dated 26 April 2013, Annex 3.1, [page 5], [...].

¹⁷⁵ Overgas' reply the Commission's request for information dated 26 April 2013, Annex 3.1, [pages 6 and 7], [...].

¹⁷⁶ Bulgargaz controls the capacity on the Romanian Transit Pipeline 1 (see Section 5.4.4).

¹⁷⁷ Overgas' reply the Commission's request for information dated 26 April 2013, Annex 3.1, [page 9], [...], and reply to question 3, [page 7], [...].

through Romania on 31 January 2013.¹⁷⁸ Appendix 1 of the 31 January 2013 Agreement contained a list of certain specified domestic exit points of the Bulgarian transmission network. Overgas could not send gas to any other exit points without first notifying Bulgargaz and amending Appendix 1.

- (109) Around the time when the negotiations for access with Overgas were ongoing, Bulgargaz informed its customers that they would need to immediately renew their contracts with Bulgargaz in order to secure continued supplies.¹⁷⁹ In contrast to other Bulgargaz' customers, Overgas' subsidiaries operating at the distribution level (see recital (45)) nevertheless chose not to renew their contracts with Bulgargaz. Instead, they hoped that Overgas could finally access the Bulgarian transmission network in time to allow them to fulfil their gas supply obligations vis-à-vis existing customers in 2013.¹⁸⁰ At the time, it was not clear that access would be granted as it was contingent on Overgas receiving access to Romanian Transit Pipeline 1 (which was fully booked by Bulgargaz, as explained in more detail in Section 5.4).
- (110) On 31 January 2013, Bulgartransgaz and Overgas signed a contract for the transmission of [200-300] mcm of gas for 2013 between entry point Negru Voda 1 and 37 exit points (largely overlapping with those mentioned in the agreement between Bulgargaz and Overgas for the transit of gas through the Romanian Transit Pipeline 1), but excluding UGS Chiren.¹⁸¹ Pursuant to Article 3.1 (h) of this contract Bulgartransgaz had the right to unilaterally terminate the contract unless Overgas provided evidence by the end of each quarter that it had secured the gas and its transmission via the Romanian Transit Pipeline 1 up to the entry point of the Bulgarian transmission network.¹⁸²
- (111) However, on 25 February 2013, Bulgargaz announced to Overgas that the contract for the transit of gas through Romania would not be automatically extended beyond the end of March (as envisaged by one of its clauses).¹⁸³ Subsequently, Overgas was forced to accept all of Bulgargaz' conditions for amending the agreement relating to transit on the Romanian Transit Pipeline 1, see recital (312)). As a result, in March 2013, Overgas managed to obtain access to the Bulgarian transmission network until 31 December 2013 (conditioned on Overgas maintaining its access to the Romanian Transit Pipeline 1).¹⁸⁴

¹⁷⁸ Overgas' reply to the Commission's request for information dated 26 April 2013, question 3, [page 7], [...].

¹⁷⁹ Overgas' reply to the Commission's request for information dated 18 September 2013, question 5, [page 6], [...].

¹⁸⁰ Overgas' reply to the Commission's request for information dated 18 September 2013, question 5, [page 7], [...].

¹⁸¹ Overgas' reply to the Commission's request for information dated 26 April 2013, Annex 3.2, [...].

¹⁸² Overgas' reply to the Commission's request for information dated 26 April 2013, Annex 3.2, [...]. Overgas' reply to the Commission request for information dated 28 August 2014, Question 3, [pages 2 and 3], [...].

¹⁸³ Overgas' reply to the Commission's request for information dated 26 April 2013, Annex 1.1, [page 12], [...].

¹⁸⁴ See also Overgas' reply to the Commission's request for information dated 26 April 2013, question 3, [pages 7 and 8], [...] and Overgas' reply to the Commission request for information dated 28 August 2014, Question 3, [pages 2 and 3], [...].

- (112) In 2014, Overgas also obtained access to the Bulgarian transmission network. Although, according to Bulgartransgaz, access was granted in line with the 2013 Rules for Access to Transmission as set out by EWRC, Overgas remained dissatisfied with both the process and the conditions for access.¹⁸⁵ Overgas did, however, admit that the access granted was not subject to any interruptions in the years 2014 and 2015.¹⁸⁶
- (113) Overgas was mainly dissatisfied due to the type of information Bulgartransgaz required it to submit together with its application for access to the Bulgarian transmission network.¹⁸⁷ According to the 2013 Rules for Access to Transmission, Bulgartransgaz could require Overgas, before granting access to the Bulgarian transmission network, to provide (a) information that it had secured/reserved transit capacity through the neighbouring network (Romanian Transit Pipeline 1) and (b) evidence that it had secured the volumes of gas for which access was requested. However, according to Overgas, Bulgartransgaz set the standard for fulfilling these requirements very high. In particular Overgas claims that the 2013 Rules for Access to Transmission did not require a presentation of actual evidence but simply information.
- (114) In order to satisfy Bulgartransgaz' demand, Overgas provided a confirmation from Gazprom that it had secured certain quantities of gas from Gazprom Export and a letter from Bulgargaz confirming that the two parties were about to sign an agreement for the transit of gas through the Romanian Transit Pipeline 1. However, Bulgartransgaz concluded that the two documents did not 'allow concluding with certainty' that the gas quantities and respectively the capacity in the Romanian Transit Pipeline 1 had been secured.¹⁸⁸ Overgas provided additional documents as requested by Bulgartransgaz on 30 December 2013 and, on the same date, Bulgartransgaz informed Overgas that it would provide Overgas with access to the Bulgarian transmission network and attached a draft transmission contract.¹⁸⁹
- (115) However, Overgas points out that the contract for access to the Bulgarian transmission network signed for 2014 could be terminated by Bulgartransgaz in case Bulgargaz terminated the agreement regarding the Romanian Transit Pipeline 1 or if Bulgartransgaz considered in any other way that Overgas had not secured quantities at the entry points of the Bulgarian grid. Overgas was concerned that this gave Bulgartransgaz a wide scope of interpretation as to whether the contract between the two parties could be terminated. Overgas pointed out that in view of the ample capacity at the Bulgarian transmission network, Bulgartransgaz' strict conditions for termination of the contract were not understandable.¹⁹⁰

¹⁸⁵ See Overgas' reply to the Commission request for information dated 28 August 2014, [pages 2-6], [...].

¹⁸⁶ See Overgas' reply to the Commission request for information dated 15 March 2016; Question 9, [page 8], [...].

¹⁸⁷ See Overgas' reply to the Commission request for information dated 28 August 2014, [pages 2-6], [...].

¹⁸⁸ Overgas' reply to the Commission request for information dated 28 August 2014, annex 2, documents relating to question 4, [pages 10 and 11], [...].

¹⁸⁹ See Bulgartransgaz reply to the Commission Letter of Facts dated 26 September 2016, recital 55.

¹⁹⁰ See Overgas' reply to the Commission request for information dated 28 August 2014, Question 4, [pages 3-6], [...].

- (116) On 23 December 2014, Overgas signed a transmission contract with Bulgartransgaz giving it access to the Bulgarian transmission network for the year 2015. According to Overgas, Bulgartransgaz continued to require evidence for concluded agreements with respect to the access to the neighbouring network (i.e the Romanian Transit Pipeline 1).¹⁹¹
- (117) The Commission notes that it took Bulgartransgaz nearly three years to finally grant Overgas access to the Bulgarian transmission network since its first access request on 30 July 2010 (see recital (101)(a)).
- (118) Bulgartransgaz contests the findings of the Commission.
- (119) First, Bulgartransgaz claims that the Commission mischaracterises the nature of contacts between Overgas and Bulgartransgaz and that Overgas did not make four access requests but only one request for access to the Bulgarian transmission network. According to Bulgartransgaz, Overgas inexplicably submitted a duplicate application, which it must have known would create a delay to the consideration of its previous application.¹⁹²
- (120) Second, Bulgartransgaz claims that it made its best efforts to assist Overgas to overcome the discrepancies in its applications and submit a complete and accurate application. In any event, according to Bulgartransgaz, Overgas only made its full access application in October 2010 and Bulgartransgaz cannot be held liable that at the time Overgas failed to secure gas supplies at the entry point to the Bulgarian transmission network.¹⁹³
- (121) Third, according to Bulgartransgaz, rather than supplying the missing information from its access application, as requested by Bulgartransgaz, Overgas complained to the EWRC in January 2011. According to Bulgartransgaz, the fact that the EWRC did not take a stance on the complaint shows that it did not have sufficient grounds to act upon it.¹⁹⁴
- (122) Fourth, Bulgartransgaz also claims that its letter to Overgas of 19 June 2012 does not constitute a refusal to grant access.¹⁹⁵
- (123) Fifth, Bulgartransgaz claims, if access would have been granted, Overgas' gas supplies could not have made it to any of the entry points of the Bulgarian transmission network (for 2010-2012) as it did not have access to the Romanian Transit Pipeline 1.¹⁹⁶
- (124) Sixth, Bulgartransgaz claims that the condition to provide evidence of obtaining gas supplies or access to neighbouring network is not restrictive as it allows Overgas to cancel the contract in case it would be unable to bring gas to the Bulgarian

¹⁹¹ Overgas' reply to the Commission request for information dated 15 March 2016; Question 8, [page 7], [...] and Annex 2 [...], [...], [...], [...], [...], [...], [...], [...], [...], [...], [...], [...], [...].

¹⁹² See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 69 -70.

¹⁹³ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 69 and 71.

¹⁹⁴ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 69 and 71.

¹⁹⁵ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 73.

¹⁹⁶ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 74.

transmission network.¹⁹⁷ Bulgartransgaz further claims that this rule is enshrined in the 2013 Access Rules for Transmission and in the Commission Regulation (EU) No 984/2013¹⁹⁸ and Commission Regulation (EU) No 2015/703^{199, 200}

- (125) Seventh, Bulgartransgaz submits that since 2013 Overgas has been granted uninterrupted access to the Bulgarian transmission network for all the volumes requested; therefore Overgas has been able to compete with Bulgargaz on gas supply markets in Bulgaria as of 2013.²⁰¹
- (126) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (127)-(136).
- (127) First, the Commission does not take a position whether Overgas made one or four access requests as it is immaterial. Instead, the Commission simply enumerates the different stages in the correspondence between Overgas and Bulgartransgaz in order to clarify to which letter it is referring to. For lack of a template application form on its website or a harmonised contract, any third party interested in using Bulgartransgaz' services was forced to send a general letter expressing its interest to conclude a contract for transmission. Even if, as Bulgartransgaz' claims, the four letters submitted by Overgas (instead of one complete application) caused certain confusion and delay in processing Overgas' application, it does not explain why it took Bulgartransgaz nearly three years to grant Overgas access to the Bulgarian transmission network (see recital (117)).
- (128) Second, considering that at the time Bulgartransgaz failed to publish a harmonised contract or to provide transparent information with respect to the access to the Bulgarian transmission network, it could not have expected interested parties to know which information was necessary in order to apply for access.²⁰² The Commission does not accept that Bulgartransgaz made its best effort to assist Overgas, since Bulgartransgaz often did not reply to Overgas within the statutory period. It also remains unclear why, despite the Bulgartransgaz working group's opinion of December 2010 that access to the Bulgarian transmission network should be granted, Bulgartransgaz took 1.5 years to officially reply to Overgas (see recital (106)).
- (129) Third, the fact that EWRC did not issue a decision concerning Overgas' complaint on access to UGS Chiren cannot be interpreted as a confirmation that Bulgartransgaz

¹⁹⁷ See Bulgartransgaz' reply to the Commission Letter of Facts dated 26 September 2016, recitals 32-34.

¹⁹⁸ Commission Regulation (EU) No 984/2013 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council (OJ L 273, 15.10.2013, p. 5).

¹⁹⁹ Commission Regulation (EU) No 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules (OJ L 113, 1.5.2015, p. 13).

²⁰⁰ See Bulgartransgaz' reply to the Commission Letter of Facts dated 26 September 2016, recitals 34-35. Bulgartransgaz is referring here to the Commission Regulation (EU) No 984/2013 of 14 October 2013 on establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council and to the Commission Regulation (EU) No 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules.

²⁰¹ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 67 – 155.

²⁰² Such harmonised contract was only finalised in July 2012 (see recital (141)).

did not infringe Union competition law. In addition, a position or the lack thereof of the national authority on Overgas' complaint is not binding upon the Commission

- (130) Fourth, the Commission also does not accept Bulgartransgaz' argument concerning the 19 June 2012 letter. In this letter, Bulgartransgaz requested from Overgas information on contracts signed with end customers, a requirement which was not prescribed by the 2007 Access Rules for Transmission in force at the time. In addition, such information was not mentioned as missing from the application in the working group's opinion approving Overgas' application for access. It is undisputed that despite [Bulgartransgaz's employee] statement of 17 December 2010 that Overgas fulfilled all the criteria for access, Overgas still did not secure any access, at that point in time, to the Bulgarian transmission network (see recital (106)).
- (131) Fifth, Bulgartransgaz' argument concerning Overgas failure to secure the required capacity on a neighbouring network (Romanian Transit Pipeline 1) cannot be accepted, either. A requirement to secure capacity on a neighbouring network in order to obtain access to the Bulgarian transmission network was not stipulated by the 2007 Access Rules for Transmission (which were in force until 2013). As explained in more detail in recital (261), Bulgargaz had booked the entire capacity of the Romanian Transit 1 Pipeline on an exclusive basis and therefore its approval was necessary to secure capacity on a neighbouring network. Bulgartransgaz cannot justify its refusal to provide access to indispensable infrastructure based on another similar refusal made by another undertaking belonging to the same corporate group as Bulgartransgaz.
- (132) Sixth, Bulgartransgaz' claim that the requirement to produce evidence of having obtained relevant gas supplies and access to a neighbouring network, was supposed to act in the benefit to the applicant, i.e allowing the applicant to terminate the contract for access to the Bulgarian transmission network in case it no longer needed such access, cannot be accepted. If this was indeed the case, it is unclear why the power to assess whether undertakings indeed had access to gas supplies or access to a neighbouring network is left with Bulgartransgaz and not the applicants themselves.
- (133) Although, it is true that the 2013 Access Rules for Transmission, adopted by the EWRC on 14 March 2013 stated that the undertakings applying for access to the Bulgarian transmission network had to provide evidence of having secured gas supplies and information concerning access to a neighbouring network (see recitals (88)-(91)), these rules only entered in force only on 14 March 2013. They therefore cannot justify the long delay in dealing with a request dating from almost three years before, namely 30 July 2010. Moreover, the Commission has objected to this rule in another context; in April 2015, the Commission stated in its Opinion on EWRC's draft certification decision for Bulgartransgaz dated 22 April 2015 C (2015)2754 110-2015-BG (the Certification Opinion) that this rule provided Bulgargaz with the power to directly control and decide whether its direct competitors could enter the gas supply markets in Bulgaria and therefore urged EWRC to remove it from the 2013 Access Rules for Transmission.²⁰³

²⁰³ See the Certification Opinion, [page 3], [...].

- (134) As concerns the Union rules invoked by Bulgartransgaz (Regulation (EU) No 984/2013 and Regulation (EU) No 2015/703) these regulations entered into force on 1 November 2015 and 1 May 2016 respectively, therefore they were not applicable during the period covered by this Decision. In any event, the two regulations do not impose any obligation on applicants for the transmission capacity to provide evidence on obtaining gas supplies or access to neighbouring networks. These regulations simply provide a framework for TSOs to cooperate with each other to encourage and facilitate efficient gas trading and transmission across gas transmission systems within the Union.²⁰⁴
- (135) Seventh, Bulgartransgaz indeed granted Overgas access to the Bulgarian transmission network starting from the year 2013. However, the contract was of unduly short duration (as it had to be renewed every three months, see recitals (110)-(111)) and therefore led to uncertainty. Therefore, it would have been practically impossible for Overgas to viably compete on the downstream wholesale gas supply market in Bulgaria under this contract.
- (136) Finally, Bulgartransgaz treatment of all access requests to the Bulgarian transmission network contrasted distinctly from the treatment of Bulgargaz, which formed part of the same corporate group as Bulgartransgaz, as it did not require the same level of information or burden of proof to be provided by Bulgargaz (see Section 5.2.4.1 and recital (97)).
- RWE*
- (137) RWE submitted a formal application for access to the Bulgarian transmission network on 22 February 2011. After not having received any answer from Bulgartransgaz, RWE subsequently sent two more letters,²⁰⁵ reiterating its request for access and threatening to take legal action with the EWRC and the Commission.
- (138) On 13 July 2011 (five months after receiving the first letter), Bulgartransgaz requested additional information, including information on the exact exit points and volumes to be shipped.²⁰⁶
- (139) RWE had requested general access to both the Bulgarian transmission network and the Bulgarian Transit Pipeline, without specifying the relevant entry and exit points.²⁰⁷ It should be noted that, at the time of RWE's request, Bulgartransgaz did not publish sufficient information to enable third parties to properly assess, on a regular and rolling basis, how much capacity was available on the network or at the interconnection points (as set out in Section 5.2.2 above).²⁰⁸ It was therefore very

²⁰⁴ See Article 28 of Regulation (EU) No 984/2013, and Article 26 of Regulation (EU) No 2015/703.

²⁰⁵ These letters were sent on 28 April 2011 and 30 June 2011. See RWE's reply to Commission's request for information dated 27 April 2012, Question 7(c), [pages 3 and 4], [...].

²⁰⁶ Thereby implying that it does not offer the possibility to apply for general access to the grid as requested by RWE.

²⁰⁷ For example, RWE's reply to the Commission's request for information dated 27 April 2012, Question 8(a) [page 4], [...], and RWE's submission of 18 June 2012, [page 4], [...].

²⁰⁸ See RWE's reply to the Commission's request for information dated 27 April 2012, question 11, [page 7], [page 6], [...]. Bulgartransgaz only started publishing some information on the used capacity in 2009, following a decision of the EWRC, see [...]. See also Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 13, [page 15], [...].

difficult for potential applicants to apply for access and thus to supply the Bulgarian gas market.²⁰⁹

- (140) RWE met twice with Bulgartransgaz' representatives and was informed that its application could not be processed without the additional information.²¹⁰ During these meetings, Bulgartransgaz explained that general grid access could not be granted and that only point-to-point access would be offered. Moreover, the procedure for the adoption of a harmonised transmission contract as stipulated in Regulation (EC) No 715/2009 was not yet finalised and a grid code was moreover not ready.
- (141) RWE, on the other hand, explained that it was not accustomed to booking capacity points without having obtained the applicable standard terms and conditions, or a grid code. The undertaking considered that it would be very risky to secure grid access only after delivery contracts had been entered into, since there would then be a risk that RWE would not be able to meet its delivery obligations.²¹¹ It can at this point be noted that Bulgartransgaz, according to the 2007 Access Rules for Transmission, was obliged to publish general conditions for transmission (which had to be approved by the EWRC). However, such harmonised contract was only approved by Bulgartransgaz' Board of Directors in July 2012.²¹²
- (142) In the end, RWE's application was not processed because, according to Bulgartransgaz, RWE did not provide the requested information.²¹³
- (143) The Commission notes that Bulgartransgaz' failure to enable RWE to access the Bulgarian transmission network contrasts distinctly with its treatment of Bulgargaz (as set out in Section 5.2.4.1 above) which was granted access without even having signed any contract with Bulgartransgaz.
- (144) Bulgartransgaz contests the findings of the Commission.
- (145) First, Bulgartransgaz claims that RWE's application was almost blank and did not contain the detailed information necessary to conclude a contract. Hence it was not a proper access request.²¹⁴
- (146) Second, according to Bulgartransgaz, there was no applicable legal and regulatory framework in Bulgaria to provide general or universal access to the Bulgarian transmission network, as can be concluded from Article 15 of the Market Rules,

²⁰⁹ RWE's reply to the Commission's request for information dated 27 April 2012, question 11, [page 6], [...].

²¹⁰ RWE's reply to the Commission's request for information dated 27 April 2012, question 7(c), [pages 3 and 4], [...], and RWE's submission of 18 June 2012, [pages 4 and 5], [...]

²¹¹ RWE's submission of 18 June 2012, [page 4], [...].

²¹² See Article 5 recital 1, point 2 of the 2007 Access Rules for Transmission. See also Bulgartransgaz' reply to Commission request for information dated 25 April 2013, [page 12], [...].

²¹³ See RWE's reply to the Commission's request for information dated 14 May 2012, Question 7(c), [page 4], 8(a), [page 5], and Question 9(e), [page 6], [...], and RWE's submission of 18 June 2012, [pages 4 and 5], [...], according to which RWE could not provide specific information on gas volumes, since it would have been risky to enter obligations without having obtained general access to the transmission system. Only after securing access could RWE search for clients and business opportunities in Bulgaria.

²¹⁴ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 174.

which required the undertaking requesting access to the Bulgarian transmission network to provide very detailed information. Therefore, on the basis of the letter sent by RWE no access could have been granted.²¹⁵

- (147) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (148)-(150).
- (148) First, Bulgartransgaz could not have expected RWE to know what information was required in order to obtain access to the Bulgarian transmission network since Bulgartransgaz failed to publish, contrary to its legal obligations (Articles 5(2) and 8(1) of the 2007 Access Rules for Transmission) a draft harmonized contract or application template. Moreover, when specifying to RWE what kind of information it would require in order to grant access to the Bulgarian transmission network, Bulgartransgaz took over 5 months to reply.
- (149) Second, the Market Rules were applicable only once access to the Bulgarian transmission network has been granted (see recital (93)). In other words, at the time of RWE's application request, Bulgartransgaz legally was not supposed to ask for such detailed information. Therefore, it cannot be concluded that the Market Rules prevented Bulgartransgaz from providing access to the Bulgarian transmission network as requested by RWE, as the Market Rules were not the applicable rules at the time of submission of the application request.
- (150) Finally, as explained in recital (97) Bulgartransgaz has not been treating all access requests to the Bulgarian transmission network equally as it did not require the same level of information or burden of proof to be provided by Bulgargaz (See Section 5.2.4.1).

Toplofikacia Razgrad

- (151) As mentioned in recitals (107) and (117), after repeated attempts of Overgas to access the network, Toplofikacia Razgrad (Overgas' subsidiary and customer) itself tried to gain access to the network in order to obtain gas supplies.
- (152) By letter dated 11 July 2012, Toplofikacia Razgrad submitted a request for access to the Bulgarian transmission network in order to transport [300-350] mcm of gas from entry point Negru Voda 1 to exit point Razgrad 2 in 2012 and 2013. The request also included a preliminary contract with Overgas, dated 9 July 2012, for gas supplies during the period from 1 November 2012 to the 31 January 2013, which made the conclusion of the final contract conditional upon Overgas receiving access to the Bulgarian transmission network.
- (153) By letter of 18 July 2012, Bulgartransgaz required Toplofikacia Razgrad to prove the possibility of providing these volumes during the requested period at entry point Negru Voda 1.²¹⁶ Bulgartransgaz pointed out that the delivery point stipulated in the preliminary contract between Toplofikacia Razgrad and Overgas was Razgrad (an exit point from the Bulgarian transmission network) and that therefore an application for access should actually be submitted by the gas supplier (in this case Overgas).

²¹⁵ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 174 – 187.

²¹⁶ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, Annex 8, [pages 2, 3, 4, 6, 12-13], [...].

- (154) On 23 October 2012, Toplofikacia Razgrad submitted an addendum to its preliminary contract with Overgas in which the delivery point was changed to entry point Negru Voda 1 (an entry point to the Bulgarian transmission network). However, the provision with the condition that Overgas would first obtain access to the Bulgarian transmission network had not been removed.²¹⁷
- (155) Thereafter, by letter of 20 November 2012²¹⁸, Bulgartransgaz issued a favourable opinion to grant access to the Bulgarian transmission network to Toplofikacia Razgrad under the condition that it provided:
- (a) a valid contract for the supply of the requested volume at entry point Negru Voda 1 with a gas supplier (that is, Overgas in this case), which in turn had to prove that it had secured the gas quantities from another gas supplier. Bulgartransgaz clarified that Overgas had to provide either a gas transport contract with the neighbouring TSO (that is, a contract evidencing access to Romanian Transit Pipeline 1, the only network connected to entry point Negru Voda 1) or a gas supply contract with a gas supplier which already had such a transport contract; and
 - (b) a precise timetable for the transmission of the quantities requested to be transported over the Bulgarian transmission network. In this context, Bulgartransgaz again emphasized that Overgas did not yet have access to the Bulgarian transmission network (as set out in Toplofikacia Razgrad's preliminary contract with Overgas).
- (156) As Toplofikacia Razgrad was unable to meet the conditions as listed in Bulgartransgaz' letter of 20 November 2012, Toplofikacia Razgrad in the end never obtained access to the Bulgarian transmission network. However, the conditions imposed by Bulgartransgaz in the letter of 20 November 2012 were either irrelevant or not required by the applicable rules:
- (a) the fact that the condition relating to Overgas first obtaining access to the Bulgarian transmission network had not been removed from the contract between Overgas and Toplofikacia Razgrad was not of any importance.²¹⁹ Overgas was supposed to supply the relevant amount of gas only to Negru Voda 1 (an entry to the Bulgarian transmission network) and, in any event, by insisting that Overgas first obtains access to the Bulgarian transmission network, Bulgartransgaz effectively refused access to Toplofikacia Razgrad based on its prior refusal to Overgas.
 - (b) the 2007 Access Rules for Transmission required that an applicant shows that it had secured the relevant gas quantities from a gas supplier (for example, by submitting a preliminary contract with its gas supplier). However, Bulgartransgaz also required that an applicant shows that its supplier had booked the capacity on networks connected to the Bulgarian transmission

²¹⁷ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, Annex 8, [pages 14, 15 and 6], [...].

²¹⁸ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, Annex 8, [page 16], [...].

²¹⁹ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, Annex 8, [page 18], [...].

network. In other words, this meant that Toplofikacia Razgrad was not only required to prove that it had secured gas from Overgas, but also that Overgas had signed a contract for transporting the gas through the Romanian Transit Pipeline 1 (for which, however, as explained in recital (261), Bulgargaz had booked the entire capacity).

- (157) Bulgartransgaz contests the findings of the Commission
- (158) Bulgartransgaz claims that the application by Toplofikacia Razgrad would have served no purpose because its contract with Overgas would have become final only after Overgas received access to the Bulgarian transmission network. In this case, according to Bulgartransgaz, Toplofikacia Razgrad could not have gained access to the same volume for the same period because it would have led to a duplication of capacity allocation. Bulgartransgaz submits that, if Toplofikacia Razgrad would have received gas from Overgas at the exit point to the Bulgarian transmission network (i.e. Razgrad), there would have been no need for it to gain access to the Bulgarian transmission network.²²⁰
- (159) Bulgartransgaz' arguments cannot be accepted. The case of Toplofikacia Razgrad's access request provides another example that Bulgartransgaz has consistently, in order to grant access to the Bulgarian transmission network, required information which went beyond what was legally prescribed by the 2007 Access Rules for Transmission. For example, Bulgartransgaz made access to the Bulgarian transmission network again conditional upon secured upstream capacities, which are however controlled by Bulgargaz. Moreover, Toplofikacia Razgrad's request did not lead to a duplication of requests as Toplofikacia Razgrad requested access to the Bulgarian transmission network when it became clear that its supplier was denied access. Finally, Bulgartransgaz did not show any goodwill in resolving any issues it might have had with the contract between Toplofikacia Razgrad and Overgas but finally rejected the access request as unclear and unacceptable.

5.3. Storage: UGS Chiren

5.3.1. The characteristics of the gas storage at UGS Chiren and possible alternatives

- (160) As set out in recital (59), UGS Chiren is the only gas storage facility in Bulgaria. It is owned and operated by Bulgartransgaz²²¹ and it is connected to the Bulgarian transmission network.²²²
- (161) UGS Chiren is a depleted gas field that was converted into a storage facility in the 1970s. Due to the geology of the gas field, UGS Chiren covers only seasonal variations of demand (it is not a multi-cycle storage, see recital (38)). That means that gas in UGS Chiren can be injected in the summer and withdrawn in the winter.²²³ In other words, storage capacity at UGS Chiren is allocated according to a schedule for gas injections in the summer and a schedule for gas withdrawals in the

²²⁰ See Bulgartransgaz reply to the SO dated 23 March 2015 [...], recitals 156 – 173.

²²¹ Bulgartransgaz' 2013-2022 Ten Year Network Development Plan, [page 22], [...].

²²² Overgas' submission of 19 July 2012, page 10, Enclosure 2, [...].

²²³ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 22, [page 22], [...]; see doc ERO 1001, [...].

winter. The capacity allocated is for the storage of working gas (the gas that regularly is injected and withdrawn, see recital (37)).

- (162) The storage reservoir of UGS Chiren could potentially have a total capacity of 1.83 bcm, of which around 1 bcm would be working gas. However, the number of wells and surface facilities in UGS Chiren allow for withdrawal of only 450 mcm of gas during a cycle of 165 days.²²⁴ In 2011, Bulgartransgaz accepted a technological project for the exploitation of UGS Chiren, according to which the working gas amounts to 550 mcm and the amount of cushion gas is 750 mcm.²²⁵ The difference between the working gas and the capacity for withdrawal allows users to store gas in reserve for more than one gas storage year.²²⁶
- (163) Bulgartransgaz has projects for the enlargement and modernisation of UGS Chiren which are planned to be finalised by 2021.²²⁷ However, the plans only concern the expansion of UGS Chiren and the undertaking has no project for a new storage facility.²²⁸

5.3.2. *Regulatory framework for granting third party access to UGS Chiren*

- (164) The rules with regard to third party access to UGS Chiren are set out both at Union and national levels in recitals (165)-(167).
- (165) First, at Union level, Article 33 of Directive 2009/73/EC²²⁹ establishes the right of third party access to storage, while leaving it to Member States to determine whether a negotiated or regulated access regime should be implemented.²³⁰ Irrespective of the access regime chosen, the access must be objective, transparent and non-discriminatory. In addition, Regulation (EC) No 715/2009 sets legally binding

²²⁴ Bulgartransgaz' clarification reply of 27 December 2012 to the Commission's request for information dated 9 July 2012, question 16, [page 1], [...].

²²⁵ <http://www.bnews.bg/article-60060>, [...].

²²⁶ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 19, [page 19], [...]. For the definition of "gas storage year", see footnote 242.

²²⁷ See Bulgartransgaz' 2013-2022 Ten Year Network Development Plan, [page 48], [...]. Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 16, [pages 27-30], [...]. The cost for the expansion of UGS Chiren is expected to amount to BGN 200 million (approximately EUR 100 million).

²²⁸ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 1, [pages 1 and 2], [...] and Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 17, [...]. Bulgartransgaz states in its 10-year network development plan for the period 2013-2022, that the undertaking has not envisaged investing into a new UGS in Bulgaria. However a plan for such facility to be built in Bulgaria has been reflected in the third Ten-Year Network Development Plan 2013-2022 of the European Network of Transmission System Operators for Gas, without specifying technical parameters, location or year of the potential investment.

²²⁹ See also Article 19 of Directive 2003/55/EC.

²³⁰ In case of negotiated third party access, the national regulatory authorities do not have the power to review tariffs (Article 41 (1)(n) of Directive 2009/73/EC). However, pursuant to Article 33 (3) of Directive 2009/73/EC (and before Article 19 (3) of Directive 2003/55/EC), storage system operators and natural gas undertakings are required to publish their main commercial conditions for the use of storage, which includes at least the publication of prices for standard services. In case of regulated third party access, details on tariff methodology must be published (Article 19(5) of Regulation (EC) No 715/2009).

standards for third party access services, capacity allocation, congestion management and transparency, including a requirement for SSOs to develop and notify to the regulatory authorities harmonised storage contracts and procedures.²³¹

- (166) Second, at national level, the Bulgarian Energy Act establishes a regulated regime for operating a gas storage facility.²³² Since 1 July 2007, SSOs are obliged to grant all users access to gas storage facilities under equivalent terms and conditions. The Bulgarian Energy Act also envisages regulated tariffs for gas storage in Bulgaria.²³³
- (167) Apart from these general rules, no detailed formal rules and procedures on access existed until March 2012,²³⁴ when Bulgartransgaz adopted the Rules for Access to UGS Chiren (the '2012 Bulgartransgaz Access Rules for Storage').²³⁵ These rules, although discussed with the EWRC, remain an act done by an undertaking.²³⁶ In April 2014, Bulgartransgaz amended its rules for access to UGS Chiren (the '2014 Bulgartransgaz Access Rules for Storage') (see recital (173)-(174)) and in April 2016, Bulgartransgaz again amended the rules, this time by introducing new capacity allocation methodology (the '2016 Bulgartransgaz Access Rules for Storage') (see recital (175)).²³⁷ Moreover, in March 2013, the EWRC adopted Rules for Granting Access to Gas Transmission and Gas Distribution Networks and for Access to Gas Storage Facilities ('the 2013 EWRC Access Rules for Storage', see recital (176)).²³⁸

Before the 2012 Bulgartransgaz Access Rules for Storage were adopted

- (168) According to Bulgartransgaz, prior to the adoption of the 2012 Bulgartransgaz Access Rules for Storage, the capacity of UGS Chiren was allocated on a '*first come, first served*' basis, depending on the available storage capacity at the time of the

²³¹ Article 1, 15, 17, 19, 20 and 22 of Regulation (EC) No 715/2009, see also Article 13 of Directive 2009/73/EC (and Article 8 of Directive 2003/55/EC).

²³² Article 39, of the Bulgarian Energy Act.

²³³ Article 172b, recital 1 and Article 30, recital 1, p. 14 of the Bulgarian Energy Act. See also EWRC's reply to the Commission's request for information dated 17 July 2012, question 32, and Annex 1, [pages 24 and 25], [...], and [pages 3 and 4], [...], according to which, in 2005, the EWRC set a tariff for gas storage at 2.49 BGN/1000 cubic meters/month, which was payable only if gas quantities had actually been stored in the facility. The same principle of payment remained unchanged in 2016, see Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 2, [page 2], [...].

²³⁴ EWRC's reply to the Commission's request for information dated 17 July 2012, question 21, cover letter, [page 14], [...]; Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, questions 10, 12 and 13, [pages 11 and 14-15], [...].

²³⁵ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 3, [page 2], [...]. On 19 July 2012 the Board of Directors of Bulgartransgaz also adopted for the first time the template contract for transmission and storage of natural gas. See BEH's submission of 8 July 2014, [...]. See also <http://www.bulgartransgaz.bg/files/useruploads/files/harcontracts.pdf>, [...].

²³⁶ EWRC's reply to the Commission's request for information dated 17 July 2012, question 19 [page 13], [...].

²³⁷ Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 14, [pages 22-25], [...].

²³⁸ Adopted by EWRC's Decision No P-1 of 14 March 2013 and promulgated in State Gazette of the Republic of Bulgaria, issue No 36 of 16 April 2013, last amended by issue No 59 of 4 August 2015.

request.²³⁹ To that end, access requests with injection and withdrawal schedules were sent to Bulgartransgaz.²⁴⁰ When granting access to UGS Chiren, Bulgartransgaz also grants the corresponding access to the Bulgarian transmission network (that is, the network capacity needed at the exit point leading to UGS Chiren).²⁴¹

The 2012 Bulgartransgaz Access Rules for Storage

- (169) The 2012 Bulgartransgaz Access Rules for Storage established the procedural steps for granting access to storage on a short- and on a long-term basis,²⁴² as well as a capacity allocation methodology (replacing the previously applied '*first come, first served*' methodology).²⁴³ Two days after having adopted the 2012 Bulgartransgaz Access Rules for Storage, Bulgartransgaz published information about the first capacity allocation procedure which was due in less than three weeks from that date (by 17 April 2012). However, the first data on the storage capacity (technical, available, booked, firm and interruptible) was published on its website only at the beginning of July 2012.²⁴⁴
- (170) According to the 2012 Bulgartransgaz Access Rules for Storage, the main principle for capacity allocation was a priority right given to potential users having supply contracts either with central heating plants or end suppliers,²⁴⁵ both qualified by Bulgartransgaz as 'public suppliers'.²⁴⁶ Storage capacity was allocated with priority right in two stages:
- (a) at the first stage, Bulgartransgaz determined the so called 'base sale quantity' of each potential user, taking into account gas quantities which the user either (1) sold in the course of the on-going gas storage year to public suppliers, or (2) contracted for sale to public suppliers in the course of the forthcoming gas storage year. The base sale quantity was equal to the smaller of these two

²³⁹ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 20, [page 13], [...]; Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 10, [page 11], [...].

²⁴⁰ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 10, [page 11], [...].

²⁴¹ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 16, [page 17], [...].

²⁴² Under the 2012 Bulgartransgaz Access Rules for storage, short term means for the duration of one "gas year". Long term means for the duration of longer than one "gas year". According to Article 2.1 of the 2012 Bulgartransgaz Access Rules for storage, a "gas year" starts on 15 April of the relevant calendar year and ends on 1 April of the following calendar year; the periods 1-15 April and 1-15 October of each calendar year are used for the preparation of the storage reservoir for the next injection/withdrawal season. For clarity and convenience, throughout the text of this Decision, when referring to gas storage, the one year period from April to April is referred to as a "gas storage year".

²⁴³ Other rules included a procedure for capacity transfer when changing the title of stored gas and the rules for virtual capacity services.

²⁴⁴ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 4 [pages 5 and 6], [...] and Annex 2, [pages 2-5 and 6-7], [...].

²⁴⁵ See footnote 40.

²⁴⁶ The priority right principle was allegedly motivated by security of supply and the need for storage to cover seasonal variations of consumption.

quantities.²⁴⁷ Priority was accorded to the user with the higher base sale quantity. The storage capacity was allocated to that user up to the amount of its monthly requests (that is, final storage capacity was allocated on the basis of the requested injection and withdrawal capacities).²⁴⁸ In other words, if the user with priority requested the full announced capacity, it would be allocated this capacity in its entirety.

- (b) if there was storage capacity still available after having completed the first stage of the procedure, potential users would at a second stage receive capacity proportionally pro-rata to their base sale quantity. In this second stage, each applicant's base sale quantity was determined by taking into account the higher of the two gas quantities either sold in the course of the on-going gas storage year to public suppliers or contracted for sale to them in the course of the forthcoming gas storage year.²⁴⁹
- (171) In practice, because the base sale quantity was equal to the smaller of the quantities set out in recital (170) smaller suppliers and new entrants would always have a very low base sale quantity²⁵⁰ reflecting their limited²⁵¹ ongoing gas sales (see recital (170)(a)). This would be the case even if they would have contracted significant (higher) sales in the forthcoming year (see recital (170)(b)). Instead, the undertaking with the highest ongoing sales of natural gas to public suppliers (that is Bulgargaz) would de facto always have priority when access to storage was determined (except possibly in the very unlikely event²⁵² that Bulgargaz would have contracted very low quantities for sale to public suppliers in relation to the forthcoming gas storage year). Users with smaller base sale quantities would only be allocated any available surplus capacity which had not been requested by the user with priority. In this context, and as the base sale quantity in the second phase of the procedure was equal to the higher of the two quantities, a potential user with limited or non-existent ongoing gas sales could nevertheless have achieved a higher base sale quantity (and thereby a second-phase priority right) if it contracted significant (higher) sales for the forthcoming year. In theory, such a user could therefore have obtained access to storage. However, this rule would only come into play once Bulgargaz' entire request for storage had already been satisfied at the first stage of the procedure.
- (172) Subsequently, if any available storage capacity had remained, it was allocated to potential users without priority right, proportionally to their requests for storage capacity.

²⁴⁷ Article 5.1 of the 2012 Bulgartransgaz' Access Rules for storage.

²⁴⁸ The capacity was allocated according to the lower value of the capacity for injection or withdrawal.

²⁴⁹ Article 5.2 of the 2012 Bulgartransgaz Access Rules for Storage.

²⁵⁰ Or even one of zero.

²⁵¹ Or non-existent.

²⁵² Bulgargaz had a near monopolistic position on the Bulgarian downstream wholesale gas supply market (see recitals (423)-(424)) therefore it was very unlikely that it would have contracted low quantities for sale to Public Suppliers.

The 2014 Bulgartransgaz Access Rules for Storage

- (173) The main principles for capacity allocation according to the 2014 Bulgartransgaz Access Rules for Storage essentially remained the same. A priority right was at a first stage granted to potential users having supply contracts with 'public suppliers' (or who themselves qualified as such) according to the 'base sale quantity' rule set out in recital (170).²⁵³ However, according to the amended rules, capacity was finally allocated between priority users up to the amount of their monthly request but according to the ratio between the 'base sale quantity' of the potential user in question and the total 'base sale quantity' of all potential users.²⁵⁴ In other words, the user with the highest 'base sale quantity' would also be allocated the highest share of available capacity (but not necessarily the entire capacity requested). In practice, and as is also shown in Table 3, the user with the by far highest share of allocated capacity would have most likely always been Bulgargaz, as the 'base sale quantity' continued to be determined by the lower of the gas quantities either sold in the ongoing or contracted for the forthcoming gas storage year.
- (174) If there was storage capacity still available after having completed the first stage of the procedure, potential users with priority right would have at a second stage received capacity according to what is set out in recital (170).²⁵⁵ Finally, if any available storage was left, it was allocated to potential users without priority right pro-rata according to what is set out in recital (172).²⁵⁶
- (175) These rules were changed in April 2016. Under the 2016 Access Rules for Storage, the capacity for storage is to be allocated proportionally to the capacity requests of all potential users thus repealing the 'base sale quantity rule'. The new methodology allocates the available storage capacity after having determined the capacity needed as a reserve for security of supply considerations.²⁵⁷

The 2013 EWRC Access Rules for Storage

- (176) As mentioned in recital (167) at the level of the regulator, the EWRC also adopted the EWRC Access Rules for Storage in March 2013. According to these rules, the available storage capacity shall, amongst others, be offered on a non-discriminatory basis and be allocated on the basis of transparency and equality, as well as on a competitive basis. Accordingly, the SSO had to elaborate and publish non-discriminatory and transparent capacity allocation mechanisms which guarantee

²⁵³ See Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, Annex 8, [pages 10 and 11], [...].

²⁵⁴ See Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, Annex 8, [page 11], [...].

²⁵⁵ See Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, Annex 8, [page 12], [...].

²⁵⁶ See Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, Annex 8, [page 12], [...].

²⁵⁷ These security of supply considerations and the obligation for natural gas undertakings to maintain gas in storage as a reserve stem from the Emergency Plan approved by the Minister of Energy and based on Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295, 12.11.2010, p. 1 (Regulation (EU) No 994/2010), see further in footnote 259.

maximum capacity to be allocated to all market players.²⁵⁸ These rules do not include any provisions with regard to priority allocation.²⁵⁹

- (177) Finally, access to gas storage can be refused based on the following:
- (a) according to Directive 2009/73/EC (and Directive 2003/55/EC), the SSO could refuse access: (1) in case of lack of capacity, (2) when access to storage would prevent the SSO from carrying out its public service obligations, or (3) serious economic and financial difficulties with take-or-pay provision;
 - (b) similarly, the Bulgarian Energy Act foresees that access can be refused: (1) in case of lack of capacity, (2) when access would prevent the operators to carry out their public service obligations, and (3) when access would infringe the technical terms and the security of the facilities.²⁶⁰

5.3.3. *Bulgartransgaz' approach toward granting access to UGS Chiren*

- (178) As set out in Sections 5.3.3.1 and 5.3.3.2 there was a clear pattern in Bulgartransgaz' behaviour to prevent or attempt to prevent third party access to UGS Chiren:
- (a) acting in a non-transparent manner and thus making it more difficult for third parties to apply for access to storage (in particular before it adopted formal storage allocation rules);
 - (b) failing to reply to access requests or failing to process the requests internally;
 - (c) overburdening third parties that requested access with requests to supply an unreasonable amount of data or to re-submit access requests on the basis of a deliberate misinterpretation of information;
 - (d) devising storage allocation rules in such a way that in all likelihood Bulgargaz, which was part of the same corporate group as Bulgartransgaz, would obtain by far the largest share of available storage capacity.
- (179) On the other hand, a far more lenient approach was applied towards Bulgargaz, which continuously obtained access to storage. This preferential treatment was awarded to Bulgargaz either informally or by establishing rules in its favour. The applications for access by Bulgargaz were processed without any delays, Bulgartransgaz frequently granting access even without a signed contract.

5.3.3.1. Allocation of storage capacity

- (180) Since the liberalisation of the Bulgarian market, Bulgargaz was the only undertaking that received continuous access to UGS Chiren.²⁶¹ In Section 5.3.3.1, the allocation

²⁵⁸ Taking into account the integrity and efficient operation of the system.

²⁵⁹ With the following exceptions: third parties cannot be granted the storage capacity necessary for the operational needs of the SSO or reserved for the TSO's needs or reserved for emergency situations as provided by the Emergency Plan adopted according to Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295, 12.11.2010, p. 1.

²⁶⁰ Article 172b, recital 2 of the Bulgarian Energy Act.

²⁶¹ Certain capacity was offered to Overgas for May and June 2013 until October-November 2013 but under such unfavourable conditions that Overgas refused to accept it (see recitals (198) and (228)). In December 2015 [COMPANY 1] applied for access to storage and Bulgartransgaz proposed a gas

of storage capacity is set out according to whether access was granted prior to or after the 2012 Bulgartransgaz Access Rules for Storage had been issued.

Allocation of storage capacities at UGS Chiren prior to the 2012 Bulgartransgaz Access Rules for Storage

- (181) Since the liberalisation of the gas market in Bulgaria in January 2007, Bulgartransgaz and Bulgargaz concluded two agreements concerning access to UGS Chiren. These agreements retroactively arranged for the provision of storage services to Bulgargaz:
- (a) One of these agreements was concluded in December 2007 and covered the 2007-2008 calendar period. Under this agreement, Bulgartransgaz was to grant Bulgargaz the storage capacity necessary for 'guaranteeing the security of gas supply'. The injections and withdrawals of gas were to be executed on the basis of Bulgargaz' gas schedules, which could be changed at any time depending on the gas consumption and the terms of Bulgargaz' upstream gas supply agreements. Furthermore, Bulgargaz only paid a storage tariff for gas volumes exceeding 250 mcm (over 50% of the storage capacity of UGS Chiren).²⁶²
 - (b) In March 2009, Bulgargaz and Bulgartransgaz concluded an agreement on access to gas storage for the January to June 2009 period.²⁶³ The agreement was intended as a temporary contract until a harmonised gas storage contract (used for all gas storage users) was drafted and signed.²⁶⁴ However, through six

storage contract. However, [COMPANY 1] withdrew its request due to its failure to organize its gas supplies (see recital (209)).

²⁶² Inspection document ALDI 1002, [pages 8-11], [...]. In reply to the Commission's request for information dated 9 April 2013, question 23, [pages 23-25], [...] and Annex 7, [...], Bulgartransgaz explained that the (250 mcm) gas for which a storage tariff was not paid under the contract, was property of Bulgargaz. Since at least 2005, when the EWRC set the tariffs for gas transmission and storage applicable at least until 2016, the costs for storing the 250 mcm gas have been covered by all customers through the transmission tariff. These gas quantities served as "gas reserves" necessary for "guaranteeing the supply and maintenance of the balance between import and consumption of natural gas". In November 2012 the Energy Minister approved an Emergency Plan (on the basis of Regulation (EU) No 994/2010). According to this Plan, Bulgargaz was obliged to maintain in UGS Chiren 130 mcm gas as reserve for guaranteeing the supply, as well as 120 mcm gas for ensuring "seasonal shortages at the entry of the system". Bulgartransgaz was obliged to store these volumes and to withdraw them when the relevant events occurred. The Plan also stipulated that gas suppliers, whose customers had non-flat consumption of gas (in particular, central heating plants), were obliged to maintain in UGS Chiren enough gas quantities to cover the seasonal fluctuation of their customers' consumption, so that no breach of the upstream gas supply agreements or shortages at the entry of the gas system could follow. The Emergency Plan was subsequently amended in June 2015 and in March 2016. Under the amended Plan gas companies supplying central heating plants and end suppliers (see footnote 40) have to store in UGS Chiren up to 290 mcm of gas per year needed for covering the seasonal consumption variation of these two customer groups. Gas quantities to be stored in Chiren should amount to between 10% and 20% of the consumption of the two customer groups and should be notified to the Minister of Energy and Bulgartransgaz before the beginning of each gas storage year. In addition, Bulgartransgaz has to maintain in UGS Chiren another 140 mcm of gas which will be used in case of disruption of gas supplies, see Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 14., [...].

²⁶³ Bulgargaz' reply to the Commission's request for information dated 3 July 2012, question 5, Annex 2, [pages 1-11], [...].

²⁶⁴ Inspection document GIA 2020, [15.06.2009], [...].

addenda concluded between Bulgargaz and Bulgartransgaz, the duration of the agreement of 2009 was extended up until April 2012.²⁶⁵

- (182) For each gas storage year in the 2007 to 2012 period, Bulgargaz submitted schedules to Bulgartransgaz for the injection of gas into UGS Chiren which are set out in Table 1.

Table 1: Bulgargaz' requested storage capacity, total available capacity and injected gas quantities for the 2007-2012 gas storage years

Gas storage year	Bulgargaz ²⁶⁶		UGS Chiren (Bulgartransgaz) ²⁶⁷		Injected gas (end of injection season) ²⁶⁸	
	Date of 1st request	Requested capacity	Available capacity	Date of informing Bulgargaz of the available capacity for injection	for Bulgargaz	For 3rd parties
2007-2008	n/a	n/a	n/a	n/a	[300-350] mcm	0
2008-2009	13.03.08	[350-400] mcm	[300-350] mcm	17.10.07	[300-350] mcm	0
			[300-350] mcm	11.03.08		
2009-2010	16.04.09	[300-350] mcm	[100-150]-[200-250] mcm*	22.04.09	[200-250] mcm	0
2010-2011	20.10.09	[350-400] mcm	[350-400] mcm	16.04.10	[150-200] mcm	0
	09.03.10	[400-450] mcm				
2011-2012	18.02.11	[350-400] mcm	[300-350] mcm	15.04.11	[300-350] mcm	0
	19.04.11	[300-350] mcm				

* *Bulgartransgaz was planning a reconstruction at the gas storage reservoir.*

- (183) The Commission notes that in an internal document Bulgartransgaz admitted that it was exposed to the risk of being accused of not granting third party access to gas storage.²⁶⁹ According to the statements made in that internal document, the capacity of UGS Chiren was not enough to satisfy all access requests and, if Bulgargaz was

²⁶⁵ Bulgargaz' reply to the Commission's request for information dated 3 July 2012, question 5, Annex 2, [pages 3-10], [...].

²⁶⁶ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 4, [pages 7, 11, 16, 17, 22, 25], [...].

²⁶⁷ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 4, [pages 4, 6, 13, 18, 24], [...].

²⁶⁸ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 16, Annex 9, [first Excel table], column "Injected volumes for Bulgargaz", [sheet 1], [...]. Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 7, [page 9], [...] and Annex 4, columns 21 and 24, [sheet 1 page 1], [...].

²⁶⁹ Report of [Bulgartransgaz's employee] to the Board of Directors, June 2009, Inspection document GIA 2020, [15.06.2009], [...].

first to make such a request, it would get the entire capacity on the basis of the ‘first come, first served’ principle.²⁷⁰

- (184) A description of Bulgartransgaz' refusals to provide third party access to UGS Chiren prior to the adoption of the 2012 Bulgartransgaz Access Rules for Storage is set out in recitals (214)-(229), (240)-(241) and (247)-(249).

Allocation of storage capacities at UGS Chiren after the entry into force of the 2012 Bulgartransgaz Access Rules for Storage

- (185) The allocation procedures set out in recitals (186)-(211), including subsequent modifications, were initiated after the adoption of the 2012 Bulgartransgaz Access Rules for Storage.

Gas storage year 2012-2013

- (186) With regard to the 2012-2013 gas storage year, two days after the adoption of the Bulgartransgaz' Access Rules for Storage, Bulgartransgaz initiated a capacity allocation procedure in March 2012 for the allocation of 300 mcm of available storage capacity in UGS Chiren. The application deadline was set at 17 April 2012.²⁷¹

- (187) In an internal report, when assessing the requests of this capacity allocation, Bulgartransgaz concluded that Bulgargaz was the only applicant having submitted a request within the deadline (it had also provided contracts with public suppliers). Under the new base sale priority rule and capacity allocation methodology, Bulgartransgaz therefore allocated the whole available storage capacity in UGS Chiren for the gas storage year 2012-2013 to Bulgargaz.²⁷² Bulgartransgaz and Bulgargaz subsequently also concluded a gas storage contract stipulating the injection of [300-350] mcm of gas between June and October 2012 and the withdrawal of the same quantity of gas between November 2012 and March 2013.²⁷³

- (188) It can at this point be noted that it would have been difficult, if not impossible, for any other market player than Bulgargaz to apply for capacity in the capacity allocation procedure, as potential applicants were given an insufficient amount of time to prepare requests (around 19 days). Within this limited period of time, an undertaking submitting a request also had to arrange its supply plans, including transmission capacity for its relevant gas quantities.²⁷⁴

- (189) In the course of the injection season, the capacity contracted by Bulgargaz in August, September and October 2012 was not entirely used. Although Bulgartransgaz did

²⁷⁰ Report of [Bulgartransgaz's employee] to the Board of Directors, June 2009, Inspection document GIA 2020, [15.06.2009], [pages 1-5], [...].

²⁷¹ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, Annex 2, [pages 2-5], [...].

²⁷² Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 19, [page 12], [...], and Annex 10, [pages 13-19 and 26-27], [...].

²⁷³ See Gas transmission and storage contract of 4 June 2012 concluded between Bulgartransgaz and Bulgargaz, [...] [pages 32 and 33].

²⁷⁴ See for example, Overgas' reply to the Commission's request for information dated 18 September 2013, question 2, [page 4], [...]. The procedure was published on Bulgartransgaz' web page on 30 March 2012 and applicants were required to submit requests by 17 April 2012.

publish data on its website on the available spare capacity for injection into UGS Chiren,²⁷⁵ it failed to publish what spare capacities there would be for withdrawal, thereby preventing potential applicants from engaging in the necessary planning needed for using the capacities.²⁷⁶

Gas storage year 2013-2014

- (190) In March 2013, Bulgartransgaz initiated a capacity allocation procedure for the allocation of the 300 mcm available storage capacity in UGS Chiren for the 2013-2014 gas storage year.²⁷⁷ As shown in **Table 2**, Bulgartransgaz announced available capacities for injection and withdrawal exceeding the announced (300 mcm) available storage capacity.²⁷⁸
- (191) Two undertakings applied for storage capacity – Overgas and Bulgargaz.²⁷⁹
- (a) Overgas requested only firm²⁸⁰ capacity. It requested the injection and withdrawal of [150-200] mcm gas in the 2013-2014 gas storage year (short-term storage services), as well as an additional injection of [5-30] mcm of gas which was to be withdrawn in the course of the next 2014-2015 gas storage year (long-term storage services). Table 2 shows Overgas' requests of firm capacity for short-term storage services.
 - (b) Bulgargaz requested firm and interruptible²⁸¹ capacity. It requested the injection of [310 – 385] mcm ([305 – 355] mcm firm and [5 – 30] mcm interruptible capacity) and the withdrawal of [290 – 365] mcm gas ([270 – 320] mcm firm and [20 – 45] mcm interruptible capacity) in the 2013-2014 gas

²⁷⁵ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 3, [page 4], [...]. See also gas volumes injected for Bulgargaz in May-August 2012, Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, Annex 4, column 21, [sheet 1 page1], [...] (some injections took place in May and not in September and October as stipulated in the contract of June 2012 between Bulgartransgaz and Bulgargaz). See also Overgas' reply to Commission request for information dated 18 September 2013, question 2, [page 4], [...].

²⁷⁶ Overgas' reply to the Commission's request for information dated 18 September 2013, question 2, [page 4], [...]. See also Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 3, [page 4], [...] where Bulgartransgaz states that it did not receive any request for access to UGS Chiren.

²⁷⁷ Out of the 300 mcm storage capacity, 210 mcm were announced as firm capacity (with respect to the injection) - of which 170 mcm for short-term and 40 mcm for long-term services - and 90 mcm interruptible capacity (with respect to the injection). Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 25, [pages 27 and 28], [...] and Annex 9, [page 20], [...].

²⁷⁸ However, in the announcement, Bulgartransgaz made an explicit remark that in a gas storage year the allocated total capacity for injection or withdrawal could not exceed the announced total available storage capacity.

²⁷⁹ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 25, [page 28], [...], and Annex 8, [pages 2 and 6], [...] and Annex 9, [page 2], [...]. See also Overgas' reply to the Commission's request for information dated 26 April 2013, [page 16], [...].

²⁸⁰ Firm capacity is a storage capacity offered in standard combination of operating volume, injection, and withdrawal capacity.

²⁸¹ Interruptible capacity is a storage capacity which depends on actual nominations for firm storage capacity, section of the storage period and time of the reservation.

storage year (short-term storage services).²⁸² Table 2 also shows Bulgargaz' requests of firm capacity for short-term storage services.

- (192) As a first step in the capacity allocation procedure, Bulgartransgaz determined the respective base sale quantity of Bulgargaz and Overgas. Bulgargaz' sales to public suppliers for 2012/2013 amounted to [1-2] bcm and the contracted sales for 2013/2014 amounted to [1-2] bcm. On the other hand, Overgas' sales to public suppliers for 2012/2013 amounted to [0-0.5] bcm and the contracted sales for 2013/2014 amounted to [0-0.5] bcm. According to Bulgartransgaz Access Rules for Storage, the base sale quantity was therefore set at [1-2] bcm for Bulgargaz and at [0-0.5] bcm for Overgas.²⁸³ On this basis, Bulgargaz had priority in the storage capacity allocation over Overgas.
- (193) As a second step in the capacity allocation procedure, Bulgartransgaz allocated the capacities for injection and withdrawal to Bulgargaz and Overgas. As Bulgargaz was deemed to have priority, Bulgargaz was allocated capacity first. In this respect, Table 2 summarizes the monthly available capacities for injection and withdrawal announced by Bulgartransgaz, as well as the requested and allocated capacities for injection and withdrawal (firm for short term storage services) to Bulgargaz and Overgas for the 2013-2014 gas storage year.²⁸⁴
- (194) As is visible from Table 2, Bulgargaz that had priority according to the 2012 Bulgartransgaz Access Rules for Storage was allocated the entire requested capacity, whereas Overgas was allocated only the leftover capacity (the capacity that Bulgargaz did not request).

²⁸² Bulgartransgaz' reply to the Commission request for information dated 9 April 2013, question 25, [pages 27 and 28], [...] and Annex 8, [pages 8 and 10], [...].

²⁸³ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 25, [page 28], [...] and Annex 8, [pages 2-3 and 6], [...] and Annex 9, [pages 4 and 5], [...].

²⁸⁴ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 8, [pages 4-5 and 8-11], [...] and Annex 9, [pages 7-11], [...].

Table 2: Monthly injection and withdrawal capacities (announced, requested and allocated) for the 2013-2014 gas storage year

Month 2013- 2014/ mcm	Announced Available firm capacity (monthly limits)		Bulgargaz				Overgas			
	Injection	With- drawal	Requested firm capacity		Allocated firm capacity		Requested firm capacity*		Allocated firm capacity	
			Inject-ion	With- drawal	Inject-ion	With- drawal	Injection	With- drawal	Inject-ion	With- drawal
April 2013	0		0		0		0		0	
May	50		[25-50]		[25-50]		[0-25] ²⁸⁵		[25-50]	
June	95		[70-95]		[70-95]		[25-50]		[5-30]	
July	90		[65-90]		[65-90]		[25-50]		[0-25]	
August	70		[45-70]		[45-70]		[25-50]		[0-25]	
September	50		[25-50]		[25-50]		[25-50]		[0-25]	
October		40		[0-25]		[0-25]		[5-30]		[5-30]
November		65		[0-25]		[0-25]		[25-50]		[25-50]
December		72		[47-72]		[47-72]		[25-50]		[0-25]
January 2014		90		[65-90]		[65-90]		[25-50]		[0-25]
February		72		[47-72]		[47-72]		[25-50]		[0-25]
March		61		[36-61]		[36-61]		[25-50]		[0-25]
Total mcm	355	400	[305-355]	[270-320]	[305-355]	[270-320]	[150-200]	[150-200]	[25-50]	up to [25-50] ²⁸⁶

* When initially requesting firm capacity Overgas provided absolute figures, however, later, in the course of the capacity allocation procedure, Bulgartransgaz requested Overgas and Bulgargaz to provide ranges instead of absolute figures (see also footnote 285).²⁸⁷

- (195) In addition, Bulgartransgaz also allocated interruptible capacities to Bulgargaz ([5-30] mcm for injection and [20-45] mcm for withdrawal in the 2013-2014 gas storage year), as well as [5-30] mcm (firm) withdrawal capacity to Overgas in the next 2014-2015 gas storage year (as part of a long term booking, see recital (196)).²⁸⁸
- (196) As a third step in the capacity allocation procedure, Bulgartransgaz allocated final storage capacity to Bulgargaz and Overgas. Since Bulgartransgaz' announcement of available injection and withdrawal capacity exceeded the available storage capacity, Bulgartransgaz had to reduce and transform the allocated capacities for injection and withdrawal in order to allocate the final storage capacity.²⁸⁹ Bulgartransgaz therefore reduced the allocated capacities from [305 – 355] to [270 – 320] mcm in the case of Bulgargaz and from [50-75] to [25-50] mcm in the case of Overgas (comprising both

²⁸⁵ Requested range was 0-25.

²⁸⁶ Overgas was given the option to use [5-30] mcm out of these [25-50] mcm withdrawal capacity as part of the short-term storage service. The remaining [5-30] mcm together with another [5-30] mcm withdrawal capacity Overgas could have used as part of the long-term storage service in the course of the next 2014-2015 gas storage year.

²⁸⁷ See Overgas' reply to the Commission's request for information dated 26 April 2013, reply to question 2, [page 5], [...] and Annex 2.1, [page 18], [...], see also Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 9, [page 6], [...].

²⁸⁸ See Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 9, [pages 10 and 24] [...].

²⁸⁹ When allocating storage capacity, for every potential user, Bulgartransgaz first reduces the allocated total injection capacity to the level of the allocated total withdrawal capacity or vice versa, whichever is lower. Storage capacity is then equal to this reduced level of capacity.

short-term and long-term capacities) but still exceeding the total available storage capacity by [25 – 50] mcm. Bulgartransgaz subsequently made additional reductions, transformations and allocations, not all of which were envisaged in the rules, finally reaching the following allocation of storage capacity: [200 – 275] mcm to Bulgargaz ([125 – 175] mcm firm (with respect to the injection capacity) and [75 – 100] mcm interruptible (with respect to the injection capacity)) and [25-50] mcm to Overgas (comprising both long and short-term capacities), together exactly amounting to total available storage capacity.²⁹⁰

- (197) Bulgartransgaz and Bulgargaz subsequently concluded a storage contract of [200-275] mcm of gas on 30 April 2013, with an injection and withdrawal schedule close to the one initially requested by Bulgargaz.²⁹¹
- (198) Overgas, on the other hand, refused to conclude a gas storage contract with Bulgartransgaz. As illustrated in Table 2, Overgas' gas could only be injected in May and June 2013, and only part of it (up to [25-50] mcm) could be withdrawn in October and November 2013, that is long before the cold season was over. In other words, Overgas was only allocated capacity which had not been requested by Bulgargaz for a certain month and which accordingly had been left over after the allocation of capacity to Bulgargaz.²⁹²
- (199) Overgas therefore explained, in a letter of 29 April 2013 to Bulgartransgaz, that the allocated storage capacity and the proposed injection and withdrawal schedule could not serve Overgas' purposes.²⁹³ According to Overgas, the capacity offered by Bulgartransgaz, meant that Overgas had to withdraw the whole gas before the winter period began and this would have prevented Overgas from properly balancing its purchase and gas supplies. Accepting these terms and conditions would therefore

²⁹⁰ See Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 8a [pages 3 and 7], [...], and Annex 9, [pages 12-14], [...]. As pointed out in recitals (169)-(172), according to the 2012 Bulgartransgaz Access Rules for Storage, to each potential user Bulgartransgaz allocated storage capacity which was equal to the reduced capacity for injection or withdrawal. Therefore, in cases where the allocated total injection, respectively withdrawal capacities exceed the available storage capacity, this rule allowed Bulgartransgaz to allocate the storage capacity to the undertaking with the largest allocated injection and withdrawal capacities (i.e. Bulgargaz which had [270-320] mcm allocated injection/withdrawal capacity). However, in this particular case, without such rules being envisaged in the 2012 Bulgartransgaz Access Rules for Storage, Bulgartransgaz chose to keep unchanged the injection/withdrawal capacities allocated to Overgas and reduced only the injection/withdrawal capacities allocated to Bulgargaz. Then, Bulgartransgaz offered the entire interruptible capacity to Bulgargaz thus reaching the final allocation of the storage capacity as described in recital (196).

²⁹¹ See Gas transmission and storage contract of 30 April 2013 concluded by Bulgartransgaz and Bulgargaz, [pages 8, 35 and 36], [...]. The contracted injection capacities were as follows: May 2013 – [25-50] mcm firm capacity; June 2013 – [45-70] mcm firm capacity; July 2013 – [65-90] mcm firm capacity; August 2013 – [45-70] mcm interruptible capacity; September 2013 – [10-35] mcm interruptible capacity. The contracted withdrawal capacities (firm and interruptible without having been specified) were as follows: December 2013 – [47-72] mcm; January 2014 – [65-90] mcm; February 2014 – [47-72] mcm; March 2014 – [10-35] mcm.

²⁹² Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 8a [3,5-6], [...] and Annex 9, [page 23], [...]. See also Overgas' reply to Commission's request for information dated 26 April 2013, [pages 20 and 21], [...].

²⁹³ Overgas' reply to the Commission's request for information dated 26 April 2013, Annex 2.1, [page 23], [...].

have meant an additional cost for storage to Overgas without having received any clear benefits.²⁹⁴

Gas storage year 2014-2015

- (200) As set out in Section 5.3.2, Bulgartransgaz amended its access rules for storage in 2014. However, the principles for allocation (including the calculation of the ‘base sale quantity’) remained similar to the access rules before the amendment. The allocation procedures set out in recitals (173)-(175), including subsequent modifications, were initiated under the 2014 Bulgartransgaz Access Rules for Storage.
- (201) In April 2014, Bulgartransgaz initiated a capacity allocation procedure for the allocation of the 300 mcm available capacity for short-term storage services in UGS Chiren for the 2014-2015 gas storage year.²⁹⁵
- (202) Two undertakings applied for firm capacity, short term storage services – Overgas and Bulgargaz – for the 2014-2015 gas storage year:
 - (a) Overgas requested the injection and withdrawal of [80-130] mcm gas (short term storage services). Table 3 shows Overgas' requests of firm capacity for short-term storage services;²⁹⁶ and
 - (b) Bulgargaz requested the injection of [250 – 300] mcm of gas and the withdrawal of [365 – 415] mcm of gas (short term storage services).²⁹⁷ Table 3 also shows Bulgargaz' short-term requests of firm capacity for short-term storage services.
- (203) As a first step in the capacity allocation procedure, Bulgartransgaz determined the respective ‘base sale quantity’ of Bulgargaz and Overgas according to the 2014 Bulgartransgaz Access Rules for Storage. Bulgargaz' sales to public suppliers for 2013/2014 amounted to roughly [1– 2] bcm and the contracted sales for 2014/2015 amounted to roughly [0.5–1] bcm. On the other hand, Overgas' sales to public suppliers for 2013/2014 amounted to roughly [0-0.5] bcm and the contracted sales for 2014/2015 amounted to roughly [0-0.5]bcm. According to the revised rules, the base sale quantity was therefore set at [0.5–1] bcm for Bulgargaz and at [0-0.5] bcm for Overgas (the lower of the respective ongoing and forthcoming contracted sales).

²⁹⁴ Overgas' reply to the Commission's request for information dated 18 September 2013, question 1, [page 3], [...].

²⁹⁵ Out of the 300 mcm storage capacity, 273 mcm were announced for short term services and 27 mcm for long term services. However, during the course of the procedure the announced capacity for long-term services was converted into capacity for short-term services. See Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, question 5, [page 8], [...] and Annex 7, [page 2], [...] and Annex 8, [page 103], [...].

²⁹⁶ Overgas' reply to the Commission request for information dated 28 August 2014, Annex 4, [page 5], [...].

²⁹⁷ In addition, Bulgargaz requested interruptible capacity for withdrawal of [25-50] mcm, storage on long-term basis; firm capacity for the injection of [250-300] mcm and the withdrawal of [365-415] mcm, storage on long-term basis, as well as the virtual capacity for injection of [1000-1100] mcm. Bulgartransgaz' reply to the Commission request for information dated 28 August 2014, Annex 7, [pages 32 – 35], [...]. These requests were rejected by Bulgartransgaz and accordingly, the announced capacity for long term services was converted into capacity for short term services, see Bulgartransgaz' reply to Commission request for information dated 28 August 2014, [pages 102 and 103], [...].

On this basis, Bulgargaz' portion ratio in the allocation of the capacity therefore amounted to [70-80]%) and Overgas' portion ratio to [20-30]% of the total available capacity in each requested month.²⁹⁸

- (204) As a second step in the capacity allocation procedure, Bulgartransgaz allocated the capacities for injection and withdrawal to Bulgargaz and Overgas according to their respective portion ratio (see previous recital).²⁹⁹ In this respect, Table 3 summarises the monthly available capacities for injection and withdrawal announced by Bulgartransgaz, as well as the requested and allocated capacities for injection and withdrawal (for short term storage services) to Bulgargaz and Overgas for the 2014-2015 gas storage year.³⁰⁰

Table 3: Monthly injection and withdrawal capacities (announced, requested and allocated) for the 2014-2015 gas storage year

Month 2014 – 2015/ mcm	Announced Available firm capacity (monthly limits)		Bulgargaz				Overgas			
			Requested firm capacity		Allocated firm capacity		Requested firm capacity		Allocated firm capacity	
	Inject- ion	With- drawal	Inject- ion	With- drawal	Injection	Withdraw al	Inject- ion	With- drawal	Inject- ion	Withdra wal
June 2014	95		[70-95]		[70-95]		[0-25]		[0-25]	
July	76		[51-76]		[51-76]		[0-25]		[0-25]	
August	47		[22-47]		[22-47]		[22-47]		[5-30]	
September	53		[28-53]		[28-53]		[28-53]		[5-30]	
October	29		[4-29]		[4-29]		[0-25]		[0-25]	
November		75		[50-75]		[50-75]		[0-25]		[0-25]
December		95		[70-95]		[70-95]		[5-30]		[25-50]
January 2015		95		[70-95]		[70-95]		[25-50]		[25-50]
February		76		[51-76]		[51-76]		[25-50]		[5-30]
March		74		[49-74]		[49-74]		[5-30]		[5-30]

²⁹⁸ Bulgartransgaz' reply to the Commission request for information dated 28 August 2014, Annex 8, [page 103], [...].

²⁹⁹ For the months that Overgas did not request any capacity, the requests of Bulgargaz were granted in their entirety, see Bulgartransgaz' reply to the Commission request for information dated 28 August 2014, Annex 8, [pages 103 – 107], [...].

³⁰⁰ Bulgartransgaz' reply to the Commission request for information dated 28 August 2014, Annex 8, [pages 103 – 107], [...].

Total mcm	300	415	[250-300]	[365-415]	[250-300]	[300-350]	[80-130]	[80-130]	[25-50]	[75-100]
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- (205) As a third step in the capacity allocation procedure, Bulgartransgaz allocated final storage capacity to Bulgargaz and Overgas. Bulgartransgaz had to reduce and transform the allocated capacities for injection and/or withdrawal (to the level of the lower one) in order to allocate the final storage capacity. Bulgartransgaz therefore reduced the allocated capacity from [300 – 350] to [250 – 300] mcm in the case of Bulgargaz and from [75-100] to [25-50] mcm in the case of Overgas (adding up to the available storage capacity).³⁰¹
- (206) Overgas ultimately refused to conclude a gas storage contract with Bulgartransgaz, as these allocated capacities did not satisfy its requirements.³⁰² As illustrated in Table 3, Overgas was only awarded roughly [20-30]% of the requested injection capacity. Bulgargaz, on the other hand, was awarded roughly [85-95]% of its requested injection capacity. Overgas did not further apply for storage capacity.³⁰³
- (207) Also Bulgargaz did not conclude a contract with Bulgartransgaz on the basis of the capacity allocation procedure. When Bulgartransgaz later again offered the capacity to the market, it concluded two contracts with Bulgargaz on 2 and 28 July 2014, respectively, for the injection and withdrawal of a total of only roughly [5 – 30] mcm.³⁰⁴ Subsequently, on 11 and 30 September 2014 Bulgartransgaz concluded with Bulgargaz two more contracts for storage of [70 – 95] mcm of gas.³⁰⁵ Therefore, following this allocation process UGS Chiren continued to have a significant amount of capacity available for other parties to apply.
- (208) After the capacity allocation procedure was over, on 19 September 2014, another undertaking requested access to UGS Chiren. The approach taken by Bulgartransgaz towards this application for access significantly differed from its handling of the previous access requests. Bulgartransgaz was very responsive (Bulgartransgaz replied to the correspondence within 1-4 days) and on 23 September 2014 Bulgartransgaz granted access to the UGS Chiren.³⁰⁶ However, according to the requesting undertaking, the gas was to be transported to UGS Chiren via a pipeline which, at the time, would not allow to ship gas to UGS Chiren. Therefore, despite Bulgartransgaz' positive evaluation of the storage access request, the gas was

³⁰¹ Bulgartransgaz' reply to the Commission request for information dated 28 August 2014, Annex 8, [pages 107 and 108], [...].

³⁰² Overgas' reply to the Commission request for information dated 28 August 2014, Question 5, [pages 6 and 7], [...].

³⁰³ Overgas' reply to the Commission request for information dated 15 March 2016, question 12, [page 9], [...].

³⁰⁴ Bulgartransgaz' reply to the Commission request for information dated 28 August 2014, Question 5, [page 9], [...]; See also Bulgartransgaz' reply to the Commission request for information dated 28 August 2014, Annex 9, [pages 18 – 54 and pages 69 – 105], [...].

³⁰⁵ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 15, [...] and Annex 26, [pages 27, 53 and 63, 87], [...].

³⁰⁶ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 15, [page 26], [...]. See Bulgartransgaz' positive reply to access request dated 23 September 2014, where also a technical problem was identified, Annex 28 [...].

eventually not stored in UGS Chiren.³⁰⁷ It is worth noting that once Bulgartransgaz identified a technical problem with shipping the gas to UGS Chiren via the route requested by the applicant, Bulgartransgaz proactively found and offered an alternative solution.³⁰⁸

Gas storage year 2015-2016

- (209) Bulgartransgaz continued applying the same rules for access to storage during the April 2015 capacity allocation procedure. However, during this capacity allocation procedure only Bulgargaz applied for access. Bulgargaz requested one third (50 mcm) of the announced available storage capacity (155 mcm) and Bulgartransgaz satisfied its capacity request. Following this open season procedure Bulgartransgaz published the remaining spare capacity on its web page.³⁰⁹ No other capacity requests were submitted until the end of the same gas storage year when in December 2015 [COMPANY 1] requested access to UGS Chiren. Bulgartransgaz agreed to grant [COMPANY 1] the requested access however, finally [COMPANY 1] withdrew its storage capacity request due to failure to organise its gas supplies (see recital (213)).³¹⁰

Gas storage year 2016-2017

- (210) Before the beginning of the next gas storage year, on 4 April 2016, Bulgartransgaz adopted a new capacity allocation methodology based on allocation proportional to the storage capacity requests (see recital (175)). The new methodology was applied in the new capacity allocation procedure in 2016.³¹¹ Only Bulgargaz applied for access to storage and its capacity request ([50 – 75] mcm) was satisfied.³¹² After the open procedure was over Bulgartransgaz published information about the remaining available storage capacity (81 mcm) on its web page.³¹³
- (211) It should at this point be noted that after Bulgargaz refused to conclude a gas storage contract at the end of the capacity allocation procedure in 2014, its future requests for storage capacity were substantially lower than the total available storage capacity.

³⁰⁷ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 15, [page 26], [...].

³⁰⁸ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 15, [page 26], [...]. See Bulgartransgaz' positive reply to access request dated 23 September 2014, where a technical problem was identified, Annex 28 [...].

³⁰⁹ See Bulgartransgaz announcements of unused capacity:
<http://www.bulgartransgaz.bg/bg/pages/sahranenie-47.html>, [...];
<http://www.bulgartransgaz.bg/bg/pages/sahranenie-na-priroden-gaz-istoricheski-danni-49.html>, [...].

³¹⁰ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, questions 14 and 15, [page 27], [...], Annex 22, [pages 1-13], [...] and Annex 29, [...]; [COMPANY 1]'s reply to the Commission's request for information dated 23 March 2016, question 5, [page 3], [...].

³¹¹ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 14, [...] and Annex 25, [...]; and additional submission, [page 1] [...].

³¹² See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, additional submission, [pages 1 and 3] [...].

³¹³ See Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, additional submission, [page 2], [...] and [...].

This continued to be the case during the 2015 and 2016 capacity allocation procedures. Thus, despite the fact that the 2014 Bulgartransgaz Access Rules for Storage continued to apply until April 2016, as of September 2014 there was consistently available capacity advertised by Bulgartransgaz and available for third parties to apply (see recitals (207)-(208)).³¹⁴

5.3.3.2. Examples of refusal to grant access or access made more difficult

- (212) At least three undertakings encountered major problems when trying to access the storage in Bulgaria, namely Overgas and two industrial final customers [COMPANY 5] and [COMPANY 6].
- (213) All of them encountered major problems and Bulgartransgaz ensured that storage capacity remained within the BEH group. In addition, also [COMPANY 1] requested access to UGS Chiren however in May 2010 it withdrew its request. On 7 December 2015 [COMPANY 1] once again sent Bulgartransgaz an inquiry about the possibility to virtually³¹⁵ inject gas into UGS Chiren during the withdrawal period. Bulgartransgaz agreed to sign a storage contract. Nevertheless in the end, [COMPANY 1] changed its initial intention to use UGS Chiren due to failure to sign a binding agreement with its potential gas supplier.³¹⁶

Overgas

- (214) On 29 April 2010, Overgas informed Bulgartransgaz of its intention to store natural gas in UGS Chiren and requested information about the available storage capacity and the commercial conditions for storage usage. Three months later, on 30 July 2010, Overgas requested Bulgartransgaz to grant it access to the UGS Chiren, informing it that it planned to store 500 mcm in the 2011-2012 gas storage year. It also proposed to make a swap with the gas quantities which were to be requested for withdrawal by Bulgargaz.³¹⁷
- (215) Following instructions from Bulgartransgaz to provide a detailed storage request,³¹⁸ Overgas did so on 24 August 2010, repeating its offer to swap gas.³¹⁹ Overgas planned to inject 160 mcm in September and October 2010. Overgas also requested the transportation and injection of 480 mcm gas to UGS Chiren in the second and

³¹⁴ See Bulgartransgaz announcements of available capacity: <http://www.bulgartransgaz.bg/bg/pages/sahranenie-47.html>, [...]; <http://www.bulgartransgaz.bg/bg/pages/sahranenie-na-priroden-gaz-istoricheski-danni-49.html>, [...].

³¹⁵ According to 2014 Bulgartransgaz Access Rules for Storage, point 2 of section 'Virtual capacity for injection and/or withdrawal', 'virtual injection' is a procedure which allows the client to acquire storage capacity as a result of replacing quantities which would have been withdrawn from the storage reservoir during the withdrawal period with quantities delivered by the client at the entry/exit point of UGS Chiren.

³¹⁶ See [COMPANY 1]'s reply to the Commission's request for information, dated 23 March 2016, question 5, [page 3], [...].

³¹⁷ Overgas submission of 20 January 2011, Exhibit II [page 30], [...].

³¹⁸ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 13, [page 2], [...].

³¹⁹ Inspection document VEMA 1016, [24.08.2010], [...] [pages 15-16].

third quarter of 2011.³²⁰ It also provided a schedule for the injection and withdrawal of gas.³²¹

- (216) One month later, Bulgartransgaz informed Overgas that it had not provided a transmission schedule and information about negotiated transmission of the gas requested for injection into UGS Chiren in 2010.³²²
- (217) In response, Overgas submitted a series of letters and detailed requests for transmission and storage of gas (see Section 5.2.4.2). On 29 September 2010, Overgas submitted a separate request for the transmission of 480 mcm gas from entry point Negru Voda 1 to exit point UGS Chiren in the second and third quarter of 2011.³²³ Some days later, Overgas submitted a new schedule for the injection of gas into UGS Chiren, where the initially planned injections for 2010 were dropped, due to Bulgartransgaz' 'delayed answer'.³²⁴
- (218) As explained in Section 5.2.4.2 above, the EWRC confirmed in a letter to Overgas that no obstacles should prevent the negotiation of access for Overgas to both the Bulgarian transmission network and to UGS Chiren. Overgas forwarded this letter to Bulgartransgaz on 10 November 2010.³²⁵ In addition, Overgas again submitted a separate request for the transmission of 480 mcm gas to exit point UGS Chiren in the second and third quarter of 2011. This time, the requested entry points for transmission of gas to UGS Chiren were Negru Voda 2 and 3 (see point (g) in recital (101)).³²⁶
- (219) A working group within Bulgartransgaz assessed Overgas' requests for access to the Bulgarian transmission network as explained in Section 5.2.4.2.³²⁷ However, the report by the working group did not include any assessment regarding the transmission of gas to UGS Chiren.³²⁸ Similarly, although in its note to Bulgartransgaz' Board of Directors [Bulgartransgaz's employee] concluded that Overgas fulfilled the conditions for access to the Bulgarian transmission network (and enclosed opinions on the terms of access); he did not provide an opinion on the access for transmission to UGS Chiren.³²⁹

³²⁰ Inspection document VEMA 1017, [24.08.2010], [...] [pages 37 and 53].

³²¹ Inspection document VEMA 1017, [24.08.2010], [...] [pages 54-55].

³²² Inspection document VEMA 1015, [24.09.2010], [...] [page 7].

³²³ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 12, [pages 2-4], [...].

³²⁴ Inspection document VEMA 1019, [05.10.2010], [...], [pages 65-66].

³²⁵ Inspection document ALDI 1029, [10.11.2010], [...]. That opinion was explicitly confirmed by EWRC as regards gas storage in reply to the Commission's request for information dated 9 July 2012, question 20, [page 14], [...].

³²⁶ See Inspection document ALDI 1029 [10.11.2010], [...]; and VEMA 1004, [05.11.2010] [...].

³²⁷ Inspection document GIA 1006, [18.10.2010], [...].

³²⁸ Inspection document VEMA 1016, [...], [pages 32 – 35].

³²⁹ Inspection document ALDI 1029, [17.12.2010], [...]; Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 30, [page 30], [...].

- (220) In fact, Bulgartransgaz never took any decision on substance regarding Overgas' access to storage.³³⁰ In an internal report to [Bulgartransgaz's employee], prepared one year later in July 2011, officials of the undertaking explicitly stated that the appointed working group had not assessed the request for access to UGS Chiren as it exceeded its competence.³³¹ In the same report, and with reference to Overgas having submitted a request in August 2010 for the 2011-2012 gas storage year (as opposed to the 2010-2011 gas storage year), the officials underlined that there was no previous practice in Europe to skip the upcoming gas storage year (that is to request a capacity for a distant future and not the immediately upcoming gas storage year). However, the officials failed to analyse in this context Overgas' subsequent requests of September and November 2010 to inject gas into UGS Chiren in the second and third trimester of 2011 which were described in the report.³³² It should at this point also be noted that, despite the fact that Bulgartransgaz did not assess Overgas' requests for access to UGS Chiren, it did nevertheless inform Overgas that it was processing all 43 requests for access to the Bulgarian transmission network, including the one with exit point UGS Chiren during a meeting at the beginning of December 2010 (see recital (103)).
- (221) Subsequently, in January 2011, Overgas sent a letter to the Energy Minister³³³ and filed a formal complaint with the EWRC against Bulgartransgaz for not having granted access to the gas transmission network and UGS Chiren.³³⁴ However, in its reply to the EWRC's request for information on the matter, Bulgartransgaz only referred to access to the transmission network (and not to storage). As far as the Commission is aware, at least until July 2015 the EWRC had not issued any decision with respect to access to storage.³³⁵
- (222) Bulgargaz, on the other hand, only submitted its injection schedule to Bulgartransgaz on 18 February 2011 for the injection season of 2011.³³⁶ Although, as described in recitals (214), Overgas had made a request regarding the 2011-2012 gas storage year before (on 30 July 2010, see recital (214)), Bulgargaz' request was accepted as a 'first-come' gas storage request for the 2011-2012 gas storage year.³³⁷ The initially requested storage capacity amounted to [350 – 400] mcm, but was subsequently

³³⁰ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 28, [page 29], [...] and Annex 11, [...].

³³¹ See Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 16, [page 3], [...].

³³² See Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, Annex 16, [page 4], [...].

³³³ Inspection document STS 1005, [17.01.2011], [pages 2-3], [...].

³³⁴ Inspection document VEMA 1008, [20.01.2011], [...] [page 9].

³³⁵ EWRC's reply to the Commission's request for information, dated 17 July 2012, question 22, [page 21], [...]. See also Overgas' reply to the Commission's question concerning Overgas' submissions dated 26 September 2014, [...]. See also Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 111 and 118, [pages 32 and 33].

³³⁶ Inspection document CGE 1201, [18.02.2011], [...].

³³⁷ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 20, [page 13], [...].

reduced to the available storage capacity of [300 – 350] mcm,³³⁸ as notified to Bulgargaz in April 2011.³³⁹

- (223) Later on, in the course of the injection season 2011, Bulgargaz requested Bulgartransgaz, by letter of 30 June, to cease the gas injection into UGS Chiren as of the beginning of July. In reply, Bulgartransgaz required to be informed about Bulgargaz' plans for scheduled injections by 8 July that year. According to Bulgartransgaz, the underlying reason for this request was that Bulgartransgaz could offer the unused storage capacity to other customers so as to minimize the loss of the ceased injections.³⁴⁰
- (224) On 8 July 2011, both Overgas and Bulgargaz approached Bulgartransgaz, confirming their interest to store gas in UGS Chiren:
- (a) Overgas, by making reference to its gas storage requests of 2010, submitted an updated injection and withdrawal schedule for the 2011-2012 gas storage year and requested Bulgartransgaz to reconsider the previously provided requests for access to the transmission network and for storage of gas.³⁴¹
 - (b) Bulgargaz referred to its own obligations as a public provider, which 'in case of necessity' required it to take full advantage of the storage capacity. Bulgargaz confirmed that it would continue with the injection of gas into UGS Chiren, but postponed providing an updated schedule to a later stage.³⁴² As a result, no gas was injected in UGS Chiren in July.³⁴³ In August, Bulgargaz only requested the injection of [25 – 50] mcm of gas³⁴⁴ and, by the end of September, it requested to have stored a total of [450 – 500] mcm.³⁴⁵
 - (c) Bulgartransgaz never replied to Overgas' request of 8 July 2011.³⁴⁶ The request was treated as having been received after Bulgargaz' request for the 2011-2012

³³⁸ Inspection document CGE 1201, [19.04.2011], [...].

³³⁹ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, Annex 12, [page 4], [...].

³⁴⁰ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, Annex 12, [pages 6 and 7], [...].

³⁴¹ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, Annex 13, [pages 7 and 8], [...].

³⁴² Inspection document CGE 1201, [08.07.2011], [...].

³⁴³ Inspection document CGE 1201, [15.09.2011], [...].

³⁴⁴ Inspection document CGE 1201, [12.08.2011.], [...].

³⁴⁵ Inspection document CGE 1201, [29.08.2011], [...]. Before the beginning of the injection season in March 2011, Bulgargaz had stored in UGS Chiren [150 - 200] mcm of gas, including the quantities in reserve, see Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 16, Annex 9, [...] column "Storage capacity used by Bulgargaz". On gas quantities stored as a reserve see also Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 23, [pages 23-25], [...].

³⁴⁶ Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, question 33, [page 30], [...].

gas storage year, that is after storage capacity had already been fully booked by Bulgargaz.³⁴⁷

- (225) In May 2012, Overgas reminded the EWRC about the complaint it had filed against Bulgartransgaz on not having been granted access to the gas transmission network and UGS Chiren.³⁴⁸
- (226) As explained in Section 5.2.4.2, one month later, as a reaction to Overgas' letter to the EWRC, Bulgartransgaz sent a reply to Overgas.³⁴⁹ By wrongly summing up the requested storage capacity under Overgas' requests of September and November 2010, Bulgartransgaz argued that the requested capacity (960 mcm) considerably exceeded the technical capacity of UGS Chiren. In addition, Bulgartransgaz invoked the argument that, in the different requests, different entry points (to the Bulgarian transmission network and to the Bulgarian Transit Pipeline) had been specified, and that this rendered it impossible to transport gas to UGS Chiren. Bulgartransgaz also reminded Overgas of the fact that more precise access data had been requested by Bulgartransgaz at a meeting in December 2010.
- (227) In this reply to Overgas, Bulgartransgaz also pointed out that Overgas had not submitted a gas storage request in the open procedure in 2012.³⁵⁰ However, according to Overgas the inaccessibility of the Romanian Transit Pipeline 1 and the Bulgarian transmission network prevented Overgas from transporting any gas to UGS Chiren and made its participation in the 2012 open procedure pointless.³⁵¹
- (228) As mentioned in recital (198) after obtaining limited access to the Bulgarian transmission network and Romanian Transit Pipeline 1, Overgas again requested access to storage in the capacity allocation procedure launched in March 2013. However, in view of the disadvantageous results of the procedure, Overgas renounced the capacity that it had been allocated.
- (229) Overgas also requested access to storage in the capacity allocation procedure launched in April 2014. However, Overgas renounced the allocated capacity in view of the disadvantageous outcome (see recital (206)).
- (230) Bulgartransgaz contests the findings of the Commission.
- (231) First, Bulgartransgaz claims that the Commission was wrong in stating that Bulgargaz was given preferential access to storage for the gas storage year 2011-2012. According to Bulgartransgaz, Overgas' request of August 2010 covered two consecutive gas storage years (2010-2011 and 2011-2012). Bulgartransgaz claims that in line with its 'long standing policy and practice', at the time when Overgas

³⁴⁷ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, question 20, [pages 13 and 14], [...].

³⁴⁸ In this context, Overgas accused EWRC of refusal to carry out its legal powers. See submission of 19 July 2012, enclosure 4, [page 8], [...].

³⁴⁹ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, Annex 2, [pages 1-4], [...].

³⁵⁰ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, Annex 2, [page 4], [...].

³⁵¹ Overgas' submission of 19 July 2012, [page 7], [...].

submitted its application, Bulgartransgaz was only considering applications for the then current gas storage year (2010-2011).³⁵²

- (232) Second, Bulgartransgaz explains that the applicable ‘first come, first served’ principle operated within temporal limits and neither Bulgargaz nor other undertakings could book storage capacity for multiple gas storage years. Therefore, according to Bulgartransgaz, Overgas' request was considered insofar as it concerned storage for the 2010-2011 gas storage year, which was already booked by Bulgargaz in March 2010. Moreover, according to Bulgartransgaz, for the 2011-2012 gas storage year, Overgas' request of August 2010 was made outside the period for submission of applications. Bulgargaz was given access as it applied earlier within the period for submission (18 February 2011) than Overgas (7 July 2011).³⁵³
- (233) Third, Bulgartransgaz claims that the fact that EWRC did not issue a decision concerning Overgas' complaint on access to UGS Chiren means that the complaint was unfounded.³⁵⁴
- (234) Fourth, with respect to Overgas' participation in the procedures for storage capacity allocation in 2014, Bulgartransgaz claims that Overgas' complaint about not having been allocated the full amount of capacity it had requested is inconsistent with the logic of the rules for access to UGS Chiren. In fact, after all participants had refused to accept the capacity allocation made by Bulgartransgaz in 2014, Bulgartransgaz announced a further open procedure. However, Overgas did not apply for access. In Bulgartransgaz' view, Overgas' own approach to applying for capacity at UGS Chiren made a significant contribution to its failure to secure capacity.³⁵⁵
- (235) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (236)-(239).
- (236) First, at the time when Overgas made its first access request Bulgartransgaz did not publish any rules or information regarding access to UGS Chiren. Therefore, Bulgartransgaz could not have expected interested third parties to know what was its policy and practice. Based on the regulatory regime requiring the incumbent to grant access to its gas infrastructure (see Section 5.3.2), Bulgartransgaz was under the obligation to clearly explain the access rules to potential applicants, including potential application periods. Moreover, when storage capacity was allocated on a first come - first served basis the evidence indicate that Bulgartransgaz did not always consider applications for the current gas storage year but was approaching the applications so as to ensure precedence of Bulgargaz' applications (see recitals (181)-(184)). As summarised in Table 1, Bulgartransgaz informed Bulgargaz about the available injection capacities for the following gas storage year (2008-2009) already in October of the ongoing gas storage year (2007). Moreover, Bulgargaz was requesting injection capacity for the following gas storage year (2010-2011) in October of the ongoing gas storage year (2009).

³⁵² See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 196.

³⁵³ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 195-198.

³⁵⁴ See Bulgartransgaz reply to the Letter of Facts dated 26 September 2016, recitals 62-63.

³⁵⁵ See Bulgartransgaz reply to the Letter of Facts dated 26 September 2016, recitals 13 and 58.

- (237) Second, on several occasions (for example by letters of 29 April 2010 and 30 July 2010, see recital (214)), that is long before Bulgargaz' access request of 18 February 2011, Overgas requested Bulgartransgaz to provide information about the conditions under which it could have stored gas in UGS Chiren. However, Bulgartransgaz has not provided the Commission with any evidence that Bulgartransgaz even attempted to explain to Overgas how to submit a proper access request. Bulgartransgaz therefore disqualified Overgas' requests, despite its own failure to provide Overgas with the necessary information and simply proceeded with granting access to Bulgargaz. Finally, apart from the access request of August 2010, Overgas also submitted requests for access to storage in September - October and November 2010, that is few months before the start of the following gas storage year and around the same time when Bulgargaz was requesting access for the following gas storage year (see recital (220)).
- (238) Third, the Commission is not bound by the EWRC's actions or lack thereof. At the same time, Bulgartransgaz cannot interpret the EWRC's lack of taking a position as a confirmation that Bulgartransgaz has not infringed Union competition law.
- (239) Fourth, Overgas lack of application for access to storage in the further open procedures cannot have any bearing as concerns the April 2014 open procedure.
- [COMPANY 5]
- (240) [COMPANY 5] twice requested access to UGS Chiren, the first time with a letter dated 25 June 2009 and the second time with a letter dated 5 June 2012. Both times, access was refused by Bulgartransgaz due to 'lack of spare capacity'. According to [COMPANY 5], during the time when it sent both of its application requests (in June 2009 and June 2012), Bulgartransgaz (despite being obliged to declare any free capacity on its website) never announced free capacity at UGS Chiren in line with the appropriate procedure (see Section 5.3.2).³⁵⁶
- (241) The Commission notes with respect to the 25 June 2009 request, that during the year 2009, UGS Chiren was under reconstruction and therefore there was very limited storage capacity available (see Table 1). However, regarding [COMPANY 5]'s June 2012 request, Bulgartransgaz had made no or hardly any information on storage capacity available. Thus, it made obtaining access to storage very difficult.
- (242) Bulgartransgaz contests the findings of the Commission.
- (243) Bulgartransgaz claims that the Commission's allegations that it did not publish information on available capacities in UGS Chiren are incorrect and misconstrued. According to Bulgartransgaz, contrary to the Commission's allegations, a public procedure was conducted for allocation of available capacity in UGS Chiren for the gas storage year 2012-2013 and information on available capacity was announced publicly on 30 March 2012. Bulgartransgaz claims that the Commission incorrectly interprets information provided by Bulgartransgaz, stating that Bulgartransgaz only began publishing data on available capacity in UGS Chiren in the beginning of July 2012. According to Bulgartransgaz it only intended to clarify that historical information on available capacities, injection, withdrawal and schedule going back to

³⁵⁶ [COMPANY 5]'s reply to the Commission's request for information dated 19 September 2013, question 5, [pages 4 and 5], [...]. In fact, according to Bulgartransgaz, the first data about storage capacity published on Bulgartransgaz' website referred to the beginning of July 2012, see recital (169).

1 July 2012 was available on the undertaking's website. Bulgartransgaz further claims that it has been publishing all information on technical, contracted and available storage capacity, and also information on extraction and injection in UGS Chiren on its website since 30 March 2012. Prior to 30 March 2012, information on spare capacity would be provided upon written request.³⁵⁷

- (244) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (245)-(246).
- (245) Bulgartransgaz' statement that, since 30 March 2012, it has been publishing on its website all information on storage capacity is not supported by evidence. In this respect, Bulgartransgaz interprets loosely evidence from its earlier submissions in which Bulgartransgaz stated that on 30 March 2012, it had published information about the first capacity allocation procedure due in less than three weeks. The published announcement only contained information on the available storage capacity which was to be allocated in the course of the procedure. Bulgartransgaz also explained, in its earlier submissions to the Commission, that it had been publishing on its web page the historical data on capacity, the earliest starting from 1 July 2012, and historical data on the gas quantities, the earliest starting from 25 June 2012 (see recital (169)).
- (246) Therefore, in June 2012, when [COMPANY 5] requested access to storage, apart from the announcement about the capacity allocation procedure that had been closed, there was still no publicly available information on storage capacity.
- [COMPANY 6]
- (247) On 25 August 2011, Bulgartransgaz received a fax letter from Bulgargaz, requesting additional capacity in UGS Chiren on top of the initially notified [300 – 350] mcm.³⁵⁸ Bulgartransgaz concluded that it would be possible to inject more gas than initially planned into UGS Chiren.³⁵⁹ Immediately, on the same day, Bulgartransgaz sent a letter to Bulgargaz, informing it of the possibility to store an additional [10 – 35] mcm gas in September and, subject to additional calculations, potentially even more gas volumes in October.³⁶⁰ By letter of 29 August 2011, Bulgargaz accepted the injection of additional gas volumes in September but rejected the proposal for October as 'economically unattractive' due to the higher gas price.³⁶¹
- (248) Shortly thereafter, on 1 September 2011, Bulgartransgaz received a letter from [COMPANY 6], a large end customer connected directly to the Bulgarian transmission network. [COMPANY 6] requested to inject [5-30] mcm of gas in September 2011 and to withdraw those volumes at the end of the same calendar year.³⁶²

³⁵⁷ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 212-215.

³⁵⁸ Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, Annex 12, [page 8], [...].

³⁵⁹ Inspection document GIA 1018, [26.08.2011], [...].

³⁶⁰ Inspection document GIA 2019, [26.08.2011], [...].

³⁶¹ Inspection document GIA 1018, [29.08.2011], [...].

³⁶² Inspection document GIA 2019, [01.09.2011], [...].

- (249) On 15 September 2011, Bulgartransgaz informed [COMPANY 6] about the lack of available storage capacity for that month (as explained recital (222), the free storage capacity in September had just been taken by Bulgargaz, without it having been made known to potentially interested operators that the capacity was available). Bulgartransgaz also explained that it was analysing the technical feasibility of gas injection for October and that it would announce any available storage capacity on its website. However, Bulgartransgaz only started to publish data about storage capacity on its website at the beginning of July 2012.³⁶³
- (250) Bulgartransgaz contests the findings of the Commission.
- (251) First, Bulgartransgaz claims that the Commission is incorrect in stating that [COMPANY 6] could not obtain information on available storage capacity, as it could have simply sent an inquiry to Bulgargaz.³⁶⁴
- (252) Second, according to Bulgartransgaz, Bulgargaz was neither duly informed nor given a general offer of available capacity; Bulgartransgaz' letter to Bulgargaz on 25 August 2011 was in response to Bulgargaz' letter of that date.³⁶⁵
- (253) Third, Bulgartransgaz claims that the additional capacity could not be described as 'spare' because this additional capacity was just a residual capacity after Bulgargaz' request was satisfied.³⁶⁶
- (254) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (255)-(257).
- (255) First, the Commission rejects Bulgartransgaz' argument that an undertaking under a regulatory obligation to publish the required information regarding access to storage can fail to do so and instead expect interested parties to make regular inquiries about any potential spare capacity.
- (256) Second, as explained in recital (169), Bulgartransgaz failed to publish storage capacity data until July 2012. The fact that there was no transparency as regards the available capacity placed the undertakings that had previously no access to UGS Chiren at a competitive disadvantage. Bulgargaz as an undertaking with ongoing business relations with Bulgartransgaz naturally had more knowledge about the possibility of storing gas in UGS Chiren than any new market player. At this point it is worth noting that it only took Bulgartransgaz a few hours to reply to Bulgargaz' letter of 25 August 2011, whereas other undertakings often had to wait for months for Bulgartransgaz' reply (see for example recital (214),(216) or (247)).
- (257) Third, the way an additional available capacity is labelled is not relevant. It is more important that Bulgartransgaz failed to communicate to potentially interested parties the availability of such capacity.

³⁶³ Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 4 [pages 5 and 6], [...] and Annex 2, [pages 6 and 7], [...].

³⁶⁴ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 207.

³⁶⁵ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 208.

³⁶⁶ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recitals 206-209.

5.4. Import infrastructure: the Romanian Transit Pipeline 1

5.4.1. Characteristics of the import pipelines

- (258) As mentioned in Section 4.4.3 above, gas is shipped from Russia towards Bulgaria via the Romanian Transit Pipelines 1, 2 and 3.
- (259) The Romanian Transit Pipeline 1 was built in 1974 and has an annual capacity of around 7.4 bcm/year, equivalent to approximately 20 mcm/day.³⁶⁷ As stated in recitals (54)-(57), until April 2016 it was the only import pipeline connected to the Bulgarian transmission network and therefore until April 2016 it was the only viable route for bringing gas into Bulgaria.³⁶⁸
- (260) The Romanian Transit Pipeline 1 is operated by the Romanian TSO, Transgaz SA, ('Transgaz'). Bulgargaz signed a commercial agreement with Transgaz on 19 October 2005 (the '2005 Commercial Agreement'), which granted Bulgargaz an access to the pipeline on an exclusive basis.³⁶⁹ The price paid by Bulgargaz to Transgaz for using the gas pipeline through Romania is set at a fixed amount and is not subject to the volumes actually transmitted.³⁷⁰ The 2005 Commercial Agreement is the only agreement governing the transportation of gas through the pipeline.³⁷¹ Through this agreement, Bulgargaz has booked the entire capacity of the pipeline for the period 2005 to 2016 (although even during daily peaks Bulgargaz' use of the pipeline did not exceed [60-70%] of the total daily capacity during the 2007-2016 period³⁷²).

³⁶⁷ According to Bulgartransgaz' web page the current technical capacity of the Negru Voda 1 entry point (from the Romanian Transit Pipeline 1 to the Bulgarian transmission network is 7.4 bcm/y. See [...] http://www.bulgartransgaz.bg/files/useruploads/files/entry_2012_en.pdf. See also Transgaz's statements that the maximum annual volume transported through the Romanian Transit Pipeline 1 was above 7 bcm in 1988 (See Romanian TSO Transgaz SA's presentation, p. 26), [...].

³⁶⁸ As described in Section 5.2, the connection between the Bulgarian Transit Pipeline and the Bulgarian transmission network is of a limited capacity, moreover the Romanian Transit Pipeline 2 and 3 are almost fully booked.

³⁶⁹ Article 2 and Article 17.1 of the 2005 Commercial Agreement [pages 5-6 and 14-15], [...]. Contract No 10726, dated 19 October 2005 for the transit on Romanian territory of natural gas for the Republic of Bulgaria, concluded between Bulgargaz and Transgaz. The 2005 Commercial Agreement was initially concluded until 31 December 2011 but in 2009 it was extended to 31 December 2016.

³⁷⁰ Article 7.1 of the Contract No 10726, dated 19 October 2005, for the transit on Romanian territory of natural gas for the Republic of Bulgaria, concluded between Bulgargaz and Transgaz, [page 10], [...].

³⁷¹ The original Intergovernmental Agreement between Romania and Bulgaria regarding the pipeline (Agreement on Cooperation in Energy Sector between the Ministry of Energy and Energy Resources in Bulgaria and the Ministry of Industry and Resources in Romania, signed on 29 November 1970, thereafter "the 1970 Intergovernmental Agreement") was concluded for the duration of 30 years. The 1970 Intergovernmental Agreement has expired and has been replaced by a framework agreement entered into between the governments of Bulgaria and Romania on 29 October 2002 (the "2002 Intergovernmental Agreement"). However, the 2002 Intergovernmental Agreement, as opposed to the 1970 Intergovernmental Agreement, does not contain any specific provisions regarding the operation of the pipeline. See BEH's reply to the Commission's request for information dated 3 July 2012, [page 4], [...]. See also Bulgargaz' reply to the Commission's request for information dated 3 July 2012, [pages 1-15], [...].

³⁷² See Bulgargaz' reply to the Commission's request for information dated 16 September 2013, question 11, [page 5], [...], where Bulgargaz indicated that the daily peak volumes between 2007 and 2012 varied between around [10-20] mcm and [10-20] mcm, amounting to between 65% and 55% of the total

- (261) Article 17.1 of the 2005 Commercial Agreement stipulates that *'the transit gas pipeline shall be used exclusively for the Client [that is Bulgargaz], and without the Client's consent it shall not be allowed to connect other customers to that pipeline, and no other natural gas amounts shall be transited except those which the Client delivered to the Transporter at the GMS Isaccea 1.'*³⁷³ In other words, Bulgargaz has contracted the entire capacity of the Romanian Transit Pipeline 1 and without Bulgargaz' consent, Transgaz is prevented from providing capacity in the pipeline to any third party, irrespective of the capacity volume actually used by Bulgargaz.
- (262) The payment for booking the entire Romanian Transit Pipeline 1 capacity was determined in the 2005 Commercial Agreement as a lump sum payable irrespective of the actual capacity usage (Article 7 of the 2005 Commercial Agreement). Although, in the Article 2, the 2005 Commercial Agreement envisaged expansion of the Romanian Transit Pipeline 1, the payment was not subject to increases following the expansion of the pipeline's capacity. Therefore, the payment for the booking was not for a specific amount of capacity but for booking the entire capacity of the Romanian Transit Pipeline 1.
- 5.4.2. *Alternatives to the Romanian Transit Pipeline 1 for bringing gas to Bulgaria*
- (263) As explained in Section 4.4.4 and recital (66), Bulgaria is dependent on gas imports to satisfy domestic demand.
- (264) A number of projects exist in order to provide alternative import routes to the Romanian Transit Pipeline 1. However none of these projects resulted in providing alternative routes for bringing gas to Bulgaria at least until July 2016. An overview of these projects is given in recitals (266)-(269).
- (265) First, until April 2016 there was no functioning connection providing firm capacity in the direction from the Bulgarian Transit Pipeline to the Bulgarian transmission network (see recitals (55)-(57)).
- (266) Second, as mentioned in recital (58), Transgaz and Bulgartransgaz constructed the interconnector Ruse (Bulgaria) - Giurgiu (Romania), by connecting the two national gas networks (that is, regarding Bulgaria, the Bulgarian transmission network).³⁷⁴ However, the project only became operational on 11 November 2016 and the first auction for negligible unbundled firm capacity was organised in January 2017.³⁷⁵

capacity. In Bulgargaz' reply to the Commission's request for information dated 23 March 2016, question 9, [page 4], [...], Bulgargaz indicated that the daily peak volumes between 2013 and 2016 varied between [10-20] mcm and [10-20] mcm, amounting to respectively 55% and 60% of the pipeline capacity.

³⁷³ Article 17.1 of the 2005 Commercial Agreement [pages 14-15], [...].

³⁷⁴ The projected capacity is 0.5 bcm/year in the direction from Romania to Bulgaria and 1.5 bcm/year in the opposite direction. At the same time, in a call for an expression of interest organised by the Bulgarian and Romanian TSOs in October 2010, fourteen companies showed an interest in booking an aggregate capacity of between 2.2 bcm/year and 2.4 bcm/year from Romania to Bulgaria during the 2012-2024 period. Bulgartransgaz' draft Investment Plan for 2013-2022, [...], [page 43], See Bulgartransgaz' reply to the Commission's request for information dated 9 July 2012, questions 7 and 9, [pages 4-6], [...], and Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 19, Annex 9, [pages 2 and 3], [...].

³⁷⁵ Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 3 [page 3], [...]. See also <http://dunavmost.bg/Ruse/Video/479-testvat-gazoprovoda-ruse-gyurgevo-nai->

- (267) Third, as mentioned in recital (58), the other projects for building interconnectors between Bulgarian and neighbouring gas networks, namely Turkey,³⁷⁶ Greece³⁷⁷ and Serbia³⁷⁸ have still not been completed. After already having been delayed, they are currently expected to become operational in the 2018-2020 period.³⁷⁹
- (268) Fourth, although the Romanian Transit Pipeline 1 is not connected to the Romanian transmission system,³⁸⁰ Transgaz is developing 'Project Reverse Flow' linking the Romanian Transit Pipeline 1 with the Romanian transmission system and ensuring bi-directional flows between these two pipelines. By the time of issuing this Decision the project had still not been completed.³⁸¹ The project aims to ensure gas supply

[rano-prez-april](#), [...]. New Eastern Europe, "Prospects for Energy Independence in Romania: Shale Gas and beyond", [page 4] [...], <http://www.neweasterneurope.eu/articles-and-commentary/1169-pr>.

Moreover, the parties face several issues with contractors which could further delay the finalization of the project. See WIEE' submission dated 22 May 2013, [page 1], [...]. See also Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 19, Annex 9, [page 3], [...], see also public statements at <http://news.expert.bg/n444584>, last recital, [...]. See Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, question 7, [pages 10-13], [...]; [update - <http://www.dunavmost.bg/Ruse/News/27975-tarsyat-izpalnitel-na-podvodnata-chast-ot-gazoprovoda-ruse-i-gyurgevo> : change of contractor and new public tender procedure; currently planned end date: end of 2016 – [...]]. <http://www.romaniajournal.ro/long-delayed-giurgiu-ruse-interconnector-launched/>, [...]. http://www.bulgartransgaz.bg/en/news/monthly_capacity_auction_at_ip_ruse_giurgiu-264-c15.html, [...].

³⁷⁶ The interconnector with Turkey will provide for physical gas flow in both directions between the Bulgarian and Turkish gas networks. The projected capacity is 3 bcm/y see Bulgartransgaz' 2013-2022 draft Investment Plan [pages 44 and 45], [...]. The implementation of the project is currently envisaged for the end of 2020. See Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, [page 15], [...] and Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 3 [page 5], [...].

³⁷⁷ The interconnector with Greece will provide for access to gas originating from the Caspian region and Middle East, as well as to LNG terminals in Greece. The projected capacity is 3 bcm/y, with a possibility to increase it to 5bcm/y, see Bulgartransgaz' draft Investment Plan for 2013-2022, [pages 46 and 47], [...]. The project is expected to be completed in 2018 (see next footnotes). BEH is currently trying to secure financing for the project, see <http://www.iene.eu/bulgaria-seeks-funding-for-gas-link-with-greece-p578.html>. [...], see Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 3 [page 6], [...]. The completion of the projec has been subject to further delays.

³⁷⁸ The interconnector with Serbia will allow for gas deliveries from Serbia to Bulgaria in crisis situations. The projected capacity is 1.8-3.2 bcm/y. The completion of the project was expected in 2018, see Bulgartransgaz' draft Investment Plan for 2013-2022, [pages 45 and 46], [...] and Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 3 [page 7], [...]. The completion of the project has been subject to further delays.

³⁷⁹ See public statements of Bulgartransgaz' CEO of October 2013: http://www.azernews.az/oil_and_gas/60359.html, [...] see public statement of the Bulgarian Deputy Minister of Economy and Energy of October 2013, http://www.novinite.com/view_news.php?id=154226, [...]; Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 3 [pages 2-7], [...].

³⁸⁰ See Bulgartransgaz' reply to the Commission's request for information dated 16 September 2013, question 20, [pages 20 and 21], [...]. See also Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 5 [pages 8 and 9], [...].

³⁸¹ Bulgartransgaz' reply to the Commission's request for information dated 23 March 2016, question 5 [pages 8 and 9], [...].

from Romania's domestic production and reserves to Bulgaria, but also in the opposite direction from Bulgaria to Romania (mostly in case of a gas crisis resulting from the shortage of gas).³⁸²

- (269) There is also a technical possibility for physical reverse flow from Greece and Turkey to Bulgaria on the Bulgarian Transit Pipeline in the volume of 2.4 mcm/day. The reverse flow between Bulgaria and Greece became commercially operational in July 2016. Until this time, however, the possibility for reverse flow, including the one with Turkey, remained limited to times of crisis in the event of complete interruption of Russian gas supplies.³⁸³

5.4.3. *Regulatory framework for third party access to the Romanian Transit Pipeline 1*

- (270) Romanian Transit Pipeline 1 is subject to Union rules in the same way as any other transmission pipeline (see Section 5.2.3 above). Union rules do not distinguish between different types of transmission systems within the Union, regardless of whether such transmission pipeline actually delivers gas in a particular Member State or whether it transports gas further to other Member States.

- (271) In addition, third party access is required by national Romanian legislation. Romanian Gas Law no. 351/2004, replaced by Romanian Energy Act no. 123/2012, requires non-discriminatory third party access and does not distinguish between domestic transmission systems and transit systems.³⁸⁴ The liberalisation of the gas market in Romania for transmission and transit took place as from 1 January 2007 (for non-households) and as of 1 July 2007 for all consumers.³⁸⁵

- (272) As explained in more detail in recital (297) in order to comply with this obligation Transgaz undertook several attempts to claim the capacity back from Bulgargaz.

5.4.4. *The BEH group's approach towards access to the Romanian Transit Pipeline 1*

- (273) As set out in Section 5.4.4, there is a clear pattern in the BEH group's behaviour to prevent or attempt to prevent third party access to the Romanian Transit Pipeline 1. Bulgargaz has until 2013 entirely blocked third party access to the pipeline, reserving the full capacity, including large unused volumes, to itself.

³⁸² Gas Interconnection Romania- reverse flow, see [...]. http://ec.europa.eu/energy/eepr/projects/files/gas-interconnections-and-reverse-flow/reverse-flow-ro_en.pdf See also Bulgartransgaz' reply to the Commission's request for information dated 28 August 2014, question 8, [page 15], [...].

³⁸³ See EWRC Annual Report to the European Commission dated July 2015, [page 52], [...] <http://www.dker.bg/PDOCS/ann-rep-ec-2015-en.pdf>. See also EWRC's Annual Report to the European Commission dated July 2014 [page 52], [...]. http://www.dker.bg/PDOCS/EWRC%20report%20EC_ACER_2014%20EN.pdf. The report states that reverse flow from Greece took place at the end of gas crisis in January 2009 based on a special agreement. However, Greece and Bulgaria undertook steps allowing to explore this connection for commercial purposes by the end of 2016. See <https://www.icis.com/resources/news/2016/06/06/10004869/greek-bulgarian-reverse-gas-flow-plan-expected-by-winter/>, [...].

³⁸⁴ Gas Law no. 351/2004 was published in Romania's Official Journal, Part I, No. 679 of 28.07.2004 and entered into force 30 days later. Electricity and Natural Gas Law no. 123/2012 was published in the Romanian Official Journal no. 485/16.07.2012.

³⁸⁵ The Energy Road Map of Romania, approved by Government Decision no. 890/2003.

(274) In 2013, when Bulgargaz finally did grant access to a competitor (Overgas), it did so in a non-transparent procedure and on a short-term basis (see recital (312)).

5.4.4.1. Capacity bookings and third party restrictions

(275) As mentioned in recital (261) with the 2005 Commercial Agreement, Bulgargaz secured for itself the entire capacity of the Romanian Transit Pipeline 1.³⁸⁶ The technical capacity of the Romanian Transit Pipeline 1 is 7.4 bcm/year.³⁸⁷

(276) However, Bulgargaz only used part of this capacity. As explained in recital (260), during daily peaks, Bulgargaz' use of the pipeline did not exceed 65% of the total daily capacity during the 2007-2016 period. Similarly, the maximum use of the entry point from the Romanian Transit Pipeline 1 to the Bulgarian transmission network did not exceed 65% of the total daily capacity during the 2009-2015 period.³⁸⁸

(277) Chart 1 illustrates the capacities used on the Romanian Transit Pipeline 1 in comparison to the capacities available on the same pipeline.³⁸⁹

Chart 1: Bulgargaz' requested storage capacity, total available capacity and injected gas quantities for the 2007-2012 gas storage years

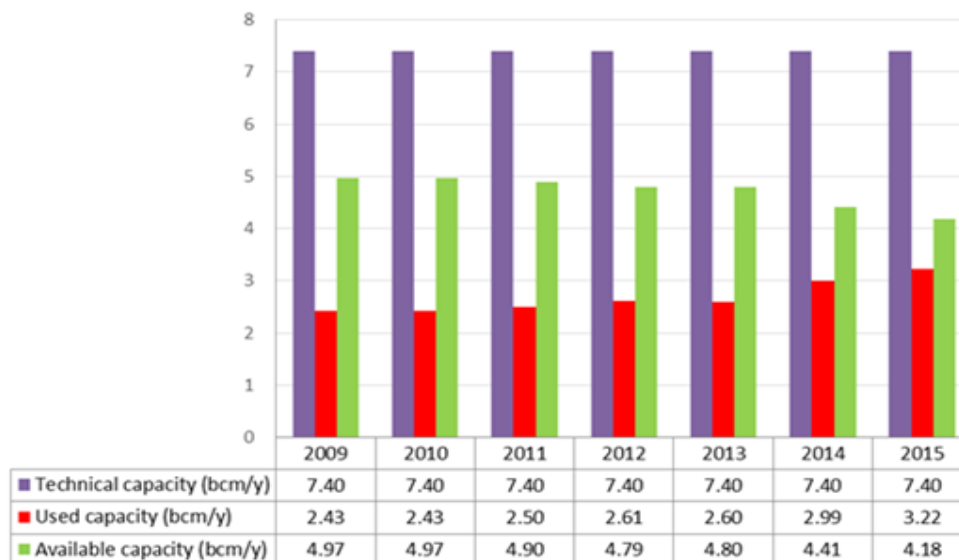
³⁸⁶ Ref. to Article 17.1 of the Contract No 10726, dated 19 October 2005, for the transit on Romanian territory of natural gas for the Republic of Bulgaria, concluded between Bulgargaz and Transgaz [pages 14-15], [...].

³⁸⁷ See recital (259).

³⁸⁸ See Minimum and Maximum Capacity use for 2009, 2010, 2011, 2012 and 2013 at Cross-border entry and Exit Points per month, http://www.bulgartransgaz.bg/files/useruploads/files/kapacitet/istoricheski/min_max_2009_2013.pdf, [...]; In 2015, the maximum capacity use at cross border entry points Negru Voda 1 per month was around 67 %, see monthly and quarterly firm capacity on a daily basis in 2015 <http://www.bulgartransgaz.bg/en/pages/kapacitet-41.html> [...] and [...].

³⁸⁹ See the technical, contractual firm and unused firm capacity at entry and exit points of the national gas transmission network [...] for the years 2009 – 2011, [...] for the year 2012, [...] for the year 2013, [...] for the year 2014 and [...] for the year 2015.

Entry point - Negru Voda 1/Kardam



- (278) Despite unused capacity on the Romanian Transit Pipeline 1, third parties such as [COMPANY 1] formed the understanding that the capacity on this pipeline was ‘booked by definition’ and that it was therefore not meaningful to explore the possibility for access.³⁹⁰ This ‘understanding’ may have changed to a certain extent when the Bulgarian Minister of Energy announced in 2012 that Bulgargaz would be ready to provide access to its reserved capacity should another undertaking be interested in obtaining access to the pipeline.³⁹¹
- (279) However, no real change occurred until 2013, when Bulgargaz for the first time offered the use of the Romanian Transit Pipeline 1 to a third party (Overgas). As is set out in further detail in recitals (316) and (651), only as of January 2015 Bulgargaz started granting continuous uninterrupted access to all requesting undertakings.
- (280) Bulgargaz contests the findings of the Commission.
- (281) First, Bulgargaz argues that the Commission misunderstands the intended meaning of the 2005 Commercial Agreement, since Bulgargaz has never booked the full capacity of the pipeline but only 5.25 bcm/y (out of 7.4 bcm/year). Therefore, [the TSO] could have offered the remaining [2-3] bcm/y to third parties.³⁹²
- (282) Second, Bulgargaz argues that it has no role in operating the Romanian Transit Pipeline 1 and thus could not have blocked third parties from accessing it. Bulgargaz claims that according to Article 14(4) of Directive 2009/73/EC, [confidential] as the

³⁹⁰ See [COMPANY 1]'s reply to the Commission's request for information dated 22 May 2012, question 7a, b and c [page 4], [...].

³⁹¹ See [COMPANY 1]'s reply to the Commission's request for information dated 18 September 2013, [page 2], [...].

³⁹² See Bulgargaz' reply to the SO dated 23 March 2015, Chapters 4.1.1 and 4.1.2, recitals 99 – 105.

TSO is responsible for granting and managing third-party access.³⁹³ Moreover Bulgargaz claims that the Commission cannot simply assume that a gas transmission infrastructure is controlled by its user.³⁹⁴

- (283) Third, Bulgargaz claims that the Romanian Regulator published the Methodology for Allocation of Capacities on the Romanian Transit Pipeline 1 in 2012,³⁹⁵ which confirms that the initial capacity allocation on the primary market can only be provided by [the TSO].
- (284) Fourth, according to Bulgargaz, Regulation (EC) No 715/2009 requires the TSO to set up rules for capacity trading on the secondary market. Bulgargaz further argues that for the lack of established procedures for secondary capacity trading, it was prevented from offering any unused capacity on the market.³⁹⁶ Bulgargaz further points out that [the TSO] only established such rules³⁹⁷ and published the first capacity tender only in September 2016³⁹⁸. Bulgargaz also claims that Article 17.1 of the 2005 Commercial Agreement does not grant Bulgargaz power to manage access to the pipeline.
- (285) Fifth, Bulgargaz argues that pursuant to the use-it-or-lose-it principle as established by the Decision of 24 August 2012 on amending Annex I of Regulation (EC) No 715/2009 ("Commission Decision of 24 August 2012"), it was the TSO [confidential] who should have withdrawn the unused capacities on the Romanian Transit Pipeline 1.³⁹⁹
- (286) Sixth, the BEH group argues that the review of the evidence in the Commission's file shows that [the TSO] did not refuse Overgas access to the Romanian Transit Pipeline 1 because of Bulgargaz' exclusive booking of the pipeline but because of an intergovernmental agreement signed between Romania and Bulgaria. More specifically, the BEH group claims that [the TSO] never stated that Bulgargaz was the obstacle to Overgas' access, but rather implied that it was the inaction of the [neighboring State] authorities and that there is no evidence on the file that the BEH group intervened to prevent access to the Romanian Transit 1 Pipeline.⁴⁰⁰
- (287) Bulgargaz' arguments cannot be accepted for the reasons set out in recitals (288)-(295).

³⁹³ See Bulgargaz' reply to the SO dated 23 March 2015, recitals 99 – 105. See also See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recital 22. See also the BEH group response to the evidence contained in document [...] dated 12 March 2018, page 3.

³⁹⁴ Bulgargaz' reply to the Letter of Facts dated 26 September 2016, recital 5.

³⁹⁵ ANRE decision 472 dated 11 July 2012, available at: <http://www.transgaz.ro/en/informa%C8%9Bii-clien%C8%9Bi/capacity-allocation-mechanism> [...]. See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recital 62.

³⁹⁶ See BEH's reply to the SO dated 23 March 2015, recitals 75-76.

³⁹⁷ See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recital 47.

³⁹⁸ See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recital 64. See also BEH's reply to the SO dated 23 March 2015, recitals 77-79.

³⁹⁹ See Bulgargaz' reply to the SO dated 23 March 2015, Chapters 4.1.3. and 4.1.4, recitals 106 – 127 [...]. See also Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recital 21.

⁴⁰⁰ See the BEH group response to the evidence contained in document [...] dated 12 March 2018, pages 5-6.

- (288) First, with the 2005 Commercial Agreement Bulgargaz reserved the entire technically available capacity of the Romanian Transit Pipeline 1 on an exclusive basis irrespective of the capacity volume actually used by Bulgargaz (see recitals (261)-(262)). The same 2005 Commercial Agreement stipulates that Transgaz cannot grant any capacity to any third party without first obtaining Bulgargaz' consent. Moreover, the fact that no third party could have had access to the Romanian Transit Pipeline 1 because of the 2005 Commercial Agreement is directly acknowledged in several documents submitted by Bulgargaz to the Commission (see points (a), (d), (h), (j) and (k) of recital (297)). Finally in the reply to the Letter of Facts the BEH group admits that third party access to the Romanian Transit Pipeline 1 was subject to Bulgargaz' consent.⁴⁰¹
- (289) The capacity of 5.25 bcm/y which Bulgargaz is referring to is only mentioned in the 2005 Commercial Agreement under Article 2.2. This Article stipulates the technical capacities the TSO is required to provide. The amount of 5.25 bcm/y is stipulated as the guaranteed technical capacity of the Romanian Transit Pipeline 1. Already in the same Article 2.2 it is further stated that after the increase of the working pressure of the pipeline section crossing the river Danube the TSO should guarantee the capacity on the Romanian Transit Pipeline at 6.49 bcm/y. The price stipulated in the 2005 Commercial Agreement is not subject to changes following the increases of the Romanian Transit Pipeline 1 capacity further confirming that Bulgargaz booked the entire technically available capacity of the Romanian Transit Pipeline 1, not a specific amount (see recital (262)). Bulgargaz' argument therefore is misleading.
- (290) Second, the Commission does not dispute that Bulgargaz was not the TSO in charge of operating the Romanian Transit Pipeline 1. However, the 2005 Commercial Agreement gave Bulgargaz the exclusive right to use the Romanian Transit Pipeline 1 and based on this agreement Bulgargaz' consent was required in order to grant third party access (see recitals (260)-(261) and Section 5.4.4.1). Since January 2011 the Romanian TSO, [confidential], undertook consistent efforts to regain the capacity back from Bulgargaz but these efforts at least until 2015 were not successful (see recital (297)). The fact that Bulgargaz eventually offered capacity to Overgas on the Romanian Transit Pipeline 1 without any involvement of the Romanian TSO confirms that it was capable to offer such capacity (see recital (312)).
- (291) Third, Bulgargaz' statement that the Methodology for Allocation of Capacities on the Romanian Transit Pipeline 1 evidences that the initial capacity allocation on the primary market can only be provided by [the TSO] is irrelevant. [The TSO] indeed allocated the capacity to Bulgargaz on the primary market by signing the 2005 Commercial Agreement.
- (292) Fourth, the lack of established rules for secondary capacity trading did not prevent Bulgargaz from selling the unused capacity to third parties. The fact that Bulgargaz eventually offered Overgas some unused capacity on the Romanian Transit Pipeline 1 is the best proof that no established rules were needed in order to allocate the unused capacities to third parties. Bulgargaz' claim that [the TSO] only published the first capacity auction on 5 September 2016 is misleading as in numerous letters, [the TSO] explained to Bulgargaz that [the TSO] is under the obligation to conduct such tenders under Union law, but that unless Bulgargaz renounces the exclusive use

⁴⁰¹ See also See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recital 22.

of the Romanian Transit Pipeline 1 (as stipulated in the 2005 Commercial Agreement), it will not be able to organize auctions for allocating capacities on the Romanian Transit Pipeline 1.⁴⁰² Therefore, it is not surprising that [the TSO] only published the first capacity auctions once the 2005 Commercial Agreement was terminated.

- (293) Fifth, regarding the Commission Decision of 24 August 2012 which Bulgargaz invokes, the following can be observed. First, the rules which entitle TSOs to implement mechanisms against capacity hoarding by pipeline users and thus offer booked but unused capacity on a long term basis, as specified in point 2.2.2 and point 2.2.5 of the Annex I to the Commission Decision of 24 August 2012, entered into force on 1 October 2013, i.e. over 3 years after the infringement had started.⁴⁰³ Second, based on those provisions, at least until the end of the infringement period, i.e. January 2015, [the TSO] could not have unilaterally withdrawn the capacity from Bulgargaz. Based on point 2.2.2 and point 2.2.5, before national TSOs were empowered to take the unused capacity back, actions of the National Regulatory Authority were required. These actions of the National Regulatory Authorities involved:
- (a) Approval and consultations with other adjacent National Regulatory Authorities on the specific rules allowing the TSO to take the unused capacity back (point 2.2.2., sub point 1)
 - (b) An assessment as to whether the conditions, as stipulated in the Commission Decision of 24 August 2012 allowing for withdrawing underutilised capacity, had materialised (point 2.2.5, sub point 1).
- (294) These actions, as envisaged by the Commission Decision of 24 August 2012 have not been finalised in Romania at least until 2015. Therefore, at least until 2015 [the TSO] could not have unilaterally withdrawn the capacity from Bulgargaz.⁴⁰⁴
- (295) Sixth, the [confidential]'s argument that [the TSO] refused access to the Romanian Transit Pipeline 1 due to an Intergovernmental Agreement between Bulgaria and Romania and not because Bulgargaz' exclusive booking of the Romanian Transit Pipeline 1 cannot be accepted. In the letter of 1 October 2010 Transgaz explained to Overgas: "*At this moment SNTGN Transgaz SA is not in the position to favourably solve your request due to the fact that currently....the entire capacity of the pipelines [is] being contracted*"⁴⁰⁵. Although [the TSO] indeed in further correspondence with Overgas mentioned the 1970 Intergovernmental Agreement, this agreement was no longer in force at the time of Overgas' access request. In any event, the 1970

⁴⁰² See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.2, [pages 10-12], [...].

⁴⁰³ Point 2.2.3 entered into force only on 1 July 2016, thus after the infringement was terminated (see point 1 of the Annex to the Commission Decision of 24 August 2012).

⁴⁰⁴ See Agency for the Cooperation of Energy Regulators Implementation Monitoring Report on Congestion Management Procedures dated 21 September 2016, available at http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/Implementation%20Monitoring%20Report%20on%20Congestion%20Management%20Procedures%20-%20Update%202016.pdf, [...] [page 10].

⁴⁰⁵ Overgas' submission of 20 January 2011, [page 6], [...].

agreement did not impose a specific obligation to reserve the entire capacity of the pipeline to one single user⁴⁰⁶.

5.4.4.2. Examples of access refusals or access made more difficult

Requests for access to capacity addressed to Transgaz

- (296) Overgas sent several letters to Transgaz (the operator of Romanian Transit Pipeline 1) requesting access to the pipeline for transmission of 1 bcm/year from Isaccea to Negru Voda during 2010 and 2011.⁴⁰⁷ Transgaz answered by explaining that all three pipelines connecting Isaccea with Negru Voda had already been fully booked.⁴⁰⁸ However, in a letter dated 20 April 2011, Transgaz stated that it planned to offer, within one and a half years, part of the unused capacity on the market.⁴⁰⁹ As mentioned in recitals (260)-(261), due to the exclusivity clause under the 2005 Commercial Agreement, no capacity could have been offered by Transgaz without Bulgargaz' consent.
- (297) Although these requests for access were initially made to Transgaz, at least as of January 2011 Transgaz on numerous occasions approached Bulgargaz requesting to terminate the exclusive use of the Romanian Transit Pipeline 1. Therefore the BEH group was aware of the general interest of third parties to use the pipeline.
- (a) According to BEH's minutes of a meeting held on 31 January 2011 in Bucharest between representatives of BEH, [COMPANY 8] and Transgaz, the latter raised the possibility of offering part of the unused capacity of the Romanian Transit Pipeline 1 to third parties in view of the construction of a LNG Terminal. The BEH minutes underline that only around half of the Romanian Transit Pipeline 1 was being used at the time. However, BEH referred to the fact that 100% of this capacity had already been booked by

⁴⁰⁶ According to Article 3 of the 1970 Intergovernmental Agreement, "the pipeline [...] shall have a single purpose – the transportation of natural gas from the Union of Soviet Socialist Republics to the People's Republic of Bulgaria for the sole purpose of meeting the domestic needs of the People's Republic of Bulgaria." Therefore the 1970 Intergovernmental Agreement did not proscribe that only one operator could use the pipeline. The clause that the gas had to be contracted from Russia did not have an influence on possible third party access as at least until July 2016 there was no possibility to import gas into Bulgaria from any other source (see recitals (51)-(54) and (73)). The 1970 Intergovernmental Agreement has expired and was replaced by 2002 Intergovernmental Agreement which does not contain any specific provisions regarding the operation of the pipeline (see footnote 371). See BEH's reply to the Commission's request for information dated 3 July 2012, [page 4], [...]. See also Bulgargaz' reply to the Commission's request for information dated 3 July 2012, [pages 1-15], [...].

⁴⁰⁷ Overgas' letters were sent on 25 March 2010, 12 August 2010, 28 September 2010 and 11 October 2010. Overgas' submission of 20 January 2011, Exhibit I, [pages 3, 4, 5 and 7-8], [...]. See also Overgas' reply to the Commission's request for information dated 18 September 2013, question 4, [page 5], [...].

⁴⁰⁸ Overgas' submission of 20 January 2011, Exhibit 1, a letter from Transgaz to Overgas, dated 1 October 2010, [page 6], [...]. In a subsequent letter dated 26 October 2010, Transgaz further explained that the Romanian Transit Pipeline 1, based on the 1970 Intergovernmental Agreement, is dedicated solely to natural gas transit from Russia to Bulgaria. Overgas' confirmed that the gas it is planning to transport along the Romanian Transit Pipeline 1 would be Russian gas destined to Bulgaria. See Overgas' reply to the Commission's request for information dated 18 September 2013, question 4, [page 5], [...].

⁴⁰⁹ See Overgas' reply to the Commission's request for information dated 18 September 2013, question 4, [page 5], [...].

Bulgargaz and that this matter first needed to be discussed at governmental level;⁴¹⁰

- (b) On 28 September 2011, BEH took part in another meeting with the Romanian side. During this meeting the representatives of both the Romanian and Bulgarian ministries were also present. Although the discussions concerned, among others, third party access to the Romanian Transit Pipeline 1, and Transgaz was present in the discussions, Bulgargaz was not. BEH alone took part in the discussions on behalf of the BEH group. The minutes of the meeting state that both the Romanian and the Bulgarian representatives agreed to inform the Commission about their cooperation concerning, among other things, renegotiation of the 2005 Commercial Agreement between Transgaz and Bulgargaz.⁴¹¹
- (c) On 30 November 2011 Transgaz sent Bulgargaz a letter proposing a meeting to discuss the renegotiation of the 2005 Commercial Agreement. Bulgargaz forwarded this letter to BEH on the same day.⁴¹²
- (d) On 26 January 2012, Transgaz sent Bulgargaz another letter requesting it to sign a Memorandum of Understanding (which was also attached to that letter). The Memorandum of Understanding stated, among others that, based on the 2005 Commercial Agreement, third parties were forbidden from accessing the Negru Voda 1 interconnection point on the Romanian side (the exit point from the Romanian Transit Pipeline 1). Against this background, under the Memorandum of Understanding as proposed by Transgaz, the contracting parties (i.e. Transgaz and Bulgargaz) were to commit to amend the 2005 Commercial Agreement to allow for third party access by 25 February 2012.⁴¹³
- (e) Bulgargaz replied on 6 February 2012 stating that the target date as proposed by the Memorandum of Understanding (i.e. 25 February 2012) was unrealistic. Bulgargaz further pointed out that before the Memorandum of Understanding could be signed, Bulgargaz would first have to obtain from Transgaz for its review and consideration the following documents (1) the draft methodology for the establishment of the (new) transmission tariff to be paid by Bulgargaz to Transgaz for gas transport and for capacity allocation, (2) the Operational Agreement and (3) the draft Capacity Allocation Agreement. Bulgargaz also referred to the meeting held between Bulgargaz and Transgaz on 11 January 2012 where the same issues were discussed.⁴¹⁴
- (f) Transgaz answered this letter on 29 March 2012 by providing Bulgargaz with the methodology for determining the transmission tariff, pointing out the email

⁴¹⁰ See document RKO 1001, [31.01.2011 [page 5], [...].

⁴¹¹ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 3 [pages 4-9], [...].

⁴¹² See BEH's reply to the Commission request for information dated 16 June 2016, Annex 1 [pages 1-3], [...].

⁴¹³ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.1, [pages 5-7], [...].

⁴¹⁴ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.1, [pages 6-8], [...].

address to which the draft Operation Agreement had been already sent and explaining that the draft Capacity Allocation Agreement would be prepared after the relevant regulatory approvals had been finalised. Transgaz also underlined that it hoped that now all the conditions for signing the Memorandum of Understanding had been fulfilled.⁴¹⁵

- (g) On 1 October 2012 Bulgargaz wrote a letter to BEH explaining that Transgaz would like to sign a Memorandum of Understanding as a basis for renegotiating the 2005 Commercial Agreement and that Bulgargaz in principle agreed to sign it but first further discussions between Bulgargaz and Transgaz were required.⁴¹⁶
- (h) Bulgargaz and Transgaz met again on 10 October 2012.⁴¹⁷ During this meeting, Bulgargaz and Transgaz discussed the possibility of granting third-party access to the Romanian Transit Pipeline 1 and to revise the 2005 Commercial Agreement. In order to allow third party access, Bulgargaz insisted that Transgaz would first need to commit annual and daily capacity of [3-4] bcm and [11-12] mcm respectively (that is, roughly half of the total pipeline capacity) to Bulgargaz for the transit on the Romanian Transit Pipeline 1 until the end of 2016. More importantly, according to the minutes of the meeting on 10 October 2012, 'Bulgargaz shall notify Transgaz that it agrees with the trading of the capacity above the specified [3-4] billion m³ annually or [11-12] million³ daily'. The Commission has not received any proof that Bulgargaz gave its agreement in this respect.⁴¹⁸
- (i) On 25 October 2012 Bulgargaz wrote a letter to BEH informing it about the meeting it had with Transgaz on 10 October 2012. It explained to BEH that during the meeting, Bulgargaz demanded from Transgaz that [3-4] bcm annual capacity be guaranteed to Bulgargaz before any capacity on the Romanian Transit Pipeline 1 could be released to third parties and that Bulgargaz would notify Transgaz of its agreement to trade capacity beyond the guaranteed [3-4] bcm. Bulgargaz further explained to BEH that based on such arrangement it would not be required to take part in future capacity auctions which Transgaz wanted to organise.⁴¹⁹ Subsequently, BEH demanded to be informed who, from the Bulgargaz side, would participate in the next meeting between Bulgargaz and Transgaz.⁴²⁰

⁴¹⁵ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.1, [pages 9-12], [...].

⁴¹⁶ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 2 [page 1], [...].

⁴¹⁷ Bulgargaz' reply to the Commission's request for information dated 9 April 2013, question 3, [page 3], [...]. See also Bulgargaz' reply to the Commission's request for information dated 9 April 2013, Annex 2, [page 2], [...] and BEH's submission of 8 July 2014, [page 2] [...].

⁴¹⁸ Bulgargaz' reply to the Commission's request for information dated 9 April 2013, Annex 2, [page 2], [...].

⁴¹⁹ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 4 [pages 1-2], [...].

⁴²⁰ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.1, [page 22], [...].

- (j) On 28 October 2013, Transgaz sent a letter to Bulgargaz, explaining that it was willing to discuss with the European Commission the possibility to guarantee [3-4] bcm annual capacity to Bulgargaz. Therefore, it asked Bulgargaz to provide the European Commission with its argumentation why it would like to have certain specific capacities secured exclusively for Bulgargaz before the remaining capacity could be freely provided to the market.⁴²¹ On 9 December 2013, the issue was again discussed between Bulgargaz and Transgaz at a meeting held in Bucharest, this time also with representatives of the Bulgarian Ministry of Economy and Energy, the EWRC, representatives of the Romanian Energy Department and the Romanian Energy Regulator. At this meeting it was agreed that the 2005 Commercial Agreement should be amended to enable the release of unused capacity on the Romanian Transit Pipeline 1 to third parties.⁴²² Bulgargaz informed BEH about this meeting in a letter dated 14 December 2013.⁴²³
- (k) In line with the discussions during the 9 December 2013 meeting, in a letter to Transgaz of 14 December 2013, Bulgargaz stated its intention to allow third-party access to the Romanian Transit Pipeline 1, however only for the capacity that was not used by Bulgargaz. To this end, Bulgargaz offered to further discuss possible amendments of Article 17.1 of the 2005 Commercial Agreement at a meeting, which Transgaz and Bulgargaz could organize at the earliest convenience.⁴²⁴ In the same letter, Bulgargaz made the release of unused capacity conditional on lowering the fixed fee agreed in the 2005 Commercial Agreement for capacity usage of the Romanian Transit Pipeline 1.⁴²⁵ Bulgargaz forwarded this letter to BEH on 14 December 2013.⁴²⁶
- (l) In its reply of 13 January 2014, Transgaz pointed out to Bulgargaz that it has a legal '*obligation to have the entire pipeline capacity offered to the market and allocated on a fully transparent basis, by means of auctions (...)*' and that '*the solution to make available only the capacity which is not used by Bulgargaz is a mere compromise.*'⁴²⁷
- (m) On 20 November 2015, BEH's Board of Directors instructed Bulgargaz to undertake the necessary steps to negotiate with Transgaz the conditions for the

⁴²¹ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.2 [pages 6-7], [...].

⁴²² BEH's submission of 8 July 2014, [pages 2 and 3], [...].

⁴²³ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 7 [pages 1-2], [...].

⁴²⁴ BEH's submission of 8 July 2014, [pages 2 and 3], [...].

⁴²⁵ BEH's submission of 8 July 2014, [pages 2 and 3], [...].

⁴²⁶ BEH's submission of 8 July 2014, [pages 1 to 3], [...].

⁴²⁷ Annex 6 to Bulgargaz' reply to SO dated 23 March 2015, [...]. In another letter of 20 January 2016, described further in recital (297)(o), [the TSO] underlined that Bulgargaz' proposal of 14 December 2013 was not in line with the European regulatory framework. See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.2, [page 15], [...].

transmission of gas via the Romanian Transit Pipeline 1, taking into account the European Commission AT.39849 antitrust case.⁴²⁸

- (n) On 1 December 2015, following the instructions from BEH, Bulgargaz wrote a letter to Transgaz offering to change Article 17.1 of the 2005 Commercial Agreement and expressed its readiness to agree on and sign a respective addendum to the 2005 Commercial Agreement.⁴²⁹ This time Bulgargaz did not make the change of the Article 17.1 of the 2005 Commercial Agreement conditional on first having certain capacities guaranteed for itself before any other undertaking could obtain access. Bulgargaz forwarded this letter to BEH on 7 December 2015.⁴³⁰
- (o) On 20 January 2016, Transgaz replied that it planned to take further steps to bring the issue of capacity allocation on the Romanian Transit Pipeline 1 in line with Union law and, therefore, planned to run capacity auctions for the Romanian Transit Pipeline 1 and to this end proposed to terminate the 2005 Commercial Agreement early (as of 30 September 2016). Bulgargaz forwarded the letter to BEH on 22 January 2016⁴³¹ and answered Transgaz on 2 February 2016, agreeing to terminate the 2005 Commercial Agreement early⁴³² (instead of just renegotiating the Article 17.1 of the 2005 Commercial Agreement (see recital (261))).
- (p) Between March and June 2016 Transgaz and Bulgargaz met and exchanged several letters concerning the necessary arrangements for early termination of the 2005 Commercial Agreement.⁴³³
- (q) On 4 April 2016 Bulgargaz wrote a letter to Transgaz attaching a draft addendum to the 2005 Commercial Agreement, which revoked Article 17.1 of the 2005 Commercial Agreement. Moreover Bulgargaz stated in the same letter that even if Transgaz did not sign the proposed addendum, Bulgargaz confirmed that it did not consider Article 17.1 of the 2005 Commercial Agreement to be applicable and that Transgaz was free to provide the unused

⁴²⁸ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.3, [pages 4 and 5], [...]. See also BEH's reply to the Commission request for information dated 16 June 2016, Annex 8, [...].

⁴²⁹ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.2, [page 13], [...].

⁴³⁰ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 9 [page 1-2], [...].

⁴³¹ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 9 [pages 3-5], [...], Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.2, [page 15], [...].

⁴³² See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.3, [page 6], [...].

⁴³³ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.3, [pages 12 and 13], [...].

capacity on the Romanian Transit Pipeline 1 to any other party.⁴³⁴ Bulgargaz' informed BEH about its exchanges with Transgaz on 4 April 2016.⁴³⁵

- (r) In its response, Transgaz pointed out that in order to offer the capacity to third parties it would need to undertake certain technical preparations and therefore again reiterated its request to simply terminate the entire 2005 Commercial Agreement as of 30 September 2016.⁴³⁶
 - (s) Finally, on 24 June 2016 both Bulgargaz and Transgaz signed the proposed addendum to the 2005 Commercial Agreement agreeing to terminate it as of 30 September 2016.⁴³⁷
- (298) Bulgargaz contests the findings of the Commission.
- (299) First, Bulgargaz claims that the discussions on the subject between Bulgargaz and Transgaz were initiated after the opening of the Commission infringement procedure against Romania ⁴³⁸ and that Transgaz never needed Bulgargaz' consent for third party access to the Romanian Transit Pipeline 1. Bulgargaz further claims that the Commission misconstrues the negotiations between Transgaz and Bulgargaz to amend the 2005 Commercial Agreement as a request from Transgaz to Bulgargaz to approve the granting of access to third parties to the pipeline.
- (300) Second, Bulgargaz argues that it undertook numerous attempts to amend the 2005 Commercial Agreement and [confidential].⁴³⁹
- (301) Third, Bulgargaz argues that it insisted on preserving [3-4] bcm/y based on annual forecasts of the needs of its clients, and it had a legal obligation to provide uninterrupted gas supplies to its customers.⁴⁴⁰
- (302) Fourth, Bulgargaz argues that the Commission does not have a single piece of evidence which contains a request from Transgaz to Bulgargaz in relation to a third party access to the Romanian Transit Pipeline 1.⁴⁴¹
- (303) Fifth, Bulgargaz argues that the Commission should have inquired with Transgaz about the specific exchanges concerning the access to the Romanian Transit Pipeline 1.⁴⁴²

⁴³⁴ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.3, [page 14], [...].

⁴³⁵ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 11 [pages 1-2], [...].

⁴³⁶ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.4, [pages 1-2], [...].

⁴³⁷ See Bulgargaz submission to the Commission dated 22 July 2016, [...].

⁴³⁸ See Bulgargaz' reply to the SO dated 23 March 2015, Chapter 4.1.5, recitals 128-136, [...], where Bulgargaz refers to case 2009/2193.

⁴³⁹ See Bulgargaz' reply to the Letter of Facts dated 26 September 2016, recital 8.

⁴⁴⁰ See Bulgargaz' reply to the SO dated 23 March 2015, Chapter 4.1.7, recitals 178 – 180, [...].

⁴⁴¹ See Bulgargaz' reply to the Letter of Facts dated 26 September 2016, recital 9. See also the BEH group response to the evidence contained in document [...] dated 12 March 2018, page 6.

⁴⁴² Bulgargaz' reply to the Letter of Facts dated 26 September 2016, recital 11.

- (304) Bulgargaz' arguments cannot be accepted for the reasons set out in recitals (305)-(310).
- (305) First, regardless of Transgaz' motives for entering into discussions with Bulgargaz,⁴⁴³ the evidence outlined in recital (297) shows that at least as of January 2011 Bulgargaz was approached by Transgaz with the aim to provide the unused capacity on the Romanian Transit Pipeline 1 to third parties. Thus, the BEH group was aware of Transgaz' willingness to take back the capacity which Bulgargaz was not using and offer it to the market on an equal transparent and non-discriminatory basis.
- (306) Second, Article 17.1 of the 2005 Commercial Agreement directly benefited Bulgargaz, by giving it a right to use the Romanian Transit Pipeline 1 on an exclusive basis. Bulgargaz therefore was in a position to unilaterally and unconditionally revoke this right, which it eventually did (see point (q) of recital (297)).
- (307) Third, the Commission does not accept Bulgargaz' argument that it 'only' insisted on reserving [3-4] bcm/y to preserve the needs of its clients. As stated in recital (297), even after reserving 'only' [3-4] bcm/y to fulfil the needs of its clients, Bulgargaz still stipulated that 'Bulgargaz shall notify Transgaz that it agrees with the trading of the capacity above the specified [3-4]billion m³ annually or [10-12] million m² daily'. Incidentally, the Commission has not obtained any proof that such agreement has ever been granted.
- (308) Fourth, as explained in recital (297), the Commission has various pieces of evidence on the file with respect to Transgaz' numerous efforts requesting Bulgargaz to terminate its exclusive use of the Romanian Transit Pipeline 1.
- (309) With respect to individual access requests to the Romanian Transit Pipeline 1, the evidence in the file provides example of only one undertaking requesting access directly from Transgaz (see recital (296)). However, Transgaz, instead of asking Bulgargaz to allow access to this specific undertaking, decided to request Bulgargaz to annul Bulgargaz' exclusive use of the Romanian Transit Pipeline 1 altogether (see recitals (296)-(297)). It is therefore irrelevant that Transgaz did not forward to Bulgargaz a specific access request; it is sufficient that Transgaz took steps aiming to ensure that the entire capacity of the Romanian Transit Pipeline 1 could be freely provided to third parties.
- (310) Fifth, the Commission has obtained all the relevant exchanges between Bulgargaz and Transgaz concerning the potential amendment to the 2005 Commercial Agreement from BEH and Bulgargaz. Therefore there was no need for the Commission again to request the same correspondence from Transgaz.

Requests for access to capacity addressed to Bulgargaz

Overgas

- (311) In addition, the Commission notes that Overgas also approached Bulgargaz directly with a view to obtain access to Romanian Transit Pipeline 1. According to Overgas, it became apparent around October 2012 that there was no room for obtaining the

⁴⁴³ Bulgargaz refers to the infringement action against Romania for the breach of Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks – Case 2009/ [confidential].

required capacity from Transgaz.⁴⁴⁴ The capacity was still fully booked by Bulgargaz. Therefore, on 23 November 2012, Overgas sent a letter to Bulgargaz inquiring about the terms and conditions under which it could gain access to Romanian Transit Pipeline 1. Prior to finally signing an agreement to that effect on 31 January 2013, Bulgargaz and Overgas engaged in several meetings and contacts, including the following:

- (a) on 21 December 2012, Overgas sent Bulgargaz a draft agreement on the transit of natural gas through the Romanian Transit Pipeline 1;⁴⁴⁵
 - (b) by letter of 28 December 2012, Overgas informed Bulgargaz that it had entered into binding contracts for the supply of natural gas with several gas distribution undertakings, as well as with Toplofikacia Razgrad, and was expected to start supplying them as of 1 January 2013.⁴⁴⁶ Bulgargaz responded that it needed BEH's approval before granting access to Romanian Transit Pipeline 1;⁴⁴⁷ and
 - (c) by letter of 7 January 2013, Bulgargaz offered Overgas to sign an agreement for the transit of natural gas through the Romanian Transit Pipeline 1, but only for the first quarter of 2013. Bulgargaz suggested to further discuss the matter at a meeting.⁴⁴⁸
- (312) After various subsequent meetings, Overgas and Bulgargaz signed an agreement on 31 January 2013 granting Overgas access to the Romanian Transit Pipeline 1 ('the 31 January 2013 Agreement'), with retroactive effect from 1 January 2013 until 31 March 2013. Bulgargaz granted access by subletting its capacity directly to Overgas.⁴⁴⁹ However, according to Overgas, the agreement was tainted by a series of shortcomings to Overgas' clear disadvantage, including the following:
- (a) the timing for concluding the agreement: Bulgargaz signed the agreement with Overgas only once Bulgargaz, in December 2012, had concluded contracts with its own customers downstream for 2013. Therefore, before Bulgargaz had signed the 31 January 2013 Agreement, Overgas was unable to confirm to its potential customers that it would be able to supply gas to them in 2013.⁴⁵⁰ By the time the agreement eventually was signed, most customers had already concluded contracts with Bulgargaz. Only Overgas' subsidiaries, including

⁴⁴⁴ Overgas' reply to the Commission's request for information dated 18 September 2013, question 4, [pages 5 and 6], [...].

⁴⁴⁵ See Overgas' reply to the Commission request for information dated 26 April 2013, [page 3], [...].

⁴⁴⁶ As described in section 5.4.4, Overgas had to secure access to the Romanian Transit Pipeline 1 on time, in order to supply gas to its subsidiaries, which had not prolonged their gas supply contracts with Bulgargaz. See Overgas' submission of 30 January 2013, [page 2], [...], and Overgas' reply to the Commission request for information dated 26 April 2013, [page 3], [...].

⁴⁴⁷ See Overgas' reply to the Commission's request for information dated 28 August 2014, [page 4], [...].

⁴⁴⁸ Overgas' reply to the Commission's request for information dated 26 April 2013, [page 3], [...].

⁴⁴⁹ Such subletting of capacity is recognised by the regulatory framework. See Article 16.3b of Regulation (EC) No 715/2009.

⁴⁵⁰ Overgas' reply to the Commission's request for information dated 18 September 2013, question 5, [pages 6 and 7], [...].

Toplofikacia Razgrad, had not yet done so and were thus in a position to sign a contract with Overgas;⁴⁵¹

- (b) the agreement's short-term duration: the agreement had three months duration and allowed for an automatic extension of an additional three months unless either party chose to terminate it 15 days in advance (with 31 December 2013 as final end date). Bulgargaz refused to give any guarantees that the contract would be extended beyond 2013. Moreover, the conditions under which Bulgargaz would choose to prolong the agreement remained unclear. According to Overgas, the short-term duration of the contract made it virtually impossible for Overgas to enter into medium or long-term planning or commitments with its upstream supplier or its current or potential downstream customers in Bulgaria.⁴⁵²
- (313) On 25 February 2013, less than a month after it signed the agreement, Bulgargaz announced to Overgas that it would not (automatically) extend the 31 January 2013 agreement. Bulgargaz' explanation for not doing so was that it had not been provided with clear evidence that Overgas had a gas supply contract with Gazprom Export throughout 2013. Following the subsequent exchange of letters, through which Overgas provided evidence of having signed up to the contracted volumes, Bulgargaz confirmed on 22 March 2013 that an agreement could be entered into until the end of 2013.⁴⁵³
- (314) However, Overgas states that following the cancellation by Bulgargaz on 25 February of the automatic extension of the capacity contract, its operations on the Bulgarian wholesale market suffered, as Overgas could no longer be sure that its contract would indeed be prolonged until the end of 2013. According to Overgas, Bulgargaz' announcement of the termination of the 31 January 2013 Agreement less than a month after its signature shows that even existing arrangements by no means are certain and Overgas fully depends on Bulgargaz' goodwill for access. In addition, Overgas had no certainty if, and based on what criteria, it would be able to sign a contract with Bulgargaz for the access to the Romanian Transit Pipeline 1 for the year 2014.⁴⁵⁴
- (315) On 16 October 2013 Overgas requested Bulgargaz to sign an agreement for the transmission of gas via the Romanian Transit Pipeline 1 for the year 2014. In response, on 17 December 2013 Bulgargaz replied that it would propose a draft contract after internal consultations with BEH.⁴⁵⁵ The final contract was signed

⁴⁵¹ Overgas' reply to the Commission's request for information dated 18 September 2013, questions 5-6, [pages 6-8], [...].

⁴⁵² Overgas' reply to the Commission's request for information dated 18 September 2013, question 1, [page 5], [...].

⁴⁵³ Overgas' reply to the Commission's request for information dated 26 April 2013, question 1 [page 4], [...].

⁴⁵⁴ Overgas' reply to the Commission's request for information dated 26 April 2013, question 1, [pages 4 and 5], [...].

⁴⁵⁵ Overgas' reply to the Commission Request for Information dated 28 August 2014, Question 8, [page 8], [...].

between Bulgargaz and Overgas on 23 January 2014, with retroactive effect as of 1 January 2014.⁴⁵⁶

- (316) Overgas also requested and was granted access by Bulgargaz to the Romanian Transit Pipeline 1 for the years 2015 and 2016, with the effective date as of 1 January 2015 and 1 January 2016 respectively.⁴⁵⁷ The access was granted with no delays. Both contracts were signed long-term, i.e. for one year duration and were not subject to any interruptions by Bulgargaz. They did not specify the volume of gas that would be shipped under the contract. Overgas would then pay to Bulgargaz part of the transportation costs proportionally to the gas actually shipped through the Romanian Transit Pipeline 1.⁴⁵⁸
- (317) Bulgargaz contests the findings of the Commission.
- (318) First, Bulgargaz claims that when asked by Overgas for access, Bulgargaz acted without delay. Bulgargaz further claims that the 2005 Commercial Agreement did not provide rules based on which Bulgargaz could offer capacity to Overgas. Bulgargaz could only agree to allow the transport of Overgas' gas through the Romanian Transit Pipeline 1 using the capacity it booked for its own use. According to Bulgargaz, the transported quantities were not determined in advance but calculated according to quantities actually delivered to Overgas' clients.⁴⁵⁹
- (319) Second, Bulgargaz claims that it accepted all the terms of the contract as suggested by Overgas and the contract signed was favourable to Overgas. In particular, Bulgargaz claims that the contractual clauses concerning the duration or linking of the transmission contract to the supply contract were included to ensure that Overgas would have the ability to revoke the agreement with Bulgargaz concerning the shipment of Overgas' gas via the Romanian Transit Pipeline 1 as soon as it could not bring any gas to the Romanian Transit Pipeline 1. According to Bulgargaz, it did not benefit from performing the contract with Overgas.⁴⁶⁰
- (320) Third, Bulgargaz claims that Overgas did not lose its clients as a result of Bulgargaz' late reply, as (a) Overgas requested access only in November 2012, very close to the date when it wanted to obtain access, (b) all Bulgargaz' contracts with its clients for 2013 were short term, with only three-month prior notice, (c) Overgas nevertheless managed to take over Bulgargaz' client [COMPANY 7] in February 2013.⁴⁶¹
- (321) Fourth, Bulgargaz also contests that the contract it entered into with Overgas was of a short duration. Bulgargaz claims that Overgas never requested contracts with duration longer than one year and Overgas' concerns and uncertainty were caused by its failure to guarantee its gas supply from Gazprom Export and not by the absence of

⁴⁵⁶ Overgas' reply to the Commission Request for Information dated 28 August 2014, Question 8, [page 8], [...] and Annex 5, [...].

⁴⁵⁷ Overgas' reply to the Commission's request for information dated 15 March 2016, question 13 [page 10] [...].

⁴⁵⁸ Overgas' reply to the Commission's request for information dated 15 March 2016, question 13 [page 10] [...].

⁴⁵⁹ See Bulgargaz' reply to the SO dated 23 March 2015, Chapter 4.1.6, recitals 156 - 161, [...].

⁴⁶⁰ See Bulgargaz' reply to the SO dated 23 March 2015, Chapter 4.1.6, recitals 137 - 149, [...].

⁴⁶¹ See Bulgargaz' reply to the SO dated 23 March 2015, Chapter 4.1.6, recitals 150 - 151, [...].

a longer-term transport agreement with Bulgargaz.⁴⁶²Fifth, Bulgargaz points out that, according to Overgas, the access granted to Overgas to the Romanian Transit Pipeline 1 for the years 2014 and 2015 was uninterrupted and satisfactory.⁴⁶³

- (322) Bulgargaz' arguments cannot be accepted for the reasons set out in recitals (323)(327)
- (323) First, Bulgargaz' argument that it acted with no delays in granting Overgas access to the Romanian Transit Pipeline 1 cannot be accepted because the access granted to Overgas as of 1 January 2013 cannot be considered a proper access which would allow Bulgargaz' competitors' to compete with it on an equal footing (see recital (312).
- (324) Second, Bulgargaz' description regarding the details of the signing of the access contract with Overgas are strongly disputed by Overgas. In particular, Overgas disputes that the contract is structured in a way that benefits Overgas or that the contested clauses, concerning the duration or linking of the transmission contract to the supply contract, were actually proposed by Overgas. The Commission notes that if indeed the aim of the contract was to ensure that Overgas would have the ability to revoke the agreement with Bulgargaz concerning the shipment of Overgas' gas via the Romanian Transit Pipeline 1 as soon as it could not bring any gas to the Romanian Transit Pipeline 1, then the power of such revocation should have been left with Overgas and not remain subject to the assessment and discretion of Bulgargaz.
- (325) Third, the fact that Overgas was eventually able to sign a contract with one former Bulgargaz' client does not change the fact that Bulgargaz only granted Overgas access to the Romanian Transit Pipeline 1 after the contracts between Bulgargaz and its clients had been signed. This substantially delayed Overgas' ability to expand its presence in the market.
- (326) Fourth, the condition imposed by Bulgargaz on Overgas requiring it to first secure its gas supplies before access to the Romanian Transit Pipeline 1 could be granted, was not justified in view of the ample unused capacity on the Romanian Transit Pipeline 1. The requirement to secure gas supplies without having any guarantee to access the infrastructure that allows the transport of the contracted gas puts undertakings at a significant business risk. This is particularly so, when the eventual access to the required infrastructure appears uncertain.
- (327) Fifth, the Commission does not contest that indeed Overgas stated that the flow of Overgas' gas via the Romanian Transit Pipeline 1 was uninterrupted and satisfactory for the years 2014 and 2015.⁴⁶⁴

C Energy Group

- (328) In 2013, also the C Energy Group AD ('C Energy Group'),⁴⁶⁵ attempted to obtain access to the Romanian Transit Pipeline 1.

⁴⁶² See Bulgargaz' reply to the SO dated 23 March 2015, Chapter 4.1.6, recitals 152 - 156, [...].

⁴⁶³ See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recital 10.

⁴⁶⁴ Overgas reply to the Commission request for information dated 15 March 2016, question 15 [page 10] [...].

- (329) C Energy Group, a trader of electricity, was planning to sell gas to non-household clients in Bulgaria. For transporting the gas, which it planned to buy at Isaccea, C Energy Group needed access to the Romanian Transit Pipeline 1 in order to transport gas from Isaccea to up until Negru Voda 1, and thereafter to the Bulgarian transmission network.
- (330) In September 2013, C Energy Group submitted a request to Bulgargaz regarding access to the Romanian Transit Pipeline 1 for the year 2014. It requested Bulgargaz to confirm the possibility to be granted access to the pipeline. C Energy Group also provided a schedule with the gas quantities it was planning to transport in 2014.
- (331) Bulgargaz never replied to C Energy Group. According to Bulgargaz, this was around the same time when it was discussing with Transgaz the amendment of the 2005 Commercial Agreement with respect to third party access to the Romanian Transit Pipeline 1. Thus, as stated by Bulgargaz, instead of contacting the undertaking and providing information about the access to the Romanian Transit Pipeline 1 it remained silent.⁴⁶⁶ With lack of access to the only import pipeline bringing gas to Bulgaria, C Energy Group therefore was unable to enter the gas supply markets in Bulgaria.

6. LEGAL AND ECONOMIC ASSESSMENT

6.1. Relevant Market

6.1.1. Relevant Product Market

- (332) A relevant product market comprises all those products and/or services that are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.⁴⁶⁷
- (333) In line with previous Commission decisions,⁴⁶⁸ activities within the natural gas sector can be divided according to:
- (a) Markets relating to gas infrastructure; and
 - (b) Markets relating to the supply of gas.
- 6.1.1.1. Gas infrastructure markets
- (334) For a supplier wishing to bring gas to the Bulgarian market, it is necessary to use gas transport infrastructure.
- (335) In its previous decisions, the Commission considered gas transport networks as natural monopolies.⁴⁶⁹ Due to high investment costs, the lengthy permission and

⁴⁶⁵ C Energy Group is ultimately owned by a private individual. See Bulgarian Company's Registry.

⁴⁶⁶ Bulgargaz' reply to the Commission request for information dated 28 August 2014, question 8, [pages 3 and 23-24], [...].

⁴⁶⁷ See the Commission Notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372, 09.12.1997, p. 5.

⁴⁶⁸ See for example the Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 11; Commission Decision of 14 November 2006, COMP/M.4180 *Gaz de France/Suez*, recital 341; Commission Decision of 8 October 2004, COMP/M.3410 *Total/GDF*, recitals 15-19; and Commission Decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, recital 90.

construction process and the associated risks, competitors cannot easily reproduce this infrastructure.⁴⁷⁰ The construction of competing parallel gas networks is, moreover, not viable economically. The supply of gas to customers, therefore, depends on the possibility of using the existing pipeline infrastructure. In other words, there is no scope for a meaningful short-term supply side reaction and the demand for this infrastructure is not substitutable with any other product or service.

- (336) Within gas transportation infrastructure,⁴⁷¹ a distinction can be made between:
- (a) Capacity related services on high-pressure pipeline grids (transmission networks);
 - (b) Capacity related services on low-pressure pipeline grids (distribution networks); and
 - (c) Capacity related services for gas imports.
- (337) The transmission network should be distinguished from the distribution network as competitive conditions differ significantly between the two. Transmission networks transport gas at higher pressure over long distances and are connected only to large final customers. By contrast, distribution networks serve to distribute the gas locally to smaller final consumers, such as households. Moreover, regulation that applies to transmission systems differs from that regulation that applies to distribution systems.
- (338) A distinction can also be made in relation to the infrastructure specifically used for gas imports, which consists, primarily, of pipeline interconnectors and LNG imports terminals.⁴⁷²
- (339) In its previous decisions, the Commission considered that the storage of natural gas should be distinguished from other forms of infrastructure, such as those relating to the transmission and distribution of gas.⁴⁷³ Within this category, underground gas storage has been deemed to constitute a separate market.⁴⁷⁴ Underground storage facilities are essential for any gas supplier to be active on the gas wholesale and retail markets, so as to optimally manage the (*inter alia* seasonal) fluctuations in customer demand.⁴⁷⁵ The Commission has previously found that storage is not substitutable with other flexibility tools, such as flexible supply contracts or sales to interruptible

⁴⁶⁹ Commission Decision of 4 May 2010, COMP/39.317 *E.ON Gas*, recital 18; and Commission Decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, recital 97.

⁴⁷⁰ Commission Decision of 18 March 2009, COMP/39.402 *RWE Gas Foreclosure*, recital 15; and Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 27.

⁴⁷¹ Commission Decision of 21 October 2009, COMP/M.5649 *RREEF FUND/ENDESA/UFG/SAGGAS*, recital 11; Commission Decision of 9 October 2009, COMP/M.5602 *RREEF FUND/BP/EVE/REPSOL/BBG*, recital 12; Commission Decision of 21 September 2010, COMP/M.5944 *OSAKA/UFG/INFRASTRUCTURE ARZAK/SAGGAS*, recitals 11-12, 15; and Commission Decision of 29 September 2010, COMP/39.315 *Eni SpA*, recital 24.

⁴⁷² Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 14.

⁴⁷³ Commission Decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, recital 99; Commission Decision of 12 November 2009, COMP/M.5549 *EDF/Segebel*, recitals 167-168.

⁴⁷⁴ Commission Decision of 8 October 2004, COMP/M.3410 *Total/GDF*, recitals 17-19; and Commission Decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, recital 99.

⁴⁷⁵ Commission Decision of 29 September 1999, Case No IV/M.1383 *Exxon/Mobil*, recital 261.

customers.⁴⁷⁶ In the present case, the Commission also considers that there is no reason to deviate from this approach.

6.1.1.2. Gas supply markets

- (340) In its previous decisions, the Commission has defined a market for the supply of natural gas (by domestic and foreign producers) to various customers.⁴⁷⁷ This market is separate from the market for transportation of gas.⁴⁷⁸
- (341) The supply market comprises gas sourced from domestic production and imports and is limited to what is actually consumed (or stored) in a given geographic market. The market for the supply of gas does not cover gas transiting through that geographic area, i.e. imported, but neither being consumed nor stored in this area.
- (342) Within the supply market, the Commission has previously made a distinction between the:⁴⁷⁹
- (a) Upstream wholesale supply of gas, where producers/exporters, sometimes via intermediaries, sell to importers and downstream wholesale suppliers;
 - (b) Downstream wholesale supply of gas, where wholesalers sell to retailers or domestic traders; and
 - (c) Retail supply to final customers.
- (343) On the upstream wholesale level, producers and exporters sell large quantities of gas to wholesalers and importers.⁴⁸⁰ Such upstream sales also cover indirect sales in which gas is sold by the producer/exporter to the wholesaler/importer on a hub or through an intermediary.⁴⁸¹ On the other hand, the downstream wholesale level, which concerns the onward sales by the wholesalers and importers to retailers or

⁴⁷⁶ Commission Decision of 14 March 2006, COMP/M.3868, *DONG* recital 51-52; Commission Decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, recital 99; and Commission Decision of 8 October 2004, COMP/M.3410 *Total/GDF*, recital 19.

⁴⁷⁷ See Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 11 seq., Commission Decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, recital 100, Commission Decision of 29 September 2010, COMP/39.315 *ENI*, recital 23 and 25, in Commission Decision of 14 March 2006, COMP/M.3868 *DONG* recital 71-72 it was also made clear that supplies also covered sales by importers, Commission Decision of 11 April 2011, COMP/M.6068 *ENI/ACEGASAPS/JV*, recital 15.

⁴⁷⁸ See Commission Decision of 4 May 2010, COMP/39.317 *E.ON Gas*, recital 13, with reference to other precedents. See also Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, which distinguishes between supply and infrastructure markets, recital 11; Commission Decision of 8 October 2004, COMP/M.3410 *Total Gas de France*, recital 15-16.

⁴⁷⁹ See for example the Commission Decision of 14 November 2006, COMP/M.4180 *Gaz de France/Suez*, recitals 375-379; Commission Decision of 8 October 2004, COMP/M.3410 *Total/GDF*, recital 21; and Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 12.

⁴⁸⁰ A recent merger decision regarding Wintershall confirmed that market participants perceive upstream gas supply as a separate market. See Commission Decision of 3 December 2013, COMP/M.6910 *Gazprom/Wintershall/Target companies*, recitals 23, 45, 84 and 85. See also Commission Decision of 19 November 2013, COMP M.6984 *EPH/Stredoslovenska Energetika*, recitals 21-23.

⁴⁸¹ Indirect sales can occur in supply chains, e.g. when a producer sells the gas contractually to a wholesaler, which contractually sells the entire gas quantity on to the national wholesaler who 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.

other downstream wholesalers (for example distribution companies)⁴⁸² is separate from this market.

- (344) With regard to the market for the supply of gas to end customers, a distinction is made between supplies to large end customers connected to the transmission network and smaller commercial customers and households connected to the distribution network.⁴⁸³ As to the market for large end customers, previous Commission practice has established that large end customers have different needs and consumption patterns⁴⁸⁴ and a distinction has been made according to the customer's connection to either the transmission or distribution grid.⁴⁸⁵

6.1.2. *Relevant Geographic Market*

- (345) According to established case law, 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 this geographic area the conditions of competition are similar or sufficiently homogeneous and can be distinguished from neighbouring areas, in which the prevailing conditions of competition are appreciably different.⁴⁸⁶
- (346) The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly, only those areas in which the conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market.⁴⁸⁷
- (347) With respect to the gas transmission and distribution markets, the Commission has in its previous decisions found that they are grid-wide.⁴⁸⁸ As stated in recital (335), the construction of competing parallel networks is not economically viable. Competitive constraints from TSOs outside the relevant network therefore remain negligible.
- (348) As described in Section 4.4.3, the Bulgarian transmission network is used to supply the majority of municipalities and big industrial customers in Bulgaria. However, in the South West of Bulgaria, some customers that are far removed away from the Bulgarian transmission network are supplied via the Bulgarian Transit Pipeline. As described in recital (54), until April 2016 it was impossible to ship gas through the

⁴⁸² See on downstream wholesale level Commission Decision of 3 December 2013, COMP/M.6910 *Gazprom/Wintershall/Target companies*, recital 24.

⁴⁸³ Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 13.

⁴⁸⁴ Commission Decision of 14 November 2006, COMP/M.4180 *GDF/Suez*, recitals 355-361.

⁴⁸⁵ Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 13.

⁴⁸⁶ See the Commission Notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372, 09.12.1997, p. 6 and the Commission Decision of 21 May 2003, COMP/C-1/37.451, 37.578, 37.579 *Deutsche Telekom AG*, recital 92-93 (not disputed in court proceedings, see judgment of 10 April 2008, *Deutsche Telekom v Commission*, T-271/03, EU:T:2008:101, recitals 242-243; and judgment in *Deutsche Telekom v Commission*, C-280/08, EU:C:2010:603, recital 50; and Commission Decision of 16 July 2003, COMP/38.233 *Wanadoo Interactive*, recital 205. See also judgment in *Michelin v Commission*, C-322/81, EU:C:1983:313, para 26; and judgment in *Asatel v SA Novasam*, C-247/86, EU:C:1988:469, para 15.

⁴⁸⁷ See judgment of 21 October 1997 *Deutsche Bahn v Commission*, T-229/94, EU:T:1997:155, para 92. See also judgment of 22 November 2001, *AAMS v Commission*, T-139/98, EU:T:2001:272, para 39.

⁴⁸⁸ Commission Decision of 18 March 2009, COMP/39.402 *RWE Gas Foreclosure*, recital 15.

Bulgarian Transit Pipeline for the purpose of supplying gas to the rest of Bulgaria (other than in the South West of Bulgaria). Against this background, and for the purposes of this case, the relevant geographic markets are:

- (a) Bulgaria, except for the South West of Bulgaria, which is solely supplied through the Bulgarian transmission network; and
 - (b) The South West of Bulgaria, where customers are supplied through the Bulgarian Transit Pipeline.
- (349) With respect to import infrastructure, in its previous decisions, the Commission determined that the origin of natural gas is irrelevant from the demand-side perspective.⁴⁸⁹ The ultimate aim of a gas supply business is to sell gas on downstream wholesale or retail markets. However, downstream gas demand can only be satisfied if there is a viable transportation route between the source of origin and the destination point. Therefore, all routes that could potentially be used to import gas to the wholesale/retail market in Bulgaria (except for the South West of Bulgaria) constitute a relevant market. In the present case, and as set out in more detail in recitals (51)-(54), all quantities of gas, at least until April 2016 imported to Bulgaria were transported via Romanian Transit Pipeline 1. Against this background, and for the purposes of this case, the import infrastructure market effectively amounts to the route provided by Romanian Transit Pipeline 1.
- (350) With respect to storage, in its previous decisions the Commission found that the market should be considered national in scope.⁴⁹⁰ As described in Sections 5.4.2, the Bulgarian transmission network is not connected to neighbouring countries in a way that would make it possible to use storage facilities outside Bulgaria. Therefore, suppliers wanting to sell gas in Bulgaria are limited to using the one and only storage site in the country. Against this background, and for the purposes of this case, the storage market should be considered national.
- (351) With respect to the gas supply markets, in its previous decisions, the Commission found that downstream wholesale and retail gas supplies to large end customers connected to the gas transmission networks are considered either regional or national in scope.⁴⁹¹ For the purposes of this case, the downstream wholesale gas supplies and retail supplies to large end customers connected to the Bulgarian transmission network should be considered national in scope except for supplies to customers in the South West of Bulgaria, which constitutes a separate geographic market (see section 4.4.3). For the purpose of this Decision, the two markets together are sometimes referred to as the gas supply markets in Bulgaria.

6.1.3. Conclusion on the Relevant Market

- (352) For the purpose of this Decision, the relevant markets where the infringement occurred can be defined as:

⁴⁸⁹ Commission Decision of 29 September 2010, COMP/39.315 *ENI*, recital 26.

⁴⁹⁰ Commission Decision of 19 December 2003, COMP/M.3318 *ECS/Sibelga*, recital 31 and Commission Decision of 13 February 2003, COMP/M.3075-3080 *ECS/Intercommunales*, recital 25.

⁴⁹¹ Commission Decision of 29 September 2010, COMP/39.315 *ENI*, recital 28; Commission Decision of 25 November 1996, Case No IV/M.713 *RWE/Thyssen*, recitals 15-19 and Commission Decision of 17 December 2002, COMP/M.2822 *ENBW/ENI/GVS*, recital 31.

- (a) capacity related services on the Bulgarian transmission network;
 - (b) capacity related services on Romanian Transit Pipeline 1;
 - (c) capacity related services for storage at UGS Chiren;
 - (d) downstream wholesale supply of gas (also referred to as the ‘downstream wholesale gas market’) in Bulgaria, except for supplies to customers in the South West of Bulgaria; and
 - (e) retail supply of gas to large end customers connected to the Bulgarian transmission network in Bulgaria, except for supplies to customers in the South West of Bulgaria.
- (353) BEH and Bulgargaz contest the findings of the Commission.
- (354) First, BEH and Bulgargaz argue that the product market definition ‘services related to the capacity of the Romanian Transit Pipeline 1’ is vague and inaccurate, and that the Commission should have made a clearer distinction between the primary and the secondary capacity markets as done in previous decisions of the Commission. BEH and Bulgargaz underline that the primary and secondary capacity market not only have different operators (TSO and network users), but are also subject to separate rules and procedures.⁴⁹² According to Bulgargaz, it could not have offered the unused capacity on the secondary market, because no such market has ever been established by Transgaz for the Romanian Transit Pipeline 1 and it would have infringed the 2005 Commercial Agreement by doing so.⁴⁹³
- (355) Second, BEH and Bulgargaz also submitted that the market definition (‘services related to the capacity of the Romanian Transit Pipeline 1’) does not follow the Commission's past decision making practice,⁴⁹⁴ namely the *ENI* and *GDF* cases.⁴⁹⁵ According to the BEH group, in the *ENI* case the Commission defined the relevant market as ‘market for the transport of natural gas to and into Italy’⁴⁹⁶ and made no reference to the capacity market in the market definition.⁴⁹⁷
- (356) BEH and Bulgargaz' arguments cannot be accepted for the reasons set out in recitals (357)-(358).

⁴⁹² See BEH's reply to the SO dated 23 March 2015, chapter 4, recitals 60-66, [...] and Bulgargaz' reply to the SO dated 23 March 2015, recitals 30-41 [...]. See also See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recitals 13-15.

⁴⁹³ BEH's reply to the SO dated 23 March 2015, recitals 76-78, [...] and Bulgargaz' reply to the SO dated 23 March 2015, recitals 51-54 [...]. See also See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recitals 16-21.

⁴⁹⁴ BEH's reply to the SO dated 23 March 2015, recitals 80-81, and Bulgargaz' reply to the SO dated 23 March 2015, recitals 56-63 [...].

⁴⁹⁵ Commission Decision of 29 September 2010, COMP/39.315 *ENI* and Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*.

⁴⁹⁶ Commission Decision of 29 September 2010, COMP/39.315 *ENI*, recital 24.

⁴⁹⁷ BEH's reply to the SO dated 23 March 2015, recital 81, [...] and Bulgargaz' reply to the SO, dated 23 March 2015, recital 57, 1866-2.

- (357) First, in line with the Commission's practice there is no need to distinguish between primary and secondary capacity hoarding.⁴⁹⁸ There is no provision in the 2005 Commercial Agreement that prohibits Bulgargaz to offer the unused capacity to third parties. The fact that the BEH group eventually started granting access to the Romanian Transit Pipeline 1 means that the establishment of rules for the secondary market was neither required nor prohibited by the 2005 Commercial Agreement (see recitals (312), (315) and (316)).
- (358) Second, the question whether the market was defined the same way in the *ENI* case or not bears no implications for the present case. The market definition needs to reflect the market reality. By booking the entire capacity of the Romanian Transit Pipeline 1, Bulgargaz became the only undertaking that could transport natural gas via the pipeline whether for itself or for third parties (i.e. offer capacity related services).

6.2. Conditions for the application of Article 102 TFEU

- (359) Article 102 TFEU prohibits, as incompatible with the internal market, any abuse by one or more undertakings of a dominant position within the internal market (or in a substantial part of it), in so far as the abuse may affect trade between Member States.
- (360) In this Section, the Commission assesses a) whether the BEH group's conduct amounts to an abusive refusal to supply access to the Bulgarian transmission network and UGS Chiren and b) with respect to the Romanian Transit Pipeline 1, whether it amounts to capacity hoarding in violation of Article 102 TFEU. In this respect, the Commission first briefly examines whether BEH, Bulgargaz and Bulgartransgaz constitute an undertaking within the meaning of Article 102 TFEU. The Commission establishes that the BEH group forms a single economic unit in which BEH determined the strategy undertaken by the group. The Commission then examines the BEH group's position on each relevant market with a view to determine whether it holds a dominant position. Thereafter, the Commission assesses whether the BEH group abused its dominant position by setting up a foreclosure strategy in the form of refusals to grant third party access to the Bulgarian transmission network and UGS Chiren respectively, as well as by engaging in capacity hoarding on Romanian Transit Pipeline 1. In this context, the Commission takes into account the applicable regulatory obligations.

6.2.1. Undertaking

- (361) According to established case-law, the subject of Union competition rules is the 'undertaking', defined in the case law as *'economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in [Article 101]*'.⁴⁹⁹ The same principles apply to the application of Article 102.
- (362) As indicated in Section 2, the BEH group is involved in a range of economic activities in the energy sector, and in particular in the gas sector in Bulgaria. BEH

⁴⁹⁸ Commission Decision of 29 September 2010, COMP/39.315 ENI, footnote 26.

⁴⁹⁹ See Judgement in *Shell v Commission*, T-11/89, ECLI:EU:T:1991:38, para 311 and Judgement in *Viho Europe BV v Commission*, C-73/95P, EU:C:1996:405, para 50.

acts on the gas market in Bulgaria through its wholly-owned subsidiaries Bulgargaz and Bulgartransgaz. Bulgargaz is the main supplier of gas at wholesale level and to final customers connected directly to the Bulgarian transmission network. Bulgartransgaz is the only TSO in Bulgaria and operates the Bulgarian transmission network and UGS Chiren.

(363) There is therefore no doubt that BEH, Bulgargaz and Bulgartransgaz are all engaged in economic activities.⁵⁰⁰

(364) Further, as explained in detail in Section 6.2.2 the BEH group forms a single economic unit under the meaning established by the Court of Justice.⁵⁰¹

6.2.2. *The BEH group forms a single economic unit*

(365) This section establishes that the BEH group forms a single economic unit in which BEH determined the strategy undertaken by the group. BEH exercises decisive influence over its subsidiaries including over individual actions of the BEH subsidiaries that could influence the group's strategy.

6.2.2.1. The BEH group corporate structure

(366) As described in recitals ((4) and (5)), BEH is an undertaking active in the energy sector in Bulgaria and it controls several Bulgarian energy companies, including the main electricity and natural gas incumbents. In the gas sector, BEH acts via its wholly-owned subsidiaries Bulgargaz and Bulgartransgaz.

(367) Bulgargaz is the main supplier of gas at the downstream wholesale level in Bulgaria and is also the main supplier to final customers connected directly to the Bulgarian transmission network (see recital (7)).

(368) Bulgartransgaz is the only licensed gas Transmission System Operator ('TSO') in Bulgaria and operates the Bulgarian transmission network, the Bulgarian Transit Pipeline, as well as the only underground gas storage facility in Bulgaria (UGS Chiren) (see recital (11)).

(369) BEH is a joint-stock undertaking incorporated under Bulgarian law. The sole owner of the equity is the Republic of Bulgaria and its rights are exercised by the Minister of Economy. BEH's corporate structure and the functions of its various corporate bodies are governed by BEH's Articles of Association. BEH's corporate bodies are: (a) a General Assembly and (b) a Board of Directors which comprises of three members.⁵⁰²

(370) Bulgargaz corporate bodies are (a) a General Assembly and (b) a Board of Directors which comprises of three members.⁵⁰³

⁵⁰⁰ See judgment in *Hofner & Elsner v Macrotron*, C-41/90, EU:C:1991:161, para 21.

⁵⁰¹ See judgement in *Viho Europe BV v Commission of the European Communities*, EU:C:1996:405, paras 15-16. See also *Shell v Commission*, ECLI:EU:T:1991:38, paras 311-312.

⁵⁰² See BEH's Annual Consolidated Management Report Independent Auditor's Report and Consolidated Financial Statements dated 31 December 2015, [pages 5 and 15], [...].

⁵⁰³ Bulgarian Energy Holding EAD, Annual Consolidated Management Report and Independent Auditor's Report Consolidated Financial Statements, 31 December 2015, p. 1-2, [...].

- (371) Currently Bulgartransgaz corporate bodies are: (a) a Supervisory Board and (b) Management Board. Until October 2012 Bulgartransgaz had only one corporate body, i.e. the Board of Directors, however in order to comply with the regulatory framework BEH changed Bulgartransgaz' Articles of Association by replacing its previously single Board of Directors with (a) a Management Board and (b) a Supervisory Board (see footnote 509).
- (372) As described in Section 4.4.1, Section 5.2.3 and Section 5.3.2, based on the regulatory regime, Bulgartransgaz as the TSO has been under the obligation to be fully independent from the BEH group ever since the market liberalisation in Bulgaria on 1 January 2007 for transmission and on 1 July 2007 for storage. However, as described in more detail in recital (605), this regulatory obligation was implemented with respect to the BEH group only on 22 June 2015.
- (373) Moreover, Bulgartransgaz admitted in the past (in a public statement made in the press) that it did not deal with Bulgargaz as a separate entity and on an arm's length basis, but rather that it behaved 'like a subsidiary of Bulgargaz'.⁵⁰⁴ This behaviour was also known to the various market players.⁵⁰⁵

6.2.2.2. BEH's close control over the actions of its subsidiaries

BEH's participation in the management of Bulgargaz and Bulgartransgaz

- (374) In line with BEH's Articles of Association, BEH's scope of activity includes participation in the management of its subsidiaries.⁵⁰⁶ BEH appoints and dismisses the members of the Board of Directors of Bulgargaz.⁵⁰⁷ Until March 2013, BEH appointed and also dismissed the members of the Board of Directors. Since the establishment of the Supervisory Board, BEH appoints several Bulgartransgaz' Supervisory Board members,⁵⁰⁸ which it continues to appoint until today.⁵⁰⁹

⁵⁰⁴ See Article 'Gas Suppliers Did Not Like the Rules for Network Access' by [T. K.] in Dnevnik, dated 12 January 2011 – submitted by Overgas on 20 January 2011 [page 57], Exhibit V., [page 51] [...]. According to the article quoting [R. O.] of Bulgartransgaz, 'It is clear to all that we are like a subsidiary of Bulgargaz and deal with it [Bulgargaz] only'. The article also concludes that '[O.] [Bulgartransgaz] ... did not hide the real situation during the discussion yesterday. Both companies were split into operator and provider because of EU requirements'.

⁵⁰⁵ See Article "Gas Suppliers Did Not Like the Rules for Network Access" by [T. K.] in Dnevnik, dated 12 January 2011, [page 50], [...], quoting a statement by [V. A.] of Agropolychim, stating that Bulgartransgaz does not respect the rules for third party access but rather "imposes rules of its own". Third (interested) parties also formed the understanding that capacity on Romanian Transit Pipeline 1 was "booked by definition" by Bulgargaz and that it therefore was not possible to explore access to the pipeline, see [COMPANY 1]'s reply to the Commission's request for information, dated 22 May 2012, question 7a, b and c [page 4], [...]; and 18 September 2013, [page 2], [...].

⁵⁰⁶ See Article 6 of BEH's Articles of Association, [...], [...], [...], [...], [...], [...], [...] and [...].

⁵⁰⁷ See Bulgargaz' Articles of Association – [...] – Article 30(4); [...], [...], [...], [...], [...], [...], [...], [...], [...] – Article 20(2)(4).

⁵⁰⁸ See Article 20.2 and Article 20.3 of Directive 2009/73/EC.

⁵⁰⁹ See Bulgartransgaz' Articles of Association – [...] – Article 30(4); [...], [...], [...], [...], [...], [...], [...], [...], [...] – Articles 18 and 20(2)(4). In view of the application for certification as ITO under Article 10 of Directive 2009/73/EC, BEH changed Bulgartransgaz' Articles of Association replacing, its previously single Board of Directors with (a) a Management Board and (b) a Supervisory Board. Officially BEH changed Bulgartransgaz' Articles of Association in October 2012, see [...] and [...], Articles 18 and Article 20(2)(4) and pages 15 and 18 in the respective IDs. However, the appointment of the first

- (375) The regulatory framework of the Union requires Bulgartransgaz' Management Board to be independent.⁵¹⁰ However, first, this regulatory obligation was implemented with respect to Bulgartransgaz' Management Board only in March 2013 (see in recital (374) and footnote 509). Second, when appointing the Management Board, Bulgartransgaz' Supervisory Board appointed exactly the same people who were members of the previous Bulgartransgaz' Board of Directors (that was still appointed by BEH). In other words, in order to comply with the regulatory regime, BEH formally split Bulgartransgaz' Board of Directors into management and supervisory boards but then all of its previous executives, which were directly appointed by BEH before the regulatory framework had been implemented, were moved into the Management Board. This Management Board, appointed in March 2013, continued its functions until January 2015.⁵¹¹ Against this background, it can be concluded that at least until January 2015, all members of Bulgartransgaz' Management Board were BEH's representatives and thus BEH closely controlled the actions of Bulgartransgaz.

BEH's approval of Bulgargaz' and Bulgartransgaz' business plans

- (376) According to the Articles of Association of BEH's subsidiaries, BEH approved, until 13 January 2013 the business plans of Bulgartransgaz. As of January 2013, according to the Bulgartransgaz' Articles of Association, Bulgartransgaz' business plan is adopted by Bulgartransgaz' Supervisory Board, of which half minus one members are elected by BEH.⁵¹²
- (377) As concerns Bulgargaz, BEH has been approving Bulgargaz' business plans and it continued to do so throughout the period investigated by the Commission.⁵¹³ According to Article 38 of BEH's internal rules for decision making with respect to its subsidiaries, the subsidiaries develop their business plans in compliance with BEH's general strategy.⁵¹⁴ In this context, BEH has not limited itself to only approve

members of Bulgartransgaz' Supervisory and Management Boards after the change were registered in the Bulgarian Commercial Register on 28 March 2013, see [...] and [...]. Hence, the appointment entered into force as of the date of the registration in the Commercial Register (Article 231, recital 4 of the Bulgarian Commercial Act, promulgated in State Gazette of the Republic of Bulgaria issue No 48 of 18 June 1991, last amendment with State Gazzette issue 13 of 16 February 2016).

⁵¹⁰ See Article 9 of Directive 2003/55/EC and Article 9 of Directive 2009/73/EC.

⁵¹¹ See the Bulgarian Commercial Register [...] and [...]. See also Commission opinion dated 22 April 2015 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Bulgaria – Bulgartransgaz, C(2015) 2754 final, [...].

⁵¹² See Bulgartransgaz' Articles of Association [...] – Article 30(19); [...], [...], [...], [...], [...] - Article 20(2)(16). The Commission notes that Bulgartransgaz' Articles of Association were changed as Bulgartransgaz was preparing to apply for the certification as Independent Transmission Operator ("ITO") under Article 10 of Directive 2009/73/EC. Directive 2009/73/EC requires that ITO is independent in carrying out its tasks. In this respect the Commission points out that the file contains two versions of Bulgartransgaz' Articles of Association dated 2 October 2012, [...] and [...], one in which BEH still approves Bulgartransgaz' business plans and one where BEH's approval is not required. BEH clarified in its reply to the Letter of Facts that the revised Bulgartransgaz' Articles of Association which deprived BEH of its power to approve or amend business plan of Bulgartransgaz came into effect on 13 January 2013. See BEH's reply to the Commission Letter of Facts dated 26 September 2016, recital 17 and footnote 11. See also Article 20.3 of Directive 2009/73/EC.

⁵¹³ See Bulgargaz' Articles of Association – [...] – Article 30(19); [...], [...], [...], [...], [...], [...], [...], [...], [...] – Article 20(2)(16).

⁵¹⁴ See BEH's reply to the Commission's request for information dated 3 July 2012, appendix 2, [...].

the business plans of its subsidiaries but also it has been giving guidance to its subsidiaries on how to draft their business plans.⁵¹⁵

BEH's approval of contracts to access the BEH group's infrastructure

- (378) BEH's Board of Directors approves Bulgargaz' contracts granting access to the Romanian Transit Pipeline 1.⁵¹⁶ Moreover, BEH was not only fully informed of the discussions between Bulgargaz and Transgaz concerning the access to the Romanian Transit Pipeline 1 but also participated in at least two such meetings (in January 2011 and September 2011, see recital (297)).
- (379) Until January 2012 also,⁵¹⁷ any conclusion by Bulgartransgaz of contracts granting access to the Bulgarian transmission network and UGS Chiren required the approval of BEH's Board of Directors. Each access application was first assessed by an expert working group composed of Bulgartransgaz experts. The working group then issued a recommendation on the technical possibility of giving access to the requested infrastructure.⁵¹⁸ Thereafter, based on the expert group's findings and recommendations, [Bulgartransgaz's employee] submitted a proposal to grant access to Bulgartransgaz' Board of Directors, following which the proposal was submitted for final approval to BEH's Board of Directors.⁵¹⁹
- (380) BEH changed the Articles of Association of its subsidiaries with the Protocol of 19 January 2012.⁵²⁰ According to this Protocol, BEH's approval was no longer necessary for contracts granting third parties access to the Bulgarian transmission network and UGS Chiren at regulated prices (tariffs).⁵²¹
- (381) However, in practice, at least during the infringement period, BEH still indirectly approved access to the Bulgarian transmission network and also to UGS Chiren,

⁵¹⁵ See Inspection document LAST 1, [...], [page 2]. See BEH's reply to the Commission's request for information dated 23 March 2016, [...], [...], [...], [...], [...], [...], [...].

⁵¹⁶ See Bulgargaz' reply to the Commission's request for information dated 16 September 2013, Annex 3, [pages 17 and 18], [...]. See also BEH's reply to the Commission's Letter of Facts dated 26 September 2016, recital 33.

⁵¹⁷ BEH's reply to the Commission's request for information dated 3 July 2012, question 5b, [pages 2 and 3], [...], and appendix 2, [page 16], [...]. The Commission notes that the Bulgartransgaz' Articles of Associations were changed in 2012 as Bulgartransgaz was preparing to apply for the certification as ITO under Article 10 of Directive 2009/73/EC. Directive 2009/73/EC requires that the ITO is independent in carrying out its tasks.

⁵¹⁸ See VEMA 1016, [pages 25-28], [...]. See also Inspection document GIA 1006, [18.10.2010] [...] [page 5].

⁵¹⁹ Inspection document ALDI 1029, [17.12.2010], ; [...]. BEH's reply to the Commission's request for information dated 3 July 2012 - Article 80 from BEH's rules regulating the relations between its subsidiaries and the Holding, appendix 2 [page 16], [...].

⁵²⁰ See BEH's reply to the Commission's request for information dated 2 October 2013, Annex II, [pages 1 and 3], [...]. The Commission notes that the Articles of Associations were changed in 2012 as Bulgargaz was preparing to apply for the certification as ITO under Article 10 of Directive 2009/73/EC. Directive 2009/73/EC requires that the ITO is independent in carrying out its tasks.

⁵²¹ See BEH's reply to the Commission's request for information dated 2 October 2013, Annex III, [page 6], [...]. See also Bulgarian Energy Act, Article 30 (1) point 12, Article 39 (1) point 2. In practice, this meant that all contracts granting third parties access to the Bulgarian transmission network would no longer need BEH's approval.

including contracts concluded at regulated prices, since the access to the Bulgarian transmission network (and indirectly also UGS Chiren) was conditional on access to the Romanian Transit Pipeline 1 (see Section 5.2.4.2). Therefore, at least as long as the 2005 Commercial Agreement was in force (guaranteeing Bulgargaz exclusive use of the pipeline), any access by third parties to the Romanian Transit Pipeline 1 continued to require the approval of BEH's Board of Directors. In this respect, the Commission notes that BEH closely controlled Bulgargaz' approach towards granting third party access (see recital (374)). For example, in order to provide capacity to Overgas on the Romanian Transit Pipeline 1, in 2013, [Bulgargaz's employee] had to request the approval of BEH's Board of Directors, convincing it that such access was in the best interest of the group.⁵²²

- (382) Moreover, the Commission has already indicated to Bulgartransgaz, in the Certification Opinion⁵²³ that the conditionality of first having access to the Romanian Transit Pipeline 1, before access to the Bulgarian transmission network could be granted, puts into question Bulgartransgaz' independence from BEH over the management of the Bulgarian transmission network (see recital (605)).⁵²⁴

The direct dealings between Bulgargaz and Bulgartransgaz

- (383) In this context, the Commission also notes that in dealings between BEH's subsidiaries (Bulgargaz and Bulgartransgaz) the entities act as an integrated undertaking. Bulgartransgaz, upon Bulgargaz' request, has provided it with its competitors' access requests (including that of Overgas and [COMPANY 5]) to the Bulgarian transmission network and to UGS Chiren, respectively.⁵²⁵ Bulgartransgaz also informed Bulgargaz on the status of its dealings with Bulgargaz' competitors (for example, Bulgartransgaz disclosed that it had asked Overgas to provide additional information subsequent to its request for access to the Bulgarian transmission network).⁵²⁶ As mentioned in recital (373), Bulgartransgaz (in public statements made in the press in the past) has also openly admitted that it does not deal with Bulgargaz as a separate entity on an arm's length basis.
- (384) BEH and Bulgargaz contest the findings of the Commission.
- (385) First, according to BEH, its approval of the business plans of its portfolio companies do not provide for a mechanism for orchestrating the abuse of its dominant position. Moreover, BEH claims that Bulgargaz' business plan does not contain any information about an intention to foreclose the downstream gas supply markets or the Romanian Transit Pipeline 1.⁵²⁷

⁵²² See Bulgargaz' reply to the Commission's request for information dated 16 September 2013, Annex 3, [pages 17 and 18], [...].

⁵²³ See the Commission Opinion, [...].

⁵²⁴ The Commission Opinion, [page 4], [...]. The access to UGS Chiren was not part of the Commission opinion.

⁵²⁵ See Inspection document VEMA 1016, [pages 15 – 16], [...].

⁵²⁶ See Inspection document VEMA 1016, [pages 15 – 16], [...].

⁵²⁷ BEH's reply to the Commission's Letter of Facts dated 26 September 2016, recitals 13 and 16-20. See also See also See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recitals 30-33.

- (386) Second, BEH and Bulgartransgaz point out that it was approving Bulgartransgaz' 3 year business plan only until 13 January 2013 and that the Commission failed to distinguish between the relationship between BEH and Bulgartransgaz prior or after that date.⁵²⁸
- (387) Third, Bulgartransgaz only sent information to Bulgargaz regarding the access requests of Bulgargaz' competitors in the framework of a court proceeding, without specifying any further details.⁵²⁹
- (388) BEH and Bulgargaz' arguments cannot be accepted for the reasons set out in recitals ((389)-(391)):
- (389) First, the Commission does not claim that BEH's approval of the business plans of its portfolio companies provided for a mechanism for orchestrating the abuse of its dominant position, but uses this evidence as one element to prove that BEH was in fact controlling the actions of its subsidiaries. Also, the fact that the business plans of BEH's subsidiaries did not contain any information about the intent to foreclose the downstream gas supply markets or access to the Romanian Transit Pipeline 1 is irrelevant. The Commission has used a wide body of evidence to prove that the BEH group had and executed a strategy to foreclose the gas supply markets in Bulgaria (see Section 6.3.1).
- (390) Second, the Commission is not claiming that BEH was approving Bulgartransgaz' business plan beyond 13 January 2013, and the Commission recognises that as Bulgartransgaz was preparing to be certified as an Independent Transmission Operator ("ITO") under Article 10 of Directive 2009/73/EC, it changed its Articles of Association as required by that Directive (see recital (376), footnote 512)). However, the Commission also points to other factors, which allowed BEH to indirectly control whether third parties obtained access to the infrastructure owned by Bulgartransgaz even after January 2013 (see recital (375) and (381)).
- (391) Third, Bulgartransgaz' explanation concerning information sharing with Bulgargaz regarding Bulgargaz' competitors cannot be accepted. Even if the information between Bulgartransgaz and Bulgargaz was exchanged purely in the framework of a court procedure,⁵³⁰ it is still not clear why the documents were exchanged directly between the two undertakings, and not via the court.

⁵²⁸ BEH's reply to the Commission's Letter of Facts dated 26 September 2016, recital 21-34. Bulgartransgaz' reply to the Commission's Letter of Facts dated 26 September 2016, recitals 19-27.

⁵²⁹ Bulgartransgaz' reply to the SO dated 23 March 2015, recitals 239-242, [...].

⁵³⁰ In this context, the Commission points out that Bulgartransgaz has not provided any detailed explanations as to the nature and the scope of the alleged legal proceeding which supposedly required Bulgartransgaz to supply Bulgargaz with information about its competitors.

Conclusion

(392) The Commission therefore concludes that BEH and its subsidiaries form a single economic unit where the subsidiaries (Bulgargaz and Bulgartransgaz) do not enjoy real autonomy in determining their course of action on the gas supply markets in Bulgaria.

6.2.2.3. BEH's direct participation in the access refusals and capacity hoarding

(393) In addition to determining the course of action of its subsidiaries, as outlined in recitals (374)(392), there is also evidence on the file, which confirms that BEH directly participated in the access refusals and the capacity hoarding on the relevant gas infrastructure controlled by the BEH group.

(394) The Commission notes in this sense that by letter of 22 December 2010 Bulgartransgaz forwarded to BEH the minutes of its Board meeting of 17 December 2010 informing BEH about Bulgartransgaz' Board of Directors' decision to adjourn the discussion on Overgas' access request to its next meeting. Bulgartransgaz' Board never got back to Overgas on this issue.⁵³¹ BEH never reacted to Bulgartransgaz' tacit refusal even after it was signalled by the Energy Minister (see recital (105)). Around the same time, BEH was also very reluctant to allow third party access to another infrastructure controlled by the BEH group (the neighbouring Romanian Transit Pipeline 1 (see point (a) and recital (297))), which shows that BEH consistently did not ensure third party access to the infrastructure controlled by the BEH group.

(395) With respect to UGS Chiren, the evidence illustrates that in the years 2011-2013, in BEH's view, it was desirable that Bulgargaz should obtain the entire capacity at UGS Chiren. BEH maintained this position although it was clear that no capacity would be left over for any other interested third party.⁵³²

(396) As concerns the Romanian Transit Pipeline 1 and as described in recital (297)(a), when asked by [COMPANY 8] and Transgaz in 2011 whether part of the capacity could be offered to third parties, BEH underlined that the entire capacity was booked by Bulgargaz. BEH also took part in another meeting with Transgaz, held in September 2011, discussing the same issue (see point (b) recital (297)(b)). Moreover, BEH was kept very closely informed about all subsequent discussions between Bulgargaz and Transgaz concerning the potential amendment to the 2005 Commercial Agreement (e.g. about the meetings which took place in January 2012, October 2012 and December 2013), Bulgargaz also regularly forwarded to BEH

⁵³¹ See Inspection documents ALDI 1028, ALDI 1029 [pages 1-3], [...], [pages 61-64], and Bulgartransgaz' reply to the Commission's request for information dated 9 April 2013, annex 11, [page 2], [...].

⁵³² In 2011, when assessing internally Bulgargaz' draft 2011-2013 business plan, after having provided guidance on it, BEH concluded that by the end of 2011 Bulgargaz was planning to have stored in UGS Chiren [0-1] bcm of gas. Despite that Bulgargaz was planning to book the total capacity of the storage facility and such plans were clearly against the obligation of BEH's other subsidiary, Bulgartransgaz, to provide third party access to storage, the internal position within BEH was that Bulgargaz' business plan had to be approved with the planned storage capacity booking. Such an approval was proposed disregarding the finding that in 2011 Bulgargaz' net cash flow would be negative due to the planned increase of gas in storage. See Inspection document LAST 1 [pages 2, 5, 6, 7], [...].

letters received from Transgaz and its own replies (see recital (297)).⁵³³ BEH also approved Bulgargaz granting access to the Romanian Transit Pipeline 1 to Overgas.⁵³⁴ Finally, it was the instruction from the BEH Board of Directors of 20 November 2015 that finally triggered Bulgargaz' offer to Transgaz to renounce the exclusive use of the Romanian Transit Pipeline 1 (see point (m) in recital (297)).

- (397) BEH contests the findings of the Commission.
- (398) First, BEH claims that, with respect to the Bulgarian transmission network, out of the three examples of access refusals, the Commission imputes BEH only with respect to the Overgas' request.⁵³⁵
- (399) Second, according to BEH, it had no involvement in the assessment of Overgas' access request and hence no internal minutes of meetings in this respect exist. Further, according to BEH, it first became acquainted with Overgas' access request by virtue of the Overgas complaint forwarded to it by the Energy Minister.⁵³⁶
- (400) Third, BEH claims that the only decision related to the access to the gas transmission network that ever reached BEH was in the case of [COMPANY 1], a fact which is not mentioned in the SO. BEH claims that in the example of [COMPANY 1], the undertaking requested to be granted access to the Bulgarian transmission network and twice BEH granted its approval.⁵³⁷ In addition, according to BEH, out of the five examples of access refusals to UGS Chiren, not even one contains any reference to the involvement of BEH in the infringement.⁵³⁸
- (401) Fourth, BEH claims that BEH's approval rights have no legal value over the enforceability of the signed contracts of its portfolio companies. According to BEH, no conduct can thus be imputed to BEH simply because it had limited approval rights over contracts for access to the Bulgarian transmission network or UGS Chiren.⁵³⁹
- (402) Fifth, BEH further claims it has not been involved in the negotiations for the amendment of the 2005 Commercial Agreement between Bulgargaz and Transgaz or in any related communications.⁵⁴⁰ According to BEH, the internal report of BEH's employee ([confidential]) from 2011 cannot constitute evidence that BEH was involved in the refusal of access to the Romanian Transit Pipeline 1. According to BEH, the meeting [BEH's employee] took part in with Transgaz mainly concerned 'general energy issues in Bulgaria' and he was not empowered to take any position on the Romanian Transit Pipeline 1. Further, according to BEH, the employee

⁵³³ See BEH's submission of 8 July 2014 [pages 1-3], [...].

⁵³⁴ See Bulgargaz' reply to the Commission request for information dated 16 June 2016, Annex 1.3, [pages 4 and 5], [...].

⁵³⁵ BEH's reply to the SO dated 23 March 2015, recital 116, [...].

⁵³⁶ BEH's reply to the SO dated 23 March 2015, recitals 117-120, [...].

⁵³⁷ BEH's reply to the SO dated 23 March 2015, recital 121, [...].

⁵³⁸ BEH's reply to the SO dated 23 March 2015, recitals 124-125, [...].

⁵³⁹ BEH's reply to the Commission's Letter of Facts dated 26 September 2016, recitals 35-39.

⁵⁴⁰ BEH's reply to the Commission Letter of Facts dated 26 September 2016, recitals 39-41.

clarified that the issue fell outside BEH's competence. Finally, according to BEH, the employees' views were not BEH's official position.⁵⁴¹

- (403) Sixth, according to BEH, it has approved every request submitted by Bulgargaz for the transit of third parties' gas through the Romanian Transit Pipeline 1.⁵⁴²
- (404) Seventh, BEH points out that there is no evidence on the file that Bulgargaz consulted BEH prior to its negotiations with Transgaz or that Bulgargaz has ever received any instructions from BEH as concerns its actions on the Romanian Transit Pipeline 1.⁵⁴³ Bulgargaz further claims that BEH was 'merely informed' on the status of the negotiations between Bulgargaz and Transgaz.⁵⁴⁴
- (405) BEH's arguments cannot be accepted for the reasons set out in recitals (406)-(414).
- (406) First, the examples provided by the Commission as regards BEH's involvement in granting or refusing third party access to the key infrastructure the BEH group controls show that BEH did participate in refusing access to the gas infrastructure controlled by the BEH group. The Commission is not required to prove that these rules were enforced by BEH with respect to every single access request.
- (407) Second, with respect to Overgas' access request, the Commission showed that BEH's omission to act hindered Overgas' access to the Bulgarian transmission network. Bulgartransgaz' Articles of Association required BEH to approve access requests; and BEH's failure to fulfil its obligation hindered third party access. There is also proof in the Commission's file that BEH was informed about Overgas' access requests prior to Overgas' complaint to the Energy Minister (see recitals (102) and (104)). In any event, as clearly demonstrated by the Commission, BEH closely supervised the actions of its subsidiaries (see Section 6.2.2.2).
- (408) Third, the Commission points out that sporadic and selective granting of access to the Bulgarian transmission network, such as the access granted to [COMPANY 1], does not change the Commission's overall assessment. Nevertheless, the Commission accepted the BEH group's argument as concerns access granted to [COMPANY 1] and on that basis the Commission did not include [COMPANY 1]'s access request in the duration of the infringement (see Section 6.10 and recital (99)). As concerns BEH's direct participation in access request the Commission proved that BEH indeed participated in access refusals (see Section 6.2.2.3) and fully controlled the actions of its subsidiaries in this respect (see Section 6.2.2.2).
- (409) Fourth, the argument that BEH's approval rights had no bearing over the enforceability of the access contracts of Bulgargaz and Bulgartransgaz appears to allege that since a subsidiary could infringe the approval right of its parent undertaking and conclude a binding contract with a third party without obtaining that

⁵⁴¹ BEH's reply to the SO dated 23 March 2015, recitals 129-133, [...]. See also BEH's reply to the Commission's Letter of Facts dated 26 September 2016, recital 40. The Commission underlines that in its reply to the Letter of Facts BEH was unable to point out in which part of the internal report [BEH's employee] clarified that the issue concerning third party access to the Romanian Transit Pipeline 1, fell outside BEH's competence.

⁵⁴² BEH's reply to the SO dated 23 March 2015, recitals 134-137, [...].

⁵⁴³ BEH's reply to the Commission's Letter of Facts dated 26 September 2016, recitals 15 and 41.

⁵⁴⁴ Bulgargaz' reply to the Commission's Letter of Facts dated 26 September 2016, recital 33.

approval, the approval right is not an element showing that the parent undertaking has control over the subsidiary. Without needing to examine whether indeed such a contract between the subsidiary and the third party would be valid in spite of the violation of the approval right, this argumentation is clearly incorrect; the approval right confers control on the parent undertaking, even if in theory the subsidiary might violate it.

- (410) Moreover, it is clear from the evidence in this Decision that in practice the two subsidiaries were unwilling to grant any access to the infrastructure controlled by them absent BEH's approval. As indicated in Section 6.2.2.2, BEH's approval rights over the actions of its subsidiaries were certainly not limited. In addition there is proof in the Commission's file that BEH was informed about Overgas' access requests on which it did not undertake any action (see for example recital (394)). In any event, the Commission also showed that BEH exercised a direct influence over its subsidiaries (see recitals (374)-(382)). Finally, in the Commission file there is evidence that without BEH's approval its subsidiaries were unwilling to grant access (see point b recital (311))
- (411) Fifth, BEH's claim that it did not take part in the renegotiations of the 2005 Commercial Agreement and that its employee ([confidential]) acted outside of the scope of its competence cannot be accepted. The acts of BEH employees are attributable to BEH.⁵⁴⁵ BEH has not provided any evidence that following the meeting with Transgaz, which took place in January 2011, it informed Transgaz that [BEH's employee]'s position was not an official position of BEH or Bulgargaz; that [BEH's employee] acted outside the scope of his competence or that access to the Romanian Transit Pipeline 1 could indeed be subject to further negotiations. Therefore, it is only natural to assume that Transgaz continued its business activities believing that Bulgargaz' continued to insist on maintaining exclusivity over the Romanian Transit Pipeline 1. Moreover, contrary to BEH's claim, the document does not prove in any way that [BEH's employee] clarified that the issue of granting access to the Romanian Transit Pipeline 1 fell outside BEH's competence.⁵⁴⁶ Finally, it is surprising that BEH did not expect that a discussion about 'general energy issues in Bulgaria' with Transgaz would include discussions on the only import pipeline that brings gas to Bulgaria (i.e. the Romanian Transit Pipeline 1). Furthermore, BEH also participated in another meeting with Transgaz and representatives of the Romanian ministries concerning third party access to the Romanian Transit Pipeline 1 (in September 2011, see recital (297)(b))⁵⁴⁷ and was also informed about subsequent discussions between Bulgargaz and Transgaz that concerned the potential

⁵⁴⁵ Judgment in *SA Musique Diffusion française and others v Commission*, C-100/80, EU:C:1983:158, para 97; Judgement in *Dole Food Company, Inc. and Dole Germany OHG v Commission*, T-588/08, EU:C:2013:130, paras 581-582.

⁵⁴⁶ The relevant part of the document reads as follows: '*The pipeline capacity is around 5-6 bcm on an annual basis and currently about 3 bcm are being used. The Bulgarian party made clear that currently 100% of the gas pipeline capacity is booked by the Public supplier Bulgargaz EAD and that such talks could be held on a governmental level and then on corporate level*'. See document RKO 1001, [31.01.2011], [page 5], [...].

⁵⁴⁷ See BEH's reply to the Commission request for information dated 16 June 2016, Annex 3 [pages 4-9], [...].

amendment to the 2005 Commercial Agreement (e.g. meetings in January 2012, October 2012 and December 2013, see recital (297)).⁵⁴⁸

- (412) Sixth, as mentioned in recital (312), the access granted to Overgas to the Romanian Transit Pipeline 1 in 2013 does not qualify as objective, transparent and non-discriminatory (see recital (312) and (543)). Therefore, if BEH approved such access request it only proves BEH's direct participation in the infringement. Finally, the Commission also presented evidence that BEH, at least until 2016, was unwilling to renounce the exclusivity of the 2005 Commercial Agreement and thus allow Transgaz to grant a third party access to the Romanian Transit Pipeline 1 (see recital (297)).
- (413) Seventh, the Commission has evidence that BEH participated at least twice in meetings with Transgaz (see points recitals (a) and (b) of recital (297)(a)). When asked during these meetings to allow access to the Romanian Transit Pipeline 1 to third parties, it pointed out that Bulgargaz booked the capacity on the Romanian Transit Pipeline 1 on an exclusive basis (see point (a) of recital (297)(a)). Bulgargaz granted access to the Romanian Transit Pipeline 1 only following BEH's approval (see point b recital (311)). Moreover, the Commission points out that Bulgargaz only revoked the application of Article 17.1 of the 2005 Commercial Agreement (granting its exclusive use of the Romanian Transit Pipeline 1) once BEH had explicitly instructed Bulgargaz to do so (see BEH's Board of Directors instructions to Bulgargaz of 20 November 2015, point (m) of recital (297)).
- (414) Against this background, the Commission concludes that BEH directly participated in the access refusals and the capacity hoarding on the relevant gas infrastructure controlled by the BEH group.

6.2.3. *Dominance*

- (415) According to settled case law, dominance is 'a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.'⁵⁴⁹
- (416) The notion of independence, which is a special feature of dominance,⁵⁵⁰ is related to the level of competitive constraints facing the undertaking in question. It is not required in order to be dominant that the undertaking in question has eliminated all opportunity for competition on the market.⁵⁵¹ However, for dominance to exist, the undertaking concerned must have substantial market power to have an appreciable influence on the conditions under which competition will develop.⁵⁵²

⁵⁴⁸ See also BEH's submission of 8 July 2014 [pages 1-3], [...].

⁵⁴⁹ See judgment in *United Brands*, C-27/76, EU:C:1978:22, para 65.

⁵⁵⁰ See judgment in *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paras 41-48.

⁵⁵¹ See judgment in *United Brands*, EU:C:1978:22, para 113.

⁵⁵² See judgment in *Hoffmann-La Roche v Commission*, EU:C:1979:36, para 39.

- (417) A stable market share of around 50% or more raises a rebuttable presumption of dominance.⁵⁵³ Moreover, factors such as high barriers to entry, the relatively smaller size of competitors and vertical integration with better access to inputs, all constitute additional indications of dominance.

6.2.3.1. Gas transport infrastructure

- (418) As explained in Section 6.1.1 and in particular recital (335), gas transport infrastructure constitutes a natural monopoly.⁵⁵⁴ The undertaking that controls the capacity on such infrastructure, therefore, also becomes an unavoidable trading partner, whose market power cannot be neutralised.
- (419) As explained in Section 4.4.3, Bulgartransgaz owns and operates the Bulgarian transmission network. As set out in Section 4.4.3, the Bulgarian transmission network is one (out of two) pipeline systems for gas transmission in Bulgaria. It is the only pipeline system available in Bulgaria through which the large majority of domestic customers is supplied (the Bulgarian Transit Pipeline - also owned and operated by Bulgartransgaz - only provides for limited supplies in the South West of Bulgaria). There are otherwise no alternative transmission pipeline systems available in Bulgaria.
- (420) In addition, and as explained in Section 5.4.4.1, although Bulgargaz was not the TSO in charge of operating the Romanian Transit Pipeline 1, Bulgargaz on an exclusive basis held the entire capacity on the Romanian Transit Pipeline 1. Based on the 2005 Commercial Agreement Bulgargaz has booked, at least until April 2016, the entire technically available capacity on the only pipeline (Romanian Transit Pipeline 1) bringing gas into Bulgaria. Bulgargaz booked the capacity on an exclusive basis irrespective of the capacity volume actually used (see recitals (261)-(262)).⁵⁵⁵ Bulgargaz was also able to sublet the capacity without any involvement of Transgaz (see recital (312)). The same 2005 Commercial Agreement stipulates that Transgaz cannot grant any capacity to any third party without first obtaining Bulgargaz' consent. On that basis Bulgargaz was in control of any possible third party access to the Romanian Transit Pipeline 1.
- (421) It can be added regarding both the Bulgarian transmission network, and the Romanian Transit Pipeline 1, that duplication of those infrastructures would appear neither economic nor efficient (see Section 6.5 and recitals (627) - (629)).⁵⁵⁶

6.2.3.2. Storage

- (422) As explained in Section 2.3 and Section 5.3.1, UGS Chiren is the only storage site in Bulgaria and it is owned and operated by Bulgartransgaz. As set out in Section 2.3

⁵⁵³ See judgment in *AKZO v Commission*, C-62/86, EU:C:1991:286, paras 59-61.

⁵⁵⁴ The Union legislator considers that non-discriminatory third party access should apply (see Section 5.2.3).

⁵⁵⁵ As explained in Section 5.2 as of April 2016 it is also possible to ship certain limited amount of gas from the Bulgarian Transit Pipeline towards the Bulgarian transmission network.

⁵⁵⁶ For the lack of possibility to duplicate the gas infrastructure see, Commission Decision of 29 September 2010, COMP/39.315 ENI recital 42. Case M.8358 -MACQUARIE / NATIONAL GRID / GAS DISTRIBUTION BUSINESS OF NATIONAL GRID, recital 15. See also, in the different context of products covered by intellectual property rights, the ECJ judgment of 29 April 2004, *IMS Health*, C-418/01, EU:C:2004:257, recital 29.

and Section 5.3.1, there is no alternative storage facility in Bulgaria and no possibility to replace the flexibility provided by UGS Chiren by other means.

6.2.3.3. Downstream wholesale supply in Bulgaria

- (423) Bulgargaz maintains a *de facto* quasi monopoly position on the downstream wholesale gas market in Bulgaria. As explained in recitals (45) and (63), until 2013, Bulgargaz was the only importer of gas into Bulgaria. As explained in recital (45), between 2013 and 2015, Overgas also imported certain small quantities of gas into Bulgaria (below 10 %). However, as of 2016 Bulgargaz again became the sole importer of gas into Bulgaria. Further, as also explained in recital (66), Bulgargaz has also secured the majority of the domestic production for its own use. Therefore, in the absence of any liquid hub for gas trading, Bulgargaz was clearly dominant on the downstream wholesale supply market in Bulgaria during the infringement period (see Section 6.10).
- (424) Moreover, Bulgargaz' market power is also illustrated through a comparison of its sales on the Bulgarian transmission network with the entire domestic gas consumption.⁵⁵⁷ Bulgargaz' sales to customers connected to the Bulgarian transmission network amounted to 96 % of the total domestic gas consumption in Bulgaria in 2011 and 2012 and in 2013 they amounted to 87 %. The remaining 13 % were realised by [COMPANY 1] and Overgas.⁵⁵⁸ In 2014 Bulgargaz share in natural gas sales amounted to 87%.⁵⁵⁹

6.2.3.4. Retail supply in Bulgaria

- (425) As described in Section 2.2, Bulgargaz is the near monopolist supplier of large end customers (industrial customers and power / heating plants) connected to the Bulgarian transmission network, supplying all but two companies, a chemical producer (supplied by [COMPANY 1] and later by Overgas) and, as of 2013, Toplofikacia Razgrad (supplied by Overgas). In terms of market shares, Bulgargaz has supplied over 90% of the supplies (in volume) to large end customers connected to the Bulgarian transmission network every year between 2010 and 2015.⁵⁶⁰

⁵⁵⁷ In 2015, the domestic gas consumption amounted to 3 bcm/year (see recital (61)).

⁵⁵⁸ In 2012, the domestic gas consumption amounted to 2.738 bcm and Bulgargaz' sales to customers connected to the transmission network amounted to 2.625 bcm. See Bulgargaz' reply to the Commission request for information, dated 16 September 2013, question 3, Annex 1, [page 1], [...]. In 2013, the domestic gas consumption amounted to 2.925 bcm and Bulgargaz' sales to customers connected to the transmission network amounted to 2.353 bcm, see Bulgargaz' reply to the Commission request for information, dated 28 August 2014, question 4, [page 2] [...]. See also EWRC's Annual Activity Report for 2013, [pages 42-43], [...] http://www.dker.bg/PDOCS/ann_rep_13.pdf.

See SEWRC's Annual Report to the European Commission dated July 2014, [page 47], [...]. http://www.dker.bg/PDOCS/EWRC%20report%20EC_ACER_2014%20EN.pdf.

⁵⁵⁹ See EWRC's Annual Report to the European Commission dated July 2015, [page 48], [...] <http://www.dker.bg/PDOCS/ann-rep-ec-2015-en.pdf>.

⁵⁶⁰ Bulgargaz' reply to Commission's request for information dated 3 July 2012, [page 1], [...]. See also Bulgargaz' reply to Commission's request for information dated 16 September 2013, [page 1], [...]. See also Bulgargaz' reply to Commission's request for information dated 23 March 2016, [page 3], [...].

6.2.3.5. Conclusions on dominance

- (426) In light of the analysis set out in recitals (418)-(425), the BEH group, through Bulgartransgaz, holds a dominant position on the following markets:
- (a) capacity related services on the Bulgarian transmission network; and
 - (b) capacity related services for storage at UGS Chiren.
- (427) In addition, the BEH group, through Bulgargaz, holds a dominant position on the following markets:
- (a) capacity related services on Romanian Transit Pipeline 1;
 - (b) downstream wholesale supply of gas in Bulgaria, except for supplies to customers in the South West of Bulgaria; and
 - (c) retail supplies to large end customers connected to the Bulgarian transmission network, except for supplies to customers in the South West of Bulgaria.
- (428) BEH contests the findings of the Commission.
- (429) First, BEH claims that it is a holding company that is not active on any of the relevant markets identified by the Commission. BEH argues that a holding company cannot be 'indirectly' dominant through the companies within its holding structure, particularly where those companies are legally independent and exercise genuine autonomy in determining their course of action on the market.⁵⁶¹
- (430) Second, Bulgargaz claims that it is not active on the market for services related to the access to the Romanian Transit Pipeline 1 as it is not the TSO.⁵⁶²
- (431) Third, the BEH group claims that in the ENI case,⁵⁶³ ENI was not only acting on the Italian market as a TSO, supplier of gas, and distributor, but it also jointly controlled, operated and held significant capacity/use rights on other pipelines outside Italy. According to the BEH group, the shareholding of ENI in the pipelines of the neighbouring countries allowed it to have effective influence on the decision-making and day-to-day management of these undertakings, which led to a position of influence on the capacity congestion management and allocation. Furthermore, in the *GDF* case, according to the BEH group, both gas supplier GDF Suez and transport network operator GRTgaz were part of the same integrated undertaking; GDF Suez had control over the capacity bookings. According to Bulgargaz, this is contrary to the situation of Bulgargaz which has no ownership or control rights over the Romanian Transit Pipeline 1.⁵⁶⁴
- (432) BEH's arguments cannot be accepted for the reasons set out in recitals (433)-(435).
- (433) First, the Commission proved that Bulgargaz and Bulgartransgaz form, together with BEH, a single economic unit (see Section 6.2.2). The Commission has moreover

⁵⁶¹ BEH's reply to the SO dated 23 March 2015, recitals 53-59, [...].

⁵⁶² BEH's reply to the SO dated 23 March 2015, recitals 60-61, [...].

⁵⁶³ Commission Decision of 29 September 2010, COMP/39.315 ENI.

⁵⁶⁴ BEH's reply to the SO dated 23 March 2015, recitals 82-85, [...] and Bulgargaz' reply to the SO dated 23 March 2015, recitals 58-61, [...]. See also the BEH group response to the evidence contained in document [...] dated 12 March 2018, page 4.

shown that the BEH group as a single economic unit holds a dominant position on the markets listed in recitals (426)-(427) and that despite the regulatory regime, BEH exercised decisive influence over the operations of Bulgartransgaz, at least until January 2015 (see recital (375), see also recital (605)).

- (434) Second, as described in Section 5.4.4.1 and recital (420), Bulgargaz de facto controlled the capacity on the Romanian Transit Pipeline 1. The 2005 Commercial Agreement granted Bulgargaz full exclusivity to use the Romanian Transit Pipeline 1 (see recitals (260)-(261) and Section 5.4.4.1).
- (435) Third, the BEH group arguments invoking the ENI and GDF cases regarding the ownership of the gas infrastructure are incorrect. None of the mentioned cases establish the principle that only a TSO can be responsible for antitrust abuses on gas infrastructure. In particular, in cases of capacity hoarding, the responsibility for that abuse rests with the undertaking hoarding capacity.⁵⁶⁵ Whether the capacity hoarder is vertically integrated together with the TSO operating the relevant network is irrelevant. Nevertheless, this argument is taken into account by the Commission in recital (698).

6.2.4. Abuse of the BEH group's Dominant Position

- (436) The general principle set out in Article 3(3) of the Treaty on European Union states that the Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon, is to include a system ensuring that competition is not distorted within the internal market.⁵⁶⁶
- (437) Article 102 TFEU is one of the competition rules referred to in Article 3(1) (b) of the Treaty on European Union, which are necessary for the functioning of the internal market.
- (438) According to Article 102 TFEU, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. The Court of Justice defined the concept of abuse under Article 102 TFEU as *'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'*.⁵⁶⁷

⁵⁶⁵ See Commission Decision of 29 September 2010, COMP/39.315 ENI and Commission Decision of 18 March 2009, COMP/39.402, RWE gas foreclosure.

⁵⁶⁶ See Judgment in *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities*, C-6/72, EU:C:1973:22, paras 23-24; and Judgment in *TeliaSonera*, C-52/09, EU:C:2011:83, para 20.

⁵⁶⁷ See Judgment in *Hoffmann-La Roche*, EU:C:1979:36, para 91.

- (439) The fact that an undertaking holds a dominant position is not in itself contrary to Union competition rules. However, an undertaking enjoying a dominant position is under a special responsibility not to engage in conduct that may distort competition.⁵⁶⁸ It follows from the nature of the obligations imposed by Article 102 TFEU that, in specific circumstances, an undertaking in a dominant position may be deprived of the right to adopt a course of conduct or take measures that are not in themselves abuses and that would even be unobjectionable if adopted or taken by non-dominant undertakings.⁵⁶⁹
- (440) Similarly, the Court of Justice has also held that an abuse of a dominant position is prohibited under Article 102 TFEU ‘regardless of the means and procedure by which it is achieved’, and ‘irrespective of any fault’.⁵⁷⁰ Article 102 TFEU is aimed not only at practices that may cause prejudice to consumers directly, but also at those that are detrimental to them through their impact on an effective competition structure.⁵⁷¹
- (441) According to consistent case law, the list of abusive practices contained in Article 102 TFEU does not exhaust the methods of abusing a dominant position prohibited by the TFEU.⁵⁷² In *Tetra Pak v Commission*, the Court of Justice highlighted that the fact that a dominant undertaking's abusive conduct has its adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 102 TFEU.⁵⁷³
- (442) Refusal to supply may in some cases amount to an abuse of a dominant position and be prohibited under Article 102 TFEU. In particular in *Commercial Solvents*, the Court of Justice found that an undertaking in a dominant position as regards the production of a raw material and therefore able to control the supply to manufacturers of derivatives, cannot, without objective justification, act in such a way as to eliminate their competition, which in that case, would have amounted to eliminating one of the principal manufacturers of the downstream product in the common market.⁵⁷⁴

⁵⁶⁸ Judgment in *Michelin*, EU:C:1983:313, para 57.

⁵⁶⁹ See, to that effect *Michelin*, EU:C:1983:313, para 57, and *ITT Promedia v Commission*, T-111/96, EU:T:1998:183, para 139.

⁵⁷⁰ See Judgment of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, EU:T:2000:290, para 170.

⁵⁷¹ *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities*, EU:C:1973:22, para 26; *British Airways*, C-95/04 P, EU:C:2007:166, paras 106-107; of 2 April 2009, *France Télécom Wanadoo*, C-202/07 P, EU:C:2009:214, para 104; see also, as regards Article 101 TFEU, *GlaxoSmithKline v. Commission*, C-501/06 P, EU:C:2009:610, para 63.

⁵⁷² See *British Airways*, EU:C:2007:166, para 57; *Europemballage and Continental Can v Commission*, EU:C:1973:22, paras 26; judgment in *Compagnie Maritime Belge Transports a.o. v Commission*, C-395/96 P and C-396/96P, EU:C:2000:132, para 112.

⁵⁷³ Judgment in *Tetra Pak v Commission*, C-333/94, EU:C:1996:436, para 22. In that regard, see judgment in *Commercial Solvents v Commission*, C-6/73, EU:C:1974:18, para 22; and judgment in *CBEM v CLT and IPB*, C-311/84, EU:C:1985:394, para 27, provide examples of abuses having effects on markets other than the dominated markets. In judgment *AKZO v Commission*, EU:C:1991:286, paras 44-45, and judgment of 1 April 1993, *BPB Industries and British Gypsum v Commission*, T-65/89, EU:T:1993:31, paras 92-93 and 96, the EU courts found to be abusive certain conduct on markets other than the dominated markets and having effects on the dominated markets.

⁵⁷⁴ *Istituto Chimioterapico and Commercial Solvents v Commission*, EU:C:1974:18, para 25.

- (443) With regard to access to infrastructure, a refusal to supply may be brought about by any effort on the part of the dominant undertaking to limit third-party access to capacity.⁵⁷⁵ The concept of refusal to supply is not confined to practices that amount to an outright or definitive refusal to grant access to the product or service in question⁵⁷⁶. For example, a similar result to a formal refusal to supply can be achieved by delaying the time to respond to third party access requests or by reserving all or most of the capacity to itself without having offered it to the market on non-discriminatory terms.⁵⁷⁷ Such a refusal to supply can also take the form of capacity hoarding.⁵⁷⁸
- (444) The Court of Justice has also held in the *Oscar Bronner*⁵⁷⁹ that an undertaking may be obliged under Article 102 to grant access to its nationwide newspaper home-delivery scheme when the refusal of the service in question is likely to eliminate all competition in the market on the part of the person requesting the service, such refusal is incapable of being objectively justified, and the service is in itself indispensable to carrying out that person's business. According to the Court, a product or service is considered necessary or essential if there is no real or potential substitute.⁵⁸⁰ In this case the question was whether, and under what conditions, Article 102 TFEU can impose an obligation on an undertaking to supply an asset in which that undertaking has invested with a view to reserving it to itself. It is in this context that the Court of Justice, in view of all the specificities of that case, laid down strict conditions for an obligation to supply under Article 102 TFEU. However, the *Bronner* test is not relevant where the Commission's decision does not oblige the dominant undertaking to conclude contracts with persons it has not selected⁵⁸¹. For example, a Commission decision does not impose such an obligation where there is already a pre-existing regulatory requirement to grant access to the infrastructure concerned.⁵⁸² In such case the Commission, decision under competition rules does not impose any additional obligations on the dominant undertaking.
- (445) The *Bronner* conditions also do not apply when the dominant firm provides access to its assets or concludes a contract but does so under abusive commercial terms.

⁵⁷⁵ See for example the Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recitals 24-25.

⁵⁷⁶ See for example, *Clearstream Banking AG and Clearstream International SA v Commission*, T-301/04, EU:T:2009:317, para 151. See also Commission Decision of 21 May 2003 in case COMP/37.451, 37.578, 37.579 – *Deutsche Telekom*, para 153.

⁵⁷⁷ Commission Decision of 22 June 2011, COMP/39.525 *Telekomunikacja Polska*, recital 803. See also judgment in *Clearstream*, EU:T:2009:317, para 151.

⁵⁷⁸ Commission Decision of 29 September 2010, COMP/39.315 *ENI*, recitals 2 and 45-50.

⁵⁷⁹ Judgment in *Oscar Bronner*, C-7/97, EU:C:1998:569, para 41.

⁵⁸⁰ Judgment in *Clearstream*, EU:T:2009:317, para 147. See also Commission Decision of 22 June 2011, COMP/39.525 *Telekomunikacja Polska*, recital 702; and judgment in *Oscar Bronner*, EU:C:1998:569, para 41.

⁵⁸¹ Judgment in *Van den Bergh Foods Ltd v Commission*, Case T-65/98, EU:T:2003:281, para 161, confirmed by the Court of Justice in *Masterfoods v Unilever Bestfoods*, C-552/03 P EU:C:2006:607, paras 113 and 117.

⁵⁸² Commission Decision of 22 June 2011, COMP/39.525 *Telekomunikacja Polska*, recital 69 and Commission Decision of 15 October 2014, COMP/39.523 *Slovak Telekom*, recital 376.

- (446) Although undertakings are, as a rule, free to choose their business partners and free to dispose of their property as they wish,⁵⁸³ in some situations certain limitations may be necessary to protect other legitimate interests and others parties' rights. This is particularly the case where an obligation to supply already exists within the Union and national regulatory frameworks, and it is clear from the considerations underlying such regulation that the necessary balance of incentives has already been applied by the legislator or public authority.⁵⁸⁴
- (447) However, the fact that there exists legislation that imposes an obligation to supply on an undertaking does not preclude the application of the Union competition rules. Indeed, even if an undertaking's behaviour is compliant with legislation, Union competition rules may nonetheless be applied for instance if the legislation is ineffective to prevent anti-competitive behaviour or if the legislation has different objectives from those envisaged by Union competition policy.⁵⁸⁵
- (448) It is settled case law that the Commission is not obliged to prove the actual effects of the infringement since, *'for the purposes of establishing an infringement of Article 82 EC [now Article 102 TFEU], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect'*.⁵⁸⁶
- (449) In order to establish if an undertaking, where there is a regulatory obligation to provide access to the infrastructure it controls, has abused its dominant position resulting in a refusal to supply, it is for the Commission to show likely anticompetitive effects. It is, on the other hand, for the undertaking in question to advance any objective justification with regard to the conduct which appears to aim at eliminating competition.⁵⁸⁷

6.2.4.1. Application to the present case

- (450) The BEH group abused its dominant position by preventing, restricting and delaying access to the gas transport and storage infrastructure it controls and its conduct was capable of foreclosing its actual or potential competitors. The infringement consists of several forms of action resulting in:

⁵⁸³ Commission Decision of 24 March 2004, COMP/C-3/37.792 *Microsoft*, recital 547.

⁵⁸⁴ See also Commission Decision of 4 July 2007, COMP/38.784 *Telefonica*, recital 309 – *'Therefore, in the light of the specific factual, economic and legal context of the case, in particular the fact that wholesale access at regional level is mandated since March 1999 and wholesale access at national level is mandated since April 2002 and the fact that the former monopoly's ex ante incentives to invest in its infrastructure are not stake in the present case, the legal test applied by the European Court of Justice in Oscar Bronner is not applicable in the present case'*. In addition, see Commission Decision of 18 December 2013, COMP/ 39.678 and 39.731 *Deutsche Bahn I and II*, recital 58.

⁵⁸⁵ Judgment in *Deutsche Telekom v Commission*, EU:C:2010:603, para 227.

⁵⁸⁶ *British Airways plc vs. Commission of the European Communities*, T-219/99, EU:C:2006:133, para 293; *Kingdom of Spain v Commission*, Case T-398/07, EU:T:2012:173, para 90; and *Clearstream*, EU:T:2009:317, para 144.

⁵⁸⁷ Judgment in *TeliaSonera*, EU:C:2011:83, para 75.

- (a) Refusals (or, in some cases, at least undue delays) to give third party access to the Bulgarian transmission network;
 - (b) Refusals (or, in some cases, at least undue delays) to give third party access to storage; and
 - (c) Capacity hoarding on the Romanian Transit Pipeline 1.
- (451) These practices are set out in more detail in recitals (467)-(565). All of these practices aimed to protect the BEH group's *de facto* monopoly position on the gas supply markets in Bulgaria. As a result, and despite the liberalisation process, which started in 2007, the BEH group retained a quasi-monopolistic position on the gas supply markets in Bulgaria and until 1 January 2015 protected the status quo by preventing, restricting and delaying the development of effective competition. The BEH group did not behave like a regular profit-maximising undertaking, interested in providing its transmission or storage services to as wide a group of customers as possible but instead protected the market position of its gas supply-arm (Bulgargaz). These three practices mutually reinforced each other and formed part of a single infringement. This infrastructure foreclosure was known to the market and inhibited the possibility for new entrants to take full advantage of market liberalisation in Bulgaria (see recital (278)).⁵⁸⁸
- (452) As explained in Section 5.2.3 and Section 5.3.2, both Union and national law impose obligations to provide third party access to the infrastructure owned by the BEH group. The obligation of third party access to infrastructure was imposed by national regulations and Union regulations after the necessary balancing of incentives to invest and innovate. Consequently, it is clear that the denial of third party access or, alternatively, granting access only under unreasonable conditions hinders the emergence of sustainable competition.
- (453) As described in Section 5.2 and Section 5.3.1, and Section 5.4.1 there is no alternative infrastructure that Bulgargaz' competitors could use for transmission or storage services. Therefore, the BEH group, as the owner of the only infrastructure, is an unavoidable trading partner. Potential competitors that wish to provide gas supply services are obliged to request access to the infrastructure owned or controlled by the BEH group.
- (454) In order to show that the BEH group has abused its dominant position by preventing restricting and delaying third party access to the infrastructure it controls, ultimately resulting in a refusal to supply, the Commission establishes that:
- (a) there is a regulatory obligation on a TSO to provide third party access to the transmission network and storage.⁵⁸⁹ (Section 6.2.4.2);
 - (b) the BEH group, despite its legal obligations, has implemented a consistent strategy since 30 July 2010 of preventing, restricting and delaying access to the

⁵⁸⁸ See, for example, European Gas Markets, the issue of 31 October 2013, page 5 "*...the key issue [in Bulgaria] according to the market sources is that access to infrastructure can be often denied and the process for managing existing assets is opaque*".

⁵⁸⁹ However, no such regulatory obligation exists as concerns Bulgargaz' capacity bookings on the Romanian Transit Pipeline 1. That aspect of the single and continuous infringement is therefore analysed separately in recitals/footnotes (x)-(x).

infrastructure that is needed in order to successfully compete with the BEH group on the gas supply markets in Bulgaria (see Section 6.2.4.3, Section 6.2.4.5 and Section 6.2.4.6);

6.2.4.2. Obligation to provide access

- (455) The Court has indicated that a relevant factor in the application of Article 102 TFEU to the conduct of an undertaking is the existence of legislation relating to the particular sector at issue. According to the Court, because sector specific legislation *'defines the legal framework applicable to it and, in so doing, contributes to the determination of the competitive conditions under which an undertaking such as the appellant carries on its business in the relevant markets, it is [...] a relevant factor in the application of Article [102 TFEU] to the conduct of that undertaking, whether for the purposes of defining the relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines'*.⁵⁹⁰
- (456) As set out in recitals (457)-(459), both Union and Bulgarian legislation require the BEH group to provide a third party access to the relevant infrastructure it owns (see recitals (79)-(83) and (164)-(167)). Directive 2009/73/EC lays down in particular the right of third parties to non-discriminatory access to transmission systems and storage.
- (457) With respect to the Bulgarian transmission network, Article 32 of Directive 2009/73/EC lays down the right of third parties to objective, transparent and non-discriminatory access to transmission systems. In addition, Regulation (EC) No 1775/2005 and thereafter Regulation (EC) No 715/2009 set out, in particular, specific requirements for non-discriminatory rules with regard to access conditions to the national gas transmission systems.⁵⁹¹ For example, operators need to ensure that equivalent contractual terms are applied to different users.⁵⁹²
- (458) With respect to UGS Chiren, Article 33 of Directive 2009/73/EC⁵⁹³ establishes the right of objective, transparent and non-discriminatory third party access to storage.⁵⁹⁴ In addition, Regulation (EC) No 715/2009 sets legally binding standards for third party access services, capacity allocation, congestion management and transparency,

⁵⁹⁰ See *Deutsche Telekom AG v European Commission ("Deutsche Telekom")*, EU:C:2010:603, para 224. Furthermore, at para 67 of Joined cases C-468/06 and 478/06 *Sot. Lélou kai Sia EE and Others v GlaxoSmithKline AVEE Farmakeftikon Proïonton*, EU:C:2008:504 the ECJ held that when assessing the compatibility with Art 102 TFEU of certain practice by a dominant undertaking, national regulation cannot be ignored.

⁵⁹¹ See Article 6 of Regulation (EC) 1775/2005 and Article 18 of Regulation (EC) 715/2009.

⁵⁹² See Article 4 of Regulation (EC) 1775/2005 and Article 14 of Regulation (EC) 715/2009.

⁵⁹³ See also Article 19 of Directive 2003/55/EC.

⁵⁹⁴ In case of negotiated third party access, the national regulatory authorities do not have the power to review tariffs (Article 41 (1)(n) of Directive 2009/73/EC). However, pursuant to Article 33 (3) of Directive 2009/73/EC (and Article 19 (3) of Directive 2003/55/EC), storage system operators and natural gas undertakings are required to publish their main commercial conditions for the use of storage, which includes at least the publication of prices for standard services. In case of regulated third party access, details on tariff methodology must be published (Article 19 (5) of Regulation (EC) No 715/2009).

including a requirement for SSOs to develop and notify to the regulatory authorities harmonised storage contracts and procedures.⁵⁹⁵

- (459) Therefore, with respect to the Bulgarian transmission network and the UGS Chiren, Bulgartransgaz was required by the regulatory rules to provide the third party access to its infrastructure.
- (460) With respect to the Romanian Transit Pipeline 1, the regulatory framework at Union level establishes a general obligation to provide third party access on the one hand and on the other hand, it establishes a right for network users to obtain access to gas networks within the Union.⁵⁹⁶ The regulatory framework also recognises the role of shippers, such as Bulgargaz, in trading capacity on the secondary market.⁵⁹⁷ Nevertheless, during the investigated period, the regulatory framework of the Union did not contain an obligation on a shipper to grant access to the capacities it holds on the secondary market.
- (461) Bulgartransgaz contests the findings of the Commission.
- (462) Bulgartransgaz claims that the Commission's finding that underground storage constitutes an indispensable infrastructure is unsupported. According to Bulgartransgaz, the Commission's practice merely states that underground storage is 'particularly relevant' for local distribution companies. Bulgartransgaz further claims that the Commission practice only provides that underground storage is a separate product market which is different from classifying it as an essential facility.⁵⁹⁸
- (463) According to Bulgartransgaz it is also evident that companies are active on the Bulgarian wholesale and retail gas supply markets in Bulgaria without access to capacity at UGS Chiren. Therefore, in Bulgartransgaz' view, the Commission failed to explain how access to gas storage at UGS Chiren could impact downstream competition.⁵⁹⁹
- (464) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (465)-(466).
- (465) The case law that Bulgartransgaz invokes was relied upon by the Commission only to define the relevant market (see recital (339)) and should be interpreted in that context. On the other hand, as indicated in Section 5.3.2, both Union and Bulgarian legislation provide for an obligation to grant third party access. The Commission considers that where regulations, which are compatible with the Union law, already impose an obligation on the dominant undertaking to provide access to its infrastructure (namely in this case, access to UGS Chiren), such existing regulations are the relevant factor in the application of Article 102 TFEU. Such existing regulations are equally relevant in the assessment of the abusive nature of the

⁵⁹⁵ Article 1, 15, 17, 19, 20 and 22 of Regulation (EC) No 715/2009, see also Article 13 of Directive 2009/73/EC (and before Article 8 of Directive 2003/55/EC).

⁵⁹⁶ See Article 32.1 and recital (25) of Directive 2009/73/EC and Article 1 and recital (37) of Regulation (EC) No 715/2009.

⁵⁹⁷ See Article 16.3b of Regulation (EC) No 715/2009.

⁵⁹⁸ Bulgartransgaz' reply to the SO dated 23 March 2015, recital 264, [...]. Bulgartransgaz refers here to Case No. IV/M.1383 Exxon/Mobil.

⁵⁹⁹ See Bulgartransgaz reply to the SO dated 23 March 2015, recitals 264 and 278 [...].

conduct (see recitals (455)-(458)). The existence of such regulations also demonstrates that access to the relevant infrastructure is required for effective competition.

- (466) Nevertheless, for the sake of completeness, the Commission, in recital (628) shows the indispensability of UGS Chiren as the only gas storage facility in Bulgaria. The Commission also clarifies in recital (623) that underground gas storage facilities enable gas suppliers to manage (in particular seasonal) fluctuations in customer demand and changes to contracted gas deliveries. Therefore, without access to UGS Chiren, competitors cannot seriously challenge the BEH group's position on the downstream wholesale gas supply market. They can exercise only weak competitive pressure and play a marginal role on the market.

6.2.4.3. Refusals to allow access

- (467) The evidence set out in Sections 5.2.4.2, 5.3.3.2 and 5.4.4.2 as well as in Section 6.3.1 established that the BEH group has been implementing a consistent strategy, at least since 30 July 2010, of preventing, restricting and delaying access to the infrastructure that is needed in order to successfully compete with the BEH group's supply arm (Bulgargaz) on the gas supply markets in Bulgaria (notably the downstream wholesale gas market and the market for retail supplies to large end customers connected to the Bulgarian transmission network) (see Section 6.3.1). The overall interest of the BEH group to protect its incumbent position on the gas supply markets in Bulgaria has taken precedence over any economic interest of its infrastructure arm to offer infrastructure capacity to the market.
- (468) As demonstrated in Sections 6.2.4.4, 6.2.4.5 and 6.2.4.6, the BEH group behaviour consisted in preventing, restricting and delaying access to the Bulgarian transmission network, as well as to UGS Chiren, the only gas storage facility in Bulgaria. It also consisted in preventing, restricting and delaying access through capacity hoarding (reserving capacity that consistently is not used, without releasing it to the market) on the only import pipeline into Bulgaria.
- (469) The behaviour has been applied in a consistent manner in relation to multiple attempts by several undertakings to enter the Bulgarian gas supply markets in competition with the BEH group. As described in Sections 5.2.4.1 and 5.3.3.1, Bulgargaz received a far more favourable treatment for access than its actual or potential competitors. As described in recital (373), the more favourable treatment of Bulgargaz was confirmed by Bulgartransgaz in certain public statements when it openly admitted that it did not treat Bulgargaz as a separate entity and on an arm's length basis, but rather that it behaved 'like a subsidiary of Bulgargaz'. Favouring Bulgargaz over other undertakings wishing to compete with it on the gas supply markets in Bulgaria led to substantial uncertainties with regard to the possibility to obtain access to infrastructure controlled by the BEH group. It deterred certain third parties from even trying to access the Bulgarian gas market (see recital (278)). Moreover, Bulgartransgaz was well aware that the strategy led to a near total obstruction of third party access to the relevant infrastructure (see recital (183)).
- (470) As demonstrated in Sections 5.2.4.2, 5.3.3.2 and 5.4.4.2, the lack of or limited third party access does not result from a lack of interest in accessing the relevant infrastructure. On the contrary, several market players expressed a strong interest in accessing the infrastructure owned or controlled by the BEH group, but were prevented from doing so as a result of the BEH group's strategy to protect its supply arm's position on the Bulgarian gas market. It is clear from the evidence referred to in

Sections 5.2.4.2, 5.3.3.2 and 5.4.4.2, that the BEH group prevented, restricted and delayed access to the infrastructure it owned or controlled on a consistent basis.

6.2.4.4. Preventing, restricting and delaying access to the Bulgarian transmission network

- (471) In accordance with the strategy referred to in Section 6.3.1, the practices set out in Section 5.2.4.2 show a clear pattern in Bulgartransgaz' behaviour to prevent, restrict and delay third party access to the Bulgarian transmission network.
- (472) Bulgartransgaz' response to third party access requests to the Bulgarian transmission network amounts to a refusal to supply. As set out in Section 5.2.4.2, the response usually took the form of delaying tactics, such as:
- (a) Failing to act in a transparent manner and to reply to access requests by following the required written procedure or within the statutory deadlines;
 - (b) Making unreasonable requests with regard to access, in particular as to information to be provided or conditions to be fulfilled before treating access requests; and
 - (c) Deliberately misinterpreting access requests or providing erroneous information with regard to conditions for access.
- (473) As a result of these tactics, at least two gas suppliers (Overgas and RWE) encountered major problems in accessing the Bulgarian transmission network. In addition, knowing the difficulties faced by its supplier (Overgas) and therefore itself trying to obtain the required access for the gas supplies, one large end customer (Toplofikacia Razgrad) also requested direct access to the Bulgarian transmission network. This request was refused by Bulgartransgaz. Overgas was ultimately granted access, but only at a much later stage.
- (474) First, as set out in Section 5.2.4.2 above, Bulgartransgaz did not respect the rules imposed by the EWRC (the 2007 Access Rules for Transmission) to respond to access requests and to request further information and documentation in writing or within the statutory one month period. Instead, Bulgartransgaz often needed several months to reply to interested parties and ask for clarification; or simply disregarded third party access requests. It had omitted to publish the harmonised contract for access applications to the Bulgarian transmission network as prescribed already by the 2007 Rules for Access. This made it impossible for third parties to know what information Bulgartransgaz would require in order to grant third party access to the Bulgarian transmission network. It took Bulgartransgaz nearly two years to process Overgas' initial access request (and nearly three years before granting Overgas any access). Moreover, it took Bulgartransgaz half a year to reply to RWE's initial access request. At the same time, it failed to provide the necessary information (on the available network capacity) to enable RWE to make a proper request. The Commission notes that Bulgartransgaz' failure to enable Overgas and RWE to access the Bulgarian transmission network contrasts distinctly with its treatment of Bulgargaz (as set out in Section 5.2.4.1 above), which was granted access without even having signed a contract with Bulgartransgaz. Therefore, various customers, who could have been interested in sourcing gas from other suppliers, had no choice but to continue their gas supply contracts with Bulgargaz.⁶⁰⁰

⁶⁰⁰ Overgas claims that it lost numerous potential customers during this period of time. See section 5.2.4.2.

- (475) Second, as set out in recitals (151)-(156), Bulgartransgaz also refused to grant Toplofikacia Razgrad access on the basis that its supplier, Overgas, first needed to obtain access to the Bulgarian transmission network (see recital (154)). However, the Commission notes that Overgas had at this point in time recently been refused access to the Bulgarian transmission network by Bulgartransgaz, based on the misinterpretation of information submitted by Overgas (see recitals (101)-(102) and (106)). In other words, Bulgartransgaz motivated one refusal by referring to another. Finally, Bulgartransgaz' requirement to provide evidence of booked capacity on a neighbouring network (on which Bulgargaz, belonging to the same corporate group has been hoarding the capacity and restricted access) before granting third party access to the Bulgarian transmission network made such access *de facto* impossible until 2013 (see Section 5.2.4.2). Until 2013, no undertaking was granted access to the Romanian Transit Pipeline 1. The access granted in 2013 was very restrictive and cannot be classified as a proper access (see recital (312)). Therefore, it was impossible for any party to *de facto* access the Bulgarian transmission network during this period. This condition was not envisaged in the 2007 Access Rules for Transmission,⁶⁰¹ and - as Bulgargaz had booked the entire capacity on the pipeline - made third party access fully subject to the BEH group's discretion.
- (476) Third, Bulgartransgaz' initial refusal of Overgas' access request was based on an obvious misinterpretation of the nature of the requests made by Overgas (see recitals (101)-(102)). Overgas submitted several letters requesting access between 1 January and 31 December 2011. In two of the letters⁶⁰², Overgas requested the same volumes and exit points but two different entry points (Negru Voda 1 for the first letter and Negru Voda 2 and 3 for the second letter). To justify its refusal to grant access to the Bulgarian transmission network, Bulgartransgaz incorrectly aggregated the capacity requested and claimed that it would exceed the available entry/exit capacity of the Bulgarian transmission network. At the same time, internal reports of the TSO provided evidence that the expert working group within Bulgartransgaz had correctly assessed Overgas' requests (by linking the relevant entry and exit points) and recommended granting access for all of them, except for UGS Chiren.⁶⁰³ This also shows that Bulgartransgaz' had fully understood the intention of Overgas' requests. In this context, it should also be noted that [Bulgartransgaz's employee] must have been aware of the conclusions of the working group, given that these conclusions were presented by [Bulgartransgaz's employee] to its Board of Directors.⁶⁰⁴
- (477) Fourth, also with respect to Toplofikacia Razgrad, Bulgartransgaz required it to provide information that was not necessary to assess its access request (see recitals (153)-(155)). Bulgartransgaz requested Toplofikacia Razgrad to prove not only that it had secured gas at the entry point Negru Voda 1 but also to present additional proof that its gas supplier had secured the relevant gas quantities upstream.

⁶⁰¹ As pointed out section 5.2.3, several months later, with the 2013 Access Rules for Transmission EWRC established similar requirement. Article 4(4) of these rules requires the application for access to the transmission network to include, amongst other things, information from an agreement for the secured/booked transmission capacity through the network of a neighbouring TSO.

⁶⁰² Overgas' third letter and fourth letter, from 29 September 2010 and 11 November 2010 respectively.

⁶⁰³ See Section 5.2.4.2, recital (102).

⁶⁰⁴ See Section 5.2.4.2, recital (102).

- (478) In addition, as described in Section 5.2.4.2, at meetings with Overgas, Bulgartransgaz claimed that because the EWRC had not approved the harmonised contract for access, it could not grant access to the network. However, and as confirmed by the EWRC, this did not prevent the TSO and third parties from entering into bilateral agreements. The EWRC also stated that, at that time, Bulgartransgaz had not even submitted a final draft harmonised contract for its approval.⁶⁰⁵ Moreover, at precisely the same time that it was expressing concern to third parties about the non-existence of a harmonised contract, Bulgartransgaz signed contracts for access to the Bulgarian transmission network with Bulgargaz (see recital (97)). In dealings with Bulgargaz, which belonged to the same corporate group as Bulgartransgaz, the lack of harmonised contract was therefore not an issue.
- (479) Finally, as set out in Section 5.2.4.2 above, although Overgas was granted access to the Bulgarian transmission network, the conditions of the access were restrictive and non-transparent.⁶⁰⁶ In particular, access for the year 2013 was granted for a short duration (initially three months only) and under uncertain conditions. Moreover, Bulgartransgaz has, on a discretionary and non-transparent basis, first refused but then granted extensions to this contract. Therefore, the fact that Overgas was granted access to the Bulgarian transmission network in 2013 cannot be perceived as a substantial change in the BEH group's behaviour with regard to third party access. As concerns the access to the Bulgarian transmission network in 2014, Overgas remained dissatisfied with its access (see recital (112)). The Commission notes, however, that it appears that for the years 2014- 2016 Overgas was granted access to the Bulgarian transmission network in a procedure which appears to correctly apply the Access Rules for Transmission in force at the time.⁶⁰⁷ The contracts were signed for one year duration on an uninterrupted basis.
- (480) Nevertheless both BEH and Bulgargaz (Overgas' direct competitor on the Bulgarian gas markets) also had discretion to decide whether Overgas' contract to access the Bulgarian transmission network should be prolonged, given that Overgas' access was contingent upon obtaining agreement from Bulgargaz to access the Romanian Transit Pipeline 1. Therefore, as long as Bulgargaz was unwilling to grant objective, transparent and non-discriminatory access to the Romanian Transit Pipeline 1 or alternatively to renounce the exclusive use of the Romanian Transit Pipeline 1, the abusive conduct regarding access to the Bulgarian transmission network cannot be considered as terminated.
- (481) In conclusion, the BEH group's strategy resulted in Bulgartransgaz unnecessarily prolonging negotiations for access, not replying to requests by claiming that they were incomplete or otherwise obstructing third-party access to its transmission network. Similar tactics were not applied to Bulgargaz.
- (482) The Commission therefore considers that these examples of refusals to grant access⁶⁰⁸ to the Bulgarian transmission network, as set out in Section 6.3, form part

⁶⁰⁵ See Section 5.2.4.2, recital (100).

⁶⁰⁶ See Section 5.2.4.2, recital (117).

⁶⁰⁷ See Section 5.2.4.2, recital (112).

⁶⁰⁸ Or at least of undue delay in granting access.

of the BEH group strategy to protect its position on the gas supply markets in Bulgaria.

- (483) Bulgartransgaz contests the findings of the Commission.
- (484) First, Bulgartransgaz denies favourable treatment of Bulgargaz to the detriment of third parties regarding access to the Bulgarian transmission network. Bulgargaz argues that such a claim is not supported by evidence. According to Bulgartransgaz, since 2013, the three contracts Bulgartransgaz has entered into with Bulgargaz were on the same terms as applied to other undertakings and Bulgargaz was subject to the same procedure (e.g. information requirements) and conditions as the others.⁶⁰⁹
- (485) Second, Bulgartransgaz claims that since no applicants other than Bulgargaz had upstream supplies prior to 2013, Bulgartransgaz simply granted access to the Bulgarian transmission network to the only undertaking who had access to gas (i.e. Bulgargaz).⁶¹⁰
- (486) Third, Bulgartransgaz further submits that it did not fail to reply to third party requests for access to the Bulgarian transmission network⁶¹¹ and it did not make unreasonable demands to hinder access by the other applicants but that the requirements were contained within the applicable rules.⁶¹²
- (487) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (488)-(490).
- (488) First, until July 2012, Bulgartransgaz had not developed any model access contract, making it impossible for third parties to submit proper access requests. Bulgartransgaz then later used the excuse of improper access requests to refuse third party access (see Section 5.2.4.2). At the same time, as described in Section 5.2.4.1, on several occasions Bulgartransgaz granted access to the Bulgarian transmission network to Bulgargaz without signing any access contract or signed such contracts retroactively. Similar treatment was not awarded to Bulgargaz' potential competitors. Moreover, by requiring applicants to obtain access to the Romanian Transit Pipeline 1 prior to obtaining access to the Bulgarian transmission network, Bulgartransgaz made the access to the Bulgarian transmission network dependent on Bulgargaz, therefore placing Bulgargaz in a position to decide whether or not any of Bulgargaz' direct competitors would be allowed to enter the downstream wholesale gas supply market in Bulgaria as well as the market for the retail supply of gas to large end customers directly connected to the Bulgarian transmission network.
- (489) Second, the argument that only Bulgargaz had access to upstream gas supplies is not acceptable. Overgas in 2010 (at the time of its first access request) was supplying Bulgargaz with gas at the Ukrainian/Romanian border (Isaccea) (see recital (63)); therefore the Commission does not accept that Bulgargaz could have had any doubts as to Overgas' access to upstream gas supplies.

⁶⁰⁹ Bulgartransgaz' reply to the SO dated 23 March 2015, recitals 227-238, [...].

⁶¹⁰ Bulgartransgaz' reply to the SO dated 23 March 2015, recital 233, [...].

⁶¹¹ Bulgartransgaz' reply to the SO dated 23 March 2015, recitals 245-248, [...].

⁶¹² Bulgartransgaz' reply to the SO dated 23 March 2015, recitals 249-251, [...].

- (490) Third, as it was evidenced in Section 5.2.4.2, Bulgartransgaz often took months to reply to individual access requests (see for example recital (137)). Moreover, as evidenced in recitals (131) and (149), Bulgartransgaz often required information that went beyond what was prescribed by the rules at the time (see recitals).

6.2.4.5. Preventing, restricting and delaying access to the UGS Chiren

- (491) In accordance with the strategy referred to in Section 6.3.1, the practices set out in Section 5.3.3.2 above show a clear pattern in Bulgartransgaz' behaviour preventing, restricting and delaying access to UGS Chiren. By refusing to provide access to the storage capacity, the BEH group deprived third parties from obtaining access to a source of flexibility that would have allowed them to compete on equal terms with Bulgargaz on the gas supply markets in Bulgaria. As described in recital (339), underground storage facilities are essential for any gas supplier to be active on the gas wholesale and retail markets, so as to optimally manage the (*inter alia* seasonal) fluctuations in customer demand.

- (492) Bulgartransgaz' response to third party access requests to UGS Chiren, as well as the 2012 and 2014 Bulgartransgaz Access Rules for Storage and their application amount to a refusal to supply. As set out in Section 5.3.3.2, Bulgartransgaz' response to access requests usually took the form of delaying tactics, such as:

- (a) Failing to reply to third parties requesting access or not processing the requests internally;
- (b) Requiring third parties to supply an unreasonable amount of information or to re-submit access requests based on a deliberate misinterpretation of the information; and
- (c) Acting in a non-transparent manner (such as not making information on available storage capacity publicly available) thus making it more difficult for third parties to apply for access to storage.

- (493) Furthermore, Bulgartransgaz in 2012 designed access rules for storage which ensured that Bulgargaz would have priority access. Therefore, these rules amount to further refusal to supply access to UGS Chiren.

- (494) As a result of these tactics, at least three companies (Overgas, [COMPANY 6] and [COMPANY 5]) encountered major problems in accessing UGS Chiren and Bulgartransgaz made sure that the bulk of the storage capacity remained within the BEH group.

- (495) When assessing the BEH group's behaviour, a distinction can be drawn according to the situation prior to and after the adoption of the 2012 Bulgartransgaz' Access Rules for Storage, including the revised access rules of 2014. Few months after these rules were adopted in March 2012, Bulgartransgaz also started publishing data about available storage capacity on its website (see recital (169)).

Prior to the adoption of the 2012 Bulgartransgaz Access Rules for Storage

- (496) Prior to March 2012 that is before the adoption of the 2012 Bulgartransgaz Access Rules for Storage capacity was supposedly allocated on a 'first come, first served' basis. However, as described in recitals (181) et seq. priority was always awarded to Bulgargaz.

- (497) First, and in violation of the 'first come, first served' principle, Bulgartransgaz never dealt with access requests made by third parties on substance prior to Bulgargaz'

requests. As set out in recitals (214), (222) and Table 1, on at least one occasion, Bulgargaz' competitor Overgas, submitted requests well in advance of Bulgargaz.⁶¹³ However, Bulgartransgaz failed to reply to them and to properly process these requests internally, but accepted instead Bulgargaz' requests for storage (see recital (222)). Moreover, as described in Section 5.3.3.2, the fact that Bulgartransgaz did not reply to access requests for storage in some cases resulted in the requesting party (for example Overgas) simply dropping the request (see for example recitals (215)-(217)). As a result, during the 2010-2011 gas storage year, part of the storage capacity that had been requested by Bulgargaz remained unused (see Table 1), despite there being a potential interest on the market for this capacity.

- (498) Second, as set out in Section 5.3.3.2, third parties that did not withdraw their requests (for example, Overgas' request for capacity during the 2011-2012 gas storage year) were overburdened with requirements to submit an unreasonable amount of data or to re-submit requests based on Bulgartransgaz' deliberate misinterpretation of the submitted data.⁶¹⁴ For example, Bulgartransgaz' refused Overgas' access to storage based on the argument that Overgas' requests exceeded the technical capacity of UGS Chiren. In reality Bulgartransgaz did not process Overgas' storage requests internally and it was Bulgartransgaz that wrongly linked different Overgas' access requests based on the different entry points specified in the different Overgas' letters. It should be noted at this point that in the internal assessment of Overgas' requests for access to the Bulgarian transmission network, (access to which was required in order to access UGS Chiren) where again different entry points were specified in different letters, Bulgartransgaz properly linked all entry and exit points to which Overgas requested access, depending on the transmission network to which they related. Similarly, the note of [Bulgartransgaz' employee] to the Board of Directors properly linked all entry and exit points. Hence, the submitted requests provided enough information for the needs of Bulgartransgaz' internal assessments of requested storage capacity and relevant entry and exit points, and consequently the additionally requested information was unnecessary (see recital (102)).
- (499) Third, as explained in Section 5.3.3.1, Bulgartransgaz acted in a non-transparent manner. During the initial five years of liberalisation (until mid-2012), Bulgartransgaz did not publish data about storage capacity. As a result, third parties were supposed to submit their requests without having any information about the capacity allocation mechanism, the available storage capacity or the time-frame allowing them to be treated on a 'first come first, served basis' (see recitals (167)-(168)).⁶¹⁵ For example, as set out in recital (249), [COMPANY 6] did not and indeed

⁶¹³ Overgas' access requested for 2011-2012 gas storage year was submitted on 30 July 2010 whereas Bulgargaz request came on 18 February 2011.

⁶¹⁴ As explained in point (b) of recital (106) and recital (226), Bulgartransgaz invoked as an argument that the requested capacity of 960 mcm, calculated by wrongly summing up the capacity under Overgas' requests, exceeded considerably the available storage capacity. It should be noted that Bulgargaz' requests often exceeded the available storage capacity (see Table 1). Another argument of Bulgartransgaz was the improperly specified entry and exit points in the different Overgas requests. However, in its internal assessment of the requests for access to the transmission system, Bulgartransgaz did not face any difficulties in connecting properly the relevant entry points with the relevant exit points (see recital (102)).

⁶¹⁵ It should be noted that provisions such as Article 19(1) of Regulation (EC) No 715/2009 requires that such information had to be published.

could not have obtained information about the additionally available storage capacity as Bulgartransgaz did not publish any information on its website before granting the capacity to Bulgargaz. As a result, [COMPANY 6]'s request was subsequently rejected (as received two days after Bulgargaz' confirmation letter, see recitals (248)-(249)). As can be seen from the capacities requested by Bulgargaz and from Bulgartransgaz' letters to Bulgargaz (see Table 1 and footnote 267), only Bulgargaz was properly informed about the available storage capacity. This non-transparent and discriminatory approach provided Bulgartransgaz with grounds to reject third parties' requests, since third parties could not prove that storage capacity was available. Consequently, when they applied, they were typically informed that capacity had already been taken (by Bulgargaz) and, as a result, access was simply refused (see Section 5.3.2). Therefore, instead of openly offering any free capacity to the market, Bulgartransgaz immediately granted it to Bulgargaz.

- (500) Bulgartransgaz contests the findings of the Commission.
- (501) First, Bulgartransgaz claims that it respected the 'first come, first served' storage capacity allocation principle and it did not favour Bulgargaz' request to the detriment of Overgas.⁶¹⁶
- (502) Second, Bulgartransgaz claims that it would only consider applications for each gas storage year at a time (i.e. current gas storage year), to avoid hoarding of capacity at UGS Chiren by any undertaking for multiple gas storage years.⁶¹⁷ Therefore, according to Bulgartransgaz, it assessed Overgas' requests insofar as they related to the gas storage year for which applications were being considered.⁶¹⁸
- (503) Third, Bulgartransgaz claims that Overgas filed duplicate applications for storage capacity for the 2011-2012 gas storage year. Bulgartransgaz states that the duplicated capacity requirements were expressly confirmed by Overgas to be concurrent and not alternative applications. According to Bulgartransgaz, any clarification required by Bulgartransgaz was therefore a direct result of Overgas' own mistakes.⁶¹⁹ Bulgartransgaz further claims that Overgas' request to transport gas to UGS Chiren by using the entry points of the Bulgarian Transit Pipeline (Negru Voda 2.3) cannot be interpreted as a clarification to its previous request which specified the entry points of the Bulgarian transmission network (Negru Voda 1). Since the newly requested entry points (by letter of November 2010) were not connected to the Bulgarian transmission network, Overgas did not provide any clarification but submitted a new application.⁶²⁰
- (504) Fourth, Bulgartransgaz claims that Bulgargaz was not any more informed regarding the available capacity at UGS Chiren than any other third party. According to Bulgartransgaz, Bulgargaz received information about spare capacity in response to direct requests, as any potential customer would have received. Bulgartransgaz further claims that the evidence the Commission relied upon is distorted and that

⁶¹⁶ See Bulgartransgaz reply to the SO dated 23 March 2015, [...], recital 257.

⁶¹⁷ See Bulgartransgaz reply to the SO dated 23 March 2015, recital 257, [...].

⁶¹⁸ Bulgartransgaz' reply to the SO dated 23 March 2015, recitals 256-257, [...].

⁶¹⁹ See Bulgartransgaz reply to the SO dated 23 March 2015, recital 258, [...].

⁶²⁰ See Bulgartransgaz reply to the Letter of Facts dated 26 September 2016, recitals 37-41.

Table 1 does not show that Bulgargaz knew about available capacity in advance of its requests.⁶²¹

- (505) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (506)-(510).
- (506) First, there are examples in the Commission's file that Bulgartransgaz did not always follow the 'first come, first served' storage capacity allocation principle. As described in recital (497) and footnote 613, there are examples where third parties submitted an application before Bulgargaz and still failed to obtain access, which was eventually granted to Bulgargaz.
- (507) Second, Bulgartransgaz' claim that it would only consider applications for one gas storage year at a time cannot be accepted. There are examples in the Commission's file that Bulgartransgaz accepted Bulgargaz' access requests for the future gas storage years.⁶²² Moreover, before the March 2012 Rules for Access to UGS Chiren were adopted, there was absolutely no transparency as to how third parties could apply for access. The BEH group has not presented any evidence proving that Bulgartransgaz informed Overgas or the public at large that it would only accept applications for the current gas storage year. Furthermore, contrary to Bulgartransgaz' claim, Overgas never requested capacity for 'multiple gas storage years' but was at the most requesting capacity for the immediate year ahead (see recital (214)).
- (508) Third, although Bulgartransgaz' view is that Overgas, in its formal complaint to EWRC in January 2011, confirmed that its requests for access to storage were duplicated (concurrent), until Overgas submitted the formal complaint to the EWRC, Bulgartransgaz had never raised the issue of duplicated requests. On the contrary, as set out in recital (102), in the internal documents of Bulgartransgaz, the entry and exit points to which Overgas requested access had been properly linked to the gas network to which they belonged. As early as July 2010, Bulgartransgaz was informed about the quantity that Overgas wanted to have stored in UGS Chiren. In the subsequent correspondence, Overgas submitted detailed schedules for transmission of gas to UGS Chiren, as well as injection schedules where the quantity was always the same, namely 480 mcm (see recitals (215)-(218)). In addition, Overgas' letter of November 2010 again referred to the previous letters and again requested to have 480 mcm stored at UGS Chiren (see recital (218)). This letter shows that the purpose of all Overgas' requests remained the same, and it was this fixed amount of gas that Overgas wanted to store in UGS Chiren. However, Bulgartransgaz failed to process properly those access requests (see recital (224)).
- (509) Fourth, the Commission maintains that, as evidenced by Table 1 and in particular by Bulgartransgaz' letters to Bulgargaz (see footnote 267), Bulgargaz was sometimes informed about the available capacity on Bulgartransgaz' own initiative, and not always as a response to Bulgargaz request. Such treatment was not granted to any other third party interested in access to UGS Chiren.

⁶²¹ Bulgartransgaz' reply to the SO dated 23 March 2015, recital 259, [...].

⁶²² For example, Bulgargaz' request of 20 October 2009 was not intended for obtaining access to storage during the ongoing gas storage year (2009 - 2010) but during the next gas storage year 2010 - 2011 (see Table 1 and footnote 266).

- (510) The Commission maintains that Table 1 correctly presents the timing as concerns the correspondence between Bulgargaz and Bulgartransgaz for each relevant gas storage year. Table 1 was constructed based on the documents obtained from the BEH group.
- Following the 2012 Bulgartransgaz Access Rules for Storage, including amended rules (until April 2016)*
- (511) The 2012 Bulgartransgaz Access Rules for Storage would have been an opportunity for Bulgartransgaz to implement an objective transparent and non-discriminatory capacity allocation procedure. However, as described in Section 5.3.2 and in particular recital (170), the rules provided Bulgargaz with a *de facto* priority right to capacity. According to these rules, priority was given to suppliers based on the calculation of their 'base sale quantity' to public suppliers (that is, central heating plants or end suppliers), which amounted to (a) gas quantities sold in the course of the on-going gas storage year, or (b) gas quantities contracted for the forthcoming gas storage year, whichever was the smaller of the two.
- (512) The approach described in recital (514) is unjustified. If the purpose of the access rules for storage was to ensure, also during peak periods, that the consumption of public suppliers was provided for, then the previous year's market shares (the amount of gas sales) of a gas supplier should have been irrelevant for granting priority in the capacity allocation procedure. For that aim, it would appear more relevant to, for example, allocate the gas storage as much as possible to those suppliers from whom the public suppliers intended to source during the next gas storage year.
- (513) However, by choosing the smaller of the two gas quantities (for the ongoing or forthcoming gas storage year respectively), the BEH group ensured that even if one of Bulgargaz' competitors contracted larger gas quantities for supply to public suppliers for the forthcoming gas storage year than it had the previous year, or larger than Bulgargaz itself contracted for the same or forthcoming gas storage year, the priority right would still be given to Bulgargaz as long as the smallest of Bulgargaz quantities exceeded the smallest of the competitor's quantities. As Bulgargaz has been by far the largest supplier of central heating plants in Bulgaria, the lower base sale quantity rule ensured that Bulgargaz, which belonged to the same corporate group as Bulgartransgaz, would always be served first during the capacity allocation.
- (514) As a result, the 2012 Bulgartransgaz Access Rules for Storage disregarded the needs of any new market entrant or smaller gas suppliers during months of the highest gas consumption, and only allowed them to inject and withdraw capacity that had not been requested by the largest gas supplier (Bulgargaz). For example, as shown in Section 5.3.3.1, the only injection and withdrawal capacity that was allocated to Bulgargaz' competitor Overgas in the capacity allocation procedure for the 2013-2014 gas storage year, concerned those months during which surplus capacity was available after having allocated capacity to Bulgargaz.
- (515) Therefore, the adoption and application of the 2012 Bulgartransgaz' Access Rules for Storage can be qualified as a refusal to supply, since the rules predetermined that only limited storage capacity (if any) could have been granted to the BEH group's competitors, whose needs to balance seasonal variations in gas demand were largely ignored. It follows that Bulgartransgaz designed these rules in order to favour Bulgargaz and that it therefore constitutes yet another example of the strategy of the BEH group to protect its position on the gas supply markets in Bulgaria.

- (516) Moreover, the unclear and non-transparent manner in which Bulgartransgaz actually allocated storage capacity for the 2013-2014 gas storage year (leaving applicants without any means to understand the allocation process and the final outcome) further demonstrates the BEH group's unjustified discretion when allocating capacity.
- (517) As set out in recital (228), regarding the 2013-2014 gas storage year, Overgas ultimately did not conclude a gas storage contract with Bulgartransgaz, as the capacity offered for storage by Bulgartransgaz required Overgas to withdraw all its gas before the winter period began, thereby preventing Overgas from balancing its gas purchase and supplies.
- (518) Moreover, the fact that Bulgartransgaz amended its access rules for storage in 2014 did not materially improve the situation for third party access. Capacity was still allocated according to the 'base sale quantity' rule, which typically favoured the undertaking with the highest ongoing sales of natural gas to public suppliers (that was Bulgargaz). However, following the April 2014 allocation procedure, in September 2014 an undertaking requested to be granted access to UGS Chiren and its request was positively evaluated (see recital (208)). Moreover, following the April 2014 allocation procedure there was consistently spare capacity at UGS Chiren which was properly advertised (see recitals (207)).
- (519) Only Bulgargaz participated in the 2015 capacity allocation procedure where the 2014 Bulgartransgaz Access Rules for Storage continued to apply. It requested [30-40%] of the available storage capacity. After the capacity allocation procedure was over in April 2015, Bulgartransgaz immediately published the remaining capacity for third parties to apply (see recital (209)). Moreover, when a third party ([COMPANY 1]) requested access to storage in December 2015 Bulgartransgaz immediately agreed to satisfy its capacity request (see recital (209)).
- (520) As discussed in recital (175), on 4 April 2016 Bulgartransgaz adopted a new capacity allocation methodology that is based on allocation proportional to the storage capacity requests. These new rules appear to be objective, transparent and non-discriminatory and therefore do not qualify as a further refusal to supply.
- (521) In conclusion, the BEH group's strategy included Bulgartransgaz' failure to reply to access requests by third parties or not processing the requests internally; requiring third parties to supply an unreasonable amount of information or to re-submit access requests based on an obvious misinterpretation of the information or acting in a non-transparent manner, thus making it more difficult for third parties to apply for access to storage. Similar tactics were not applied to its Bulgargaz. The Commission therefore considers that these examples of refusing access to UGS Chiren, as set out in Section 5.3.3.2, form part of the BEH group's strategy to protect its position on the gas supply markets in Bulgaria.
- (522) Bulgartransgaz contests the findings of the Commission.
- (523) First, Bulgartransgaz claims that the Commission provides no evidence that Bulgartransgaz intended to design a system of rules for access to gas storage that would favour Bulgargaz.⁶²³

⁶²³ Bulgartransgaz' reply to the SO dated 23 March 2015, recital 262, [...].

- (524) Second, Bulgartransgaz claims that the Commission fails to demonstrate the harmful effects of the design of the rules. According to Bulgartransgaz, the Commission fails to show how the rules prevented competitors from negotiating larger gas supply contracts.⁶²⁴
- (525) Third, Bulgartransgaz claims that the alleged benefit conferred by the rules could only be effective for a single gas storage year and if a competitor negotiated larger volumes of gas in a given year, this competitor would in the next year enjoy privileged access.⁶²⁵
- (526) Fourth, Bulgartransgaz claims that the discussions between [COMPANY 1] and Bulgartransgaz for access to storage at the end of 2015 occurred at the time when the 2014 Bulgartransgaz Access Rules for Storage were applicable, undermining the allegation that these rules were inherently abusive (see recital (213)).⁶²⁶
- (527) Bulgartransgaz' arguments cannot be accepted for the reasons set out in recitals (527)-(531).
- (528) First, the Commission considers that though the intention of the undertaking might be taken into account, since abusive conduct is an objective concept, it is not necessary to find or establish an anti-competitive intent. The intent has never been a standalone element that the Commission is required to prove as long as the conduct amounts to abuse objectively.⁶²⁷
- (529) Second, based on well-established case law, the Commission is not required to demonstrate concrete anticompetitive effects on the market. It is enough for the Commission to show that the behaviour tends to distort competition on the relevant market or that the behaviour is capable of having such an effect.⁶²⁸ Nevertheless for the sake of completeness, it has been demonstrated that the implementation of the 2012 and 2014 Bulgartransgaz' Access Rules for Storage disregarded the needs of new market entrants and smaller gas suppliers during months with the highest gas consumption, only granting the new market entrants (injection and withdrawal and hence storage) capacity that had not been requested by the largest gas supplier, Bulgargaz (see recitals(198) and (206)).⁶²⁹ Consequently, the system of rules favoured Bulgargaz.
- (530) Third, if one of Bulgargaz' competitors had negotiated a larger supply of gas in a given year; it would have needed larger storage capacity during the same year

⁶²⁴ See Bulgartransgaz' reply to the SO dated 23 March 2015, recital 263, [...].

⁶²⁵ Bulgartransgaz' reply to the SO dated 23 March 2015, recital 263, [...].

⁶²⁶ See Bulgartransgaz' reply to the Letter of Facts dated 26 September 2016, recitals 12. Although the Letter of Facts refers to the 2012 Bulgartransgaz Access Rules for Storage, the Commission understands that it meant to refer to the 2014 Bulgartransgaz Access Rules for Storage.

⁶²⁷ See Judgment of 19 April 2012 in *Tomra Systems ASA and Others v European Commission*, Case C-549/10P, EU:C:2012:221, paras 17, 20 and 21.

⁶²⁸ See *British Airways plc vs. Commission of the European Communities*, EU:C:2006:133, para 293; and see also judgment in *Clearstream*, EU:T:2009:317, para 144.

⁶²⁹ For example, the evidence outlined in Table 2 (see recital (194)) shows that based on the 2012 Bulgartransgaz Access Rules for Storage applicable at the time, Bulgargaz was awarded the total or almost total requested capacities in UGS Chiren, whereas its competitor, Overgas, was awarded only a fraction of what it requested.

allowing it to cover the seasonal fluctuations of demand of its larger customer base. Therefore, Bulgartransgaz' argument that such a competitor would have been granted priority access to storage in a subsequent year disregards the actual needs of Bulgargaz' competitors. In practice, no competitor could have negotiated a larger supply of gas than Bulgargaz without the use of UGS Chiren. Consequently, the rules allowed for marginalization of Bulgargaz' competitors.

- (531) Fourth, as pointed out in recitals (514) and (515), the adoption and application of the 2012 and 2014 Bulgartransgaz' Access Rules for Storage predetermined that only limited storage capacity could have been granted to the BEH group's competitors allowing them the allocation of capacity that had not been requested by the largest gas supplier (Bulgargaz). Until 2014, there was no (or very limited) storage capacity which could be booked by Bulgargaz' competitors -Bulgargaz booked almost the entire storage space (see recitals (207) and (209)). Only following the capacity allocation procedure, which ended in April 2014, was there properly advertised storage capacity available for third parties to apply for (see recital (207)). Finally, only as of September 2014 did Bulgartransgaz change its approach and started granting objective, transparent and non-discriminatory access to the UGS Chiren (see recital (208)).

6.2.4.6. Capacity hoarding on the Romanian Transit Pipeline 1

- (532) In accordance with the strategy referred to in Section 6.3.1, the BEH group practices show that Bulgargaz engaged in capacity hoarding on the Romanian Transit Pipeline 1 into Bulgaria. Taking into account that the regulatory framework of the Union does not include an obligation on a shipper such as Bulgargaz to grant third party access to the capacity it holds on a transmission pipeline (such as the Romanian Transit Pipeline 1 see Section 6.2.4.2) ⁶³⁰, the Commission, in line with the applicable case law⁶³¹ demonstrates the indispensable nature of the Romanian Transit Pipeline 1.
- (533) As a supply undertaking, Bulgargaz has limited incentives to release unused capacity towards its third party competitors. In fact, by fully blocking third party access, Bulgargaz had for many years enjoyed the almost total absence of competition on the downstream wholesale gas supply market in Bulgaria and on the market for the retail supply of gas to large end customers directly connected to the Bulgarian transmission network.
- (534) Bulgargaz' capacity hoarding of the Romanian Transit Pipeline 1 amounts to a refusal to supply. As set out in Section 5.4.4.2, Bulgargaz' consistent behaviour in refusing access to the Romanian Transit Pipeline 1 comprised of:
- (a) booking the entire capacity of the Romanian Import Pipeline 1 when Bulgargaz used only a very limited part of the total available capacity (see in particular recitals (275) and (276));

⁶³⁰ According to the settled case law, even if an undertaking's behaviour is compliant with sector legislation, Union competition rules may nonetheless be applied for instance if the legislation is ineffective to prevent anti-competitive behaviour or if the legislation has different objectives from those envisaged by Union competition policy. Judgment in *Deutsche Telekom v Commission*, EU:C:2010:603, para 227.

⁶³¹ See *Oscar Bronner*, EU:C:1998:569, para 41 and *Radio Teelfis Eireann (RTE) v Commission*, T-69/89, EU:T:1991:39, para 73.

- (b) not agreeing to return the capacity when requested by Transgaz or imposing conditions before the capacity was returned (see in recital (297))
 - (c) not replying to individual access request (see recital (331)).
- (535) As set out in Section 6.3.1, until 1 January 2015 there was a clear pattern in the BEH group's behaviour of not returning the unused capacity without imposing any additional conditions.
- (536) It can also be noted at this point that in 2013, when Bulgargaz finally entered into an agreement with one of its competitors (Overgas) for a limited part (of the unused) capacity, it did so after a delay, as well as on the basis of short-term and uncertain conditions. Moreover, as explained in recital (297), when it was approached by Transgaz it kept imposing several conditions before the agreement could be revised.⁶³²
- (537) Bulgargaz had reserved 100% of the total capacity of the Romanian Transit Pipeline 1 for the period 2005-2015 when it only used part of the booked capacity when peak usage did not exceed 65% of total daily capacity during the period 2007-2016 (see recital (260)). At the same time, there was third party demand to use the additional capacity as shown, for example, by Overgas' requests for access. In this respect, the Commission also notes that third parties developed the understanding that the capacity was 'booked by Bulgargaz' and that they therefore considered that it would not be meaningful to explore the possibility to access the pipeline (see recital (278)).
- (538) Up until the 31 January 2013 Agreement with Overgas, Bulgargaz had, as explained in Section 5.4.4.2, not offered any capacity to any third party. It also had not granted the capacity back to Transgaz. There is also no evidence suggesting that Bulgargaz would have expected its usage of the Romanian Transit Pipeline 1 to dramatically increase.
- (539) As shown in Section 5.4.4.2, Overgas has, at least since March 2010, requested access to the Romanian Transit Pipeline 1. These requests were initially addressed to the Romanian TSO, Transgaz, which stated to the interested parties that the capacity had already been fully reserved (as it was reserved by Bulgargaz on an exclusive basis, see recitals (275) and (296)). The BEH group was informed by Transgaz, at least as of January 2011, of the general interest to access the Romanian Transit Pipeline 1 (see recital (297)). However, BEH expressed reluctance to discuss the issue and relied on the 2005 Commercial Agreement which granted Bulgargaz 100% of the capacity usage (see recital (297)(a)).
- (540) During subsequent discussions on third party access between Bulgargaz and Transgaz in 2012, Bulgargaz insisted that certain capacity was guaranteed to Bulgargaz before the rest could be freely auctioned to other market players and that Transgaz would need to obtain Bulgargaz' prior agreement before it could trade the capacity in excess of the capacity guaranteed to Bulgargaz. Therefore, despite the pressure exerted by Transgaz to make at least part of the unused capacity available on the market, BEH and Bulgargaz have defended their contract for the entire pipeline in order to maintain the status quo (recital (297)).

⁶³² As stated in Section 5.4.4.2, although in a letter to Transgaz sent on 14 December 2013 Bulgargaz agreed to release some capacity to third parties, no agreement appears to have been signed to this effect.

- (541) Moreover, as described in Section 5.4.4.2, when informed by Transgaz that there was a general interest to access the Romanian Transit Pipeline 1, the BEH group first refused to discuss the issue with Transgaz and thereafter made third party access conditional upon its prior approval. Therefore, despite only using part of the total capacity available on the pipeline, the BEH group obstructed and rendered more difficult any third party access. The BEH group has not provided any viable justification as to why these conditions were needed.
- (542) Bulgargaz should have either renounced the exclusivity under the 2005 Commercial Agreement or offered the capacity through an objective, transparent and non-discriminatory procedure on the secondary market.
- (543) As set out in Section 5.4.4.2, Bulgargaz was also directly approached by Overgas for access to the Romanian Transit Pipeline 1. Overgas sent a letter to Bulgargaz in November 2012 to inquire under which conditions it could purchase capacity on the Romanian Transit Pipeline 1. The bilateral negotiations lasted around three months and Bulgargaz eventually granted access to Overgas. However, the procedure through which Bulgargaz made capacity available to Overgas in 2013 was neither transparent nor based on any objective or non-discriminatory criteria and was fully subject to Bulgargaz' (and BEH's) discretion:⁶³³
- (a) Access was granted only after Bulgargaz itself had secured contracts with most customers for 2013, giving Overgas the opportunity to conclude contracts only with its own subsidiaries, including Toplofikacia Razgrad;
 - (b) Despite the permanently high rate of unused capacity of the pipeline, access was only granted for a very short period of time (initially three months and later signed for another nine months);
 - (c) The contract was also subject to uncertainties regarding a possible prolongation and lacked any specification on the basis of which criteria the contract could be extended.
- (544) In other words Bulgargaz maintained full discretion as to which companies could enter the gas supply markets in Bulgaria and under what conditions.
- (545) Overgas and Bulgargaz signed bilateral acts (daily and monthly) for the relevant quantities and the BEH group did not commit on the volume of gas that Overgas would be able to ship.
- (546) Bulgargaz granted satisfactory access to the Romanian Transit Pipeline 1 to Overgas in 2014. However, for the same year it tacitly refused to grant access to C Energy Group. Bulgargaz simply failed to respond or in any other way process C Energy Group's access requests (see recital (331)).
- (547) The Commission also notes that Bulgargaz paid a fixed monthly fee for the use of the Romanian Transit Pipeline 1 to Transgaz irrespective of the volume of gas actually transmitted (see recitals (261)-(262). Therefore, it would have been in Bulgargaz' interest to grant secondary capacity access to interested third parties in order to recover some of the fixed usage fee - if it were not to protect its downstream markets.

⁶³³ As set out in Section 5.4.4.2, any access by third parties required the approval of BEH's Board of Directors.

- (548) In conclusion, the Commission considers that the examples of capacity hoarding and additional measures preventing, restricting and delaying access to the Romanian Transit Pipeline 1, as set out in Section 6.3, form part of the BEH group strategy to protect its position on the downstream wholesale gas supply market in Bulgaria and on the market for the retail supply of gas to large end customers directly connected to the Bulgarian transmission network.
- (549) Taking into account that the regulatory framework of the Union does not contain an obligation on a shipper such as Bulgargaz to grant third party access to the capacity it holds on a transmission pipeline (such as the Romanian Transit Pipeline 1 see recital (460) the Commission, in line with the applicable case law⁶³⁴ will demonstrate in recitals (550)-(558) that:
- (a) the refusal is likely to lead to the elimination of competition in the affected market on the part of the undertakings requesting access;
 - (b) the refusal cannot be objectively justified; and
 - (c) the refusal on the Romanian Transit Pipeline 1 relates to a product or service which is indispensable in order to enter into effective competition in a market.

The refusal is likely to lead to the elimination of competition

- (550) In this case, the BEH group's conduct was likely to prevent the development of effective competition on the gas supply markets in Bulgaria. The BEH group's abusive behaviour was capable of creating barriers to market entry and therefore also of limiting the degree of competition on these markets. In fact, the BEH group made it more difficult or even impossible for potential competitors to enter into the downstream wholesale gas supply market in Bulgaria and on the market for the retail supply of gas to large end customers directly connected to the Bulgarian transmission network. If competition had not been restricted, suppliers other than Bulgargaz may well have been operating on these gas supply markets in Bulgaria earlier and to a greater extent, bringing with them further competition and choice to the benefit of Bulgarian consumers.
- (551) As set out in Section 6.2.3 above, the BEH group, through its supply arm Bulgargaz, holds a quasi-monopolistic position and faces no viable competition on the Bulgarian wholesale gas market and on the retail gas market for large end customers connected directly to the Bulgarian transmission network. By refusing third parties access to the Romanian Transit Pipeline 1, the BEH group restricted the development of competition and ensured that its dominant position on downstream markets was effectively maintained.
- (552) Bulgargaz' capacity hoarding on the Romanian Transit Pipeline 1 restricted the possibility of viable competition on the downstream wholesale gas supply market in Bulgaria and on the market for the retail supply of gas to large end customers directly connected to the Bulgarian transmission network. As described in Section 5.4.4, Bulgargaz for many years reserved to itself the full capacity on the Romanian Transit Pipeline 1, instead of returning the unused capacity to the market for third party use. Although Bulgargaz in 2013 granted limited capacity access to Overgas, the access

⁶³⁴ *Oscar Bronner*, EU:C:1998:569, para 41 and *Radio Teelfis Eireann (RTE) v Commission*, EU:T:1991:39, para 73.

granted was of a too short-term and uncertain nature to allow viable competition to develop. Until 1 January 2015, i.e when Bulgargaz granted Overgas access to the Romanian Transit Pipeline 1 (see recital (316)), the access granted to the Romanian Transit Pipeline 1 was not objective transparent and non-discriminatory (see recital (649). On that basis, until 1 January 2015, potential competitors were prevented from viably competing with Bulgargaz on the gas supply markets in Bulgaria.

The refusal cannot be objectively justified

- (553) The BEH group has not provided any arguments that its refusal to grant third party access to the Romanian Transit Pipeline 1 could be objectively justified, or that it is necessary for the achievement of efficiency gains, which could counteract any likely negative effects on competition and consumer welfare without eliminating effective competition.
- (554) The BEH group submitted however that the [supplier's practices] and their consequences for the Bulgarian market should constitute either an objective justification or a mitigating circumstance, which should lead to a significant fine reduction.⁶³⁵ However, one undertaking's (possible) violation of Union competition law cannot be a justification for another undertaking to violate competition law.⁶³⁶ Regarding the relevance of these arguments for determining the gravity of the infringement, the Commission considers these arguments in recitals (715)-(718).

Indispensability of the Romanian Transit Pipeline 1

- (555) The Romanian Transit Pipeline 1, (at least until April 2016), was the only viable route for bringing gas to Bulgaria (see recitals (51)-(54)). Therefore, at least until April 2016 there was no alternative infrastructure that Bulgargaz' competitors could use for bringing gas into Bulgaria (see recitals (265) and (269)).
- (556) An input is considered indispensable if there are technical, legal or even economic obstacles making it impossible, or at least unreasonably difficult, for other operators, such as operators seeking access to that input, to provide that input.⁶³⁷ In gas markets, this means for example that competitors need to be able to replicate the incumbent's network infrastructure in order to compete effectively. The Commission has recognised in its previous decisions that gas import infrastructure were essential facilities as it was not commercially viable to duplicate the infrastructure.⁶³⁸
- (557) Moreover, there are technical and economic obstacles making it impossible, or at least unreasonably difficult, for a would-be user to duplicate import infrastructure

⁶³⁵ See the BEH group submission "Supplement to the BEH groups' defence and request for further access to information in the Commission's possession." Dated 13 June 2018, [...].

⁶³⁶ See, in this sense, *Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s.*, [2013] 7 February 2013, C-68/12, EU:C:2013:71, para, 19..

⁶³⁷ See also *Oscar Bronner*, EU:C:1998:569, paras 44 and 46. ("it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers.") see also, in the scenario of products covered by intellectual property rights, *IMS Health*, EU:C:2004:257, para 29.

⁶³⁸ Commission Decision of 4 May 2010, COMP/39.317 *E.ON Gas*, recital 18; and Commission Decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, recital 97.

(that is, to create the transmission capacity capable of providing an effective competitive constraint on the latter), alone or in cooperation with other users:

- (a) High investment costs, lengthy permission and construction process and the associated risks make it difficult for competitors to reproduce this infrastructure.⁶³⁹
 - (b) In order to operate efficiently, pipeline systems have traditionally been sized with a view to satisfy the totality of national demand plus a safety margin. Therefore, when a system of such infrastructure is already in place, it is extremely unlikely that – in a scenario with stationary or moderately increasing demand - there could be sufficient residual demand for a new infrastructure system to be economically viable.
 - (c) As mentioned in recital (260), Bulgargaz' use did not exceed 65 % of the total daily capacity of the Romanian Transit Pipeline 1. It is clearly not viable to invest into additional infrastructure if the existing one is running half-empty.
- (558) On this basis, the Commission concludes that the Romanian Transit Pipeline 1 was indispensable in order to enter into effective competition with the BEH group on the relevant markets.
- (559) Bulgargaz contests the findings of the Commission.
- (560) First, Bulgargaz argues that Article 17.1 of the 2005 Commercial Agreement between Bulgargaz and Transgaz that required Bulgargaz' consent before third party access could be granted was mutually agreed between the Romanian and Bulgarian parties and not, as the Commission alleges, unilaterally imposed by Bulgargaz.⁶⁴⁰
- (561) Second, Bulgargaz also argues that it could not unilaterally release its unused capacity on the Romanian Transit Pipeline 1 because the Romanian legislation did not provide any rules that would allow for a release of the booked and unused capacity on the secondary market.⁶⁴¹
- (562) Bulgargaz' arguments cannot be accepted for the reasons set out in recitals (563)-(564).
- (563) First, the Commission underlines that it does not allege that Bulgargaz unilaterally imposed Article 17.1 of the 2005 Commercial Agreement. What the Commission argues is that Bulgargaz' was unwilling during a long period to waive its exclusivity right regarding the unused capacity, in spite of various requests to do so, and that this constitutes an infringement of Article 102 TFEU.
- (564) Second, as stated in recital (357), there is no requirement that a secondary market must be established before unused capacity can be released. For example, Bulgargaz was able to grant access to Overgas to the Romanian Transit Pipeline 1 between 2013 and 2015, even in the absence of the established secondary market. In any event, if Bulgargaz was uncertain as to the applicable rules for the secondary market it should have renounced the exclusivity included in the 2005 Commercial

⁶³⁹ Commission Decision of 18 March 2009, COMP/39.402 *RWE Gas Foreclosure*, recital 15; and Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, recital 27.

⁶⁴⁰ Bulgargaz' reply to the SO dated 23 March 2015, recitals 21-26, [...].

⁶⁴¹ Bulgargaz' reply to the SO dated 23 March 2015, recitals 27-29, [...].

Agreement and handed the unused capacity back to Transgaz. If the capacity was handled back to Transgaz, it would have been Transgaz' obligation to organize access to the Romanian Transit Pipeline 1 in an objective, transparent and non-discriminatory manner.

6.2.4.7. Conclusion

- (565) Following careful assessment of the evidence referred to in Sections 5.2.4.2, 5.3.3.2 and 5.4.4.2, the Commission contends that the BEH group's conduct amounted to a refusal to supply, including through offering access on conditions that are disadvantageous and capacity hoarding on the infrastructure that it controls in and leading into Bulgaria. The BEH group's refusal to supply served the purpose of foreclosing third parties from entering the gas supply markets in Bulgaria.

6.3. The BEH group's strategy and BEH's direct involvement

6.3.1. *The strategy*

- (566) The BEH group claims that the Commission is wrong in assuming that it developed a strategy to restrict competition and foreclose third parties from accessing the gas supply markets in Bulgaria and denied that any such strategy existed.⁶⁴²
- (567) To prove an overall strategy, the Commission is not required to point out direct evidence that demonstrates the existence of a coherent anti-competitive plan. The Commission may rely on a body of evidence. In particular, where the practices at issue are of fragmented nature, the Commission may rely on the following elements:
- (a) the infringement was consistent over time;
 - (b) the comparable nature and complementarity of the practices in question;
 - (c) the common standard of being able to foreclose the competitors.⁶⁴³
- (568) Each of these points will be discussed in more detail in Sections 6.3.1.1-6.3.1.5 with respect to the BEH group's behaviour. Finally, the Commission lists other indirect evidence pointing to the existence of the strategy employed by the BEH group.

6.3.1.1. The nature of the strategy

- (569) The BEH group's strategy consisted in maintaining its dominant position in the gas supply business by foreclosing access by its competitors to the gas infrastructure owned or controlled by the BEH group. In other words, despite the entry into force of the regulatory regime, the BEH group continued to behave like it did in the pre-regulatory period, taking advantage of its fully controlled gas infrastructure to foreclose potential competitors from the downstream wholesale supply of gas as well as from the retail supply of gas to large end customers directly connected to the Bulgarian transmission network.
- (570) The strategy was determined by BEH and followed by its two subsidiaries Bulgargaz and Bulgartransgaz.

⁶⁴² BEH's reply to the SO dated 23 March 2015, recitals 94-101.

⁶⁴³ See judgement in *Intel v Commission*, EU:T:2014:547, paras 1528-1530; *Intel Corp. v European Commission*, EU:C:2017:632.

(571) This strategy explains why throughout the investigated period Bulgartransgaz did not comply with its regulatory obligation to grant objective, transparent and non-discriminatory access to the infrastructure controlled by the BEH group. At the same time, Bulgartransgaz always treated Bulgargaz more favourably, often granting access to its infrastructure without imposing the same requirements as it did towards other companies (see Section 5.2.4.1, Section 5.3.3.1 and in particular recital (181)).

6.3.1.2. The infringement was consistent over time

(572) Since the first access request in July 2010 in the newly liberalised Bulgarian gas market, the BEH group consistently prevented restricted and delayed access to the Bulgarian transmission network and UGS Chiren. It also prevented, restricted and delayed access, through capacity hoarding, on the only pipeline bringing gas to Bulgaria. This behaviour was applied in a consistent manner in relation to multiple attempts by several companies to enter gas supply markets in Bulgaria in competition with the BEH group. At the same time, as described in Section 5.2.4.1 and Section 5.3.3.1, Bulgargaz received a far more favourable treatment.

(573) As described in more detail in Section 6.2.4.4, the consistent refusal to grant access to the Bulgarian transmission network comprised: (a) failing to act in a transparent manner and to reply to access request in writing or within the statutory deadlines (see recitals (101), (138), and (139)); (b) making unreasonable requests with regard to access, in particular as to information to be provided or conditions to be fulfilled before treating access requests (see recitals (106), (141) and (156)); and (c) deliberately misinterpreting access requests or providing erroneous information with regard to conditions for access (see recital (106)).

(574) As described in more detail in Section 6.2.4.5 the consistent refusal to grant access to UGS Chiren comprised: (a) failing to reply to parties requesting access or not processing the requests internally (see recitals (214) and (219)-(220)); (b) requiring third parties to supply unreasonable amounts of information or to re-submit access requests based on a deliberate misinterpretation of the information (see recitals (220) and (226)); (c) acting in a non-transparent manner and thus making it more difficult for third parties to apply for storage (see recitals (214) and (240)); and finally (d) designing the access rules for storage in order to ensure that Bulgargaz would have priority access (see recitals (169)-(174)).

(575) The consistent refusal to grant access to the Romanian Import Pipeline 1 comprised: (a) booking the entire capacity of the Romanian Import Pipeline 1 when Bulgargaz used only a very limited part of the total contracted capacity (see recitals (275)-(276)); (b) not agreeing to return the capacity when requested by Transgaz or imposing conditions before the capacity was returned (see recital (297)) (c) not replying to individual access requests (see recital (331)).

(576) Under pressure from the Commission, the BEH group started to gradually change its behaviour and provide limited access to its competitors to the infrastructure owned or controlled by the BEH group. However, the access granted to the Romanian Import Pipeline 1 did not qualify as objective, transparent and non-discriminatory until 1 January 2015 (see recitals (543) and (651)).

6.3.1.3. The comparable nature and complementarity of the practices in question

(577) The BEH group's practices of preventing, restricting and delaying access to the Bulgarian transmission network and the UGS Chiren as well as capacity hoarding on the Romanian Transit Pipeline 1 complemented and mutually reinforced each other.

Access to all three infrastructures is necessary to successfully compete with Bulgargaz on the relevant gas supply markets in Bulgaria (see recitals (418)-(422)). Moreover, the practices were explicitly interlinked, by making access to the Bulgarian transmission network (controlled by Bulgartransgaz) conditional upon third party access to the Romanian Transit Pipeline (controlled by Bulgargaz and subject to authorisation by BEH). Bulgartransgaz commonly refused to grant access to the Bulgarian transmission network unless an applicant could prove it obtained access to the Romanian Transit Pipeline 1 (see recitals (116) and (156)).

- (578) Finally, in order to obtain access to UGS Chiren, access to the Bulgarian transmission network is required (as the only infrastructure that could bring the gas to the storage). Therefore, when granting access to UGS Chiren Bulgartransgaz also grants the corresponding access to the Bulgarian transmission network (see recital (168)). Finally, the ability to access UGS Chiren, certainly during the infringement period, was indirectly linked to the ability to access the Romanian Transit Pipeline 1. This is because the Romanian Transit Pipeline 1 was the only route bringing gas to the Bulgarian Transmission Network during the infringement period (see recital (51)).
- (579) Bulgartransgaz and Bulgargaz were thus able to influence and jointly contribute to the prevention, restriction and delay of third party access to the infrastructure owned or controlled by the BEH group. Moreover, as described in Section 5.2.4.1 and Section 5.3.3.1 and recital (383) Bulgargaz and Bulgartransgaz were coordinating their behaviour in relation to third party access requests and dealt with each other as entities within an integrated undertaking. BEH was also directly involved in all those practices (see recitals (583)-(591)).

6.3.1.4. The practices were able to foreclose competitors

- (580) Each of the actions referred to in recitals (577)-(579) could have foreclosed the BEH group's competitors from the Bulgarian gas supply market. Because of the BEH group's behaviour with respect to the Bulgarian transmission network, at least three undertakings (Overgas, Toplofikacia Razgrad and RWE) encountered major problems in accessing these networks; and with respect to UGS Chiren, at least three companies ([COMPANY 5], [COMPANY 6] and Overgas) encountered major problems in accessing these networks.
- (581) Because of the BEH group's behaviour with respect to the Romanian Transit Pipeline 1, no access was granted to third parties until at least 2013. Access was finally granted to Overgas in 2013, but after a delay, only on a short-term basis and only under uncertain conditions (see recital (312)).
- (582) This behaviour caused substantial uncertainties among the undertakings who wished to access the relevant infrastructure and ultimately to enter the gas supply markets in Bulgaria in competition with Bulgargaz.

6.3.1.5. Other indirect evidence of the BEH group's strategy

- (583) As stated in recital (373), the BEH group initially did not disguise that, despite market liberalisation, it behaved as if it would behave in a pre-regulatory period. Bulgartransgaz (in public statements made in the press) admitted that it did not deal with Bulgargaz as a separate entity and on an arm's length basis.
- (584) As described in recital (383), Bulgartransgaz, upon Bulgargaz' request, provided Bulgargaz with its competitors' access requests (including that of Overcourtergas and [COMPANY 5]) to the Bulgarian transmission network and to UGS Chiren, respectively. Bulgartransgaz also informed Bulgargaz on the status of its dealings

with Bulgargaz' competitors (for example, Bulgartransgaz disclosed that it had asked Overgas to provide additional information following its request for access to the Bulgarian transmission network.

- (585) As explained in recital (97) Bulgartransgaz was fully aware that granting a preferential treatment to Bulgargaz, which belonged to the same corporate group as Bulgartransgaz, in accessing the gas infrastructure owned by the BEH group was illegal. It even explicitly admitted that it exposed the undertaking to the accusation of not granting third party access to gas storage (see recital (183)).
- (586) Finally, BEH was also directly involved in the abusive practices of its subsidiaries (see Section 6.2.2.3).
- (587) The BEH group contests the findings of the Commission.
- (588) First, the BEH group contests the existence of any strategy and argues that the Commission failed to prove, as required by the case law, that there was an agreement or a concurrence of wills between BEH, Bulgargaz and Bulgartransgaz.
- (589) Second, BEH claims that the Commission does not put forward any internal documents, corporate presentations or minutes of meetings referring to the anticompetitive strategy but the Commission relies on evidence provided by the BEH group itself.⁶⁴⁴ Bulgargaz points out that the Commission's file lacks evidence of 'active coordination' by BEH of the behaviour of Bulgargaz and Bulgartransgaz and that Commission cannot presume a strategy based on limited approval rights of BEH.⁶⁴⁵ Finally, BEH claims that the Commission only relied on the information supplied by the BEH group itself and did not gain any other evidence in this respect.
- (590) The BEH group's arguments cannot be accepted because the entire case law that the BEH group relies on to show that the Commission failed to meet the required burden of proof as regards the concurrence of wills between the undertakings concerned relates to Article 101 TFEU. However, the BEH group forms a single economic unit, in which situation the required standard of proof as regards the concurrence of wills concerning independent economic units does not apply.⁶⁴⁶ In this respect, if the subsidiary's strategy is determined by the parent, the parent and subsidiary will pursue a common course irrespective of the existence of any agreement between them.⁶⁴⁷
- (591) Second, the fact that the Commission relied on the documents provided by the BEH group itself does not in any way undermine the Commission's finding. On the contrary, it is prudent to rely on documents coming directly from the undertaking concerned. Moreover, to prove an overall strategy, the Commission is not required to

⁶⁴⁴ BEH's reply to the Commission Letter of Facts dated 26 September 2016, recitals 46-47.

⁶⁴⁵ See Bulgargaz' reply to the Commission Letter of Facts dated 26 September 2016, recitals 23-29 and 36-39.

⁶⁴⁶ *Imperial Chemical Industries v Commission* (Dyestuffs), C-48/69, EU:C:1972:70, paras 132-136; *Viho Europe BV v Commission*, EU:C:1996:405, para 16; *Viho Europe BV v Commission*, T-102/92 EU:T:1995:3, para 47.

⁶⁴⁷ See *Shell v Commission*, ECLI:EU:T:1991:38, recitals 312 – 315. The unified conduct on the market of the parent undertaking and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities. See *Viho Europe BV v Commission*, EU:T:1995:3 paras 54-68 and *Akzo Nobel v Commission*, Case C-97/08 P, EU:C:2009:536 para 55.

point out direct evidence that demonstrates the existence of a coherent anti-competitive plan. The Commission may rely on a body of evidence as it has been presented in Section 6.3.1. This entire body of evidence and not only the approval rights make clear that the BEH group followed a strategy in implementing the infringement.

6.3.2. *BEH's involvement*

- (592) According to settled case law, the Commission can generally presume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent undertaking, i.e. the Commission is not required to review whether the parent undertaking has in fact exercised that power.⁶⁴⁸ Moreover, actions of a mother undertaking and its subsidiaries qualify as an action of a single undertaking under Article 102 TFEU.⁶⁴⁹
- (593) Nevertheless, for the sake of completeness and without being required by the case-law to do so, the Commission notes that BEH controls the actions and omissions of Bulgargaz and that, at least between 2007 and 2015, it also controlled the actions and omissions of Bulgartransgaz, with respect to access requests to the Bulgarian transmission network and UGS Chiren. In this sense, until January 2015, neither subsidiary operated as independent undertaking (see Section 6.2.2.2). All three undertakings together, BEH, Bulgargaz and Bulgartransgaz formed a single economic unit.
- (594) By acting as an integrated undertaking, the BEH group was in a position to ensure consistent implementation of the strategy, orchestrated and controlled by the mother undertaking, BEH.
- (595) Finally, also for the sake of completeness, the Commission presents evidence showing BEH's direct participation in the infringement. To this end, the Commission provides examples that BEH directly participated in access refusals on the Bulgarian transmission network, UGS Chiren and the capacity hoarding on the Romanian Transit Pipeline 1 (see Section 6.2.2.3).
- (596) The BEH group contests the findings of the Commission.
- (597) First, the BEH group contests its participation in the infringement. According to BEH, the Commission's assumption that a 100% shareholding justifies a finding of direct involvement in the alleged abuse would stretch the parental liability test disproportionately so that both the existence of decisive influence and the application of the alleged anticompetitive conduct are caught under the very same presumption.

⁶⁴⁸ Judgement in *Akzo Nobel and Others v Commission*, EU:C:2009:536, para 60. See also Judgment of 12 December 2007, *Akzo Nobel and Others v Commission*, T-112/05, EU:T:2007:381, para 60; *Akzo Nobel v Commission*, T-330/01, EU:T:2006:269 para 83; Judgment of 15 June 2005, *Tokai Carbon and Others v Commission*, Joined Cases T-71/03, EU:T:2005:220, para 60; Judgment of 14 May 1998, *Stora Kopparbergs Bergslags v Commission*, T-354/94, EU:T:1998:104, para 80, upheld in judgment *Stora Kopparbergs Bergslags v Commission*, C-286/98, EU:C:2000:630, paras 27-29; and judgment in *AEG v Commission*, C-107/82, EU:C:1983:293, para 50.

⁶⁴⁹ See *Shell v Commission*, ECLI:EU:T:1991:38, paras 312–315, *Imperial Chemical Industries v Commission* (Dyestuffs), EU:C:1972:70 paras 132-136; *Viho Europe BV v Commission*, EU:C:1996:405, para 16; *Viho Europe BV v Commission*, EU:T:1995:3, para 47.

- (598) Second, according to the BEH group, its subsidiaries operated independently from BEH. According to the BEH group, the lack of economic, organizational and legal links tying BEH, Bulgargaz and Bulgartransgaz together effectively rebuts the presumption that BEH exercised decisive influence over the subsidiaries. BEH points out that since January 2012, the contracts of Bulgartransgaz with third parties for access to gas transmission and storage do not require BEH's approval. BEH claims that it was not aware of the infringement; and in any event, it did not participate directly in any of the allegedly infringing conduct.
- (599) Third, the BEH group claims that the Commission attempts to interpret formal and bureaucratic ratifications granted by BEH to decisions of its portfolio companies as instructions to engage in an anticompetitive behaviour. BEH claims that this is not the case because BEH is a pure financial holding that behaves like a financial investor.
- (600) Fourth, the BEH group submits that in light of the Certification Opinion, BEH is almost fully deprived of any influence over Bulgartransgaz by virtue of a strict regulatory regime. In addition, according to BEH, the Decision of the Council of Ministers of 13 February 2008 set a clear separation of the roles of BEH and the gas portfolio companies. Moreover, BEH and Bulgartransgaz point out the Bulgarian Competition Authority's decision⁶⁵⁰ that, according to them, states that BEH and its gas portfolio companies 'will continue to be separate and independent from other companies within the holding and from the BEH economic unit'. Finally, the BEH group invokes the State Audit Report for the period 1 January 2011 to 30 June 2013 that concluded that BEH is not in charge of the operative management of its gas portfolio companies.⁶⁵¹
- (601) The BEH group's arguments cannot be accepted for the reasons set out in recitals (602)-(607).
- (602) First, it is settled case law that a wholly owned subsidiary can be assumed – absent convincing evidence to the contrary – to essentially follow the instructions of the parent undertaking and not have a real autonomy in determining its course of action.⁶⁵² Nevertheless, for the sake of completeness and without being required to do so, the Commission demonstrates how BEH directly controlled the course of action of its subsidiaries and presents evidence that BEH directly participated in refusals to grant access to the gas infrastructure controlled by the BEH group (see Section 6.2.2.2 and Section 6.2.2.3).
- (603) Second, the mere fact that a subsidiary has a separate legal personality is not sufficient to exclude that its conduct could be attributed to the parent undertaking.⁶⁵³

⁶⁵⁰ Decision no 505 dated 24 June 2008 of the Bulgarian Commission for Protection of Competition.

⁶⁵¹ State Audit Report on the financial performance and structure of BEH in the period between 1 January 2011 and 30 June 2013, conclusion no. 25. See also BEH's reply to the Commission Letter of Facts dated 26 September 2016, recital 24.

⁶⁵² See in this sense *the Goldman Sachs Group, Inc v Commission*, Case T-419/14, EU:T:2018:445, para 45 and *Pirelli & C. SpA v European Commission*, Case T-455/14, EU:T:2018:450, para 69.

⁶⁵³ Judgment in *Imperial Chemical Industries v Commission* (Dyestuffs), EU:C:1972:70 paras 132-133; Judgment in *Hydrotherm Gerätebau*, C-170/83, EU:C:1984:271, para 11; and judgment of 12 January 1995, *Viho Europe BV v Commission*, EU:T:1995:3, para 50, cited also in judgment of 30 September 2003, *Michelin v Commission*, T-203/01, EU:T:2003:250, para 290.

The Commission also considers that BEH has failed to demonstrate the autonomy of the two subsidiaries on a broad scale, having regard to their potential economic, legal and organizational independence. Taking into consideration BEH's influence on Bulgargaz' and Bulgartransgaz' management, business plans and the assessment of third party access requests to the gas infrastructure controlled by the BEH group, it cannot be accepted that BEH's subsidiaries operated independently from BEH. For the same reason, the Commission does not accept BEH's argument that it was not aware of its subsidiaries' infringement. Although, as of January 2012, BEH's approval is indeed no longer needed to obtain access to the gas infrastructure controlled by Bulgartransgaz, by making access to the Bulgarian Transition Network conditional on first obtaining access to the Romanian Transit Pipeline 1 (which was fully booked by Bulgargaz), Bulgargaz and BEH continued to have indirect influence on which undertakings would obtain access to the Bulgarian transmission network (see recital (133)).⁶⁵⁴

- (604) Third, the Commission does not accept that the control BEH enjoys over the access granted to the infrastructure controlled by the BEH group is simply formal or bureaucratic. The Commission demonstrates in Section 6.2.2.2, that these rights, among others, allow BEH to exercise a direct influence over the actions of its subsidiaries. Moreover, the fact that BEH presents itself as a pure financial holding has no bearing on BEH's rights and powers as owner of Bulgargaz and Bulgartransgaz.
- (605) Fourth, according to the settled case law, even if an undertaking's behaviour is compliant with sector legislation, Union competition rules may nonetheless be applied for instance if the legislation is ineffective to prevent anti-competitive behaviour or if the legislation has different objectives from those envisaged by Union competition policy.⁶⁵⁵ In any event, The EWRC's certification decision was issued only on 22 June 2015.⁶⁵⁶ Until that point in time, Bulgartransgaz could not have been deemed compliant with the regulatory regime requiring separation between the supply and infrastructure arm. The Commission's Certification Opinion, issued shortly before the EWRC's certification decision, pointed to several factors that put Bulgartransgaz' independence from the BEH group into question.⁶⁵⁷ Finally, the

⁶⁵⁴ As explained in recitals (113) and (131), in order to obtain access to the Bulgarian transmission network, Bulgartransgaz required the applicants to first prove that they had access to the only upstream pipeline (i.e. the Romanian Transit Pipeline 1).

⁶⁵⁵ Judgment in *Deutsche Telekom v Commission*, EU:C:2010:603, para 227.

⁶⁵⁶ See the EWRC's decision No.C-4 of 22 June 2015.

⁶⁵⁷ Directive 2009/73/EC requires that undertakings designated as an ITO are certified in line with the procedure established under Article 3 of Regulation (EC) No 715/2009. The purpose of the certification procedure is to ensure that a designated TSO complies with all the regulatory requirements as established in the Directive 2009/73/EC. The Certification Opinion pointed out to several factors which, at the time, put Bulgartransgaz' independence from the BEH group into question, and these included: (a) loans granted by Bulgartransgaz to BEH, (b) the stability of Bulgartransgaz' management (referring to the fact that the management was subject to abrupt dismissals despite the need for the TSO management to be stable in order to properly manage the infrastructure concerned) and (c) the fact that the access to the Bulgarian transmission network is conditional on first obtaining access to the neighbouring Romanian Transit Pipeline 1, the capacity of which was at the time fully booked by Bulgargaz (see pages 2-3 of the Certification Opinion). The Certification Opinion then required EWRC to take utmost account of the Commission's comments when issuing its certification decision.

Certification Opinion clearly states that it is without prejudice to Commission procedures under the Union competition rules.⁶⁵⁸

- (606) With respect to the reports issued by various other public bodies in Bulgaria, including the Council of Ministers, the Bulgarian Competition Authority or the State Audit Report, the Commission is not bound by their assessment. The criteria and the purpose for an assessment concerning independence of undertakings conducted by any other national or international body might be different from those considered by the Commission in an antitrust investigation.
- (607) For the sake of completeness, the Commission also notes that in 2012, another Bulgarian authority, the EWRC, took the view that within the integrated undertaking, BEH was able to control and exercise influence over the decision-making process of Bulgartransgaz regarding its transmission activity.⁶⁵⁹

6.4. Single and continuous infringement

- (608) As set out in Section 6.2.4, the BEH group's practices amount to a refusal to supply, resulting in the foreclosure of gas supply markets in Bulgaria. These practices constituted a single and continuous infringement under Article 102 TFEU.
- (609) The BEH group's behaviour (as described in more detail in Section 6.3) formed part of an overall plan to foreclose gas supply markets in Bulgaria.
- (610) First, as explained in Sections 5.2.3, 5.3.2 and 5.4.3, the European and Bulgarian regulatory frameworks require that operators of transport infrastructure and storage grant objective, transparent and non-discriminatory access to the relevant infrastructure. Access to such infrastructure is required in order to operate in a viable manner on the downstream wholesale gas supply market in Bulgaria and on the market for the retail supply of gas to large end customers directly connected to the Bulgarian transmission network.
- (611) Each of the BEH group's three practices, namely access refusals (including preventing, restricting and delaying access) in relation to both the Bulgarian transmission network and to UGS Chiren, as well as capacity hoarding on the Romanian Transit Pipeline 1, had the ability to foreclose the BEH group's competitors on the downstream wholesale gas supply market in Bulgaria and on the market for the retail supply of gas to large end customers directly connected to the Bulgarian transmission network. More specifically, with regard to the Bulgarian transmission network and UGS Chiren, Bulgartransgaz (by virtue of being the owner of both relevant infrastructures) prevented, restricted and delayed third party access to the benefit of Bulgargaz. In addition, Bulgargaz itself had the ability to foreclose its competitors on the gas supply markets in Bulgaria by hoarding capacity on the only viable import pipeline bringing gas to Bulgaria, the Romanian Transit Pipeline

According to Regulation (EC) No 715/2009, Article 3(2), the national regulatory authority shall adopt its final decision regarding the certification of TSO, taking the utmost account of the Commission Opinion. [...]. There is no "approval process" for the final certification decision of the national regulatory authority by the Commission.

⁶⁵⁸ See Commission Opinion of 22 April 2015 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Bulgaria - Bulgartransgaz, page 3, [...].

⁶⁵⁹ See EWRC's reply to the Commission's request for information dated 17 July 2012, question 22 [page 21], [...].

1. Moreover, as described in Section 6.2.2, BEH closely supervised the behaviour of the two subsidiaries. Until January 2012, prior approval by BEH's Board of Directors was necessary in order for Bulgartransgaz to grant third party access to the Bulgarian transmission network and to UGS Chiren. As of January 2012, BEH's approval was in theory no longer required, but in practice BEH maintained the control, since access to the Bulgarian transmission network (and thereby indirectly also access to the storage facility) was conditional upon first obtaining access to the Romanian Transit Pipeline 1, for which BEH's prior approval was required (see point (b) recital (311)).

- (612) Second, the BEH group's three practices complemented and mutually reinforced each other and were implemented with the single aim of foreclosing the gas supply markets in Bulgaria. As shown in recital (382) Bulgargaz and Bulgartransgaz were coordinating in relation to third party access requests and dealing with each other as entities within an integrated undertaking. The practices were also explicitly interlinked, as described in Sections 5.2.4.2, by making access to the Bulgarian transmission network (controlled by Bulgartransgaz) conditional upon third party access to the Romanian Transit Pipeline 1 (controlled by Bulgargaz) and subject to authorisation by BEH. This allowed BEH, Bulgartransgaz and Bulgargaz to influence each others' practices and together they contributed to preventing, restricting and delaying third party access to the infrastructure owned or controlled by the BEH group. It also allowed the BEH group to coordinate its behaviour in a consistent manner by applying similar methods.
- (613) Finally, the existence of the BEH group's strategy was also known to market participants. As described in recital (278), potential new entrants to the gas markets in Bulgaria were aware that they could not take full advantage of the market liberalisation in Bulgaria.
- (614) It can therefore be concluded that the practices of the BEH group with respect to the Bulgarian transmission network, the Romanian Transit Pipeline 1 and UGS Chiren constituted a comprehensive and long-term plan to foreclose gas supply markets in Bulgaria to the benefit of Bulgargaz, the gas supply arm of the group. The BEH group therefore engaged in a single and continuous infringement.

6.5. The conduct was capable of having anticompetitive effects

- (615) In recitals (620)-(630), the Commission establishes that the BEH group's conduct was capable of having anticompetitive effects on the relevant markets.
- (616) The General Court has ruled that, '*for the purposes of establishing an infringement of Article 82 EC [now 102 TFEU], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or is likely to have, such an effect.*'⁶⁶⁰
- (617) Furthermore, it should be added that, '*where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the*

⁶⁶⁰ *British Airways plc vs. Commission of the European Communities*, EU:C:2006:133, para 293; and see also judgment in *Clearstream*, EU:T:2009:317, para 144.

*result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82 EC [now 102 TFEU].*⁶⁶¹

- (618) The Commission's practice in relation to abuses of dominance that exclude market players from the market is, in line with the cited case law, to show that the behaviour tends to distort competition on the relevant market (or on an upstream or downstream market), or that the behaviour is capable of having such an effect. It is not necessary for the Commission to demonstrate the actual effects of the behaviour in question.
- (619) Further, where the behaviour raises barriers to trade between Member States and consequently to the internal market, the Commission considers that the behaviour in and of itself affects competition within the internal market.⁶⁶²
- (620) The BEH group's conduct had the ability to prevent the development of effective competition on the gas supply markets in Bulgaria. The BEH group's abusive behaviour was capable of creating barriers to market entry and therefore also of limiting the degree of competition on these markets. In fact, the BEH group made it more difficult (or even impossible) for potential competitors to enter into the gas supply markets in Bulgaria. If competition had not been restricted, suppliers other than Bulgargaz may well have been operating on the gas supply markets in Bulgaria earlier and to a greater extent, bringing with them further competition and choice to the benefit of Bulgarian consumers.
- (621) As set out in Section 6.2.3 above, the BEH group, through its supply arm Bulgargaz, holds a quasi-monopolistic position and faces no viable competition on the Bulgarian wholesale gas market and on the retail gas market for large end customers connected directly to the Bulgarian transmission network. By refusing third parties access to the Bulgarian transmission network, UGS Chiren and the Romanian Transit Pipeline 1, the BEH group restricted the development of competition and ensured that its dominant position on downstream markets was effectively maintained.
- (622) With regard to the Bulgarian transmission network, undertakings that did not have access to the network were foreclosed from entering the gas supply markets in Bulgaria. The BEH group's refusal to supply had the ability to block third party access to these markets or at least very severely restricted it for years. The Commission also notes that there was an increased interest in customers diversifying their gas supplies, as shown by the number of potential contracts between suppliers (such as Overgas) and end customers (some of which were lost due to the lack of network access).⁶⁶³ In this respect, and as described in Section 5.2.4.2, Overgas' access to the Bulgarian transmission network was too limited and uncertain to allow Overgas to viably compete with Bulgargaz until 1 January 2015.
- (623) As concerns UGS Chiren, the BEH group's strategy to refuse access to the only storage facility in Bulgaria had the ability to prevent competitors from developing their offers on equal terms on the gas supply markets in Bulgaria. As set out in

⁶⁶¹ Judgment of 30 January 2007, *France Télécom*, T-340/03, EU:T:2007:22, para 196; see also Judgment of 8 October 1996 *Compagnie maritime belge transports and Others v Commission*, Joined Cases T-24/93 to T-26/93 and T-28/93, EU:T:1996:139, para 149; and judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, para 191.

⁶⁶² Commission Decision of 3 December 2009, COMP/39.316 *Gaz de France*, para 41.

⁶⁶³ See Section 5.2.4.2, recitals (98) - (99) and (100).

Section 4.4.3, underground gas storage facilities enable gas suppliers to manage (in particular seasonal) fluctuations in customer demand and changes to contracted gas deliveries. Therefore, at least until 23 September 2014, the lack of/limited access to UGS Chiren made it considerably more difficult for competitors to seriously challenge the BEH group's dominance on the gas supply markets in Bulgaria (see recital (208)).

- (624) Bulgargaz' capacity hoarding on the Romanian Transit Pipeline 1 also had the ability to restrict the possibility of viable competition on the gas supply markets in Bulgaria. As described in Section 5.4.4, Bulgargaz for many years reserved to itself the full capacity on the Romanian Transit Pipeline 1. Although Bulgargaz in 2013 granted limited capacity access to Overgas, the access granted was of a too short-term and uncertain nature to allow viable competition to develop (see recital (543)). At least until 1 January 2015, the access granted to the Romanian Transit Pipeline 1 was not objective transparent and non-discriminatory (see recital (651)). On that basis, at least until 1 January 2015, potential competitors were prevented from viably competing with Bulgargaz on the wholesale gas supply market in Bulgaria.
- (625) The potential effects of the BEH group's behaviour on the market are reinforced by the fact that the infrastructure that the BEH group controls is indispensable for third parties wishing to compete on the gas supply markets in Bulgaria.
- (626) First, with regard to the Bulgarian transmission network, the Commission notes that there is no competing transmission network available. Access to this network is therefore vital in order to deliver gas to large end customers directly connected to the Bulgarian transmission network, as well as to local distribution networks. Access is also necessary for transporting gas to UGS Chiren.
- (627) Moreover, there are technical and economic obstacles making it impossible, or at least unreasonably difficult, for a would-be user to duplicate Bulgartransgaz' system of transmission infrastructure (that is, to create the transmission capacity capable of providing an effective competitive constraint on the latter), alone or in cooperation with other users. For example:
 - (a) in order to operate efficiently, national pipeline systems have traditionally been sized with a view to satisfy the totality of national demand plus a safety margin. As a consequence, when a system of such infrastructure is already in place, it is extremely unlikely that – in a scenario with stationary or moderately increasing demand - there could be sufficient residual demand for a new infrastructure system to be economically viable. Gas networks are therefore in most cases considered as natural monopolies.⁶⁶⁴ As described in Section 6.1.1, European and national legislations also recognize the 'natural monopoly' character of gas transmission infrastructure; and
 - (b) Bulgarian domestic consumption has fallen considerably since the 1990s and the Bulgarian transmission network was dimensioned to carry considerably higher volumes than are needed today (see recital (61)). It is clearly not viable to invest into additional infrastructure if the existing one is running half-empty.

⁶⁶⁴ See Commission Decision of 29 September 2010, COMP/39.315 *ENI*, recital 42.

- (628) Second, as concerns UGS Chiren, the Commission notes that there is only one gas storage facility in Bulgaria - UGS Chiren. As described in Section 5.3.1 above, there are technical and economic obstacles making it unreasonably difficult to duplicate UGS Chiren. As described in Section 5.3.2, Union legislation and Bulgarian national legislation also recognize the 'natural monopoly' character of a gas storage facility.⁶⁶⁵ Moreover, the Commission notes that:
- (a) storage facilities in neighbouring countries do not constitute an alternative, since, the Bulgarian transmission network is not sufficiently interconnected to neighbouring countries (see Section 5.2); and
 - (b) there are technical and economic obstacles making it unreasonably difficult to convert a depleted gas field into a gas storage infrastructure. As set out in recital (67), there is a gas field which could be converted into storage in Bulgaria (Galata) but the concessionaire has not obtained the relevant approvals for converting the gas field into storage. Further, Bulgarian law imposes certain license requirements to operate a storage facility, which in practice has proved very difficult to obtain.
- (629) Third, the Romanian Transit Pipeline 1 was, at least until April 2016, the only viable import route for importing gas into Bulgaria (see Section 5.4.2). The indispensable nature of the Romanian Transit Pipeline 1 is also explained in recitals (549)- (558). In addition, the Commission notes that:
- (a) domestic production is limited and largely contracted by the BEH group;
 - (b) there is no liquid hub for gas trading in Bulgaria;
 - (c) as described in Section 5.4.3, both Union legislation and national Romanian legislation recognises the 'natural monopoly' character of the import infrastructure; and
 - (d) as set out in Section 5.4.2, other infrastructure projects for connecting Bulgarian gas networks to neighbouring countries have been significantly delayed. In addition, these projects would in any case be insufficient to provide any effective short-term competitive constraint on the BEH group.
- (630) In conclusion, due to the BEH group's refusal to supply, access of third parties to the infrastructure was blocked for years, which has restricted the development of competition and protected the BEH group's dominant position on the gas supply markets in Bulgaria.

6.6. Objective justification

- (631) Conduct that *prima facie* constitutes an abuse can escape the prohibition of Article 102 TFEU if the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies that outweigh the negative effects on competition. The burden of proof for such an objective

⁶⁶⁵ Article 33 of Directive 2009/73/EC states that the Member States shall ensure access to the storage facilities in their countries when it is technically and economically necessary. Once a Member States opts to make an access to storage mandatory it recognizes a monopoly character of a storage facility in its country. As described in section 5.3.2, in Bulgaria, storage operators are obliged to grant access to gas storage facilities.

justification or efficiency defence is on the dominant undertaking.⁶⁶⁶ It is for the undertaking invoking the defence against a finding of an infringement to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied.⁶⁶⁷ The Commission then, if it still proposes to make a finding of an abuse of a dominant position, has to show that the arguments and evidence relied upon by the undertaking cannot prevail and that therefore the justification put forward by the undertaking cannot be accepted.⁶⁶⁸

- (632) As explained in Section 5.2.3 and Section 5.3.2 above, the European regulatory framework makes clear that operators of transport infrastructure and storage must grant any gas supplier non-discriminatory access to the relevant infrastructure. Undertakings may only refuse access under certain narrowly defined conditions. The Commission also proved that the lack of access to the Romanian Transit Pipeline 1 was likely to eliminate competition, was not objectively justified and that the access to the Romanian Transit Pipeline 1 was indispensable (see recitals (460) and (552)-(558).
- (633) The BEH group has not provided any arguments that its refusal to grant third party access to the Bulgarian transmission network, UGS Chiren and the Romanian Transit Pipeline 1 could be objectively justified, or that it is necessary for the achievement of efficiency gains which could counteract any likely negative effects on competition and consumer welfare without eliminating effective competition.
- (634) The BEH group submitted however that the [supplier's practices] and their consequences for the Bulgarian market should constitute either an objective justification or a mitigating circumstance which should lead to a significant fine reduction.⁶⁶⁹ The Commission has considered these arguments in recitals (715)-(718).

6.7. Substantial part of the internal market

- (635) In *Suiker Unie*, the Court established that for the purpose of determining whether a specific territory is large enough to amount to a substantial part of the internal market within the meaning of Article 102 THEU '*the pattern and volume of production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered*'.⁶⁷⁰ The General Court has also ruled that if the relevant geographic market corresponds to the territory of a Member State, it can be regarded as constituting a substantial part of the internal market.⁶⁷¹ In *Merci*

⁶⁶⁶ See judgment in *Post Danmark*, C-209/10, EU:C:2012:172, paras 41-42.

⁶⁶⁷ 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 TFEU], OJ L 1, 4.1.2003, recital 5 and article 2; judgment in *Post Danmark* EU:C:2012:172, paras 41-42.

⁶⁶⁸ See judgment in *Microsoft v Commission*, T-201/04, EU:T:2007:289, para 688.

⁶⁶⁹ See the BEH group submission "Supplement to the BEH group's defence and request for further access to information in the Commission's possession." Dated 13 June 2018, [...].

⁶⁷⁰ Judgment in *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission*, C-40/73, EU:C:1975:174, para 371.

⁶⁷¹ Judgment in *Irish Sugar v Commission*, EU:T:1999:246, para 99.

Convenzionali Porto di Genova,⁶⁷² the decisive criteria were considered to be the volume of traffic in the Port of Genoa, and that port's importance in relation to maritime import and export operations as a whole in the Member State concerned.

- (636) Where an undertaking that holds a dominant position covering the whole of a Member State engages in exclusionary abuses, such abusive conduct will generally make it more difficult for competitors from other Member States to enter the market, in which case patterns of trade are capable of being affected.⁶⁷³
- (637) The BEH group's refusal to grant access to the Bulgarian transmission network, the UGS Chiren and the capacity hoarding on the Romanian Transit Pipeline 1 between 30 July 2010 and 1 January 2015 *de facto* prevented third parties from other Member States from accessing the gas supply markets in Bulgaria.

6.8. Capability to affect trade between Member States

- (638) Article 102 TFEU prohibits any abuse of a dominant position within the internal market or in a substantial part of it insofar as it may affect trade between Member States. An abuse of a dominant position affects trade between Member States when it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States.⁶⁷⁴ This does not imply, however, that each element of the behaviour must be assessed in isolation. Conduct that forms part of an overall strategy pursued by the dominant undertaking must be assessed in terms of its overall impact. Where a dominant undertaking adopts various practices in pursuit of the same aim, for instance practices that aim at eliminating or foreclosing competitors, in order for Article 102 TFEU to be applicable to all the practices forming part of this overall strategy, it is sufficient that at least one of these practices is capable of affecting trade between Member States.⁶⁷⁵
- (639) As the Court of Justice held in *United Brands*, if an undertaking established in the internal market and holding a dominant position aims at eliminating competitors that are also established in the internal market, it is immaterial whether this behaviour directly relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition within the internal market.⁶⁷⁶
- (640) The Court of Justice held that '*Article 82 [now 102 TFEU] does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect*'.⁶⁷⁷ The Court also clarified that it

⁶⁷² Judgment in *Merci convenzionali porto di Genova SpA v Sidergica Gabrielli SpA*, C-179/90 EU:C:1991:464, para 15.

⁶⁷³ See judgment in *BPB Industries and British Gypsum v Commission*, EU:T:1993:31, paras 135-137. See also Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101/81, 27.4.2004, recital 93.

⁶⁷⁴ See judgment in *Bagnasco and Others*, C-215/96, EU:C:1999:12, para 47.

⁶⁷⁵ See judgment in *Hoffmann-La Roche*, EU:C:1979:36, paras 123-126. See also Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101/81, 27.4.2004, recital 17.

⁶⁷⁶ See judgment in *United Brands*, EU:C:1978:22, para 201.

⁶⁷⁷ See judgment in *Michelin*, EU:C:1983:313, para 104; see also judgment in *Radio Telefís Éireann*, EU:C:1995:98, paras 69-70.

follows from well-established case law that the interpretation and application of the condition relating to effects on trade between Member States 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.

- (641) Thus, Union law covers any agreement or any practice that is capable of constituting a threat to freedom of trade between Member States in a manner that might harm the attainment of the objectives of a single market, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market.⁶⁷⁸
- (642) The BEH group's behaviour, until 1 January 2015, was capable of affecting import flows and hindering foreign competitors from competing on the gas supply markets in Bulgaria. By definition, restricting the possibility for companies active in other Member States to become economically active in Bulgaria affects trade between Member States.⁶⁷⁹

6.9. Conclusion on the infringement to Article 102 TFEU

- (643) The Commission therefore takes the view that the BEH group's consistent strategy to prevent, delay and restrict third party access to the Bulgarian transmission network, UGS Chiren and Romanian Transit Pipeline 1 (by capacity hoarding) between 30 July 2010 and 1 January 2015 amounted to an abusive refusal to supply, resulting in a foreclosure of Bulgarian gas supply markets. This constituted an abuse of the BEH group's dominant position under Article 102 TFEU.

6.10. Duration of the infringement

- (644) The liberalisation of the Bulgarian gas market for both the transmission network and the storage came into effect on 1 July 2007. From this day on, the BEH group should have provided access to this infrastructure on objective, transparent and non-discriminatory terms as well as terminated its exclusive booking of the capacity on the only import pipeline bringing gas to Bulgaria, thereby allowing third parties to viably compete on the gas supply markets in Bulgaria.⁶⁸⁰
- (645) The BEH group argues that for its behaviour to be abusive there must be demand to access the relevant gas infrastructure.⁶⁸¹ Although the Commission considers that an abusive behaviour can also take place if an undertaking abstains from offering capacity that is reserved but is not used,⁶⁸² however indeed at the beginning of the liberalisation period in Bulgaria demand for access to the liberalised infrastructure was very limited, if any at all. Nevertheless, at the latest, when the actual demand to access the relevant infrastructure materialised, and the BEH group became aware of such demand, the BEH group should have taken all the necessary steps in relation to

⁶⁷⁸ Judgment in *Hugin Kassaregister and Hugin Cash Registers v Commission*, C-22/78, EU:C:1979:138 para 17; Judgment in *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, para 47; Judgment in *Dalmine v Commission*, C-407/04, EU:C:2007:53, para 89.

⁶⁷⁹ Judgment in *Verband der Sachversicherer v Commission*, C-45/85, EU:C:1987:34, paras 47-50.

⁶⁸⁰ See Case COMP/39.401 – E.ON/GDF, see recitals 286-287 and 292-297.

⁶⁸¹ See the BEH group "non-paper on the duration of the alleged infringement", dated 12 October 2016, recitals 6-7 [...]. See also Case COMP/39.315 – ENI, see recitals 43 and 45-50.

⁶⁸² See Case COMP/39.315 – ENI, see recitals 45-50.

the three infrastructures concerned in order to grant access to third parties. This is considered separately for each of the infrastructures concerned in Section 6.10.1, Section 6.10.2 and Section 6.10.3.

6.10.1. The Bulgarian transmission network

- (646) The first access request to the Bulgarian transmission network, which was not granted, was made by Overgas on 30 July 2010 (see recital (101)). Therefore, the anticompetitive conduct concerning the Bulgarian transmission network started on 30 July 2010.
- (647) As concerns the end date of this anticompetitive conduct, Bulgartransgaz started granting uninterrupted access to Overgas as of 1 January 2014. There is also no information on the Commission's file that any other undertaking was denied access to the Bulgarian Transmission network after 1 January 2014 (see recital (116)). However, as the access to the Bulgarian transmission network was fully dependent at that time on the access to the Romanian Transit Pipeline 1 (see recital (116)), the end date of the anticompetitive conduct concerning the Bulgarian transmission network should be linked to the end date of the anticompetitive conduct concerning the Romanian Transit Pipeline 1.

6.10.2. The UGS Chiren

- (648) The first access request to the UGS Chiren, which was not granted, was made by Overgas on 30 July 2010 (see recital (214)). Therefore the anticompetitive conduct concerning the UGS Chiren has started on 30 July 2010.
- (649) As concerns the end date of the anticompetitive conduct, the Commission maintains that the 2012 Bulgartransgaz Access Rules for Storage and the 2014 Bulgartransgaz Access Rules for Storage were discriminatory and that priority access was granted to the supply arm of the BEH group. These rules were revised in April 2016 (see recital (175)). However it should be taken into consideration that a competitor applied for access to storage on 19 September 2014 and the access was offered (see recital (208)). Thereafter there was consistently spare capacity in the storage facility which was properly advertised (see recital (211)). Therefore, the anticompetitive conduct concerning the UGS Chiren ended on 19 September 2014.

6.10.3. The Romanian Transit Pipeline 1

- (650) Based on the evidence in the Commission's file, the first time the BEH group became aware of the demand to access the Romanian Transit Pipeline 1 was in January 2011, during the meeting between Transgaz and BEH where Transgaz requested to offer part of the unused capacity on the Romanian Transit Pipeline 1 to third parties (297)(a). Therefore, the anticompetitive conduct concerning the Romanian Transit Pipeline 1 started on 31 January 2011.
- (651) As concerns the end date of the anticompetitive conduct, Bulgargaz' abusive practices on the Romanian Transit Pipeline 1 could have been terminated either by renouncing exclusivity provisions in the 2005 Commercial Agreement or by Bulgargaz granting capacity itself to third parties in an objective transparent and non-discriminatory manner. The BEH group argues that the anticompetitive conduct concerning the Romanian Transit Pipeline 1 did not continue beyond the issuing of the SO and it was, in fact, terminated on 1 January 2013 when Bulgargaz provided

access to the Romanian Transit Pipeline 1 to Overgas.⁶⁸³ However, as stated in recital (312), the access granted to Overgas to the Romanian Transit Pipeline 1 in 2013 does not qualify as objective, transparent and non-discriminatory. Although the access granted to Overgas in 2014 by Bulgargaz was not tainted by the same shortcomings as the access granted in 2013 (see recital (315)), another undertaking, C Energy Group, did not obtain access, despite making an access request for the entire year 2014 (see recital (328)-(331)). Until all applicants were provided equal access in a timely manner, granting access to the Romanian Transit Pipeline 1 could not qualify as objective, transparent and non-discriminatory. Therefore the abuse on the Romanian Transit Pipeline 1 cannot be considered terminated until 1 January 2015 when Bulgargaz granted Overgas access to the Romanian Transit Pipeline 1 for the year of 2015 (see recital (316)). The signing of the access contract was not subject to delays and the access was provided on a long-term basis (i.e. one year) (see recital (316)). Overgas confirmed that the access granted was not subject to any interruptions and can be considered overall satisfactory (see recital (327)).

- (652) Therefore, the anticompetitive conduct concerning the Romanian Transit Pipeline 1 ended on 1 January 2015.

6.10.4. Conclusion

- (653) The abuse consists of a single and continuous infringement (see Section 6.4) and therefore it starts with the first anticompetitive conduct and ends when the last abusive practice was terminated. On that basis, the infringement started on 30 July 2010 and ended on 1 January 2015.
- (654) The BEH group contests the findings of the Commission.
- (655) The BEH group claims that the duration of the abusive conduct should be linked to the time when the access requests were actually made by interested third parties and which were actually or tacitly refused.
- (656) First, with respect to the Bulgarian transmission network, Bulgartransgaz claims that the infringement could have started, at the earliest, with Overgas' first access request to the Bulgarian transmission network, which according to the BEH group took place on 4 October 2010, and ended on 31 January 2013, when the 2013 transmission contract between Bulgartransgaz and Overgas was signed.⁶⁸⁴
- (657) Second, with respect to UGS Chiren, Bulgartransgaz claims that the infringement could have started, at the earliest, with Overgas' first access request to UGS Chiren on 24 August 2010 and ended on 29 April 2014 when the rules for providing access to the UGS Chiren were last amended.⁶⁸⁵

⁶⁸³ See the BEH group "non-paper on the duration of the alleged infringement", dated 12 October 2016, recitals 28-31 [...].

⁶⁸⁴ See Bulgartransgaz' reply to the SO dated 23 March 2015, recitals 265-267, [...]. See also the non-paper of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on duration of the alleged infringement dated 12 October 2016, page 2 and the Submission of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on the mitigating circumstances that should reduce the final amount of the fine dated 13 December 2017.

⁶⁸⁵ See Bulgartransgaz' reply to the SO dated 23 March 2015, recitals 268-271, [...]. See also the non-paper of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on duration of the alleged infringement dated 12 October 2016, page 2 and the Submission of Bulgarian Energy Holding EAD,

- (658) Third, the BEH group argues that, with respect to the Romanian Transit Pipeline 1, any alleged abuse should have started at the earliest on 11 January 2012 when the meeting between Transgaz and Bulgargaz took place and when the access to the Romanian Transit Pipeline was discussed and ended at the beginning of 2013 when Overgas first obtained access and ended on 1 January 2013 when Bulgargaz granted Overgas access to the Romanian Transit Pipeline 1.⁶⁸⁶ The BEH group points out that in any event no abuse on the Romanian Transit Pipeline 1 could have taken place before 2012 as in years 2010-2011 Overgas was in contact solely with Transgaz and Bulgargaz was not involved in these negotiations and thus it could not have been aware of Overgas access request.⁶⁸⁷
- (659) The first argument of the BEH group is recognised in recital (645)).
- (660) However, the BEH group's other arguments cannot be accepted for the reasons set out in recitals (661)-(666).
- (661) First, based on the evidence in the Commission's file, the BEH group was certainly aware that the demand to access the gas supply markets in Bulgaria through the relevant infrastructure materialised on 30 July 2010, when Overgas submitted its request to access the Bulgarian transmission network (see recital (101)(a)). The date of 4 October 2010, as suggested by the BEH group, cannot be accepted because on that date Overgas sent its fourth letter requesting access to the Bulgarian transmission network (see point (f) of recital (101)). Certainly, the BEH group became aware of the demand to access the Bulgarian transmission network with the first letter in which Overgas requested to be granted access.
- (662) As concerns the end date of the infringement, it cannot be accepted that the infringement ended on 31 January 2013 when the 2013 transmission contract between Bulgartransgaz and Overgas was signed. As described in recital (312), the access granted to Overgas to the Bulgarian transmission network in 2013 was not objective, transparent and non-discriminatory (see recital (479)).
- (663) Second, the claim that the demand to access the UGS Chiren materialised at the earliest on 24 August 2010 cannot be accepted. Overgas made its first request to access the UGS Chiren on 30 July 2010 (see recital (214)). On 24 August 2010, Overgas merely submitted more detailed information concerning its access request (see recital (215)). For the purpose of determining the infringement period, it is not relevant as of when the BEH group believes that a proper access request was made, according to its rules, but as of when third parties expressed an actual interest in accessing the gas infrastructure controlled by the BEH group.

Bulgartransgaz EAD and Bulgargaz EAD on the mitigating circumstances that should reduce the final amount of the fine dated 13 December 2017.

⁶⁸⁶ Bulgargaz' reply to the SO dated 23 March 2015, recitals 217-220, [...]. See also the non-paper of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on duration of the alleged infringement dated 12 October 2016, pages 2 and 7 and the Submission of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on the mitigating circumstances that should reduce the final amount of the fine dated 13 December 2017.

⁶⁸⁷ See also the BEH group response to the evidence contained in document [...] dated 12 March 2018, pages 6-7.

- (664) As concerns the end date of the infringement, it cannot be accepted that this part of the infringement ended on 29 April 2014 when the rules for providing access to the UGS Chiren were last amended. Under the 2014 Bulgartransgaz Access Rules for Storage, the main principles for capacity allocation remained essentially the same as under the 2012 Bulgartransgaz Access Rules for Storage. They continued to be discriminatory and priority access was granted to the supply arm of the BEH group (see recitals (173)-(174)).
- (665) Third, the Commission cannot accept that the abuse on the Romanian Transit Pipeline 1 started on 11 January 2012 when Bulgargaz and Transgaz discussed the access to the Romanian Transit Pipeline 1 as it was not the first meeting between Bulgargaz and Transgaz when this issue was discussed. As mentioned in point (a) in recital (297)), the BEH group first became aware of the interest and thus the need to grant third party access to the Romanian Transit Pipeline 1 at the latest during the meeting with Transgaz which took place on 31 January 2011.
- (666) As concerns the end date of the infringement, the infringement ended when all undertakings obtained access to the Romanian Transit Pipeline 1 on an objective, transparent and non-discriminatory basis. As described in Section 5.4.4.2, the access granted to Overgas to the Romanian Transit Pipeline 1 for the year 2013 did not follow an objective, transparent and non-discriminatory procedure (see recital (312)). Only the access granted as of 1 January 2015 can qualify as such (see recital (651)).

7. LIABILITY FOR THE INFRINGEMENT

- (667) In principle, subsidiaries are (alone) liable when they are able to autonomously determine their behaviour on the market where they commit the infringement.⁶⁸⁸
- (668) According to settled case law, the conduct of a subsidiary may be attributed to the parent undertaking and the parent and subsidiary may thus be held jointly and severally liable if these companies form a single economic unit, i.e. one single undertaking. To be considered as a single economic unit, a parent undertaking must (a) be in the position to exercise decisive influence over the subsidiary's commercial conduct and (b) have actually exercised this influence.⁶⁸⁹
- (669) According to settled case law of Union Courts, the Commission can generally presume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent undertaking without needing to check whether the parent undertaking has in fact exercised that power.⁶⁹⁰ In these circumstances, 'it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent undertaking in order for it to be presumed that the parent actually exercises decisive

⁶⁸⁸ Judgment in *Cascades v Commission*, C-279/98, EU:C:2000:626, para 79.

⁶⁸⁹ See *Imperial Chemical Industries v Commission* (Dyestuffs), EU:C:1972:70, para 137. Also, see judgment of the Court of Justice in *AEG v Commission*, EU:C:1983:293, para 50.

⁶⁹⁰ Judgment in *Akzo Nobel and Others v Commission*, EU:C:2009:536, para 58-60 and 73-74. See also Judgment of 12 December 2007, *Akzo Nobel and Others v Commission*, EU:T:2007:381, para 60; *Akzo Nobel v Commission*, EU:T:2006:269, para 83; Judgment of 15 June 2005, *Tokai Carbon and Others v Commission*, Joined Cases T-71/03, EU:T:2005:220, para 60; Judgment of 14 May 1998, *Stora Kopparbergs Bergslags v Commission*, T-354/94, EU:T:1998:104, para 80, upheld in judgment *Stora Kopparbergs Bergslags v Commission*, C-286/98, EU:C:2000:630, paras 27-29; and judgment in *AEG v Commission*, EU:C:1983:293, para 50..

influence over the commercial policy of that subsidiary'.⁶⁹¹ The Commission can then hold the parent undertaking to be jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent undertaking, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.⁶⁹²

- (670) BEH has owned 100% of the shares in its subsidiaries Bulgargaz and Bulgartransgaz during the entire infringement period. Moreover, the Commission has established that BEH participated alongside Bulgargaz and Bulgartransgaz in the infringement (see Section 6.2.2.3). Therefore, BEH has not rebutted a presumption of its direct participation in the infringement. BEH has also not proven that, in spite of its 100% ownership of Bulgargaz and Bulgartransgaz, it did not have a decisive influence over those subsidiaries.

Involvement in the infringement

- (671) It is established by the facts, as described in Section 5.2.4.2, Section 5.3.3, Section 5.4.4 and Section 6.3, that the BEH group devised and implemented a strategy to foreclose competitors endeavouring to enter the Bulgarian gas supply market. The implementation of that strategy was carried out by all three undertakings: Bulgartransgaz, Bulgargaz, and BEH, which are the addressees of this Decision.
- (672) The Commission contends that Bulgartransgaz engaged in actions or omissions preventing, restricting and delaying third party access to the Bulgarian transmission network and the gas storage UGS Chiren until as specified in Section 6.10 (see also Sections 5.2.4 and 5.3.3). Bulgartransgaz restricted third party access to protect the BEH group's supply arm, Bulgargaz. As shown in Section 5.2.4.2, Section 5.3.3, Section 5.4.4 and Section 6.3, Bulgargaz and Bulgartransgaz have been coordinating in relation to third party access requests, and deal with each other as entities within the same integrated undertaking (see Section 6.3.1).
- (673) As set out in recital (532), Bulgargaz engaged in capacity hoarding on Romanian Transit Pipeline 1 until as specified in Section 6.10, reserving the full capacity for itself, despite only using part of the contracted capacity of the pipeline. Bulgartransgaz has also made third party access to the Bulgarian transmission network conditional on third party access to the Romanian Transit Pipeline 1 (see Section 5.2.4). Finally, BEH was directly involved in the strategy undertaken by the BEH group (see Section 6.2.2.3).
- (674) Moreover, in line with the case law outlined in recital (669), BEH is ultimately responsible for the actions and omissions of its wholly owned subsidiaries according to the general presumption that a wholly-owned subsidiary essentially follows the instructions given to it by its parent undertaking.
- (675) The reorganization of BEH and the renaming of Bulgargaz Holding EAD to Bulgarian Energy Holding EAD on 18 September 2008 by decision of the Minister of Economy and Energy bears no influence on the imputability of the undertaking. During the entire infringement period, BEH has been the 100% owner of Bulgargaz and Bulgartransgaz.

⁶⁹¹ Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paras 61.

⁶⁹² Judgment in *Tokai Carbon and Others v Commission*, EU:T:2005:220, para 61.

- (676) BEH also has not rebutted this presumption, which is based on its 100% ownership of Bulgargaz and Bulgartransgaz. BEH argues that it is a pure financial investor,⁶⁹³ however, in Section 6.2.2, the Commission sets out how BEH is certainly not a purely financial investor but rather an owner who tightly controls the actions of its subsidiaries.
- (677) The Commission therefore considers that BEH, in addition to Bulgargaz and Bulgartransgaz, infringed Article 102 TFEU and therefore directly participated in the infringement. In addition, it bears the liability for its role as a parent undertaking of its wholly-owned subsidiaries Bulgargaz and Bulgartransgaz for the entire period of the infringement.

8. REMEDIES AND FINES

8.1. Article 7(1) of Regulation (EC) No 1/2003

- (678) Where the Commission finds that there is an infringement of Article 102 TFEU, it may require by decision that the undertaking concerned brings such an infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
- (679) It has been established in Section 6.10 that the BEH group has brought the infringement to an end. Nevertheless, the BEH group should be ordered to refrain from any practices, which would have the same or similar object or effect as described in this Decision.
- (680) BEH argues that no fine should be imposed on the BEH group due to lack of clarity in the past case law regarding the interaction of the energy regulatory framework with antitrust law. In particular, BEH argues that in view of EWRC's certification decision acknowledging Bulgartransgaz' compliance with the rules that require the separation of Bulgartransgaz from BEH, the Commission should consider not to impose a fine. Also, Bulgargaz argues that no fine should be imposed as Bulgargaz could not have been aware that it had to offer the unused capacities to third parties.⁶⁹⁴
- (681) The Commission does not accept this argument.
- (682) The gravity of an infringement has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effects of fines, and no binding or exhaustive list of the criteria which must be applied has been drawn up.⁶⁹⁵ One factor relevant in assessing the nature of the infringement is whether relevant legal precedents exist, which have clarified the scope of Article 102 TFEU. Such precedents⁶⁹⁶ reinforce and give a more detailed

⁶⁹³ BEH's reply to the SO dated 23 March 2015, recitals 148-156.

⁶⁹⁴ Bulgargaz' reply to SO dated 23 March 2015, [...], recital 250 -251.

⁶⁹⁵ *Tomra Systems ASA*, C-549/10P published in the electronic Reports of Cases (Court Reports- general), para 107 and *Ferriere Nord v Commission*, C-219/95P, EU:C:1998:608, para 33.

⁶⁹⁶ See in particular *Commercial Solvents v Commission*, EU:C:1974:18; *Oscar Bronner*, EU:C:1998:569; *Clearstream*, EU:T:2009:317; *IMS Health*, EU:C:2004:257; *Radio Telefís Éireann*, EU:C:1995:98; *Microsoft v Commission*, EU:T:2007:289; Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers v Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland/Air Lingus*– (OJ L 96, 10.4.1992, p. 34). Commission Decision of 29 September 2010, COMP/39.315 ENI.

interpretation of the general prohibition of the TFEU and the nature of the infringement.

- (683) In this regard, the Commission first refers to the fact that there are a number of precedents in the form of judgments by Union courts or Commission decisions, which have condemned exclusionary practices by dominant undertakings, including in otherwise regulated sectors, and also in the energy sector.⁶⁹⁷
- (684) Moreover, Article 102 TFEU is directly applicable, irrespective of whether it has been applied to similar situations before. Neither the prohibition contained in Article 102 TFEU nor the Commission's enforcement action in the present case depends on whether or not there are precedents in the case law.
- (685) As concerns the EWRC's decision confirming that Bulgartransgaz complied with the regulatory framework cannot play a role in determining the fine as the EWRC's decision was only issued on 22 June 2015 (see recital (605)) and therefore after the infringement was terminated (see recital (651)). Moreover, even if an undertaking's behaviour complied with Union sectorial legislation, Union competition rules may nonetheless be applied, for instance if the legislation was ineffective to prevent anti-competitive behaviour or if the legislation had different objectives from those envisaged by Union competition policy (see recital (605) and footnote 630). Therefore, the EWRC's certification decision does not prevent the Commission from developing its own assessment as to BEH's ability to influence Bulgartransgaz for the purpose of establishing the infringement under antitrust rules. Similarly also, Bulgargaz' arguments that it could not have been aware that it was required to grant third party access to the Romanian Transit Pipeline 1 has to be rejected, since the Commission has in the past adopted decisions declaring capacity hoarding as a violation of Union competition rules.⁶⁹⁸

8.2. Fines under Article 23(2) of Regulation (EC) No 1/2003

- (686) Under Article 23(2) of Regulation (EC) No 1/2003,⁶⁹⁹ the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 102 TFEU. The fine for each undertaking participating in the infringement may not exceed 10 % of its total turnover in the preceding business year.
- (687) The Commission considers that, based on the facts described in this Decision and the assessment contained therein, the infringement was committed intentionally. The infringement was an obvious infringement, as it consisted of a strategy to prevent, restrict and delay access to the indispensable infrastructure that the companies control, hence foreclosing gas supply markets in Bulgaria. In addition, such behaviour has been condemned on several occasions by the European Courts and the

⁶⁹⁷ *Deutsche Telekom v Commission*, EU:C:2010:603; *Orange Polska S.A., formerly Telekomunikacja Polska S.A. v European Commission*, Case T-486/11, EU:T:2015:1002, Commission Decision of 29 September 2010, COMP/39.315 ENI.

⁶⁹⁸ Commission Decision of 29 September 2010, COMP/39.315 ENI recital 50.

⁶⁹⁹ Under Article 5 of Council Regulation (EC) 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area, “the Community rules giving effect to the principles set out in Articles 85 and 86 of the EC Treaty [now Articles 101 and 102 TFEU] ... shall apply *mutatis mutandis*” (OJ L 305, 30.11.1994, p. 6).

Commission.⁷⁰⁰ Thus the BEH Group must have been aware that its practices violated Article 102 TFEU. In the alternative, the Commission considers that the infringement has at least been committed by negligence.

- (688) In fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement. In setting the amount of the fines, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003⁷⁰¹ ('the Guidelines on fines').

8.2.1. *Basic amount of the fine*

- (689) The basic amount of the fine to be imposed on the undertaking concerned is to be set by reference to the value of sales, that is, the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic market. Depending on the gravity of the infringement, a proportion of the value of sales (up to 30% according to the Guidelines on fines) is to be established that is multiplied by the number of years over which the infringement was committed.

8.2.1.1. Calculation of the value of sales

- (690) The Commission normally takes into account the relevant sales made by an undertaking during the last full business year of its participation in the infringement.⁷⁰² There is no reason to deviate from this practice in the present case. On the basis of the information currently on the file, the last full year of BEH's, Bulgartransgaz' and Bulgargaz' participation in the infringement is 2014.
- (691) The present case concerns an infringement in the form of refusal to supply access to the indispensable gas infrastructure in Bulgaria or for bringing gas to Bulgaria. The relevant sales are therefore the BEH group's sales of: (a) gas on the downstream wholesale gas market (in as far as it is supplied via the Bulgarian transmission network) and (b) gas on the retail market for supplies to large end customers connected to the Bulgarian transmission network. On the basis of sales in 2014, the last full year of the infringement, the value of sales to which the infringement relates amounted to EUR [600 000 000 – 800 000 000].⁷⁰³

⁷⁰⁰ See in particular *Commercial Solvents v Commission*, EU:C:1974:18; *Oscar Bronner*, EU:C:1998:569; *Clearstream*, EU:T:2009:317; *IMS Health*, EU:C:2004:257; *Radio Telefis Eireann*, EU:C:1995:98; *Microsoft v Commission*, EU:T:2007:289; Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers v Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland/Air Lingus*– (OJ L 96, 10.4.1992, p. 34). Commission Decision of 29 September 2010, COMP/39.315 ENI.

⁷⁰¹ OJ C 210, 1.09.2006, p. 2-5.

⁷⁰² Guidelines on fines, point 13.

⁷⁰³ See Submission of Bulgargaz EAD on the revised value of sales dated 20 October 2016, [...]. On the basis of this submission the relevant value of Bulgargaz' sales as established in recital (691) for the year 2014 amounts to EUR [600 000 000 – 800 000 000]. See also Bulgargaz' reply to the Commission's request for information dated 30 January 2017, [...]. The applicable exchange rate is the annual average exchange rate from the same year as the year for determining the BEH group total turnover, i.e. the year 2014. See the judgement of the Court of Justice in *Pilkington Group Ltd and others v Commission*, C-101/15 P, EU:C:2016:631, para 42 "where the economic reality is to be assessed as it appeared at a given time, it is reasonable to refer to the exchange rates applicable during that period".

8.2.1.2. Percentage for gravity

- (692) In order to determine the proportion of the value of sales to be considered as basic amount, the Commission takes into account a series of factors, such as the nature of the infringement, the undertaking's market share, the geographic scope of the infringement and/or whether or not the infringement has been implemented

Nature of the infringement

- (693) The infringement concerns an abuse of a dominant position in the form of a refusal to supply. A refusal to supply by an undertaking in a dominant position has already been condemned on several occasions by the Commission and the Union Courts.⁷⁰⁴ BEH, Bulgargaz and Bulgartransgaz employed several types of conduct (as described in Sections 5.2.4.2, 5.3.3.2 and 5.4.4.2), which all served the purpose of preventing, restricting and delaying competitors from entering into the gas supply markets in Bulgaria. They resorted to these types of conduct, despite the fact that since the liberalisation of the gas market in Bulgaria there was an obligation to allow third party access to their gas infrastructure (see Section 6.2.4.2).

Market shares

- (694) During the entire infringement period, the BEH group held a near monopoly position on the relevant markets (see Section 6.2.3.5).

Geographic scope

- (695) The infringement covers the whole territory of Bulgaria (see Section 6.1.2)

8.2.1.3. Other factors

- (696) The BEH group argues that the [supplier's practices] in Central and Eastern European gas markets are relevant for the calculation of the fine in the BEH gas case.⁷⁰⁵ Indeed, in determining the gravity factor the Commission takes into account all the relevant circumstances of the case.⁷⁰⁶
- (697) [Supplier's practices]⁷⁰⁷ do not justify the infringement committed by the BEH group and are therefore not relevant for the present case.
- (698) Nevertheless, in assessing the gravity of the infringement the Commission has also taken into account that during the infringement period the BEH group operated in a relatively isolated gas market, because Bulgaria secures by far most of its natural gas supplies through imports from Gazprom. Thus, the context of the market in which the BEH group has operated during the investigated period has been taken into

⁷⁰⁴ See in particular *Commercial Solvents v Commission*, EU:C:1974:18; *Oscar Bronner*, EU:C:1998:569; *Clearstream*, EU:T:2009:317; *IMS Health*, EU:C:2004:257; *Radio Telefis Eireann*, EU:C:1995:98; *Microsoft v Commission*, EU:T:2007:289; Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers v Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland/Air Lingus*– (OJ L 96, 10.4.1992, p. 34). Commission Decision of 29 September 2010, COMP/39.315 ENI.

⁷⁰⁵ See the BEH group submission "Supplement to the BEH group's defence and request for further access to information in the Commission's possession." Dated 13 June 2018, [...].

⁷⁰⁶ See Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, point 20.

⁷⁰⁷ [Another investigation of the Commission].

account in setting the gravity factor of the infringement. Moreover, in assessing the gravity of the infringement the Commission has taken into account that Bulgargaz was not an owner of the Romanian Transit Pipeline 1 and the national regulator in particular as of 1 October 2013 also could have had a role in withdrawing the unused capacity (see recitals (293)- (294)). Although these factors in no way put into question the illegality of the BEH group conduct as concerns capacity hoarding on the Romanian Transit Pipeline 1, these factors can be taken into account for the purpose of determining the gravity. In particular, the new regulatory rules on withdrawing unused capacity which entered into force on 1 October 2013 constitute a certain novelty as compared to the other precedents in the energy sector (see recital (293)- (294)).

- (699) Another factor which the Commission may take into account when determining a fine, including when determining the gravity factor to be applied, is the necessity to achieve a sufficient and proportionate level of deterrence.⁷⁰⁸ The Commission takes this element into account in light of the circumstances and nature of the BEH group.

Conclusion on the gravity of the infringement

- (700) The proportion of the value of sales used to establish the basic amount of the fine to be imposed on BEH, Bulgargaz and Bulgartransgaz should therefore be 2.5 %.

8.2.1.4. Duration

- (701) The Commission considers that the BEH group's abuse of its dominant position commenced on 30 July 2010 and continued until 1 January 2015 (see Section 6.10).
- (702) Therefore, the overall duration of the BEH gas infringement to be taken into account for the calculation of the fine to be imposed amounts to 4 years and 5 months.
- (703) Therefore, for the purpose of the calculation of the fine, the amount determined in recital (691), should be multiplied by 4.42 to take account of the duration of the infringement.

8.2.1.5. Conclusion on the basic amount of the fine

- (704) Against this background, the basic amount of the fine to be imposed should therefore be EUR 77 068 992.

8.2.2. *Adjustment of the basic amount of the fine*

- (705) According to the Guidelines on fines, the basic amount of the fine may be reduced or increased where the Commission finds mitigating or aggregating circumstances.
- (706) There are no aggravating or mitigating circumstances in this case.
- (707) The BEH group argues that the following mitigating circumstances in this case exist: first, there is no precedent that the conduct of the BEH group amounted to an infringement of Union competition law; second, the BEH group terminated the alleged infringement as soon as the Commission intervened; third, the alleged infringement, if committed, was a result of negligence; fourth, the BEH group effectively cooperated with the Commission throughout the course of the investigation; fifth, elements of the alleged infringement have been authorised and

⁷⁰⁸ See Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, points 4, 30 and 37.

encouraged by the existing legal and contractual framework some of which pre-dates the accession of Bulgaria to the Union.⁷⁰⁹

- (708) These arguments cannot be accepted for the reasons set out in recitals (709)-(713).
- (709) First, the Commission has pointed to numerous precedents where refusal to supply by an undertaking in a dominant position has been condemned by the Commission and the Union Courts (see recital (693) and footnote 704).
- (710) Second, the argument that the BEH group terminated the alleged infringement as soon as the Commission intervened cannot be accepted as the Commission initiated proceedings in the present case on 4 July 2013 (see recital (15)), the on-the-spot inspections under Article 20(4) of Regulation (EC) No 1/2003 at the premises of BEH, Bulgargaz and Bulgartransgaz took place even earlier, between 27 and 30 September 2011 (see recital (14)). At the same time, the infringement continued until 1 January 2015 (see recital (701) and Section 6.10).
- (711) Third, the argument that the fine should be adjusted downwards because the infringement was committed as a result of negligence cannot be accepted either. The Commission considers that the infringement was committed intentionally (see recital (687)). Moreover, even assuming that the infringement was merely committed negligently, it remains nevertheless an infringement of considerable importance.
- (712) Fourth, the BEH group has not met the required standard of effective cooperation with the Commission throughout the course of the investigation to justify it as a mitigating circumstance in line with the Commission practice.
- (713) Fifth, it cannot be accepted that elements of the alleged infringement have been authorised and encouraged by the existing legal and contractual framework. As the explained in Section 6.2.4.2 quite to the opposite, the existing framework required the BEH group to grant third party access to its infrastructure. Moreover, contrary to the BEH group's claim no regulatory framework encouraged capacity hoarding. To the contrary, at Union level steps have been undertaken to limit capacity hoarding by shippers.⁷¹⁰ As concerns the contractual framework, presumably the BEH group refers here to the 2005 Commercial Agreement. As explained in recitals (306) and point (q) of the recital (297) Article 17.1 of the 2005 Commercial Agreement directly benefited Bulgargaz, by giving it a right to use the Romanian Transit Pipeline 1 on an exclusive basis. Bulgargaz therefore, was in a position to unilaterally and unconditionally revoke this right, which it eventually did after a long and unnecessary delay.
- (714) In addition the BEH group submitted that [supplier's practices] and their consequences for the Bulgarian market should constitute either an objective justification or a mitigating circumstance which should lead to a significant fine

⁷⁰⁹ See a Submission of Bulgarian Energy Holding EAD, Bulgartransgaz EAD and Bulgargaz EAD on the mitigating circumstances that should reduce the final amount of the fine dated 13 December 2017.

⁷¹⁰ See the Commission Decision of 24 August 2012.

reduction.⁷¹¹ In particular the BEH group submits that [supplier's practices should be taken into account by the Commission].⁷¹²

- (715) Although an undertaking in a dominant position cannot be deprived of a right to protect its own commercial interest and may take appropriate steps to protect its said interests if it feels attacked, such behaviour cannot be accepted if its actual purpose is to strengthen its dominant position and abuse it.⁷¹³
- (716) Nevertheless, the Commission has taken into account the special situation of the market the BEH group had to operate within during the investigated conduct when setting the gravity factor (see recital (700)). On that basis, no further reduction under the mitigating circumstances is justified.
- (717) In light of the above analysis concerning mitigating circumstances, the Commission considers that there is no justification for reducing the amount of fine to be imposed on the BEH group.
- (718) The final amount of the fine does not exceed 10 % of the total turnover of the undertaking.⁷¹⁴
- (719) Therefore, no adjustment to the basic amount is applied.

8.2.3. *Conclusion on the final amount of the fine*

- (720) In applying the foregoing, the final amount to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be EUR 77 068 000.

9. CONCLUSION

- (721) In light of the considerations set out in this Decision, the Commission:
 - (a) finds that BEH, Bulgargaz and Bulgartransgaz committed a single and continuous infringement of Article 102 TFEU from 30 July 2010 until 1 January 2015, resulting in a foreclosure of Bulgarian gas supply markets;
 - (b) requires BEH, Bulgargaz and Bulgartransgaz to bring the identified infringement of Article 102 TFEU to an end in so far as they have not already effectively done so, refrain from taking measures having an equivalent effect as the conduct identified as infringing Article 102 TFEU;

HAS ADOPTED THIS DECISION:

Article 1

Bulgarian Energy Holding EAD and its subsidiaries Bulgargaz EAD and Bulgartransgaz EAD have committed a single and continuous infringement of Article 102 of the Treaty on the Functioning of the European Union by refusing third party access to the Bulgarian transmission

⁷¹¹ See the BEH group submission "Supplement to the BEH group's defence and request for further access to information in the Commission's possession." Dated 13 June 2018, [...].

⁷¹² See the BEH group submission "Supplement to the BEH group's defence and request for further access to information in the Commission's possession." Dated 13 June 2018, [...].

⁷¹³ *United Brands*, EU:C:1978:22, para 189.

⁷¹⁴ Article 23(2) Regulation (EC) No 1/2003.

network, the Romanian Transit Pipeline 1 and UGS Chiren resulting in foreclosure of the gas supply markets in Bulgaria.

Article 2

The infringement commenced on 30 July 2010 and lasted until 1 January 2015.

Article 3

For the infringement referred to in Article 1, a fine of EUR 77 068 000 is imposed on Bulgarian Energy Holding EAD and its subsidiaries Bulgargaz EAD and Bulgartransgaz EAD, being jointly and severally liable for the payment of the entire fine.

The fine shall be paid in euros, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI/AT.39849

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where Bulgarian Energy Holding EAD or Bulgargaz EAD or Bulgartransgaz EAD lodges an appeal, it shall cover the fine by the due date, either by providing an acceptable financial guarantee or making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046⁷¹⁵.

Article 4

Bulgarian Energy Holding EAD and its subsidiaries Bulgargaz EAD and Bulgartransgaz EAD shall immediately bring the infringement referred to in Article 1 to an end, insofar as they have not already effectively done so. They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

Article 5

This Decision is addressed to

(2) Bulgarian Energy Holding EAD, 16 Vesletz Street, 1000 Sofia, Bulgaria;

⁷¹⁵ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1.).

- (3) Bulgargaz EAD, 47 Petar Parchevich Street, 1000 Sofia, Bulgaria;
- (4) Bulgartransgaz EAD, 66 Blvd Pancho Vladigerov, 1336 Sofia, Bulgaria.

This Decision shall be enforceable pursuant to Article 299 of the Treaty on the Functioning of the European Union.

Done at Brussels, 17.12.2018

For the Commission

(Signed)

Margrethe VESTAGER

Member of the Commission