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COMMUNICATION FROM THE COMMISSION

**published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case
AT.39816 Upstream Gas Supplies in Central and Eastern Europe**

PRELIMINARY VERSION, NOT LEGALLY BINDING!

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1. INTRODUCTION

- (1) According to Article 9 of the 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 Treaty¹, the Commission may decide – in cases where it intends to adopt a decision requiring that an infringement is brought to an end and the parties concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment – to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. According to Article 27(4) of the same Regulation, the Commission shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Commission.

2. SUMMARY OF THE CASE

- (2) On 22 April 2015, the Commission adopted a Statement of Objections concerning an alleged infringement of Article 102 of the Treaty on the Functioning of the European Union ('TFEU') by OAO Gazprom and OOO Gazprom Export ('Gazprom') on the markets for the upstream wholesale supply of natural gas in each of Bulgaria, Estonia, the Czech Republic, Hungary, Latvia, Lithuania, Poland and Slovakia ('the CEE'). This document is a preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003.
- (3) The Commission's preliminary assessment is that Gazprom is dominant on all eight CEE markets for the upstream wholesale supply of gas. The Commission's preliminary view is that Gazprom may have abused this dominant position contrary to Article 102 of the TFEU.
- (4) In particular, Gazprom may have implemented an overall abusive strategy by imposing territorial restrictions in its supply agreements in the CEE countries. These restrictions include export bans, destination clauses and equivalent measures that may have prevented the cross-border flow of gas.
- (5) These territorial restrictions may have allowed Gazprom to pursue an unfair pricing policy in five Member States, namely Bulgaria, Estonia, Latvia, Lithuania and Poland, by charging prices to wholesalers that were significantly higher than competitive Western European gas prices.

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this notice, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when applicable.

- (6) Gazprom may also have abused its dominant market position on the market for the upstream wholesale supply of natural gas in Bulgaria by making the supply of gas dependent on investment in the South Stream pipeline project.
- (7) The Commission's preliminary assessment concludes that Gazprom's practice has the potential to raise barriers to the free flow of gas within the Internal Market, to lower the liquidity and efficiency of gas markets and to result in higher natural gas prices.

3. THE MAIN CONTENT OF THE OFFERED COMMITMENTS

- (8) Gazprom does not agree with the Commission's preliminary assessment. It has nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns. The key elements of the commitments are presented below.
- (9) Gazprom will commit to introduce a number of changes to its relevant contracts in order to remove the obstacles to the free flow of gas at competitive prices in the CEE:
 - (a) Gazprom will not apply and will not introduce any contractual provisions in its CEE gas supply contracts that may, directly or indirectly, prohibit, restrict or make economically less attractive the customers' ability to re-export or re-sell gas. Gazprom will also commit not to introduce any such measures in its future gas contracts in the CEE;
 - (b) Gazprom will ensure the introduction of reasonably required changes to its Bulgarian and Greek contracts, subject to the consent of its contractual counterparties, that are necessary for the conclusion of interconnection agreements between Bulgaria and other EU Member States.
 - (c) Gazprom will offer its relevant CEE customers the possibility to request that all or parts of their contractual gas volumes delivered at certain delivery points in the CEE shall be delivered at another delivery point used by Gazprom for supplies to Bulgaria and the Baltic States. Gazprom will commit to offer this possibility for as long as the customer is unable to arrange itself for the transport of gas from the relevant contractual delivery point to Bulgaria or the Baltic States.
 - (d) Gazprom will offer to either introduce a price revision clause in the contracts with its relevant customers that do not already contain such a clause or amend any existing price review clause. Gazprom will commit to enable its relevant customer to trigger a price revision on the basis of the contractual price not reflecting, amongst others, the development of the border prices in Germany, France and Italy or the development of the gas prices at the liquid gas hubs in Continental Europe. The parties will also be able to refer to the same competitive benchmarks when reviewing the contractual price. Gazprom will also commit to increase the frequency and speed of price revisions. For its relevant customers, Gazprom will also commit to introduce the same price review provisions in future contracts.
 - (e) Gazprom will not claim any damages on the basis of the termination of the South Stream project from the Bulgarian counterparts. The termination was confirmed by Gazprom.

- (10) These commitments should meet the Commission's concerns by ensuring the free flow of gas at competitive prices in the CEE. Gazprom will be prevented from partitioning and isolating the CEE gas markets by relying on explicit territorial restrictions or other contractual measures having the effect equivalent to territorial restrictions. The Commission notes that the situation in the CEE has improved in terms of the connecting gas infrastructure and in terms of the CEE customers' ability to trade gas across borders, either through reverse flows or gas swaps. However, the same possibilities are still insufficiently present in the Baltic States and Bulgaria.
- (11) The commitments will compensate for the unavailability of gas flows between, on the one hand, the rest of the CEE and, on the other hand, Bulgaria or the Baltic States. Gazprom will provide CEE customers with a possibility to carry out swap-like operations to enable them to bring more gas liquidity into the Baltic States and Bulgaria. Gazprom will be able to charge a service fee for this, as it could for a typical swap in markets where transportation of gas is available. The possibility of such swap-like operations will be of particular importance in case the gas prices in the Baltic States or Bulgaria were to diverge significantly from the rest of the CEE.
- (12) These commitments should meet the Commission's concerns on prices for the five Member States by allowing customers to trigger a price revision under their contracts in case the contractual price, inter alia, deviates from the prices at generally accepted liquid hubs in Continental Europe. The commitments will also provide explicit substantive guidance on the competitive Western European benchmarks to be used for a price review. This will ensure that customers in the five CEE Member States will obtain an explicit contractual right to refer to competitive and liquid hub prices when reviewing their contractual price. The explicit reference to competitive Western European benchmarks will also highlight their importance to arbitrators, in case price revision negotiations are followed by arbitration. All of this will ensure that CEE gas prices will not divert significantly from competitive benchmarks in the future.
- (13) In relation to Bulgaria, the commitments will also remove the threat of damages actions, independent of whether such claims would have been valid or not, against the Bulgarian counterparts following the termination of the South Stream project. This will ensure that the alleged abuse that Gazprom has made the supply of gas dependent on investment in the gas infrastructure in Bulgaria is deprived of its effects.
- (14) The commitments are published in full in English on the website of the Directorate-General for Competition at:

http://ec.europa.eu/competition/index_en.html

4. INVITATION TO MAKE COMMENTS

- (15) Subject to market testing, the Commission intends to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring binding the commitments summarised above and published on the Internet, on the website of the Directorate-General for Competition, to be binding.
- (16) In accordance with Article 27(4) of Regulation 1/2003, the Commission invites interested third parties to submit their observations on the proposed commitments.

These observations must reach the Commission not later than seven weeks following the date of this publication. Interested third parties are also asked to submit a non-confidential version of their comments, in which any information they claim to be business secrets and other confidential information should be deleted and replaced as required by a non-confidential summary or by the words 'business secrets' or 'confidential'.

- (17) Answers and comments should preferably be reasoned and should set out the relevant facts. If you identify a problem with any part of the proposed commitments, the Commission would also invite you to suggest a possible solution.
- (18) Observations can be sent to the Commission under reference number **AT. 39816 Upstream Gas Supplies in Central and Eastern Europe** either by e-mail (COMP-GREFFE-ANTITRUST@ec.europa.eu), by fax ((32-2) 295 01 28) or by post, to the following address:

European Commission
Directorate-General for Competition
Antitrust Registry
B-1049 Bruxelles/Brussel