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**COMMISSION DECISION**

**of XXX**

**on the exemption of the "Gazelle" interconnector according to Article 36 of Directive  
2009/73/EC**

**ONLY THE CZECH TEXT IS AUTHENTIC.**

## COMMISSION DECISION

of 20 May 2011

on the exemption of the "Gazelle" interconnector according to Article 36 of Directive 2009/73/EC

**ONLY THE CZECH TEXT IS AUTHENTIC.**

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2009/73/EC<sup>1</sup>, and in particular Article 36 thereof,

Whereas:

(1) **Procedure**

1. On 29 December 2010, the Energy Regulatory Office of the Czech Republic ("ERU") adopted a decision exempting a new gas pipeline called "Gazelle" which crosses the Czech Republic and connects the OPAL pipeline in Eastern Germany with the MEGAL pipeline system in Southern Germany.
2. On 13 January 2011, upon invitation of ERU, the German energy regulator Bundesnetzagentur ("BNetzA") provided comments on the decision.
3. On 20 January 2011, ERU notified its decision to the European Commission according to Article 22 of Directive 2003/55/EC.
4. On 14 February 2011, the Commission published a notice inviting the public to submit comments on the notified exemption decision. No such comments were received.
5. On 17 February 2011 and on 12 April 2011, the Commission requested additional information from ERU which was provided on 23 February, 7 March and 18 and 21 April 2011. The latter request for information prolonged the initial two months deadline for the Commission's decision by another two months according to Article 36(9) Directive 2009/73/EC which entered into force on 3 March 2011.
6. On 28 February 2011 and on 15 March 2011, the Czech authorities met with the Commission services to discuss the case.
7. On 30 March, the Commission services met with NET4Gas and RWE Transgas to discuss the case.

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<sup>1</sup> OJ L 211 of 14.8.2009, p.94.

## (2) Description of the project

8. The planned Gazelle pipeline is the continuation of the Ostsee Pipeline Anbindungsleitung "OPAL" and is as such part of the wider Nord Stream project which aims at transporting Russian gas to Europe via the Baltic Sea.
9. Gazelle will start at the Czech/German border point Brandov; crosses the Northwest of the Czech Republic and ends at the Czech/German border at the Waidhaus border station. Gas quantities taken up by Gazelle will be directly shipped to Waidhaus and can only be exited in Waidhaus.<sup>2</sup> At the German Waidhaus border station, Gazelle will be connected to the MEGAL pipeline system, which is a pipeline system in southern Germany that transports gas from Waidhaus and the Austrian/German border to the German/French border.
10. While the three projects Nord Stream, OPAL and Gazelle are sponsored by different companies, they depend on one another, as both OPAL and Gazelle transport further the Russian gas delivered through Nord Stream.<sup>3</sup>
11. The Czech transmission system for natural gas is operated by NET4GAS and it is almost 2 460 km long. The system has a triangular shape: In the North, the existing pipeline system starts at the border point of Hora Sv. Kateřiny which is connected to the German border point Olbernhau where it connects to the German pipeline system operator by Wingas Transport GmbH. Hora Sv. Kateřiny is also connected to the Sayda compressor station, the end point of the pipeline system operated by ONTRAS VNG Gastransport GmbH. From Hora Sv. Kateřiny the existing system connects to the Czech/Slovak border point of Lanžhot where it connects to the Slovak pipeline system operated by Eustream a.s. From Lanžhot the existing pipeline system runs to the Western border point of Rozvadov which is connected to the German border point of Waidhaus. A smaller pipeline runs from The Western border point Rozvadov via the Primda compressor station to Hospozin, a take off point on the Hora Sv. Kateřiny – Lanžhot line. This transmission system transports up to 30 bcm / year of natural gas through the Czech Republic.
12. The below table shows the total transit volume of natural gas (bcm per year 15 °C).

	Transit from the Slovak Republic (CPB Lanžhot) to Germany - (East - West flows)			Transit from CBP Olbernhau to CBP Waidhaus (North - South flows from Germany to Germany)	Transit from Germany to the Slovak Republic (West - South flows)	Σ Transit
	Lanžhot to Waidhaus	Lanžhot to Sayda	Lanžhot to Olbernhau			
<b>2010</b>	18.938	3.413	1.374	3.992	1.761	29.478
<b>2009</b>	13.469	3.942	894	6.812	444	25.561

<sup>2</sup> Application for an exemption by NET4Gas to ERO page 4, section 1.3. The valves at the Primda station are designed in a way that no gas can be transported to the Lanžhot station. This means that gas shipped through Gazelle can only flow to the Waidhaus border station where the pipeline connects to the German transmission system MEGAL.

<sup>3</sup> Commission Decision of 12 June 2009, K(2009)4694, D/3322 at paragraph 12.

<b>2008</b>	17.849	3.747	1.154	6.812	0	29.562
<b>2007</b>	17.497	3.787	934	5.312	0	27.530

13. This transit of between 27 and 29 bcm/year compares to a domestic consumption of natural gas in the Czech Republic of about 8 bcm/year. The below table indicates the total consumption of gas in the Czech Republic (bcm per year).

<b>2007</b>	8.653
<b>2008</b>	8.685
<b>2009</b>	8.161
<b>2010</b>	8.979

14. The planned Gazelle pipeline will operate with a capacity between 29.53 bcm/year (assuming 90% efficiency) and 32.81 bcm/year (assuming 100% efficiency). Its planned length is 160 km long of which 140 km will be newly constructed. For the last 20 km, the Gazelle pipeline will use an existing stretch of the pipeline system between the Primda station and the Rozvadov/Waidhaus border transit station. This stretch, located in an environmentally protected area, is currently owned by NET4GAS. NET4GAS will transfer the 20 km stretch into the exclusive use and ownership of Brawa<sup>4</sup>.
15. Gazelle will be fully owned by a special purpose company called Brawa which was set up as a 100% subsidiary of NET4GAS s.r.o. NET4GAS is the transmission system operator of the existing Czech pipeline system and belongs to the RWE Transgas group. The Gazelle pipeline will be operated by NET4GAS, whereas the capacity will be booked by RWE Transgas. On the day Gazelle will start operating, the owner of the pipeline will therefore be a legal person which is distinct from the operator of the Czech gas pipeline system NET4GAS. Brawa will own the entire length of the Gazelle pipeline from the point where it enters the Czech Republic from Northern Germany near Brandov to the border point near Waidhaus where it leaves the Czech Republic again to Southern Germany.

### (3) The notified decision

16. The notified decision exempts a maximum of 30 bcm / year of direct forward-flow capacity of the Gazelle pipeline from regulated Third Party Access (Article 32,33 and 34 of Directive 2009/73/EC) and from the regulation of tariffs (Article 41 (6), (8) and (10) of Directive 2009/73/EC) for a period of 23 years. More specifically, the decision stipulates the following:

*I. "The Brandov Border Transit Station – Rozvadov DN 1400 High-pressure Gas Pipeline" interconnector, which is to directly interconnect the future Brandov/Olbernhau border transit station and the Waidhaus/Rozvadov border transit station, some 160 km long, has been exempted from the obligation to allow regulated TPA under the conditions laid down in the Energy Act (hereinafter referred to as "temporary reduction").*

<sup>4</sup> See at page 9 of the notification of NET4Gas to ERU, section 2.1.2.

*II. The temporary reduction has been set for a period commencing on 1 January 2013 and ending on 1 January 2036. The temporary reduction shall terminate in the event that the Gazelle gas pipeline is not put into operation by 31 December 2016.*

*III. The following conditions of access have been set for the Gazelle pipeline:*

*a) The temporary reduction shall apply to the entire length of the interconnector, namely for its direct forward-flow capacity of 30 bcm/year.*

*b) The temporary reduction shall only apply to the joint booking of the Brandov entry border point and the Waidhaus exit border point, without a possibility to enter the virtual trading point. The temporary reduction shall be without prejudice to the opportunity of the separate booking of transmission capacities amounting to the difference between the technical capacity and the capacity of the Gazelle pipeline, each of the above border points, and, in turn, the entry into and exit from the virtual trading point.*

*c) The transmission system operator shall provide for the following terms and conditions in gas transmission agreements relating to exempt capacity:*

*aa) If a user does not nominate transmission on the gas day (D-1) preceding the gas day on which the transmission is to take place, the transmission system operator shall offer this capacity, in a non-discriminatory manner, to other users as firm capacities for the following day and shall provide them well in advance to make possible their effective use on day D.*

*bb) If the utilisation of exempt capacity booked for more than one quarter of a year by a single user is, on average, less than 10% of the booked capacity during the course of one quarter, the transmission system operator shall withdraw all unused exempt capacity from the user of the exempt capacity for at least the following calendar quarter and offer it to other users, on time and in a non-discriminatory manner, as firm daily or standard transmission capacities.*

*Outages of the line caused by failures, repairs and similar events shall be taken into account for the benefit of the original user. The foregoing shall be without prejudice to the original user's obligation to pay the agreed price for unused capacity.*

*cc) Following the withdrawal of exempt capacity under points aa) and bb) of this ruling, the original user's nominations and re-nominations shall be ruled out.*

*dd) Should no third party be interested in withdrawn exempt capacity, the original user shall have the right to use such capacity again.*

*d) The transmission system operator shall ensure that as at the date of effect of a gas transmission agreement relating to exempt capacity and entered into with the user of exempt capacity, the total exit capacity booked for this user at the Waidhaus exit border point does not exceed 30 bcm/year. The foregoing shall be without prejudice to the right of the user of exempt capacity to book free capacity, if any, at the Waidhaus exit border point under the conditions laid down in applicable legal regulations for capacity allocation.*

*IV The part of the application concerning a temporary reduction in the obligation to allow connection to the Gazelle pipeline has been rejected. "*

**(4) Assessment of the conditions for an exemption**

17. As by the date the present decision is adopted, Directive 2003/55/EC has been repealed, the Commission services must apply the substantive provisions of Article 36 of Directive 2009/73/EC which entered into force on 3 March 2011 irrespectively of the fact that the Czech legislator is delayed in transposing the provisions of this Directive into national law.
18. No reasons speak against an exemption in principle. However, some additional conditions must be foreseen to ensure full compliance with the conditions under Article 36 of Directive 2009/73/EC.

***Application of Article 36 to Gazelle***

19. Gazelle is a transmission pipeline and its purpose is to continue the Ostsee Pipeline Anbindungsleitung "OPAL" as part of the wider Nord Stream project which aims at transporting Russian gas to Europe via the Baltic Sea. Gazelle starts at the Brandov border point and ends at the German border station of Waidhaus where an exit point exists and where Gazelle is connected to the German transmission system.
20. As Gazelle crosses a border between Member States, namely the Czech/German border at the Waidhaus border station where it is connected to the German transmission system, Gazelle qualifies as "*interconnector*" within the meaning of Article 36 in conjunction with Article 2 (17) of Directive 2009/73/EC.
21. The fact that Gazelle uses 20 km of an existing pipeline between Primda and the German border station of Rozvadoc/Waidhaus must however be analysed further with respect to the question whether Gazelle is a "*new*" interconnector.
22. The Commission considers generally that the constituent elements of Article 36 of Directive 2009/73/EC, namely "*new*" and "*interconnector*", must be interpreted strictly as Article 36 is an exception to the general rules of the internal market. The legislator of the Third Package neither intended to open the possibility for retrospective exemptions of existing interconnectors, nor for purely domestic transmission systems.
23. However, where the predominant aspect of a new transmission system is clearly to interconnect Member States, the qualification as "*interconnector*" is not prevented by the fact that a relatively small portion of the overall capacity of a new pipeline is used for domestic transmission purposes, as well.<sup>5</sup>

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<sup>5</sup> The Commission concluded in the OPAL case that where a new interconnector is hooked up to an existing transmission system and where a relatively small capacity on the new interconnector is used for domestic use, this does not prevent the qualification of an interconnector as long as the predominant purpose of the pipeline is to interconnect transmission systems of two countries. See the Commission's decision in the OPAL case, K(2009) 4694 at paragraph 24. OPAL has a total capacity of 36.5 bcm/year and 4.5 bcm of the capacity will be used in Northern Germany for domestic use.

24. Likewise, whether a gas infrastructure is "new" within the meaning of Article 36 (1) in conjunction with Article 2 (33) of Directive 2009/73/EC must be assessed on a case by case basis. The fact that a relatively small portion of an interconnector is not constructed from scratch but rather achieved by rededicating an existing part of a domestic pipeline system, does not yet prevent the qualification of the entire pipeline as "new" gas infrastructure if the existing part is proportionately short compared to the total length of the interconnector and if the alternative of constructing a new piece of infrastructure raises environmental concerns, is technically not required and commercially unreasonable.
25. This is the case here. The predominant part of the 160 km Gazelle pipeline will be newly constructed, while only a 20 km stretch will be achieved through the transfer of an existing pipeline into the exclusive ownership and use by the Gazelle owner Brawa. According to NET4GAS, the existing Primda-Rozvadov pipeline system already exceeds the total exit capacity of the German pipeline system ending at Waidhaus. It would therefore be uneconomical to build a parallel pipeline next to the existing system.<sup>6</sup> Building a new 20 km stretch of pipeline might also be problematic for environmental reasons, as the existing pipelines between Primda and Rozvadov cross an environmentally protected area.
26. In view of these facts, the Commission can agree with ERU to qualify Gazelle as new gas infrastructure within the meaning of Article 36 of Directive 2009/73/EC.

***Conditions for an Exemption according to Article 36***

***(a) Investment must enhance competition in gas supply and enhance security of gas supply - Article 36 (1) (a) of Directive 2009/73/EC***

***(aa) Enhancement of competition***

27. According to 36 (1) (a) of Directive 2009/73/EC the investment must enhance competition in gas supply. For the analysis of this condition, the likely positive and negative effects of the investment on competition need to be analyzed and balanced. Only if the positive effects of the investment outweigh the negative effects, an exemption under Article 36 can be granted<sup>7</sup>.
28. In its decision, ERU concludes that the construction of Gazelle will overall enhance competition.<sup>8</sup>

***Czech Republic***

29. What concerns the competitive effects in the Czech Republic, ERU considers that if Gazelle were not built, gas from the new OPAL pipeline would have to be transported through the existing pipeline system on a much longer route (from Brandov via Lanžhot to Rozvadov/Waidhaus), thereby congesting the existing Czech

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<sup>6</sup> See page 9 of the notification of NET4Gas to ERU, section 2.1.2.

<sup>7</sup> COMMISSION STAFF WORKING PAPER Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – New Infrastructure Exemptions ("Staff Working Paper"), paragraphs 31 and 32.

<sup>8</sup> Notified decision of ERU on page 6.

pipeline system. According to ERU, the construction of Gazelle will, conversely, free almost the entire capacity on the existing pipeline system between Lanžhot, Rozvadov/Waidhaus and Hora Sv. Kateřiny. This capacity (approx. 30 bcm/year) will then be available for third parties who could transport gas from and to other countries and notably create transport alternatives for imports from Germany, Norway or Russia.

30. The Commission agrees with ERU that the construction of Gazelle will, on balance, have a positive effect on the Czech gas markets. The construction will notably not reinforce the dominant position of an undertaking active on the Czech wholesale or retail or the upstream gas production markets.
31. As concerns the upstream *producer market*<sup>9</sup>, gas purchased from Gazprom Export Ltd. ("Gazprom") accounts for the majority of the Czech gas consumption<sup>10</sup>. However, the construction of Gazelle will not strengthen Gazprom's market position on this market.
32. The gas volumes on Gazelle will be transported to Germany and other markets via the Rozvadov/Waidhaus exit point and are not intended to serve the Czech market, except for emergency situations<sup>11</sup>. From a competition point of view, the Gazelle pipeline is thus rather a substitute for the "*Brotherhood*" pipeline, which is currently used for transports to the German border, than an additional source for gas imports to the Czech markets.
33. Furthermore, the Czech regulator rightly points to the fact that the available import capacities for competitors of Gazprom would rapidly decrease absent the construction of Gazelle, since the gas volumes arriving at Hora Sv. Kateřiny from the OPAL pipeline would have to be transported on the existing Czech gas transmission system, significantly reducing import capacities, in particular at the Lanžhot border point. The construction of Gazelle therefore ensures that the import capacities available to Gazprom's competitors will at least be maintained even after the change of gas transits to OPAL<sup>12</sup>.

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<sup>9</sup> See on this market also "OPAL" exemption decision, K(2009) 4694 at paragraph 58 et seq. It appears that the definition of a *producer market* (also referred to as "*market for production and first time sale*" or "*upstream wholesale*" market) which concerns gas sales by gas producers to wholesalers sold on a long-term basis and in large volumes to Czech importers, is still appropriate. Indeed, the market conditions on this market vary from the customers' perspective from the conditions on other markets for the supply/import of gas (e.g. gas purchases via gas hubs which are usually for smaller volumes and short- or mid-term). The question of the exact market delineation can, however, be left open since the competition assessment would not substantially change if gas imports via hubs would be included to the relevant market.

<sup>10</sup> Gas imports into the Czech Republic from Russia amounted to approx. 5 bcm in 2009, from Norway to approx. 3 bcm and from Germany to approx. 0.5 bcm. Gazprom therefore accounted for around 53% of domestic gas consumption. It must be noted that this figure includes only direct imports from Gazprom, not indirect imports via Germany.

<sup>11</sup> The conditions imposed by ERU to its exemption decision make in any case sure that gas exiting in the Czech Republic will not benefit from the exemption decision.

<sup>12</sup> The current situation *after the construction of OPAL* differs from the capacity situation described by the ERU in 2008 (see "OPAL" exemption decision, K(2009) 4694 at paragraph 54/footnote 35). Before the construction of OPAL and the decision to redirect gas flows to the North Stream and OPAL pipeline, there were indeed no capacity bottlenecks in the Czech gas transmission pipeline system. However,



34. As concerns the Czech *wholesale and retail markets*, the Commission notes that RWE Transgas is still by far the most important player on these markets. According to data provided by ERU, the market share of RWE Transgas was above 70% in 2010. On the retail market, companies belonging to the RWE Group had, according to ERU, a market share of 62% in 2010, which decreased to 59% in January 2011. However, the conditions imposed by ERU to its exemption decision make sure that RWE Transgas will not benefit from the exemption on the Czech market, e.g. by booking capacities which are exempted from regulatory provisions<sup>13</sup>. Transports on Gazelle are only insofar exempted from regulatory provisions as they concern bookings from *border to border*. Conversely, any volumes exiting within the Czech Republic cannot be exempted from regulatory provisions<sup>14</sup>. Therefore, RWE Transgas will not be able to strengthen its market position as a result of the exemption decision.
35. The Commission agrees also with the conclusion of ERU that the construction of Gazelle will improve the competitive situation of competitors of RWE Transgas on the Czech gas wholesale and retail markets. A significant shortage of gas import capacities, resulting from "OPAL"-capacities on the Czech gas transmission system, would undoubtedly negatively affect the capabilities of RWE Transgas's competitors to compete with the incumbent on the Czech wholesale and retail markets.
36. Gazelle will therefore positively affect the competitive situation on the Czech gas markets, without strengthening the position of dominant players on these markets.

*Germany and other countries*

37. The Commission has also considered possible competition effects of the Gazelle project on the German gas markets which will be served by the Gazelle pipeline<sup>15</sup>. Indeed, the Commission has made clear in previous cases that exemption requests introduced by dominant companies which might increase their dominant position in markets served by the new infrastructure are unlikely to meet the criteria of Article 36 (1) (a) of Directive 2009/73/EC<sup>16</sup>.
38. However, in the present case there is no risk that the Gazelle project might reinforce a dominant position of RWE Transgas or Gazprom.
39. Concerning the producer market, Gazelle replaces the previous transport route via the "*Brotherhood*" pipeline and will not result in increased gas imports from Gazprom. Since there is currently no free capacity at the entry point in Waidhaus and no substantial capacity expansion is envisaged, Gazprom is not in a position to substantially increase its imports into Germany on this point. Furthermore, the gas transported via Gazelle to Waidhaus has already entered the German market in

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ERU is correct in assuming that this situation is likely to change after the redirection of gas volumes through OPAL.

<sup>13</sup> See Staff Working Document, paragraph 34.

<sup>14</sup> See in this context also the similar condition of the German regulator (Bundesnetzagentur) in the "OPAL" decision and the Commission's assessment of the impact of the OPAL pipeline on the German market, see decision K(2009) 4694 at paragraphs 76-78.

<sup>15</sup> See already the Commission's "OPAL" decision, in which the effect on the Czech markets were at the core of the analysis, see decision K(2009) 4694 at paragraphs 55-74.

<sup>16</sup> Staff Working Paper, paragraphs 33 and 34.

Greifswald. Gazprom's position on the producer market, which is in any event significantly smaller in Germany than in the Czech Republic, will therefore not change through Gazelle.

40. Gazelle will also have no negative effect on the German wholesale and retail markets. The gas volumes entering the German market at Waidhaus will be owned by Gazprom according to the agreement between RWE Transgas and Gazprom. Due to the capacity constraints at Waidhaus, Gazprom will not have more gas volumes available at Waidhaus than today. Furthermore, Gazprom is not dominant on the wholesale and retail markets in the relevant market areas to which the entry point at Waidhaus is connected (Open Grid Europe market area).
41. Likewise, no negative effects on competition can be expected in other Member States.

*(bb) Impact of Gazelle on security of supply*

42. According to ERU, a *physical* reverse flow capacity from the Waidhaus border point to the Brandov border point is possible in emergency situations by decreasing the operating pressure of the OPAL pipeline is decreased.<sup>17</sup> The Brandov border point is technically arranged to physically enable the transport of gas from the Czech Republic into Germany via Olbernhau or the Sayda border points, as well to the existing pipeline system of the Czech Republic. In emergencies, the transmission system operator can also use the existing transmission system for transporting gas from Waidhaus to Hora Sv. Kateřiny and from there to the North of Germany.
43. According to ERU, the Brandov border point of Gazelle is technically connected to the Olbernhau and Sayda border points. The Gazelle pipeline is moreover technically connected to the Czech transmission system in Brandov, Jirkov, Svinomazy and Přimda in emergency situations. If there is an emergency, as it was the case during the gas flow interruption via Ukraine in January 2009, the transmission system operator is able to put these connections into operation so that there is a direct and continuous flow of natural gas to the Czech system.
44. The decision however does not yet contain an explicit condition which obliges the operator of Gazelle to enable bi-directional capacity on Gazelle. To fulfill the condition that Gazelle enhances the security of supply, the operator of Gazelle must be obliged to offer an adequate capacity for bi-directional flows. In determining the bi-directional capacity, the operator of Gazelle will have to consult the competent authority in the Czech Republic.
45. Moreover, the Use It or Lose It requirements imposed by ERU foresee that the user of Gazelle loses the exempted capacity if and to the extent that it does not nominate transmission on the gas day (D-1) preceding the gas day on which the transmission is

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<sup>17</sup> Between the cross-border points of Brandov and of Waidhaus, there is no compression station for technical reasons. According to ERO (letter of 23 February 2011 on page 1), the reason for the absence of compressor stations on Gazelle is the fact that the pressure at the Brandov border point is 73 MPa while on the Waidhaus border point it must decrease to 50 MPa, the same (and required) pressure level of the downstream transmission system in Germany. Therefore there is no need for compression. The pressure drop occurs while transporting gas through the pipeline from Brandov to Waidhaus.

to take place. NET4GAS must then offer this capacity in a non-discriminatory manner to all other users as firm capacities for the following day and shall provide them well in advance to make possible their effective use on day D. To the unused capacities all provisions of Regulation (EC) No 715/2009 apply.

46. As far as virtual reverse flows on Gazelle are concerned, the notified decision applies to forward flow capacity from Brandov to Waidhaus, only.<sup>18</sup> This means that physical and virtual reverse flows on Gazelle are subject to regulation.
47. Therefore, it is physically and contractually possible to make use of gas transported through Gazelle for supplying the Czech market or any neighbouring market by making use of at least virtual but possibly also physical reverse flow from Germany into the Czech Republic.
48. Moreover, the completion of Gazelle will relieve the existing system of transport capacity and this capacity can be used for new combinations of forward and reverse flows on the Olbernau/Hora Sv. Kateřiny – Lanžhot route. The freed up capacity in the Czech transmission system will be important both in terms of short-term effects, for example, in the case of supply disruptions and in terms of long-term effects.
49. However, it is not yet foreseen that the two border points of Hora Sv. Kateřiny and Brandov will serve as one common virtual platform for trading gas from Germany to the Czech Republic and *vice versa*. This shortcoming prevents an increase of liquidity in the Czech market by foregoing the possibility of netting gas transports on the existing North-South/East axis between Hora Sv. Kateřiny and Lanžhot with gas transports on the new Brandov - Waidhaus connection through Gazelle.
50. ERU should therefore ensure by means of an additional condition that at the new border point of Brandov, regulated reverse flows apply from the exit point of Gazelle into OPAL and from the exit point of OPAL into Gazelle. The new border point of Brandov shall be treated as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from the Czech Republic to Germany and from Germany to the Czech Republic.
51. In conclusion, the Commission considers that Gazelle will enhance the competition and security of supply for the Czech Republic if the new border point of Brandov is treated as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from and to Germany. This exemption is notwithstanding the legal obligation of the operator of the Gazelle pipeline to offer bi-directional capacity according to Article 7 of Regulation (EC) No 994/2010.

***(b) The level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted – Article 36 (1) (b) Directive 2009/73/EC***

52. On 27 August 2010, NET4GAS published an open season procedure based on the provisions of the Czech Energy Act 458/2005 and Regulation (EC) No 1775/2005<sup>19</sup>

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<sup>18</sup> See III.A of ERO's Decision "for its direct forward flow capacity of 30 bcm/year". *E contrario*, the exemption does not apply to physical and virtual reverse flows on Gazelle.

and invited potentially interested shippers to submit legally binding capacity requests and to provide possible indications of conditions under which they would book transmission capacity on the Gazelle pipeline other than those under regulated terms. ERU was consulted upfront on the conditions of the open season procedure.<sup>20</sup> By the end of the open season procedure on 1 November 2010, NET4GAS received no binding bids at all. However, on 1 November 2010 RWE Transgas sent to NET4GAS, in line with Article 9 of the Open Season Procedures<sup>21</sup>, a non-binding indication that they would be interested in booking capacity on Gazelle for a price other than the regulated price for gas transmission and under different commercial terms and conditions.

53. In view of the outcome of the open season, NET4GAS applied to ERU for an exemption from the Section 67a of the Energy Act for a period ending on 1 January 2036. According to ERU, the failure of the open season procedure demonstrates that the investment will not pay off within a reasonable period of time unless it is exempted from the internal market rules on tariffs and Third Party Access.
54. ERU also refers to the technical and financial risks of the Nord Stream project which are borne by OPAL and indirectly also by Gazelle.
55. Notwithstanding the value of NET4Gas' open season for determining the risks of a regulated solution<sup>22</sup>, the risks of building Gazelle are at any rate closely related to the risks of building OPAL which are in turn related to the construction of the Nord Stream subsea pipeline as set out in the Commission's OPAL Decision<sup>23</sup>. In addition, there are no other realistic prospects of requests for booking capacity on the Gazelle pipeline as Gazelle is connected only to the OPAL pipeline.
56. While ERU considers these risks as one fundamental reason for granting the exemption, neither in the notification of NET4Gas nor in the assessment of ERU it is explained why Gazelle would carry *higher* risks than the OPAL pipeline. The Commission therefore takes the view that the duration of the exemption for Gazelle must be limited to the exemption for OPAL which was 22 rather than 23 years. The exemption must consequently at any rate end on 1 January 2035 rather than on 1 January 2036.
57. In conclusion, the Commission can agree that the risks of building Gazelle necessitate an exemption provided that the duration of the exemption remains limited to 22 years.

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<sup>19</sup> Regulation (EC) No 1775/2005 of the European Parliament and the Council of 28 September 2005 on conditions for access to the gas transmission networks, OJ 289 of 3.11.2005 on p.1.

<sup>20</sup> See reply of ERU of 7 March 2011 at Q 3.b.

<sup>21</sup> Article 9 of the Open Season Procedure reads: "*Non-binding Indication. In case these Regulations contain conditions that preclude a Participant from submitting a Request, such Participant is kindly asked to provide NET4GAS with a non-binding indication under which conditions it would be willing to make such request (especially, what would be the acceptable terms and conditions of the gas transmission contract and the tariff conditions).*"

<sup>22</sup> In the Commission's view, the eligibility conditions for the participation of bidders in the open season of NET4Gas are not unproblematic, as they excluded shippers who could not submit a bid for 90% of the total capacity.

<sup>23</sup> K(2009)4694, D/3322, paragraphs 31 to 35.

***(c) Infrastructure must be owned by a legal person different from system operators in whose system that infrastructure will be built – Article 36 (1) (c) Directive 2009/73/EC***

58. As set out in section II.2 above, the Gazelle pipeline will be owned by a legal person which is distinct from the operator of the Czech gas transmission system NET4Gas. Brawa will own the Gazelle pipeline and NET4GAS operates the remaining pipeline system in the Czech Republic. This legal separation between the owner of the exempted pipeline and the operator of the existing national grid fulfils the requirement under Article 36 (c) of Directive 2009/73/EC.
59. For sake of clarity, fulfilling the requirement of Article 36 (c) of Directive 2009/73/EC does not mean that the operator of Gazelle also fulfils the requirement of ownership unbundling which applies as of 3 March 2011 to all new transmission system operators within the meaning of Article 9 of Directive 2009/73/EC. This requirement addresses the separation of production or supply from transmission by means of measures which prevent the exercise of control by a company active in the production or supply of gas over a company which acts as transmission system operator for a gas pipeline and *vice versa*.
60. The Czech Republic cannot provide for a derogation of NET4GAS from ownership unbundling obligations according to Article 9 (4) or Article 9 (8) of Directive 2009/73/EC by means of law, because the Gazelle transmission system did not belong to a vertically integrated undertaking by the cut off date of 3 September 2009. The only possibility to lift the obligation of ownership unbundling is an explicit exemption by the national regulatory authority ERU according to the national provisions which implement Article 36 of Directive 2009/73/EC. Unless ERU grants such an exemption (which must subsequently be approved by the European Commission), the obligation of ownership unbundling applies to Gazelle.
61. The Commission therefore agrees with ERU that the owner of the Gazelle pipeline, Brawa, fulfils the requirement of Article 36 (1) (c) of Directive 2009/73/EC. Brawa, RWE Transgas and NET4GAS will however have to comply with the requirement of ownership unbundling according to Article 9 of Directive 2009/73/EC unless ERU exempts Gazelle thereof according to Article 36 of the Directive. The present decision does not exempt the operator of Gazelle from the obligation of ownership unbundling.

***(d) Charges must be levied on users of the infrastructure – Article 36 (1) (d) Directive 2009/73/EC***

62. As part of the indicative conditions for capacity allocation on the Gazelle route, RWE Transgas a.s. specified tariff conditions in point 3 of its letter of 1 November 2010. This confirms, as ERU concludes, that charges for the use of the interconnector must be levied on the users of Gazelle.

***(e) The exemption must not be detrimental to competition or the functioning of the internal market – Article 36 (1) (e) Directive 2009/73/EC***

63. Exemptions under Art. 36(1)(e) may notably have a detrimental effect on competition if a similar infrastructure project is planned in parallel to the project for

which an exemption is requested and the exemption for this project risks jeopardizing the commercial viability of the other project<sup>24</sup>. Since no alternative projects to Gazelle exist in the present case, the exemption for the Gazelle project is unlikely to be detrimental to competition<sup>25</sup>.

64. As to the functioning of the internal market, there are no concrete indications that the capacity of Gazelle would be below demand.<sup>26</sup> The dimension of Gazelle corresponds to the dimension of OPAL at the border entry point of Brandov.
65. However, the construction of a new major infrastructure may require the expansion or reinforcement of the existing regulated infrastructure due to substantially increased energy flows. It is therefore necessary to consider how the exemption influences the costs of operating the regulated system if, for example, the users of the regulated system are faced with substantially increased higher network tariffs.
66. The exemption of Gazelle from tariff regulation has the potential to protect users from underwriting the risks related to the construction of this new pipeline which duplicates the existing pipeline structure of NET4 gas for the transit of Russian gas to Germany in the East West direction.
67. At the same time, if Gazprom Export decides to route all gas transported through the Czech Republic via Nordstream, OPAL and Gazelle, then the capacity of the existing triangular pipeline system between Lanžhot, Waidhaus and Hora Svaté Kateřiny may become largely redundant. Maintaining this existing pipeline system nevertheless may necessitate tariff increases which are ultimately borne by the users of the regulated system.
68. ERU however informed the Commission that tariffs on the existing pipeline system are regulated for a longer period of time. ERU also expects that any future increase of tariffs for the maintenance of the triangular pipeline system between Lanžhot, Waidhaus and Hora Svaté Kateřiny will be attenuated by the possibility that the Baumgarten hub in Austria is in the future connected to the Nabucco pipeline which will connect central Europe to the Caspian basin. Then, additional new gas volumes from the Caspian basin could be transported from Baumgarten via Lanžhot to Waidhaus and Hora Svaté Kateřiny.
69. The risk of tariff increases for the regulated system, albeit limited, must be balanced with the advantage for users who are protected through an exemption from underwriting the risks related to the construction of Gazelle. Considering moreover the possibility of enhanced entry to the Czech market due to the freeing of capacity on the existing pipeline system, the effects of an exemption are therefore overall most likely positive for the internal market.

**(f) Others**

70. According to Article 36 (6) of Directive 2009/73/EC the national regulatory authority must oblige the transmission system operator to foresee both Use It Or Lose It

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<sup>24</sup> Staff Working Paper, paragraph 60.

<sup>25</sup> See for the competition assessment under Art. 36(1)(a) above, paragraphs 27-41.

<sup>26</sup> Staff Working Paper, paragraph 63.

(UIOLI) Principles and the possibility for users of this infrastructure to trade capacity on the secondary market. While the notified decision foresees UIOLI principles, it does not explicitly impose the possibility of secondary trading. This condition must therefore be added.

HAS ADOPTED THIS DECISION:

#### *Article 1*

The Commission requests the Energy Regulatory Office of the Czech Republic to modify according to Article 36 of Directive 2009/73/EC the decision of 29 December 2010, notified to the European Commission on 20 January 2011 with file reference number 09645-10/2010-ERU as set out in the subsequent articles.

#### *Article 2*

The duration of the exemption shall be reduced from 23 to 22 years (from 1 January 2036 to 1 January 2035).

#### *Article 3*

An additional condition shall be imposed on the addressee of the exemption decision to enable sufficient bi-directional capacity on Gazelle to safeguard the security of supply of the Czech market in emergencies based on an opinion of the Competent Authority in the Czech Republic.

#### *Article 4*

An additional condition shall be imposed on the addressee of the exemption decision which stipulates that at the new border point of Brandov, regulated virtual reverse flow shall apply from the exit point of Gazelle into OPAL and from the exit point of OPAL into Gazelle. The exemption must also be conditional upon the treatment of the border point of Brandov as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from the Czech Republic to Germany and from Germany to the Czech Republic, so that access from the Czech virtual hub (i.e. its entry/exit system) to the German exit point of OPAL and the German virtual hub, and vice versa from Germany to the Czech Republic, is possible.

#### *Article 5*

An additional condition shall be imposed on the addressee of the exemption decision which stipulates that users of the infrastructure must be entitled to trade their contracted capacities on the secondary market.

*Article 6*

In line with Article 36 (9) of Directive 2009/73/EC, the Commission's approval shall lose its effect two years from its adoption in the event that construction of the infrastructure has not started and five years from its adoption in the event that the infrastructure has not become operational unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

*Article 7*

This Decision is addressed to the Energy Regulatory Office of the Czech Republic, Masarykovo namesti 5, 586 01 Jihlava, Czech Republic.

Done at Brussels,

*For the Commission*  
*Günther Oettinger*  
*Member of the Commission*