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COMMISSION DECISION

of 28.10.2016

on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC

Only the German text is authentic

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THE EUROPEAN COMMISSION,

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

Having regard to 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 ("Directive 2009/73/EC")¹, and in particular Article 36(9) thereof,

Whereas:

1. PROCEDURE

1.1. Initial exemption procedure 2009

- (1) On 25 February 2009, the German energy regulator Bundesnetzagentur ("BNetzA") took two decisions on the exemption of the Ostseepipeline-Anbindungsleitung ("OPAL") from third party access and tariff regulation in accordance with Article 22 of Directive 2003/55/EC² (transposed into German law by Article 28a of the Energy Industry Act ("EnWG")). Both decisions refer to separate co-ownership parts (*Bruchteilseigentum*) on OPAL.
- (2) Current ownership of OPAL belongs to a Bruchteilsgemeinschaft between the WIGA Transport Beteiligungs-GmbH & Co ("WIGA", formerly W & G Beteiligungs-GmbH & Co.KG, formerly Wingas GmbH & Co. KG, 80% co-ownership share) and E.ON Ruhrgas AG (20% co-ownership share). WIGA Transport Beteiligungs-GmbH & Co is jointly controlled³ by OAO Gazprom ("Gazprom") and BASF SE. The share of WIGA in OPAL is operated by OPAL Gastransport GmbH & Co.KG ("OGT"), whereas the E.ON Ruhrgas share is operated by Lubmin-Brandov Gastransport GmbH ("LBGT", formerly E.ON Ruhrgas Nord Stream Anbindungsgesellschaft mbH). Technical management of the entire pipeline is handled by OGT.⁴
- (3) In its decisions of 25 February 2009, BNetzA exempted, subject to conditions, the entire capacity of the pipeline for a period of 22 years, beginning with the start of

¹ OJ L 211, 14.8.2009, p. 94–136.

² Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176, 15.7.2003, p. 57–78.

³ Case No COMP/M.6910 – GAZPROM / WINTERSHALL / TARGET COMPANIES, Par. 4 (non-confidential version not yet published) provides that the joint control of OGT was not replaced by sole control of Gazprom in the course of the Wintershall acquisition. Joint ownership is publicly available, see <http://www.wiga-transport.de/> and <https://www.opal-gastransport.de/unternehmen/>.

⁴ Based on BNetzA reply to question 27 of the Commission's request for information

pipeline operations, from the application of provisions of regulated third party access ("TPA") in accordance with Article 18 and tariff regulation in accordance with Article 25 (2), (3) and (4) of Directive 2003/55/EC (transposed into German law as §§ 20-25 EnWG). For further details, reference is made to the BNetzA decisions of 25 February 2009 ("February 2009 Decisions"⁵). The present review concerns only the decision in case BK7-08-009 on the WIGA co-ownership share in OPAL.

- (4) By letter of 12 June 2009, the Commission established that the February 2009 decisions did not give sufficient evidence to show that the construction and operation of OPAL on the basis of the conditions imposed would have positive effects on competition in the Czech market for downstream wholesale supply of natural gas. Further, the Commission could not conclude with the required certainty that the operation of OPAL, as foreseen by the February 2009 decisions, would not result in a strengthening of the competitive position of Gazprom on the upstream wholesale gas supply market in the Czech Republic.
- (5) Against this background, the Commission requested BNetzA on the basis of Article 22 (4) Directive 2003/55/EC to modify its decisions of 25 February 2009 within 4 weeks as of receipt of the request ("Commission Request").⁶ The requested modification entailed limiting capacity bookings at the exit point from Germany into the Czech Republic at Brandov by undertakings or groups of undertakings holding a dominant position in one or several up- or downstream markets for natural gas in the Czech Republic or for deliveries of natural gas to the Czech Republic, unless special conditions, described in more detail below, are fulfilled. For further details on the 2009 procedure, reference is made to the Commission Request.
- (6) On 7 July 2009, BNetzA amended the February 2009 decisions to include the capacity limitation combined with an optional gas release programme as foreseen in the Commission Request (BNetzA file references remaining BK7-08-009 and BK7-08-010, respectively). Hereinafter, the BNetzA decision on the WIGA ownership part of OPAL, as amended by the decision of 7 July 2009 in case BK7-08-009, is referred to as "the Final Decision".

1.2. Review procedure

- (7) On 12 April 2013, OGT, Gazprom, as well as OOO Gazprom export ("Gazprom Export") formally requested BNetzA to review the conditions of the Final Decision.
- (8) On 31 October 2013, BNetzA, OGT, Gazprom, and Gazprom Export signed a Settlement Agreement under German public law ("the Settlement Agreement"). Annex 1 to this Settlement Agreement contains amendments to the operative part of the Final Decision and was published on BNetzA's website.⁷ It follows from the Settlement Agreement that the amendments contained in its Annex 1 as well as further obligations contained in paragraphs 1 and 2 of the Settlement Agreement are, subject to prior approval by the Commission in line with Article 36(8) Directive 2009/73/EC, directly applicable to the Final Decision.

⁵ File number BK7-08-009 and BK7-08-010.

⁶ Ausnahmegenehmigung der Bundesnetzagentur für die OPAL-Gasleitung gemäß Art. 22 der Richtlinie 2003/55, Commission request of 12 June 2009, C (2009) 4694, http://ec.europa.eu/energy/infrastructure/exemptions/doc/doc/gas/2009_opal_decision_de.pdf.

⁷ http://www.bundesnetzagentur.de/cln_1911/DE/Service-Funktionen/Beschlusskammern/1BK-Geschaeftszeichen-Datenbank/BK7-GZ/2008/2008_001bis100/BK7-08-009_BKV/Ver%C3%B6ffentlichung_Aktuelles.html?nn=361064

- (9) On 18 November 2013, BNetzA notified to the Commission the Settlement Agreement and in particular its Annex 1 as a draft decision for review of the Final Decision, concerning the exemption of the OPAL pipeline from the third party access requirements and regulation of access conditions ("First Settlement Agreement").
- (10) On 28 November 2013, Annex 1 to the First Settlement Agreement was published by the Commission on its website, asking interested parties for comments by 12 December 2013. On 2 December 2013, the deadline for comments was extended until 16 December 2013. Written comments were submitted in the course of the market consultation by one third party⁸ and the Polish regulator. Meetings were held between the Commission and representatives of two Member States concerned by the decision.
- (11) By email of 20 December 2013, the Commission requested additional information from BNetzA. BNetzA replied by email of 7 January 2014. Consequently, on the basis of Article 36(9) of Directive 2009/73/EC, the deadline for adoption of the Commission decision was extended by an additional two months from the date following the receipt of the reply.
- (12) On 7 January 2014, the Commission requested information on the Czech market for natural gas and the expected impact of the Notified Decision on the market from the Czech regulator Energetický regulační úřad ("ERU"). On 29 January 2014 ERU replied to the questionnaire.
- (13) On 7 March, 30 April, 15 July, 12 September and 30 October 2014, the period for taking a decision by the Commission was further extended in accordance with Article 36(9) of Directive 2009/73/EC with the consent of both the Commission and BNetzA. The last of these prolongations extended the deadline for a Commission decision to be taken until 31 January 2015.
- (14) Along with the prolongations of the period for issuing a decision, the parties of the First Settlement Agreement extended its validity until 31 October 2014. However, on 31 October 2014, the deadline under § 3(3) lit. b) of the First Settlement Agreement expired, as that deadline had not been prolonged by this point in time. Pursuant to § 3(4) of the First Settlement Agreement, all provisions of the First Settlement Agreement aiming at changes to the Decision became void. The Commission thus confirmed by a letter of 2 December 2014 to BNetzA that the review procedure had become without substance.
- (15) On 13 May 2016, BNetzA notified to the Commission a new agreement (the "New Settlement Agreement"). Pursuant to the New Settlement Agreement, the deadline under § 3 (3) lit. b) of the First Settlement Agreement is replaced by a deadline of 31 July 2016. The New Settlement Agreement integrates the substantive provisions of the Settlement Agreement and repeals and replaces it, with the exception of confidentiality requirements. On 8 July 2016, the Commission sent a set of questions to BNetzA, the reply to which was submitted on 2 August 2016. On 14 July 2016, the Commission sent questions to ERU, the reply to which was provided on 18 August 2016. On 28 September 2016, BNetzA agreed with the Commission on a prolongation of the deadline under Article 36(9) of Directive 2009/73/EC until 31 October 2016. BNetzA furthermore informed the Commission that the deadline under § 3 (3) lit. b) of the First Settlement Agreement was also prolonged until 31 October 2016.

⁸

As the third party has expressed the wish to remain anonymous, its identity is not specified here.

- (16) As the initial review procedure has been closed following the expiration of the First Settlement Agreement, the submission of the New Settlement Agreement by BNetzA ("the Notified Decision") is to be considered as starting a new review procedure at the level of the European Commission.
- (17) Prior to the Settlement Agreement between OGT, Gazprom, Gazprom Export and BNetzA, a working group had been established between the Ministry of Energy of the Russian Federation and the European Commission, including also representatives of BNetzA and Gazprom. The working group has explored how, against the background of the legal, factual and market circumstances, the OPAL pipeline could be operated more efficiently in line with EU law. The working group has formulated recommendations without prejudice to the applicable legal procedures in Germany and the EU for reviewing the Final Decision.

1.3. Legal context

- (18) The Commission notes that although there are no explicit provisions in Article 36 of Directive 2009/73/EC on possibilities for a review of existing exemption decisions, it results from general principles of administrative law that decisions with long-lasting effects may be subject to a review. In its decision-making practice, the Commission recognises the need to assess whether, in view of changes which have occurred following an exemption decision, a derogation from the internal energy market rules is still acceptable and whether the scope of the exemption and the conditions attached thereto are still appropriate. Where such changes have been assessed at national level and a modification of the national exemption decision is envisaged, the Commission has to have the opportunity to assess the modifications considered, so that full respect of the energy *acquis* is ensured. Otherwise the national decision to review the exemption decision would not be accompanied by corresponding changes in the Commission's decision on the initial national decision and the Commission would have no opportunity to assess the changes proposed. This would not be an acceptable result as it could lead to circumvention of Article 36 of Directive 2009/73/EC.
- (19) Review possibilities are clearly identified in similar types of decisions with long-lasting effects and which are subject to specific commitments. For instance, if EU merger control clearance has been granted subject to conditions, the standard conditions foresee a review clause, allowing the Commission to review the conditions upon request by the notifying party.⁹ In case of commitments in antitrust decisions, Article 9(2) of Regulation 1/2003¹⁰ provides that the Commission may, upon request or on its own initiative, re-open proceedings where there has been a material change in any of the facts on which the decision was based; where the undertakings concerned act contrary to their commitments; or where the decision was based on incomplete, incorrect or misleading information provided by the parties. The commitment text may also contain more specific review clauses.
- (20) In view of the principle of congruent forms and in order to ensure legal certainty, it is appropriate, in case of modifications to national exemption decisions such as the Notified Decision, to review it under the procedure described in Article 36 of

⁹ Model text for divestiture commitments; section F, <http://ec.europa.eu/competition/mergers/legislation/commitments.pdf>.

¹⁰ 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 OJ L 1, 04.01.2003, p.1-25.

Directive 2009/73/EC. In the absence of specific review clauses, changes to the scope of an exemption or the conditions attached to an exemption decision must be justified. New factual developments which have occurred following the initial exemption decision can be a valid reason for a review. A review process may be triggered where, for example, an exemption holder submits to the relevant NRA a request to amend certain conditions imposed by the existing exemption decision, to amend the scope of the exemption or requests a prolongation of the exemption or of the validity of the exemption decision.¹¹ It can also concern cases, where due to changes in the project and/or external circumstances, certain parameters of the project change and as a result questions arise whether the existing exemption still can be applicable to the modified project.¹²

- (21) The implementation of modifications to national decisions by way of a settlement agreement under German public law does not differ from the implementation via a decision under national law. Under Article 36 of Directive 2009/73/EC, national settlement agreements are to be considered as decisions if they directly produce legal effect and are binding in nature. In the case at hand, the New Settlement Agreement directly introduces modifications to the Final Decision, subject to prior approval by the Commission.

2. OPERATION OF THE OPAL PIPELINE

- (22) Since the granting of the exemption in 2009, the OPAL pipeline has been built and has become operational in 2011. The pipeline links the landing point of the Nord Stream pipeline at Greifswald/Lubmin in Germany to the Czech Republic (exit point Brandov). The OPAL pipeline consists of two separate segments: the northern segment, with a total annual capacity of 36.5 bcm (45 394 745 kWh/h), goes from Greifswald to Gross Köris (nearby Berlin). The southern segment, with 32 bcm annual capacity (39 661 324 kWh/h), links Gross Köris to the Czech system at Brandov. The difference of 4.5 bcm (5 733 421 kWh/h) is foreseen for the GASPOOL market area in Northern Germany.¹³
- (23) At Brandov, the OPAL pipeline connects with the Gazelle pipeline that crosses the north-west of the Czech Republic and ends at Waidhaus at the Czech/German border. On 20 May 2011 and 1 December 2011, the Commission issued two decisions on the exemption of the Gazelle pipeline from third party access, tariff regulation and

¹¹ The Commission twice reviewed the Nabucco exemption decision addressed to E-Control both under Article 22 of Directive 2003/55/EC (Commission decision of on 22 October 2008 (reference number: C(2008)6254), https://ec.europa.eu/energy/sites/ener/files/documents/2008_nabucco_decision2_austria_en.pdf_f) and under Article 36 of the Directive 2009/73/EC (Commission decision of 16 May 2013 (reference number: C(2013)2947), https://ec.europa.eu/energy/sites/ener/files/documents/2008_nabucco_decision_austria_en.pdf). In both cases this was based on a modification of the relevant exemption decision by the national regulatory authority, which was notified to the Commission.

¹² For example in Nabucco, certain new events took place after the initial exemption decisions were granted. The changes concerned the shareholders' structure, the pipeline's capacity and its route as well as the change in the start of the pipeline operation.

¹³ See para 13 of the Commission Request. The re-calculation from bcm to kWh/h is based on the data provided by BNetzA on 30.01.2014 using a caloric value of 11,25.

ownership unbundling, respectively.¹⁴ The Gazelle pipeline started operations in January 2013.

- (24) Under the Final Decision, transport capacity on OPAL from entry in Germany (notably at Greifswald) to the exit point Brandov¹⁵ is exempted from provisions on third party access and tariff regulation subject to the specific commitments described in more detail in paragraph (27). The exemption does not apply to the additional capacities at the entry point in Greifswald and exit at Gross Körös into the GASPOOL area.¹⁶ The exemption is, amongst others, subject to a condition that only up to 50% of OPAL's exit capacity at Brandov can be booked by undertakings with a dominant position in the Czech Republic ("capacity cap").
- (25) The Commission established a dominant position of Gazprom on the Czech wholesale upstream market and of RWE Transgas on the Czech wholesale downstream market. Due to their close links, the decision considered Gasprom's and RWE Transgas' capacity bookings in an aggregated manner for the purpose of the 50 % capacity cap. The 50% cap could be lifted in case a gas release programme of 3 bcm was offered by the dominant undertakings.
- (26) Under the Final Decision, the exemption from third party access rules is subject to a gas release programme of 3 bcm. The obligation to implement such a gas release programme is imposed on undertakings or groups of undertakings holding a dominant position in one or several up- or downstream markets for natural gas in the Czech Republic or for deliveries of natural gas to the Czech Republic in case they book more than 50 % of the exit capacity of the OPAL pipeline at the German/Czech border. As the gas delivered to OPAL at Greifswald is owned by Gazprom Export and there is no change of the ownership of the gas along the OPAL pipeline before the Brandov entry point into the Czech Republic, the 50 % capacity cap *de facto* has an effect on Gazprom's capacity bookings.
- (27) Gazprom Export engaged in discussions with BNetzA and agreed on the main principles of the gas release programme in 2011, but has to date not implemented the programme. Therefore, capacity bookings at exit Brandov by dominant undertakings in the Czech Republic, including Gazprom, have, in the absence of a gas release programme, been restricted to 50 % of the available total transport capacity on OPAL at Brandov. This provision has not affected the utilization of the transport capacity operated by LBGT, as the capacities are booked [CONFIDENTIAL] and hence the

¹⁴ The Commission's exemption decision regarding an exemption from regulated-TPA and regulated tariffs for 30 bcm of the forward capacities for a duration of 22 years for Gazelle was adopted on 20 May 2011 (under Article 36 of Directive 2009/73/EC) under reference number C (2011) 3424, see https://ec.europa.eu/energy/sites/ener/files/documents/2011_gazelle_decision_en.pdf. A separate exemption from the ownership unbundling provisions was granted on 1 December 2011 (reference number C(2011) 8777), see: https://ec.europa.eu/energy/sites/ener/files/documents/2011_gazelle_unbundling_decision_en.pdf.

¹⁵ The total technical capacity at exit Brandov is 39,661,324 kWh/h as published by OGT and LBGT, which is equivalent of 30.88 bcm/a recalculated using a calorific value of 11,25. These capacities are operated respectively by OGT (31.729.064 kWh/h i.e. 24.7 bcm/a calculated using a cleric value of 11,25) and LBGT (7,932,260 kWh/h i.e. 6.18 bcm calculated using a cleric value of 11,25). The figures are based on data provided by BNetzA on 30/01/2014.

¹⁶ These are (based on the data provided by BnetzA on 30.01.2014) approximately 4.5 bcm/a calculated using a caloric value of 11,25 – an equivalent of 5,733,421 kWh/h. These capacities are operated respectively by OGT (4.586,737 kWh/h i.e. 3.57 bcm/a calculated using a caloric value of 11,25) and LBGT (1,146,684 kWh/h i.e. 0.89 bcm calculated using a caloric value of 11,25).

50% capacity cap on the dominant undertakings is respected. However, it had an effect on the utilization of the OPAL pipeline part of WIGA, due to Gazprom's dominant position.

- (28) Entry capacity at Greifswald is only of interest to shippers having gas at Greifswald. Under the current technical configuration, natural gas is delivered at Greifswald only through the Nord Stream pipeline. The only supplier with access to the Nord Stream pipeline is Gazprom Export. [CONFIDENTIAL] Thus, without the gas release programme, Gazprom can only use 50% of the available capacity, leading to an underutilization of the pipeline. No regulated firm capacity on OPAL is currently available for booking from the GASPOOL hub into the Czech Republic. There is interruptible capacity offered under regulated conditions at Brandov.
- (29) It is against this background that OGT, Gazprom and Gazprom Export request a modification of the conditions, and in particular the obligation to implement a gas release programme, as imposed under the Final Decision. They argue in particular that the competitive situation in the Czech Republic has improved and that sufficient transport capacities are available both in the Czech Republic and from Germany to the Czech Republic for alternative upstream and downstream suppliers to compete in the Czech market. They also argue that the underutilization of OPAL has negative effects on security of supply.

3. THE NOTIFIED DECISION

- (30) The Notified Decision maintains the exemption from general tariff regulation provisions for the previously exempted capacity (i.e. for the total forward capacity of the OPAL pipeline from Greifswald to Brandov, excluding the forward capacity between Greifswald and Gross Kōris). The exemption from third party access provisions in place since 2009 is, by contrast, reduced to 50 % of total capacity of the WIGA ownership part of the OPAL pipeline (covering only transport capacities from Greifswald to Brandov; i.e. the capacities with entry at Greifswald and exit at Gross Kōris remain under the regulated system). The limitation on capacity bookings by dominant undertakings is in other words replaced by the obligation for OGT to offer at least 50% of the transport capacity (i.e. 15 864 532 kWh/h) in auctions, in accordance with EU and German third party access regulation. Out of the 15 864 532 kWh/h, 14 064 532 kWh/h are to be offered as 'firm dynamically allocable capacities' (feste, dynamisch zuordenbare Kapazitāt, "DZK") and 1 800 000 kWh/h as 'firm freely allocable capacities' (feste, frei zuordenbare Kapazitāt, "FZK"). The main difference between these two capacity products is that FZK capacities provide firm access from the GASPOOL market area to Brandov. DZK capacities provide firm entry at Greifswald and firm exit at Brandov, combined with interruptible access to the GASPOOL market area.
- (31) In order to facilitate the provision of the FZK products to third parties, [CONFIDENTIAL] is obliged by the Notified Decision to [CONFIDENTIAL]. [CONFIDENTIAL], including technical solutions, or completed [CONFIDENTIAL], see Paragraph 1 (2) b) of the Notified Decision [CONFIDENTIAL] in case there is a demand for firm capacity from GASPOOL to the Czech Republic [CONFIDENTIAL].
- (32) In detail, Annex 1 to the Notified Decision introduces the following changes to the Final Decision:

§ 1

Clause 1 (a) to (d) of the decision of 25 February 2009 in the version of the decision of 7 July 2009 (file number BK7-08-009) shall be replaced by the following provisions:

“1.) The capacities created on the basis of the co-ownership share of W & G Beteiligungs-GmbH & Co. KG (formerly Wingas GmbH & Co. KG) in the Ostseepipeline-Anbindungsleitung (hereinafter “OPAL”) are exempted from the application of sections 20 to 25 of the Energy Industry Act (EnWG) in favour of the Applicant in accordance with the following provisions:

a) The exemption applies exclusively to interconnection capacities on OPAL. Interconnection capacities are, without consideration of the physical gas flow:

aa) limited allocable entry capacities at the entry point Greifswald and limited allocable exit capacities at the exit point Brandov which are offered in a coupled way (“Coupled Interconnection Capacities”);

bb) separately bookable, firm dynamically allocable entry and exit capacities, for which firm capacities for entry at the entry point Greifswald and firm capacities for exit at the exit point Brandov are connected with an interruptible access to the virtual trading point of the market area of GASPOOL Balancing Services GmbH (“DZK Interconnection Capacities”); as well as

cc) separately bookable, firm freely allocable exit capacities at the exit point Brandov which can be used without restrictions to transport gas from the virtual trading point of the market area of GASPOOL Balancing Services GmbH to the exit point Brandov (“FZK Interconnection Capacities”, together with DZK Interconnection Capacities: “Decoupled Interconnection Capacities”)

If, with regard to Coupled Interconnection Capacities, the amount of offered entry capacities deviates from the amount of offered exit capacities, the exemption as a whole will only extend to the lower of the two amounts.

Thus, not exempted are in particular (i) reverse flow transports with the booking of entry capacities at the entry point Brandov, (ii) entry capacities at the entry point Greifswald that are neither Coupled Interconnection Capacities nor DZK Interconnection Capacities, and (iii) exit capacities that are neither Coupled Interconnection Capacities nor Decoupled Interconnection Capacities. The physical transfer of gas by the Applicant at the interconnection point Radeland between OPAL and the Jamal-Gas-Anbindungsleitung as well as emergency exit and/or emergency entry transfer of gas by the Applicant off or into OPAL which is necessary due to threat to or a disturbance of the security or reliability of OPAL or any connected infrastructure facilities do not affect either the existence or the validity of the exemption of the Coupled Interconnection Capacities and the Decoupled Interconnection Capacities from the application of sections 20 to 25 Energy Industry Act (EnWG) in accordance with the following provisions. Any emergency exit and/or entry transfer off or into OPAL must be notified to the Ruling Chamber (Beschlusskammer) without delay.

b) Coupled Interconnection Capacities are exempted from the application of sections 20 to 25 Energy Industry Act (EnWG) as entry capacities at the entry point Greifswald and as exit capacities at the exit point Brandov, in each case in a volume of 15,864,532 kWh/h (“Exempted Coupled Interconnection Capacities”). With regard to Exempted Coupled Interconnection Capacities, the following provisions apply:

aa) *The Applicant is obliged to charge tariffs to the users of the Exempted Coupled Interconnection Capacities.*

bb) *In the event of a contractual congestion, the Applicant is obliged to implement a market-oriented, transparent and non-discriminatory procedure. The general legal requirements for congestion management with regard to non-exempted capacities remain unaffected.*

cc) *In its contracts regarding Exempted Coupled Interconnection Capacities, the Applicant is obliged to include specific provisions against the hoarding of capacities and to make use thereof in accordance with the contractual provisions. The general legal requirements for congestion management with regard to non-exempted capacities remain unaffected. In the contracts regarding Exempted Coupled Interconnection Capacities, the Applicant must at least adhere to the following requirements or stipulate the following conditions, as the case may be:*

(i) *If capacities are not nominated on the day before (D-1) the day on which the transport is to take place (D), the Applicant must offer these capacities to other transport customers on a non-discriminatory basis as firm capacities on a day-ahead basis and provide them in such a timely manner that they can effectively be used on day D (hereinafter “short-term UIOLI”).*

(ii) *If capacities for transports which are booked by a transport customer for multiple quarters (or a comparable period of time measured in other time periods) are not used at all within a quarter, or are used only to an insignificant extent, the Applicant must withdraw the booked capacities from the holder for at least the following quarter and offer them to other transport customers in a timely manner and on a non-discriminatory basis as firm capacities on a daily, monthly and quarterly basis. Use to an insignificant extent is deemed to be an average nomination of less than 10% of the booked capacities in the relevant period of time, whereby pipeline failures due to disruptions, maintenance or similar events are to be taken into account in favour of the original transport customer. The transport customer can avert a withdrawal if it sells its capacities to a third party in full and for the entire period of the threatened withdrawal no later than one month before the beginning of the following quarter and provides proof of this to the Applicant (hereinafter “long-term UIOLI”).*

(iii) *The withdrawn capacities can be offered to third parties also with a modification or removal of the limitation of the allocation conditions. The Applicant is obliged to perform such a modification or removal to the extent this is technically possible and economically feasible. A nomination or renomination by the original transport customer is not possible after its capacities have been withdrawn. The original transport customer remains obliged to pay the agreed tariffs. An objection by it does not prevent the withdrawal unless it can invoke a final and binding court ruling. If there is no demand for the withdrawn capacities by a third party, the original transport customer continues to be entitled to use them.*

c) *Decoupled Interconnection Capacities are exempted from the application of sections 21 and 21a and 23a of the Energy Industry Act (EnWG) as entry capacities at the entry point Greifswald and as exit capacities at the exit point Brandov, in each case in a volume of 15,864,532 kWh/h (“Partly Regulated Decoupled Interconnection Capacities”). As regards network access, in accordance with or subject to (as the case may be) the following provisions in d) and e), the Partly Regulated Decoupled Interconnection Capacities are governed by the general*

regulatory rules on network access, currently primarily the Gas Network Access Ordinance, the Gas Regulation (EC) No. 715/2009, as well as the EU Network Codes.

d) Until 3 March 2014 or – should this auction procedure not have been completed by 3 March 2014 – until the conclusion of the first auction procedure of yearly capacities for the Partly Regulated Decoupled Interconnection Capacities, the following applies in respect of the Partly Regulated Decoupled Interconnection Capacities:

aa) The Applicant is entitled and obliged to offer Partly Regulated Decoupled Interconnection Capacities as DZK Interconnection Capacities and (by bringing about flow commitments necessary for this purpose or alternative measures to such flow commitments) FZK Interconnection Capacities as follows:

(i) As entry capacities at the entry point Greifswald, the Partly Regulated Decoupled Interconnection Capacities are offered exclusively as DZK Interconnection Capacities.

(ii) As exit capacities at the exit point Brandov, the Partly Regulated Decoupled Interconnection Capacities are offered as DZK Interconnection Capacities and FZK Interconnection Capacities in the following volumes:

- FZK Interconnection Capacities in a volume of 1,800,000 kWh/h, and*
- DZK Interconnection Capacities in a volume of 14,064,532 kWh/h.*

Irrespective of the temporal provision stated in d) sentence 1, the following shall apply: If in the course of allocating exit capacities the demand for FZK Interconnection Capacities at the exit point Brandov exceeds the offer of FZK Interconnection Capacities in the volume of 1,800,000 kWh/h at the exit point Brandov in two consecutive annual auction procedures for yearly capacities, the Applicant is obliged to increase the offer of FZK Interconnection Capacities to the extent necessary to meet demand, but no more than up to 3,600,000 kWh/h, if such an increase is economically feasible. This obligation does not exist if there are reasonable grounds to assume that the demand has exceeded the offer of FZK Interconnection Capacities in the volume of 1,800,000 kWh/h at the exit point Brandov only because customers have participated in the auction for the purpose of speculation with capacities. If there is an increase in the offer of FZK Interconnection Capacities to more than 1,800,000 kWh/h, the offer of DZK Interconnection Capacities is decreased by the amount corresponding to such increase (up to a maximum of 1,800,000 kWh/h) only if and to the extent that such decrease is technically required.

bb) The duration of entry and exit contracts for Partly Regulated Decoupled Interconnection Capacities is subject to the restrictions arising from the applicable general rules as amended from time to time regarding the term of entry and exit contracts. Within the framework of these restrictions, the Applicant is entitled to allocate these Partly Regulated Decoupled Interconnection Capacities in as long-term a manner as possible.

FZK Interconnection Capacities at the exit point Brandov shall be allocated as short-term and medium-term contracts in the sense of section 14 (1) Gas Network Access Ordinance.

The allocation of Partly Regulated Decoupled Interconnection Capacities is carried out in accordance with the relevant general legal rules on the allocation of entry and exit capacities as amended from time to time, so that under the current rules such allocation is to be carried out by way of auctions on the primary capacity platform “PRISMA primary” in accordance with the relevant conditions for capacity auctions on this capacity platform as amended from time to time. Participation in capacity auctions for the Partly Regulated Decoupled Interconnection Capacities is not subject to any rules or restrictions deviating from or exceeding the general legal rules. In particular, Gazprom, Gazprom export and affiliated undertakings can participate in capacity auctions in respect of Partly Regulated Decoupled Interconnection Capacities, as well as purchase and use them on equal terms with third parties.

cc) The Applicant is obliged to charge tariffs to the users of the Partly Regulated Decoupled Interconnection Capacities in accordance with the following provisions. The base price for the Partly Regulated Decoupled Interconnection Capacities allocated in the auctions is formed by non-discriminatory and transparent prices. Non-discriminatory means that the prices must be equal to the tariffs for the Exempted Coupled Interconnection Capacities, unless deviations from these tariffs are reasonably justified in view of the respective capacity product (DZK Interconnection Capacities, FZK Interconnection Capacities) and its respective configuration.

If the tariffs for the Exempted Coupled Interconnection Capacities change, the Applicant is obliged to inform the Bundesnetzagentur immediately of the changed tariffs. The Applicant is further obliged in this case to adjust the base prices for the Partly Regulated Decoupled Interconnection Capacities in a non-discriminatory way.

e) For the period following 3 March 2014 or – should this auction procedure not have been completed by 3 March 2014 – following the conclusion of the first auction procedure of yearly capacities for the Partly Regulated Decoupled Interconnection Capacities, the provisions in d) above shall continue to apply unless such application conflicts with mandatory general rules regarding network access. The mandatory general rules regarding network access as amended from time to time shall take precedence. In any event, the Applicant is entitled and obliged to offer DZK Interconnection Capacities at the exit point Brandov in the amount of at least 12,264,532 kWh/h and at the entry point Greifswald in the amount of at least 15,864,532 kWh/h.”

§ 2

Clause 1 (j) of the decision of 25 February 2009 in the version of the decision of 7 July 2009 is hereby repealed.

§ 3

In all other respects, the operative provisions of the decision of 25 February 2009 in the version of the decision of 7 July 2009 remain unchanged.

§ 4

The application of section 118 (7) EnWG with regard to sections 8 to 10e EnWG shall remain unaffected.

- (33) Besides the changes to the operative part of the Final Decision provided for in Annex 1, the Notified Decision includes several additional provisions.
- (34) The preamble clarifies that the Notified Decision only affects the WIGA ownership part of OPAL. The LBGT ownership part of OPAL is therefore not affected by the Notified Decision and the present Commission decision. It remains subject to the conditions of the Final Decision, including (in the absence of a gas release programme) the limitation on capacity bookings by dominant companies.
- (35) § 1 of the Notified Decision provides that [CONFIDENTIAL] is obliged to offer, in so far as this is required for booking of firm freely allocable capacities (FZK) with entry into the GASPOOL area and exit at Brandov, [CONFIDENTIAL] from the entry point Greifswald to the GASPOOL area. Regarding capacity allocation, the Notified Decision provides that OGT is both entitled and obliged to offer regulated¹⁷ capacities as long term as possible, whereas FZK at exit Brandov are to be offered as short- and medium term products. BNetzA acknowledges the expectation of OGT, Gazprom Export and Gazprom to be able to offer 80 % long-term capacity as of entering into force of Regulation (EU) 984/2013¹⁸, and declares the willingness to take this into account so far as this is legally possible in its decision on capacity allocations.
- (36) Regarding auction prices, the Notified Decision provides that starting prices at capacity auctions for regulated capacity must be identical to tariffs for fully exempted capacities, unless a deviation is justified by changes in the capacity product being offered. The agreement provided figures for the expected starting prices in 2014. At the Commission's request, BNetzA has provided updated estimates for tariffs in 2015 and 2016.
- (37) [CONFIDENTIAL].
- (38) § 3 of the Notified Decision provides that amendments to the Final Decision shall be subject to the condition of prior review by the Commission under Article 36 of Directive 2009/73/EC.
- (39) § 4 provides that Annex 1 to the Notified Decision shall be published, whereas the remainder of the Notified Decision is regarded as confidential.
- (40) § 5 provides that in case of changes to the general rules applicable to access to gas pipelines, including changes to interpretation and application of these rules, which impact the ability of companies of the Gazprom group to book or make use of booked OGT capacity, or in case of invalidity of the provisions in § 1 of the Settlement Agreement, the parties agree to take up negotiations with the purpose to modify the Settlement Agreement, in order to take into account the balance of interests as agreed in the Settlement Agreement. This includes, as expressly stated, any deviations in minimum capacity allocation shares under Article 8(6)-(9) of Regulation (EU) No 984/2013. The rights of the Commission in review procedures remain expressly applicable.

¹⁷ BNetzA refers to these capacities to be 'partly' regulated, but the Commission considers this term to be misleading, as these capacities will be allocated and auctioned according to the third party access rules applicable to regulated capacity.

¹⁸ 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. 5–17.

- (41) Finally, § 6 provides that the Notified Decision is subject to German law, with the German language version prevailing. It also provides that in case of invalidity of § 1, the formal request to reopen the 2009 procedures will remain valid; invalid clauses will be replaced by clauses reflecting as closely as possible the intended purpose.
4. COMMISSION'S ASSESSMENT OF THE EXEMPTION CRITERIA OF ARTICLE 36 OF THE DIRECTIVE 2009/73/EC
- 4.1. General considerations
- (42) According to Article 36(9) of Directive 2009/73/EC, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption based on its assessment of the criteria listed in Article 36(1).
- (43) According to Article 36(1) of Directive 2009/73/EC,
- "Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:*
- (a) the investment must enhance competition in gas supply and enhance security of supply;*
- (b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;*
- (c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;*
- (d) charges must be levied on users of that infrastructure; and*
- (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected."*
- (44) The Commission notes that these conditions are identical with those included in Article 22 of Directive 2003/55/EC, which was the basis for the assessment of the Commission Request.
- (45) The assessment presented in paragraphs (22) to (25) of the Commission Request remains valid for the purpose of the current decision as the proposed changes in the conditions attached to the Final Decision do not undermine the qualification of the OPAL pipeline as an interconnector.
- (46) Further, although OPAL is already in operation, for the purpose of this review it still qualifies as a "new" gas infrastructure under Article 36 of the Directive 2009/73/EC. Article 2 (33) Directive 2009/73/EC defines "new infrastructure" as infrastructure which was not completed by 4 August 2003. Under this definition, OPAL is to be considered as new infrastructure.
- (47) OPAL was a new infrastructure at the time of the decisions in 2009 and therefore eligible for an exemption under Article 22 of Directive 2003/55/EC. Reviewing an existing exemption does not require the infrastructure concerned to be non-operational at the time of the review, as otherwise the review of exemption decisions would be in many cases impossible. The purpose of this review is not to grant a new exemption, but to assess whether modifications to the original exemption notified by a national

regulatory authority are justified. Reference can thus be made to the qualification as new infrastructure in paragraph (22) of the Commission Request.

4.2. "The investment must enhance security of supply"

- (48) The Commission notes that the enhancement of security of supply due to the OPAL pipeline has been established in the Commission Request (in particular paragraphs (27) to (30)), and the Notified Decision proposed by BNetzA does not change this conclusion.
- (49) The increased utilisation of the OPAL pipeline that is likely to result from the changed scope of the exemption will further increase security of supply. Currently, the use of OPAL is in practice limited by the capacity cap implemented at the German-Czech border at Brandov. Under the Notified Decision, additional capacities will be auctioned under the regulatory framework. That would allow for additional capacities to be shipped through OPAL to the Czech Republic and beyond to other EU Member States and neighbouring countries, in particular Slovakia and Ukraine. It should be noted that it results from general provisions of competition law that natural gas flowing through OPAL to the Czech Republic may not be subject to any contractual restrictions as to the final destination of the gas. This enhancement of security of supply is thus to the benefit of all areas (particularly in the EU and the Energy Community) which are accessible via existing or future infrastructure.
- (50) Looking at the total transport capacity of Nord Stream from Russia, the Notified Decision would increase the possibility to flow natural gas in case of interruption of gas supply via other routes.¹⁹ This additional capacity of less than 10 bcm however would not allow for a full replacement of Russian gas flowing through other routes to the EU. The main import route (technical capacity up to 140 bcm/a) for Russian gas to the EU and the Energy Community is still the one from Uzhgorod to Velke Kapusany (Ukraine/Slovak border). Therefore a higher utilisation ratio of OPAL is not likely to dry out alternative routes. Furthermore, increased capacities on OPAL will only have a limited beneficial effect for those EU countries which face the most significant security of supply problems.²⁰
- (51) Moreover, taking into consideration the additional requirement, imposed by the present decision, to provide third party access to the additional FZK capacity products directly linking GASPOOL with Brandov entry point, OPAL would allow also other gas than the Nord Stream gas to be shipped to the Czech Republic. The Notified Decision also foresees a possibility of a technical connection to be established between NEL and OPAL allowing in future for the flows of gas from NEL through OPAL. All these elements contribute to the enhancement of security of supply.

¹⁹ Assuming use of the full capacity on NEL (22 bcm), full capacity on the LBGT ownership share of OPAL (6.4 bcm), the regulated capacities in the northern part of the OPAL pipeline (4.5 bcm) and 50 % of the exempted part of OGT-OPAL (12.8 bcm), approximately 9.3 bcm of the 55 bcm Nord Stream capacity could not be transported onwards.

²⁰ See in this respect also the conclusions from the Commission's "Energy Stress Tests" on 2014 (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the short term resilience of the European gas system of 16.10.2014 (COM(2014) 654 final), p4, Fn 10): *"Importantly, according to the ENTSOG analysis, increasing the capacity of the OPAL pipeline (which is one of the extensions of the Nord Stream pipeline, running from Greifswald in northern Germany to Brandov on the German-Czech border) to 100% from its current 50% will not have an effect of reducing the missing gas volumes in the Eastern Member States due to existing infrastructure constraints towards the east. The effect of increasing the capacity to 100% will be limited to replacing LNG volumes in Western Europe."*

- (52) The Commission therefore comes to the same conclusion as BNetzA regarding OPAL's impact on security of supply.
- (53) Based on the above, the Commission concludes that the OPAL pipeline will continue to enhance security of supply within the meaning of Article 36(1) of Directive 2009/73/EC also under the proposed changes.
- 4.3. "The level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted"
- (54) This condition had been assessed in detail in the Commission Request, in particular in paragraphs (31) to (35). The investment risk in OPAL due to risks related to Nord Stream at the time of its construction and other risks resulting from the economic and financial crisis has been an important consideration for granting an exemption from regulated tariffs and TPA rules.
- (55) With regard to the risk criteria, the purpose of a review is not to grant a new exemption, but to assess whether modifications to the original exemption notified by a national regulatory authority are justified. The suggested amendments do not put into question the risk assessment done in the Commission Request.
- (56) The Final Decision granted OPAL operators an exemption from regulated tariffs for capacities linking directly Greifswald with Brandov for a period of 22 years. The validity of the exemption and the related tariff structure were put in place to ensure the pipeline's financing and operation. The changed conditions do not affect the scope and validity of this exemption.
- (57) Based on the above, the Commission concludes that the risk criterion within the meaning of Article 36(1) of the Directive 2009/73/EC is met also under the proposed changes.
- 4.4. "The infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built"
- (58) The assessment of this criterion has not changed since the Commission Request, where, under paragraph (36), the Commission concluded that the exemption criterion for legal unbundling is fulfilled. Legal unbundling from existing Transmission System Operators ("TSOs") is fulfilled as OGT is a separate and independent legal entity from the relevant and existing system operator in Northern Germany. To ensure that OGT also fulfils the roles as TSO independent from supply interests of WIGA and related companies, the Commission notes that the operator of the pipeline should be certified under the provisions of Directive 2009/73/EC (as further discussed in section 5.1.3 below).
- (59) It follows that OGT still meets the criteria of legal unbundling within the meaning of Article 36(1) of the Directive 2009/73/EC also under the proposed changes.
- 4.5. "Charges must be levied on users of that infrastructure"
- (60) In paragraph (37) of the Commission Request, the Commission agreed with BNetzA's conclusion that this criterion was met, as the operator of OPAL intended to charge levies on users of the infrastructure. This assessment is still valid with the proposed changes. Auctioning of 50% of OGT's capacity will be based on the OPAL tariff as base price for the auctions and the users of the infrastructure will be directly charged for the use of this capacity.

- (61) It follows that OGT will continue charging levies on users within the meaning of Article 36(1) of the Directive 2009/73/EC also under the proposed changes.
- 4.6. "The exemption must not be detrimental to the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected"
- (62) The Commission notes that the fulfilment of these criteria has been assessed in the Commission Request (paragraphs (38) and (39)). It was argued that the exemption from tariffs protects the regulated system from economic risks related to the infrastructure, while the additional gas flows help to enhance market liquidity.
- (63) The proposed changes in the scope of the exemption may have additional positive effects on the internal energy market and the regulated system. BNetzA argues²¹ that the proposed changes would help to prevent congestion in the German transmission system which could result from accommodating the total gas volumes supplied through the Nord Stream pipeline in the remaining German gas network. BNetzA argues that the total capacity of Nord Stream of 55 bcm/a could only be fully utilised if both NEL²² and OPAL are available at full capacity. With usage of the WIGA ownership part of OPAL being de facto limited to 50 %, capacity in the amount of more than 13 bcm/a (or 15.8 million kWh/h) could be missing. While the Commission notes that utilisation of the WIGA part of OPAL is under the Final Decision only limited to 50 % in so far as undertakings dominant in the Czech Republic are concerned, it acknowledges that in practice an underutilisation of OPAL has occurred. Increased utilisation of OPAL could have the positive effect of facilitating flows of gas between Germany and the Czech Republic, without creating congestions. With the commissioning of Gazelle, large volumes continue to flow through the Czech Republic into the South of Germany without congestion.
- (64) Finally, the Commission notes that the proposed changes would most likely allow access of third parties to part of the capacity on the pipeline. In particular, the provision of firm capacity between the GASPOOL market area and the Czech market is in principle a suitable measure to improve the functioning of the internal gas market through increased trading options between the German and Czech gas markets.
- (65) However, the Commission considers that the envisaged amount of firm capacity to be provided on this route is disproportionate in comparison to the market area in question. The GASPOOL hub has in recent years become increasingly liquid. According to data provided by BNetzA, traded volumes increased from 1 251 TWh in 2013 to 1 493 TWh in 2015. The churn rate²³ on GASPOOL had increased to 3.52 in 2015, compared to 2.82 in 2013. Exchange-based trading volume reported on EEX for the GASPOOL area more than doubled from 2013 to 2014.²⁴ Gas trading via broker

²¹ Preamble to Settlement Agreement and replies to questions 1 to 3 of the Commission's request for information.

²² The NEL connects the subsea Nordstream pipeline, which comes on land in Greifswald in Northern Germany, with the existing transmission grids in the west of Germany. It is 440 km long and has the capacity of transporting 22 bcm of natural gas per year. See: Commission's Opinion on BNetzA's draft certification decisions for NEL, Gasunie, Ostsee and Fluxys of 18 October 2013, C(2013) 7019.

²³ The churn rate measures how often each gas molecule is traded (the total trade volume divided by the physically traded volume). A higher churn rate means a higher liquidity.

²⁴ Annual Monitoring report of Bundesnetzagentur and Bundeskartellamt 2015, p. 277, http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2015/Monitoring_Report_2015_Korr.pdf?__blob=publicationFile&v=4.

platforms (873 to 964 TWh)²⁵ and nominations at the GASPOOL virtual trading point (1120 to 1141 TWh for high calorific gas)²⁶ also increased from 2013 to 2014. This increase in trading activities makes it likely that on one hand, dominant undertakings willing to use parts of the OPAL pipeline can combine this with trades on the Gaspool hub, thus reducing risks from firm capacities for third parties, and on the other hand provides a basis for higher demand for firm capacity to the Czech market by non-dominant undertakings over the coming years.

- (66) Therefore, the Commission considers that the amount of firm capacity to and from GASPOOL market area into the Czech market, as envisaged in the Notified Decision, should be increased to reflect the increase in liquidity with a view to improving the functioning of the internal gas market by increasing trading options and allowing for arbitrage between hubs.
- (67) Based on the above, the Commission concludes that under the proposed changes the exemption of the OPAL pipeline will continue to not be detrimental to the effective functioning of the internal market in natural gas and the efficient functioning of the regulated system to which it is connected within the meaning of Article 36(1) of Directive 2009/73/EC also under the proposed changes in the scope of the exemption, subject to the amendments to the Notified Decision set out hereinafter.
- 4.7. "The exemption must not be detrimental to competition of the internal market in natural gas, and the investment must enhance competition in gas supply"
- (68) Article 36 of the Directive 2009/73/EC requires that the investment project enhances competition in gas supply and that the exemption is not detrimental to competition. While these two requirements are not identical, they imply that the project must be pro-competitive and thus create benefits for consumers.²⁷
- (69) In the Commission Request, it was concluded that the OPAL pipeline will not have a positive impact on competition and that the exemption, without additional commitments, may even be detrimental to competition on the Czech gas market (see paragraphs (40) to (79) of the Commission Request).
- (70) As regards the Czech market, the Commission concluded that RWE Transgas was dominant on the downstream wholesale supply of gas market in the Czech Republic. Concerning the upstream wholesale supply (import and production) market, the Commission disagreed with BNetzA's assessment that this market was at least EEA-wide and that the Czech suppliers could, without any barriers, procure gas from the EEA market and beyond. The Commission considered that the upstream wholesale gas supply market was limited to the Czech Republic and the additional pipeline reinforced the dominant position of Gazprom on that market. Additionally, the Commission considered that due to existing free capacities to enter into the Czech gas transmission system at other interconnector points, the positive impact of the

²⁵ Annual Monitoring report of Bundesnetzagentur and Bundeskartellamt 2015, p. 280, http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2015/Monitoring_Report_2015_Korr.pdf?__blob=publicationFile&v=4.

²⁶ Annual Monitoring report of Bundesnetzagentur and Bundeskartellamt 2015, p. 281, http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2015/Monitoring_Report_2015_Korr.pdf?__blob=publicationFile&v=4.

²⁷ 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, §30.

additional interconnection point for the development of competition on that market would be limited.

- (71) In the preamble of the Notified Decision, reference is made to arguments raised by OGT, Gazprom and Gazprom Export that the conditions imposed in the Final Decision are no longer necessary due to changes on the Czech market. In particular, the companies argue that (i) significant entry and exit capacity is free in the Czech Republic, (ii) significant capacities are available for export of natural gas from Germany to the Czech Republic, and (iii) competition in the markets for natural gas in the Czech Republic has improved, notably shown by the lower share of RWE supply & trading CZ.

4.7.1. Market definitions

The product market

- (72) In the Commission Request a distinction was made between the market for downstream wholesale supply of gas (comprising sales of large volumes of gas by wholesalers and importers with the purpose to further resell gas to other wholesalers or downstream suppliers/retailers) and the market for the upstream wholesale supply of gas (where gas producers and exporters sell large quantities of gas to importers/wholesalers). This is in line with other Commission decisions²⁸ and this distinction remains relevant for the purpose of the current assessment.

The geographic market

(a) Downstream wholesale supply of gas

- (73) According to established case-law and Commission practice, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different.²⁹
- (74) In the Commission Request, the geographic scope of the downstream wholesale gas supply market was considered to be limited to the Czech Republic. According to the Commission decisional practice, the downstream wholesale gas supply markets are considered to be national³⁰ or smaller in scope (corresponding to the geographic area that is covered by the transmission or distribution grid)³¹. For the area to be grid-wide (meaning that the relevant geographic scope is the area covered by the transmission network), the grid has to be operated as a single entry/exit zone without any relevant internal bottlenecks that could constrain the unrestricted exchange of gas within the grid once the gas has reached an entry point. Downstream wholesale supply markets

²⁸ In particular the most recent is COMP/M.6984 – EPH/Stredoslovenska Energetika, paragraph (21).

²⁹ Commission Decisions in case COMP/37451, *Deutsche Telekom AG*, recitals 92-93; and case COMP/38.233, *Wanadoo Interactive*, recital 205. See also judgment in Case C-27/76 *United Brands vs. Commission*, paragraph 44; judgment in Case 322/81 *Michelin v Commission*, paragraph 26; judgement in case 247/86 *Alsatel v Novasam*, paragraph 15.

³⁰ See Case No COMP/M.3868 *DONG / Elsam / Energi E2* (2006) paragraphs 147-168 and 193.

³¹ See Case No COMP/M.3696 *E.ON / MOL* (2005), paragraph 125, Case No COMP/39.317 *E.ON Gas* (2010), paragraphs 21-22, where the Commission noted that despite the liberalization of the market alternative offers for customers connected to the incumbent's grid remained extremely limited. See also Case No COMP/M.5467 *RWE Essent*, of 23 June 2009; Case No COMP/M.5220 *ENI / DISTRIGAZ*, of 15 October 2008.

may be defined wider than grid-wide in cases of balancing zones which encompass various grids, depending on whether there are no bottlenecks or other obstacles which might restrict free competition within ‘balancing zones’³² or ‘established sales regions’.

- (75) Although the Commission notes some recent developments on the Czech wholesale gas supply market that indicate its further integration with the neighbouring markets, there are a number of considerations which allow concluding that the Czech downstream gas supply market remains national in scope.
- (76) First, the main wholesalers in the Czech Republic are different than in the neighbouring markets, with the incumbent RWE Ceska republika a.s. still maintaining a very significant share of the downstream wholesale gas supply market in the Czech Republic.
- (77) Second, there are also important contractual elements, [CONFIDENTIAL], which limit competition across borders.
- (78) Third, although the establishment of the Czech Virtual Trading Point (VTP) in 2010 resulted in some convergence of the gas prices at the Czech VTP with the prices at German gas hubs (in particular NCG), the relatively large share of gas delivered under long-term contracts limits the convergence of gas prices.³³ A long-term contract (until 2035, thus until after the exemption has expired) between RWE and Gazprom (as discussed in more detail in paragraph (91)), covering a substantial part of the Czech gas consumption, [CONFIDENTIAL].
- (79) Against this background, for the purpose of the current assessment, there is no need to depart from the relevant geographic market as defined in the Commission Request.
- (80) Gazprom argues³⁴ in favour of not limiting the geographic dimension to the Czech Republic due to the following circumstances: (1) interconnectors with Germany, Slovakia and Poland with substantial spare capacity, (2) increasing supplies from German hubs and (3) relatively low transportation costs as a percentage of spot prices at German hubs. The Commission considers Gazprom's arguments as not convincing for the following reasons.
- (81) As regards Gazprom's claims that there are substantial free capacities available at interconnectors with Germany, Slovakia and Poland³⁵, the Commission considers that the impact of some of these interconnectors is either limited (Polish-Czech border)³⁶,

³² Case No COMP/39.316 – *Gaz de France*, of 3 December 2009; Case No COMP/M.4180 *Gaz de France / Suez*, of 14 November 2006; Case No COMP/M.3410 *Total / Gaz de France*, of 8 October 2004. A balancing zone should be understood as an entry-exit system, which may consist of more than one system, as defined in Article 2(13) of the Gas Directive, to which a specific balancing regime (for injections and off takes of gas) is applicable.

³³ Reply to question 1, p. 7, ERU reply from 29 January 2014.

³⁴ Gazprom's response to Commission/BNetzA questions and comments of 26 July 2013, received on 13 August 2013, answer to question 15.

³⁵ [CONFIDENTIAL]. The Commission notes that the findings of this study may be limited as it refers to all firm products and makes no distinction between the different types of firm products available. The study does not specify whether or not the capacity products provide access to the virtual trading point (hub) and allow shippers to supply end customers without any additional capacity booking. For example, GASCADE offers FZK and DZK products, both products are “firm” but DZK is of lower quality (with only interruptible access to the virtual trading point).

³⁶ Interconnection point ("IP") at Polish/Czech border (Cieszyn/Český Těšín) - the pipeline has limited capacities available.

or weak due to lack of different gas sources (Slovak-Czech border)³⁷. As regards the German-Czech interconnection points, in the Commission's opinion Waidhaus (with connection to NCG) has limited relevance in the analysis for the Czech gas markets because only virtual (reverse) flows are possible.³⁸ Therefore, the main interconnection points to be considered are the two interconnectors at Hora Svate Kateriny ("HSK") on the Czech–German border (with connection to the GASPOOL market area and offering bi-directional flows). Data provided by a study carried out by [CONFIDENTIAL] at request of [CONFIDENTIAL] show that the free capacities at these interconnection points amount to approximately 1 bcm/a.³⁹ However, the Commission points out that this capacity may not be available during the entire year as would at least be required by a wholesaler supplying final customers. For example, the data provided by [CONFIDENTIAL], showed that there were number of days where the capacity utilisation at HSK exceeded 90%. Although for HSK Deutschneudorf the number of such days appears limited, by contrast at HSK Olbernhau (where technical capacity is almost 3 times as high as at HSK Deutschneudorf) the number of days where the capacity utilisation exceeded 90%, between 2012 and 2013 varied between 10%-47%.⁴⁰ Therefore, the HSK interconnection points do not appear to allow for unrestricted flow of gas between the Czech and German markets.

- (82) As regards Gazprom's argument that there are increasing supplies from German hubs into the Czech Republic, the Commission notes that these increased figures for import from Germany include also indirect imports of natural gas based on supplies from Russia. There are no data on the exact split between imports from German hubs and imports from Russia. While imports from Germany have increased, a significant decrease of imports from Norway from 23% in 2008 to less than 1% in 2015 can be observed. The data show that in the years 2011-2013, when the spread between the spot prices and the long term contract prices was increasing, some Czech wholesalers started to buy gas at German hubs. However, even with the substantial spread of prices

³⁷ IP at Slovak/Czech border (at Lanzhot – 55bcm/a of technical capacity) is a part of the traditional gas route from Russia, via Ukraine, Slovakia and the Czech Republic into southern Germany (at Waidhaus) and was designed to flow Gazprom's gas along that route. Although there are currently some entry capacities available at Lanzhot (1.45 bcm/a in 2013 according to [CONFIDENTIAL] study, p. 38), they are likely to increase in the future (partly due to the decreased flows from Ukraine via Slovakia and the Czech Republic to Germany). Still, there is a limited availability of other sources than Gazprom's gas at Lanzhot. There is a possibility to flow via Lanzhot gas from the Central European Gas Hub (CEGH) in Austria but this requires flows through two IPs (Baumgarten and Lanzhot) as there is no direct connection between the Czech market and the Austrian hub. Although the congestion on both IPs will most likely decrease in the future ([CONFIDENTIAL] study, pp. 29-37) and there will be some spare capacities available to facilitate gas flows, the magnitude and impact of these potential gas flows (see table on p. 38 of the [CONFIDENTIAL] study) on the Czech market is difficult to assess or ensure at this moment. In particular, the consultant study shows lower liquidity indicators for CEGH compared to German hubs (NCG, GASPOOL), hence limiting the possibility of sourcing alternative gas through Lanzhot.

³⁸ The Commission notes that the entry capacities at Waidhaus in the direction of the Czech Republic are only offered on the basis of virtual reverse flow. Therefore the reverse flow (DE→CZ) is not always possible because physical flows from CZ→DE can go down to zero (cf. flows in October 2012) and thus the IP Waidhaus cannot be fully taken into consideration for the analysis. The [CONFIDENTIAL] study (p. 6) mentions storage facilities as an instrument to provide and use flexibility in order to deal with interruptions at Waidhaus, still Gazprom's reply to the Commission/BNetzA questions shows that the Czech storage facilities are close to be fully booked for the storage year 2013/2014 with only very limited firm and interruptible capacities currently available.

³⁹ [CONFIDENTIAL] study, p. 38.

⁴⁰ [CONFIDENTIAL] study, p. 23-24 and 26. For the year 2013 the data were presented until June 2013.

between spot and long term contracts, incentivising imports of gas from German hubs, the significance of imports from Russia has decreased only slightly [CONFIDENTIAL].

Table 1: Imports of natural gas by countries in % of the total imports into the Czech Republic

	2009	2013	2014	2015
Russia	58%	64%	70%	65%
Norway	35%	0%	10%	0%
Germany/EU*	7%	36%	20%	34%
Total	100%	100%	100%	100%

Source: Preventive Action Plan, Ministry of Industry and Trade, 30 November 2012, p. 14 / Czech National Regulatory Authority reply of 18 August 2016

(83) There has not been a substantial change in the share of Russian gas imports into the Czech upstream gas market in the last three years. In this context it should be noted that the share of Russian gas in the Czech Republic has remained very high at least since 2008, and the significance of gas imported from other regions remains limited.

(84) As regards, Gazprom's claim concerning relatively low transportation costs as a percentage of spot prices at German hubs, the Commission cannot accept this argument. The transportation cost still constitutes an important portion of the average price of natural gas, in particular when compared to average sales' margins of wholesalers in the Central and Eastern Europe.

(b) Upstream wholesale supply of gas

(85) Although the Commission did in some previous cases consider that the geographic market for the upstream supply of gas could potentially be defined as EEA-wide, its analysis in those cases was undertaken from the demand-side perspective only and has not taken into consideration the supply side constraints of transmitting gas.⁴¹ More recently, the Commission has considered that from the supply side perspective, due to limited interconnection infrastructure (lack of interconnectors between markets) or lack of available cross-border capacity, markets should be defined nationally.⁴²

⁴¹ See COMP/M.1383 *Exxon/Mobil*, cited above, paragraph 18 or COMP/M.1532 *BP-Amoco/Arco*, cited above, paragraphs 16-17, Commission decision of 5 July 1999, COMP/M.1573 *Norsk Hydro/Saga*, paragraph 15.

⁴² COMP/M.6910 *Gazprom/Wintershall/Target companies*, cited above, paragraph 86, Commission decision of 3 May 2007, Case/M.4545 *Statoil/Hydro*, paragraphs 13-16, in which technical constraints such as absence of pipelines or import capacity are mentioned; Commission decision of 8 March 2013, Case/M.6801 *Rosneft/TNK-BP*, paragraph 12; COMP 39.315, *ENI*, cited above, paragraph 28; COMP/M.3696 *E.ON Mol*, cited above, paragraph 131, in which the various gas supply markets are defined national in scope; Commission decision of 9 December 2004, COMP/M.3440 *EDP, ENI, GDP*, paragraphs 25 -28; for all gas supply markets identified in that decision Portugal was considered the relevant geographic market, OJ L 302 of 19.11.2005, p. 69; Commission decision of 29 September 1999, COMP/M.1383 *Exxon Mobil*, paragraphs 134 et seq., 152 (regional for Germany), OJ L 103 of 7.4.2004, p. 1; Commission decision COMP 39315 *ENI*, cited above, paragraph 28 with reference to

- (86) In the Commission Request, the geographic scope of the upstream wholesale gas supply market was considered to be limited to the Czech Republic. There does not appear to be a need to depart from this conclusion.
- (87) The substantial portion of gas imported into the Czech Republic, by the largest importer RWE, is procured to a very large extent [CONFIDENTIAL]. [CONFIDENTIAL] contribute to the creation and maintenance of the national market in the Czech Republic.
- (88) Finally, as indicated above, the infrastructure allowing bringing gas into the Czech Republic, including interconnectors with Germany, Slovakia and Poland, still appears limited (see paragraph (81)).
- (89) Against this background, for the purpose of the current assessment, there is no need to depart from the relevant geographic market as defined in the Commission Request.

4.7.2. Size of the Czech gas market

- (90) The Commission notes that the size of the Czech gas market (as measured by actual consumption) decreased since 2007 due to the overall economic stagnation and reductions in heating consumption due to better insulation and lower room temperatures.⁴³ Total consumption remained close to 8 bcm/a through the last years with the exception of 2010 when the consumption was close to 9 bcm/a (see the table below). In 2014, consumption was at 7.6 bcm.⁴⁴ Therefore, the predictions included in the Commission Request that the Czech market would increase from year 2007 to year 2017 from 9 to 12 bcm⁴⁵ so far have not materialized.

Table 2: Actual consumption in the Czech Republic (in bcm/a)

2008	2009	2010	2011	2012	2013	2014	2015
8.652	8.161	8.979	8.085	8.158	8.273	7.280	7.607

Source: 2008-2012 ERU/OTE Yearly Report on the Operation of the Czech Gas System, January-December 2012; 2013-2014: ERU annual report 2015⁴⁶, 2015: ERU's reply of 18 August 2016

4.7.3. Market position of Gazprom on the upstream wholesale gas supply market

- (91) In the Czech Republic, the domestic resources constitute a negligible part of the total consumption (i.e. 1.5%), therefore the import data are a good proxy for the upstream supply market. In the reply to the Commission's questions, Gazprom provided only its market shares related to an EEA-wide market definition ([CONFIDENTIAL]) and no data for any other possible geographic market. Gazprom claimed that it was not possible to provide data for the Czech Republic only, [CONFIDENTIAL]. [CONFIDENTIAL], Gazprom is unquestionably the main upstream supplier into the Czech Republic (in 2012 Gazprom sold to RWE Ceska republika a.s. [CONFIDENTIAL], while the size of the Czech consumption was 8.2 bcm⁴⁷). The

Commission decision of 25 November.1996, IV/M.713 *RWE/Thyssengas*, paragraphs 15-19; Commission decision of 17 December 2002, COMP/M.2822 *EnBW/ENI/GV*.

⁴³ Reply to question 2, p. 8, ERU reply from 29 January 2014.

⁴⁴ Reply to request of information by the Commission of 18 August 2016.

⁴⁵ Commission Request, para (84).

⁴⁶ https://www.eru.cz/documents/10540/488714/NR_ERU_2014.pdf/6780461c-286b-44d3-8d43-eda3dd2ddc48.

⁴⁷ Gazprom's reply to the Commission and BNetzA questions, p. 29, table 18.

size of the long term contract between Gazprom and RWE provides an evidence pointing towards the dominance of Gazprom on the Czech market.

- (92) Based on figures from ERU, the share of Russian imports in the total gas imports into the Czech Republic was of 65.5 % in 2015.⁴⁸ Due to the Russian export monopoly on natural gas, only one company, Gazprom, can supply this gas.
- (93) Other competitors do not have the strength and are not numerous enough to effectively constrain Gazprom's gas supply position into the Czech Republic. Therefore, Gazprom has a pivotal role which means that, without its supplies in the short to mid-term, customers are not able to cover their demand for gas. Not least because of its large gas reserves, Gazprom is an unavoidable trading partner for large parts of the national consumption in the Czech Republic.
- (94) Therefore, the Commission maintains its conclusion that Gazprom continues to enjoy a dominant position on the Czech upstream wholesale gas supply market.

4.7.4. Market position of RWE on the downstream wholesale supply market

- (95) As regards market developments at downstream wholesale gas supply market in the Czech Republic, data from the National Regulator's Reports⁴⁹ as well as reports provided by Gazprom⁵⁰ show an erosion of RWE's market position.
- (96) On the downstream wholesale gas supply market⁵¹ RWE still remains the largest wholesaler (although its market share is representing a decreasing trend: [CONFIDENTIAL]⁵²). In 2011⁵³, Gazprom's affiliates ([CONFIDENTIAL]) had respectively [CONFIDENTIAL]% market share, while the remaining wholesalers represented 32% of the wholesale gas supply market. In 2010, Gazprom's affiliates ([CONFIDENTIAL]) had respectively [CONFIDENTIAL]%, while the remaining wholesalers represented 21% of the wholesale gas supply market. Although [CONFIDENTIAL], its position as the main buyer on the import market is likely to remain due to lack of available interconnection capacity (see paragraph (81) and the long-term supply contract between RWE Transgas and Gazprom, which remains valid until 2035. [CONFIDENTIAL]. This means that most likely RWE Transgas will remain the main importer and the main wholesale supplier on the Czech market for the foreseeable future.
- (97) [CONFIDENTIAL], there are many indications that RWE still remains a dominant company. It can be left open whether RWE remains dominant on the Czech downstream wholesale gas supply market.

5. Conclusion

⁴⁸ Reply to request of information by the Commission of 18 August 2016, not taking account of the origin of transited gas.

⁴⁹ Czech Republic National Reports on Electricity and Gas Industries 2009, 2010, 2011 and 2012, OTE-ERU Yearly Report on Natural Gas Supply and Consumption in the Czech Gas System, 2011 and 2012
⁵⁰ Gazprom's reply to the Commission/BNetzA questions, p.p. 26-27.

⁵¹ The figures relate to what is defined in the Czech regulator's National Reports as "import market" and estimates market shares of the buyers on the import market. This is the closest proxy to the downstream wholesale gas supply market as defined by the Commission that is available in the official reporting.

⁵² Based on Gazprom's estimates, Gazprom's reply to the Commission/BNetzA questions, p. 26. The National Report of the Energy Regulatory Office on the Electricity and Gas Industries in the Czech Republic for 2011 does not contain the same detailed level of information.

⁵³ Case No COMP/M.6910 – GAZPROM / WINTERSHALL / TARGET COMPANIES, Par. 71. The same data was provided in Gazprom's reply to the Commission/BNetzA questions, p. 26.

(98) Therefore, the Commission maintains its conclusion that Gazprom continues to enjoy a dominant position on the Czech upstream wholesale gas supply market, and there are strong indications that RWE most likely remains dominant on the Czech downstream wholesale gas supply market.

5.1.1. The remedies in the Commission Request

(99) As established in the Commission Request, the exemption under review concerns only exit capacities into the Czech market, and does not apply to capacities linking entry- and exit-points inside Germany, or to the counter flows with entry at Brandov or Olbernhau. The exemption therefore affects mostly competition in the Czech Republic.⁵⁴

(100) The Commission Request found no plausible grounds to assume that Gazprom will supply additional gas to non-dominant undertakings in the Czech Republic. This was particularly based on the close link between Gazprom and RWE Transgas on the basis of long term supply contracts. Further, the additional capacities on OPAL could strengthen the dominant position of Gazprom on the upstream wholesale gas supply market for natural gas.

(101) To remedy these potential negative effects on competition and ensure an improvement of competition in gas supply, the Commission therefore requested BNetzA to modify the February 2009 decision and introduce the capacity booking limitation, coupled with a gas release programme, as described above.⁵⁵

(102) As regards the effectiveness of the conditions proposed in the Commission Request, BNetzA underlines that the gas release programme was never put into effect. The Final Decision did not include any obligation to introduce a gas release programme as long as the capacity booking limitations for dominant undertakings are respected. BNetzA further submits in its reply to the request for information⁵⁶ that Gazprom has repeatedly rejected such a gas release programme and that there is no indication Gazprom would in the future agree to its introduction. The comments by third parties in the course of the review procedure also showed no interest by third parties in purchasing gas from a gas release programme as traders prefer standard regulated products with access to liquid hubs and virtual arbitrage. Furthermore, also ERU supports the abolishment of the gas release programme in favour of the new possibilities for shippers to transport gas from GASPOOL area into the Czech Republic.⁵⁷ In so far as Gazprom has auctioned limited quantities of gas, it should be noted that the conditions of these sales were not subject to any prior assessment by BNetzA to verify if they fulfil the requirements of a gas release programme.

(103) The alternative to the implementation of a gas release programme under the Final Decision is the limitation of capacity use by dominant undertakings to 50 % of total available exit capacity at exit Brandov. Based on the information received from BNetzA, no non-dominant undertakings book firm capacities on the WIGA ownership part of OPAL with exit Brandov.⁵⁸ [CONFIDENTIAL].⁵⁹

⁵⁴ Commission Request, para. 75-77.

⁵⁵ Commission Request, para. 80 f.

⁵⁶ BNetzA reply to question 1 of the Commission's request for information.

⁵⁷ ERU reply, pp. 2-3.

⁵⁸ BNetzA reply to question 1 of the Commission's request for information.

⁵⁹ [CONFIDENTIAL].

(104) Against this background it has to be assessed whether, taking into account changes to the market conditions which occurred since 2009 and are described in detail in sections 4.7.1-4.7.5, the amendments proposed by the Notified Decision ensure that the potential negative effects on competition identified in the Commission Request are sufficiently addressed. This requires that, on balance, the operation of OPAL has positive effects on competition and the exemption is not detrimental to competition. It is thus necessary to compare the effects of the additional conditions requested in 2009 to the conditions included in the Notified Decision.

5.1.2. Effects on competition of the amendments

(105) No negative effects result from changes to the scope of the exemption, as none of the already non-exempted capacities will be subject to exemption. As expressly confirmed by BNetzA, the scope of the exemption is reduced.⁶⁰ This is because 50 % of the capacity owned by WIGA will now be auctioned according to the third party access rules applicable to regulated capacity.

(106) By limiting the capacity bookings of Gazprom (and other undertakings with a dominant position in the Czech Republic, including RWE) to 50 % of the total available capacity, the Final Decision limited the possibility for Gazprom to strengthen its dominant position on the upstream wholesale gas supply market including the Czech Republic. Under the new conditions in the Notified Decision, Gazprom would be entitled to take part in auction procedures for the regulated capacities along with all other interested shippers. Hence it could book transport capacities at Brandov above the 50% threshold. This could, as established in the 2009 Commission request, potentially allow Gazprom to further strengthen its dominant position on the upstream wholesale supply market in the Czech Republic.

(107) The potential negative effects on competition by Gazprom gaining the possibility to use additional exit capacity to the Czech market are mitigated by several factors. As described above (paragraph (72)-(94)), it has to be acknowledged that some changes occurred on the Czech market since 2009. Changes in the competitive situation can affect the proportionality and effectiveness of the previously envisaged remedies.

(108) In particular, in the Commission Request, the size of the gas release programme was related to the predicted size of the Czech gas market and based on an assumption that the market would grow in the future (from 9 bcm/a in 2007 to 12 bcm/a in 2017).⁶¹ However, the consumption in the Czech Republic has de facto decreased (in 2015 the size of the market is around 7.6 bcm/a) due to overall economic stagnation and it is rather unlikely that in the coming years it would increase considerably. The 3 bcm gas release programme was designed in a way to cover the needs of approximately 25 % of the Czech market in the future. Due to the market stagnation, the size of the gas release programme, if it was implemented, would represent a much higher percentage than what had been envisaged (39 %).

(109) Furthermore, with the development of competition on the downstream wholesale gas supply market, where the RWE position has deteriorated in the last years and RWE's competitors managed to increase their share of the market and secure some gas from other sources, it is questionable whether there is still a need to execute a gas release programme of the size foreseen, i.e. of 3 bcm, as this would most likely exceed the

⁶⁰ BNetzA reply to question 25 of the Commission's request for information.

⁶¹ Commission Request, para. 84.

needs of alternative traders. Third party comments submitted to the Commission in the course of the procedure have not shown significant interest in the gas release programme as foreseen in the Final Decision.

- (110) The proposed FZK capacity allows firm access for third parties from the liquid GASPOOL hub to the Czech market. As argued by BNetzA⁶², it is therefore to be expected that Gazprom (and other potentially dominant companies such as RWE) would be subject to competitive pressure from other market participants bidding for these capacities. ERU also expects, depending on the price of the capacities offered⁶³ and availability of matching entry capacities⁶⁴ on the Czech border (both issues addressed in paras (116)-(123) below) that FZK products will be of interest to the third parties active on the Czech market.
- (111) BNetzA also expects competitive pressure on Gazprom in auctions for DZK capacities.⁶⁵ DZK capacities are however of more limited interest to third parties. While they provide for firm entry capacity at Greifswald and firm exit capacity at Brandov, currently natural gas is available at Greifswald only to Gazprom Export. DZK capacities allow for access to the GASPOOL market area, but this access is interruptible. The interest of third parties in auctions for DZK capacities will therefore depend also on the probability of interruption. Against this background, the competitive pressure on Gazprom in DZK capacity auctions is likely to be limited under the current circumstances. This is also confirmed by ERU that underlines the importance of the FZK products as regards their impact on the Czech market as compared with the DZK that would de facto substitute the coupled interconnection capacities.⁶⁶ Technical changes, such as a connection between NEL and OPAL, which would make non-Gazprom gas available at Greifswald, could significantly change this situation and increase the interest of third parties also in DZK capacity auctions. Such development would be positive for increasing the attractiveness of the DZK capacity for third parties and further improving competition on the Czech gas market.
- (112) Nevertheless, as Gazprom remains dominant in the upstream wholesale supply market, a negative impact on competition resulting from the possibility for Gazprom to book up to 100 % of available capacity on the WIGA ownership part of OPAL cannot be fully excluded. The argument of BNetzA⁶⁷ that Gazprom could even without any exemption book 100 % of the available capacity in capacity auctions does not take into account the significant differences which remain compared to a fully regulated pipeline. In particular, OGT is not subject to ownership unbundling obligations and is exempt from general tariff regulation. These provisions would, in the alternative scenario described by BNetzA, effectively mitigate possibilities for abuse.
- (113) The Commission also takes note of ERU's argument that [CONFIDENTIAL], the alignment of the interests of these two companies in the Czech Republic has deteriorated. Nevertheless, the Commission considers that due to the existence of the long-term contract linking these two companies until 2035, there is a strong vertical link between these two companies and it cannot be excluded that this may influence

⁶² BNetzA reply to question 4 of the Commission's request for information.

⁶³ ERU reply, pp. 8-9.

⁶⁴ ERU reply, pp. 3 and 9.

⁶⁵ BNetzA reply to question 4 of the Commission's request for information.

⁶⁶ ERU reply, p. 2.

⁶⁷ BNetzA reply to question 1 of the Commission's request for information.

the behaviour of both companies and their incentives to cooperate in order to foreclose downstream competitors.

- (114) Although, as explained in this section, the potential negative impact of making available additional transport capacities to dominant undertakings is mitigated to a large extent, some potential for a negative impact of removing the 50 % capacity booking limitation remains. It thus has to be assessed whether this potential negative effect is sufficiently compensated by larger positive effects on competition of the new conditions and whether sufficient safeguards are foreseen in the Final Decision and the Settlement Agreement.

5.1.3. Effects on competition of the new capacity options

- (115) The new conditions oblige OGT, as operator for the WIGA part of OPAL, to grant access to 50 % of the available capacity in transparent and non-discriminatory capacity auctions. This provides additional exit capacity from Germany to the Czech Republic, made available on transparent booking platforms. By making 50 % of the WIGA owned capacities subject to present and future legislation on capacity allocation, the conditions further increase transparency, reliability and comparability of the capacity on OPAL to other transmission networks.
- (116) The FZK and DZK capacity products to be offered by OGT are of higher interest to Gazprom competitors than the currently available OGT products. This is particularly true for FZK capacity, which will offer additional firm access from GASPOOL to the Czech Republic, adding to the limited capacities currently offered on other pipelines than OPAL (i.e. Ontras and Gascade) from GASPOOL into the Czech Republic at Hora Svate Kateriny ("HSK")⁶⁸. The increased amount of available transport capacity may, according to BNetzA, reduce capacity prices and make it more difficult for dominant companies to exclude competitors.

5.1.3.1. Availability of matching FZK capacities in Brandov on the Czech side

- (117) At a late stage of the procedure, ERU expressed its concerns that due to the exemption granted to Gazelle (for approximately 30 bcm/a), there will be no matching capacities available on the Czech side of Brandov. ERU based its concerns on the current booking situation at Brandov, where entry capacities into the Czech Republic would be insufficient to accommodate FZK until the end of 2016.⁶⁹
- (118) However, by letter of 3 April 2014 to the Commission, NET4GAS, the TSO operating both Gazelle and the main Czech gas transmission network, declared being ready to offer the required amount of firm entry capacities into the Czech VP at the entry point Brandov in order to fully match FZK capacities on OPAL. [CONFIDENTIAL]. In addition, NET4GAS accepted implementing all necessary procedures in order to ensure the availability of firm entry capacities as necessary.

⁶⁸ According to the Compass Lexecon study, the currently available spare firm capacities at HSK are in the magnitude of 1 bcm/a in 2013-2014, and scheduled to grow as of 2015. Table on p. 38. There is a miss-match of the exit capacities from Germany and entry capacities into the Czech Republic at HSK points at Deutschneudorf and Olbernhau, with the first IP having larger spare capacities at the exit from Germany and not matched by lower entry capacities at entry into the Czech Republic, while the second IP having lower exit capacities from Germany and higher entry capacities into the Czech Republic. See: [CONFIDENTIAL] study, pp. 23 and 26. The availability of additional capacities at these entry points has been also verified by the Commission on the basis of more recent data available at the NET4GAS website, http://extranet.net4gas.cz/capacity_ee.aspx.

⁶⁹ Based on data available at Net4Gas website on 28 February 2014.

- (119) NET4GAS already provides more technical entry capacity at Brandov than OGT and LBGT jointly provide as technical exit capacity at the same physical interconnection point on the German side. In order to allow for the contractual booking of firm capacity, NET4GAS also accepts to make the necessary level of firm entry capacity, if required, available through oversubscription both on a day ahead and longer term basis. The presently offered capacities would be sufficient for the booking of FZK capacities on OPAL up to a maximum of 3.6 million kWh/h.⁷⁰
- (120) The capacities offered by NET4GAS will provide access to the Czech hub from the entry point Brandov. This capacity will be accessible on a non-discriminatory basis, for timeframes that match the FZK products to be made available on OPAL (daily, monthly, quarterly, yearly, the latter products being offered as a multiple of monthly capacity products until the implementation of the Network Code on Capacity Allocation Mechanisms), and subject to the general regulatory provisions in the Czech Republic, particularly as regards applicable tariffs and transparency obligations.⁷¹
- (121) [CONFIDENTIAL].⁷²
- (122) In its answers to the new Commission request for information, ERU confirmed that based on increases to the available entry capacity at Brandov, no further doubts existed that sufficient entry capacity would be available.⁷³

5.1.3.2. Attractiveness of the FZK products for third parties and sufficiency of its volumes

- (123) The Commission agrees with ERU that the attractiveness of the FZK capacities offered on OPAL will depend on its price. As regards the tariff setting by OGT, the Commission notes that in accordance with the Settlement Agreement, the starting price to be set in auctions for the regulated capacity is to be identical with the tariff applied to the fully exempted capacity (taking into account the differences between capacity products to be offered), as calculated under the initial exemption request.⁷⁴ In this respect, the Commission notes that on the basis of the base price estimates in the Settlement Agreement, which are based on a formula determined in the initial exemption request, base prices for FZK capacities are close to regulated capacity tariffs in Germany. However, to ensure the attractiveness of the FZK capacities also in the future, it is important that the starting price to be set in auctions for the regulated capacity will not exceed regulated capacity tariffs in Germany. Therefore, the Commission believes it is essential that the base price of capacities for FZK products shall not be set higher than the average base price of regulated tariffs on transmission networks from the Gaspool area to the Czech Republic in the same year for comparable products (i.e. FZK Capacities reflecting the period for which they are booked). Finally, based on the information provided by NET4GAS, the corresponding capacities on the Czech side of the border, allowing for the connection with the Czech VP, would be priced as regulated capacities, ensuring non-discriminatory tariffs for its users.

⁷⁰ [CONFIDENTIAL].

⁷¹ [CONFIDENTIAL].

⁷² [CONFIDENTIAL].

⁷³ ERU Reply to request of information by the Commission of 18 August 2016, p.3.

⁷⁴ Paragraph 1 (1) d) i) of the Settlement Agreement and BNetzA reply to question 22 of the Commission's request for information. The cost calculation is further described in annex AS 33 to the initial exemption request.

- (124) As regards the FZK volumes, under the proposed changes OGT would be initially obliged to offer capacities of 1.8 million kWh/h (approximately 15768 GWh/a). If demand for FZK capacities in two consecutive auctions exceeds 1.8 million kWh/h, this offer is to be doubled by OGT in the next auction programme.
- (125) The Commission considers that the revised conditions will have to be designed in such a way as to allow for the development of competition even in the absence of the gas release programme as a pre-condition for the full use of OPAL as stipulated in the Final Decision.
- (126) The expected effect of extended possibilities for sourcing gas from GASPOOL and for shipping it into the Czech Republic is crucial in the present assessment. Notably, the GASPOOL hub includes gas supplies from different sources and has become increasingly liquid, with an increase in traded volumes from 1 251 TWh in 2013 to 1 493 TWh in 2015.
- (127) Contrary to the gas release programme in the Final Decision, the provision of additional FZK capacities is not based on gas being made available by Gazprom to the Czech market, but on providing additional access from the GASPOOL hub and the gas traded on this hub to the Czech VTP. This could contribute to further integration of national gas markets in the EU and gives Czech downstream competitors access to additional gas sources, in particular to the liquid GASPOOL hub, under the condition that the quantities of firm capacity to be offered are adjusted to the changed market environment. In particular it must be ensured that the additional FZK capacity will enable Gazprom's competitors for the foreseeable future to acquire natural gas at the GASPOOL hub for transport to the Czech Republic.
- (128) Currently there is no firm capacity available on OPAL to third parties which would have an effect similar to FZK capacities. [CONFIDENTIAL]. As regards the availability of interruptible capacity, it should be noted that the expected increase in the OPAL utilization rate under the changes proposed in the Notified Decision could result in an increased likelihood of interruption. Thus, as has been pointed out by one participant to the market consultation, interruptible capacity could under the new conditions be of more limited interest to competitors than in the current situation marked by an underutilization of the pipeline. It should be noted, however, that already under the current situation, the interruption probability of interruptible capacity from GASPOOL could increase if non-dominant undertakings would use the capacity from Greifswald. This could happen at any time if Gazprom Export changed the contractual delivery point of gas on Nord Stream to Greifswald. Interruptible capacity currently available to third parties thus cannot be regarded as equal to firm capacity. Furthermore, §13 Gasnetzzugangsverordnung ("GasNZV") provides that interruptible capacity could be exchanged for firm capacity, in which case only the latter would have to be paid for. Therefore, the third party currently using the interruptible capacity can exchange it for a better capacity product.
- (129) In view of the above and taking into account the increasing trend in liquidity⁷⁵ of the GASPOOL hub, the Commission considers that the amount of firm capacity to and from GASPOOL market area into the Czech market, as envisaged in the proposed changes, should be increased to reflect this increase in liquidity with a view to improving the functioning of the internal gas market by increasing trading options and allowing for arbitrage between hubs. Moreover, provision should be made for a further

⁷⁵ Also evidenced in the [CONFIDENTIAL] study, pp. 11-14.

demand increase for FZK capacity to and from the GASPOOL area towards the Czech Republic. To this end, the Notified Decision should be amended to include an automatic mechanism by which the minimum quantity of FZK to be offered by the Applicant will increase gradually.

- (130) Considering the current demand structure, the initial FZK capacities to be offered should at least be equal to 10 % of the total capacities (3.2 million KWh/h), and should be increased in 5 % steps where at least 90 % of these capacities have been booked in the preceding year. The total minimum amount of FZK capacities should not increase to more than 20 % of total capacities (6.4 million kWh/h).
- (131) The imposed cap of 20% capacity to be offered to third parties is justified based on the specificity of the functioning of the German gas transmission networks and the specific product that is offered on those networks (i.e. the FZK and DZK capacities).
- (132) First, shippers wishing to enter OPAL from Gross Kōris to ship gas to Brandov would need to use the upstream Gascade system, possibly facing physical constraint on the internal Gaspool network depending on the flow pattern or its operating pressure. Based on §9 Gasnetzzugangsverordnung when determining whether a firm capacity product can be offered, TSO need to take into account not only the availability of the capacity on the pipeline where the gas will be shipped but also the availability of the capacity on other pipelines which are impacted in load flow simulations, also beyond the TSO's network and beyond the market area in auestion. Therefore, in order to offer firm capacity on the OPAL pipeline (i.e. FZK from Gross Koeris to Brandov), it would be necessarily to either (i) invest into the enhancement of the Gaspool network, including investments outside the OGT network or (ii) impose flow commitments via the OPAL pipeline, which could be used when the gas cannot physically come from the Gaspool VTP.⁷⁶ Therefore, the additional expenses linked to these options do not appear justified without imposing an upper limit on the capacities that could be accessed by third parties.⁷⁷ It thus is necessary to limit the initial amount of FZK capacities, which however could be gradually increased if there is more demand and such an increase is both technically feasible and justified taking into account its benefits and costs.
- (133) Second, pursuant to Article 8 (6) 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, at least 20 % of the capacities of regulated pipelines should be set aside for annual or shorter-term products. This minimum share should, if sufficient demand for such products exists, also be respected on the OPAL pipeline. On the other hand, if demand for FZK products were low, FZK capacities could be made available to a lower extent, but in no case pushing annual firm products below 20 % of the regulated capacities, thus 10 % of total OGT capacities.
- (134) Nevertheless, it also has to be taken into consideration, that within the time-frame of this exemption decision, the situation on the relevant markets might change and the

⁷⁶ The BNetzA KOLA (Festlegung der Kosten für Lastflusszusagen als volatile Kostenanteile i.S.d. §11 Abs. 5 ARegV of 15 May 2014, BK9-14-606) decision requires that flow commitments are concluded for maximum one year.

⁷⁷ The "More capacity survey", published in December 2015 by a number of German TSOs, regarding exit capacities to the Czech republic, showed market demand for DZK capacity (but not FZK). Available at https://www.more-capacity.eu/fileadmin/downloads_morecapacity/presse/more_capacity_Report_Demand_Analysis.pdf

demand for the access to the OPAL pipeline may increase beyond the envisaged 20%. In such circumstances the Commission must be able to adapt the decision, on its own initiative, to the potential future circumstances and adjust the amount of capacity which would be offered to third parties. In such circumstances, the Commission will take account of additional costs the increase of the capacity to be offered to third parties would entail. The burden of proof as concerns such additional costs, however, rests with OGT.

- (135) It results from the above that positive effects on competition can be expected, subject to an amendment of the Notified Decision stipulating an increase of the amount of additional firm capacity to be provided to and from the GASPOOL area, with an automatic mechanism for further increases of FZK to be offered in the event of growing demand.

5.1.4. Ability of Gazprom to foreclose competitors by overbidding for FZK capacity

- (136) As Gazprom maintains a dominant position on the Czech upstream wholesale gas supply market for natural gas, the abilities and incentives of Gazprom to overbid its competitors require careful assessment. In order to ensure that the amended conditions have a positive effect on competition in the Czech Republic, particular attention has to be paid to any possibility for Gazprom to strengthen this dominant position or to increase the potential for abuse of this dominance vis-à-vis its competitors.
- (137) Any potential for Gazprom to foreclose competitors as regards access to regulated capacities thus has to be avoided. In this respect, it is necessary to distinguish between FZK and DZK capacities. For the DZK capacity products, a strong position of Gazprom follows already from its position as sole shipper on NordStream. At least until technical investments are made, Gazprom has a large degree of control over the gas available at Greifswald. Even though granting access to these capacities on the basis of transparent auctions is clearly a progress, they cannot be seen as equivalent in effect to the gas release programme. Against this background, it is particularly important to ensure that competing shippers have a real possibility to get access to FZK capacities.
- (138) Gazprom's ability to foreclose competitors from capacity auctions in order to restrict access for downstream competitors to the Czech market is limited by the use-it-or-lose-it principles included in the Notified Decision. §1 1)(b)(i),(ii) of Annex 1 to the Settlement Agreement provides that capacities which are not nominated at the day ahead stage have to be made available on a non-discriminatory basis to third parties. Capacities which are used to only a very limited extent within a quarter have to be withdrawn by OGT for at least the following quarter. In order to block third parties from using regulated capacity, Gazprom would thus have to acquire these capacities in competitive auctions and use them for transport of gas to or through the Czech Republic. Using this capacity could also result in further aligning wholesale prices in the German and Czech markets. This creates incentives not to book more than the required capacity. However, the UIOLI provisions do not completely prevent Gazprom from bidding for these capacities and using them.
- (139) An additional safeguard against manipulation of prices by Gazprom is included in § 1 (2) d) of the Settlement Agreement. This provides that, notwithstanding the exemption from tariff regulation, tariff setting must be transparent and non-discriminatory. Changes to the applicable tariffs are to be notified to BNetzA. § 1 (10) of the Settlement Agreement expressly provides that the general powers of BNetzA remain at its disposal with regard to enforcing the obligations resulting from the Settlement

Agreement. It is the Commission's understanding that this includes in particular the powers provided for in §§ 29 to 35 and 69 EnWG.

- (140) Potential abuse by Gazprom of its dominance vis-à-vis its competitors could be further facilitated due to the vertical integration with OGT. Tariffs are set by OGT according to a formula. Under this formula, tariffs are calculated on an annual basis based on actual costs incurred (discounted cash flow, including CAPEX, based on a fix interest rate) and income generated in the previous year. If the auctioning procedure leads to higher tariffs paid by the shippers, it is the Commission's understanding⁷⁸ that the auction premium would be included in the tariff calculation model, leading to lower tariffs in the following year. In so far as this formula results in lower tariffs in the following years, including for exempted capacities, this is to the benefit of the main shipper, Gazprom. As half of the capacities (the exempted capacities) are not accessible to other shippers, Gazprom would thus be to a large extent compensated for the higher initial bid for FZK. In so far as the higher income results in higher benefits to WIGA, this would also be to the benefit of Gazprom, which jointly controls WIGA. Against this background, Gazprom would not be prevented from repeatedly bidding excessively high tariffs for access to FZK capacity, thereby preventing other shippers from getting access to this capacity. This concern was also shared by a participant to the market consultation.
- (141) This is not prevented either by the fact that overbooking of FZK capacities by Gazprom would trigger the obligation to double FZK capacities. These additional capacities would be subject to the same constraints as discussed above.
- (142) In order to prevent the possibility of foreclosure regarding the key product of FZK capacities, it is necessary to impose an additional condition in the exemption decision. This condition should not prevent Gazprom from using FZK capacity if this capacity would otherwise remain unused, but at the same time should prevent situations when Gazprom overbids in order to foreclose its competitors. Further, the condition has to apply to any other undertaking which may be in a similar position as Gazprom in the future. Thus, the Commission considers it as appropriate to require undertakings with a dominant position in the Czech Republic or which control more than 50 % of natural gas arriving at Greifswald to submit their bid for FZK capacities on OPAL only at the base price, excluding any successful bidding for FZK capacities in case of congestion. In the ascending clock auction system provided for in Article 17 Regulation (EU) 984/2013⁷⁹, already implemented on the Prisma platform, this means that bids of these undertakings would only participate in the first bidding round.
- (143) On the basis of this additional condition, it is ensured that Gazprom cannot exclude third parties from booking FZK capacities and using these capacities to gain access to the Czech market. On the other hand, should third parties not bid for the entire FZK capacities available, Gazprom is not excluded from booking these capacities, thus ensuring efficient use of technically available capacities.

5.1.5. Economic feasibility

- (144) It is important in this context that § 1 (1) b of the Settlement Agreement and §1 (1) d aa) of its Annex 1 provide that, in so far as this is economically feasible, FZK capacity

⁷⁸ This has been confirmed by OGT by e-mail on 2 February 2014.

⁷⁹ 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. 5-17.

is to be doubled if demand for FZK capacities in two consecutive auctions for annual capacities exceeds 1.8 million kWh/h. No additional capacity has to be offered if there are reasonable grounds to assume that the demand is based on speculation.

- (145) BNetzA explains that the economic feasibility of a doubled FZK capacity offer is subject only to the legal and economic assessment in the context of the general obligation of transmission system operators to expand their network (§ 11 (1) EnWG) and did not introduce an additional condition.⁸⁰
- (146) The Commission notes that § 1 (2) b) of the Settlement Agreement provides that the [CONFIDENTIAL] (which is necessary for the offer of FZK capacities by OGT) could be replaced by an alternative technical solution. As explained by BNetzA,⁸¹ this would particularly include a connection between OPAL and NEL, which would require the construction of a gas flow measurement station as well as smaller network adaptations. Such a physical connection between OPAL and NEL at Greifswald could stimulate further development of upstream competition in the Czech Republic. It would mean that also other gas, in addition to Gazprom's gas from Nord Stream, could be shipped via OPAL to the Czech Republic, which would increase an interest of other parties in DZK products linked to Greifswald. The Commission underlines that this option would be highly desirable and, if justified by demand and the economic test, should be implemented. The same would apply to technical solutions ensuring full access of third parties from the Gaspool VTP [CONFIDENTIAL], if and to the extent such solutions are justified by demand and the economic test.
- (147) In case these alternative measures do not allow for OGT to offer the FZK capacities in the required amount, the [CONFIDENTIAL] would continue.⁸² In this regard, the Commission considers that, at least up to the limit of 20 % of total capacities, providing additional capacities [CONFIDENTIAL] should in principle always be economically feasible. Thus, the Commission considers that the condition of economic feasibility cannot result in the FZK capacities not being increased in case of sufficient demand. Rather, it may be invoked only in case the TSO makes technical investments to ensure the availability of FZK [CONFIDENTIAL]. Technically, [CONFIDENTIAL] enabling the offer of FZK capacities. Whereas the Settlement Agreement foresees [CONFIDENTIAL], if and as long as alternative technical measures are not implemented, [CONFIDENTIAL] should remain obliged to offer [CONFIDENTIAL] under economically feasible conditions, [CONFIDENTIAL]. While this could already be seen as resulting from the general obligation of [CONFIDENTIAL] to enable the effective implementation of the Settlement Agreement, it should be clarified further in order to ensure the effectiveness of the increase in FZK capacities in case the technical investments are economically not feasible.
- (148) The Settlement Agreement also provides that no additional capacity has to be offered if there are reasonable grounds to assume that the demand is based on speculation. In this regard, BNetzA expressed the view that the burden of proof for this provision would fall on OGT and that such a proof would be difficult to obtain.⁸³ However the Commission considers that demand for FZK capacities that would trigger an increase

⁸⁰ BNetzA reply to question 17 of the Commission's request for information.

⁸¹ BNetzA reply to question 14 of the Commission's request for information.

⁸² BNetzA reply to question 15 of the Commission's request for information.

⁸³ BNetzA reply to question 18 of the Commission's request for information.

of capacities to be offered would in itself be a clear counter-indication to this demand being based on mere speculation. Therefore, the Commission considers that this clause should be removed from the New Settlement Agreement.

- (149) Based on this understanding of the provisions of feasibility criteria and ensuring that [CONFIDENTIAL] provides the necessary level of [CONFIDENTIAL] until alternative technical solutions are fully implemented, the Commission agrees with BNetzA on the positive effect of increased FZK capacities in case of high demand for FZK.

5.1.6. Duration of capacity products

- (150) § 1 (1) d) bb) of Annex 1 to the Settlement Agreement provides that FZK capacity at exit Brandov has to be offered also as short or medium term capacity. In 2009, the Commission had established that short- and medium-term capacity only was insufficient to allow for efficient competition to Gazprom and RWE in the Czech Republic to develop. Rather, long term alternatives were required.⁸⁴ However, as explained above, the development of hubs has resulted in a significant increase in liquidity since 2009 resulting in an increased trust in the market and increased demand for short- and medium-term capacity. This has been confirmed in the market consultation and by BNetzA and ERU.⁸⁵
- (151) In markets where competition already exists or is emerging, short-term contracts will make market entry and exit easier, thereby enhancing competition.⁸⁶ Short- and medium-term FZK capacities contribute to enhanced competition in the Czech Republic. Therefore, the Commission agrees that the current market conditions justify offering the product on a short- and medium-term basis. However, as the decision has a long-term character, it cannot be excluded that in the future there may be demand from third parties for long-term capacity as well. In case such long term demand occurs and would lead to an effective improvement of competition in the Czech Republic, the provision of such capacity products can be ensured under the renegotiation clause which could be invoked by BNetzA.
- (152) § 1 (4) of the Settlement Agreement provides that, as of the applicability of Regulation (EU) 984/2013, OGT, Gazprom and Gazprom Export have the legitimate expectation of offering 80 % of the regulated capacity as long-term capacity. This could be understood as allowing the allocation of long-term capacity beyond the maximum threshold foreseen under national law. It follows from § 14 (1) GasNZV that 20 % of annual capacity has to be allocated in contracts of up to two years and up to 65 % of capacity may be allocated in contracts of duration longer than four years. The Commission notes that Regulation (EU) No 984/2013 expressly allows in Article 8 (6-9) for the application of higher minimum thresholds of short term capacity.
- (153) BNetzA argues that on the basis of § 1 (2) c) of the Settlement Agreement and § 1 (1) d) bb) of Annex 1 to the Settlement Agreement, the contract duration of the regulated capacity is subject to the relevant legal provisions. BNetzA claims⁸⁷ that although Regulation (EU) No 984/2013 allows for higher minimum thresholds of short term

⁸⁴ Commission Request, para. 4.

⁸⁵ BNetzA reply to question 8 of the Commission's request for information; ERU reply, p. 9.

⁸⁶ DNV KEMA Study on LT-ST Markets in Gas, Final Report, http://ec.europa.eu/energy/gas_electricity/studies/doc/gas/lt-st_final_report_06092013final.pdf, p.6 and 47.

⁸⁷ BNetzA Reply to question 7 of the Commission's request for information.

capacity, it is up to the national regulator, not the national legislator, to foresee stricter thresholds. The Commission is not convinced that an obligation under national law to require more short term capacities is contrary to Regulation (EU) No 984/2013, as argued by BNetzA. Article 8 (6) and (7) of Regulation (EU) No 984/2013 foresee that at least 20% should be offered as short- and medium-term products.

- (154) Legitimate expectations recognized in the Settlement Agreement cannot result in the possibility for OGT, Gazprom or Gazprom Export to allocate a smaller part of the regulated capacities on short-term contracts than foreseen by the applicable national and EU law. This is also recognized by BNetzA.⁸⁸ Against this background, in future decisions on the applicable thresholds for capacity allocation, in particular regarding decisions under Article 8 (9) of Regulation (EU) No 984/2013, BNetzA has to take full account of national and EU law and avoid any discrimination in comparison to other regulated pipelines.
- (155) Finally, the Settlement Agreement provides in § 1 (2) c) that OGT is entitled and obliged to offer regulated capacities as much in the form of long term capacities as legally possible. The Commission considers it in contradiction with Regulation (EU) No 984/2013 to restrict in any way OGT's right to offer more than 20% in the form of short- or medium-term products. OGT should not be allowed to commit itself in a settlement agreement involving a shipper with a particular interest in long-term products to maximise long-term capacities, taking into account in particular the likely preference of competing market operators for shorter term products.
- (156) Beyond the problems which arise from any such agreement in a civil law contract, including under competition rules, imposing such obligations in a settlement agreement under public law, which results in changes to an exemption decision, is, in the view of the Commission, generally excluded. The obligation follows no express regulatory purpose. Including it in the Settlement Agreement gives the impression to the TSO that the provision has received regulatory approval. For the above reasons, the Commission rejects the obligation on OGT to offer regulated capacities as much in the form of long term capacities as legally possible as part of the amended exemption conditions. The Commission considers that this obligation does not form an enforceable part of the Settlement Agreement. It highlights that the legality and enforceability of such an obligation is questionable under EU law.

5.1.7. Potential effects on competition in Germany

- (157) As established in 2009⁸⁹ and above, the competitive assessment should clearly focus on effects in the Czech Republic. The exemption only relates to transmission capacity with entry in Greifswald and exit in the Czech Republic.
- (158) Effects on competition in Germany would thus be limited. The higher utilization of OPAL is expected by BNetzA to result in higher demand and thereby higher liquidity on GASPOOL.⁹⁰ The Commission shares the expectation that the availability of FZK capacity (as well as the increased transparency for interruptible capacity) will result in higher demand on GASPOOL. Demand on GASPOOL can be supplied from different sources, in particular from Russia, Norway and the Netherlands. Total imports of natural gas into Germany in 2014 were of 1 788 TWh, compared to 1 771 TWh in

⁸⁸ BNetzA reply to question 6 of the Commission's request for information.

⁸⁹ Commission Request, para. 75-77.

⁹⁰ BNetzA reply to question 2 of the Commission's request for information.

2013.⁹¹ Against this background, no negative effects on competition in Germany are to be expected.

- (159) However, as indicated above, the Commission considers that the obligation to auction additional FZK capacities as envisaged in the Notified Decision should be scaled up to reflect the increased liquidity of the German market. Moreover, provision should be made for a further demand increase for FZK capacity to and from the GASPOOL area towards the Czech Republic. To this end, the Notified Decision should be amended to include an automatic mechanism by which the minimum quantity of FZK to be offered by the Applicant will increase gradually.

5.1.8. Grounds for review

- (160) The amendments proposed in the Notified Decision can be introduced as part of a review of the initial 2009 exemption. The amendments are justified by factual changes which occurred after the Commission Request. In particular, the volume of the Czech market has, contrary to what was predicted in 2009, not significantly increased but has at most remained stable (see above paragraph (90)). Also, it appears that the market share of RWE in the Czech Republic has somewhat decreased on the downstream wholesale gas supply market (see above section (4.7.4)). Finally, the changes in the market structure had as a consequence that the gas release programme foreseen became of limited interest to market participants and thereby this condition can no longer be expected to materialize.

5.1.9. Conclusion

- (161) Therefore, the Commission concludes that the amendments proposed by the Notified Decision ensure that the potential negative effects on competition identified in the Commission Request are sufficiently addressed and the operation of the OPAL pipeline enhances competition, while the exemption, as amended, is not detrimental to competition.

6. IMPLEMENTATION OF THE DECISION

6.1.1. The renegotiation clause

- (162) Paragraph 5 of the Notified Decision provides for a renegotiation clause in case [CONFIDENTIAL]. The aim of the renegotiation should be to re-establish the balance of interests as found in the Settlement Agreement, including the economic interests of Gazprom and its affiliates. BNetzA explains that this clause would also apply to changes in EU network codes.⁹² In case of disagreement as to whether the conditions for a renegotiation have been met, the clause would have to be interpreted by national courts. Changes to the Settlement Agreement or its Annex 1, resulting in changes to the exemption decision, would be subject to approval by the Commission upon the request by BNetzA.
- (163) The Commission underlines that any changes following renegotiation would have to fulfil all criteria under Article 36 of Directive 2009/73/EC (or the respective rules applicable at the time of review). Unless justified under these provisions, the balance of interests as established in the Settlement Agreement cannot be re-established only on the basis of the renegotiation clause. The Commission would like to note that the renegotiation clause can in any event not apply to the application of future provisions

⁹¹ BNetzA Monitoring Report 2015.

⁹² BNetzA reply to question 26 of the Commission's request for information.

which were already known to the parties at the time of conclusion of the Settlement Agreement, in particular the network code on Capacity Allocation Mechanisms (Regulation (EU) No 984/2013), the Commission Decision of 24 August 2012 on Congestion Management Procedures⁹³ and Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks⁹⁴. Entering into force of these provisions cannot result in a change to the balance of interests found in the Settlement Agreement, as it has to be assumed that these provisions were already taken into account when this balance was established. Further, Paragraph 5 (1) (ii) of the Settlement Agreement provides that the renegotiation clause can also be invoked in case the provisions of Paragraph 1 of the Settlement Agreement are ineffective. It is the Commission's understanding that this would also apply to situations in which the availability of FZK capacity does not allow third parties to effectively gain access to the Czech market under competitive conditions or in cases where there would be a need to change the type of capacity products to be offered as FZK/DZK in case of changes in the market conditions. The Commission requests BNetzA to closely monitor this provision. Finally, the Commission understands that in case dominant undertakings repeatedly acquire large parts of FZK capacity, this could be an indication of the conditions not being effective in improving competition in the Czech Republic, which could be the basis for invoking the renegotiation clause.

6.1.2. Auctioning Procedure

- (164) § 1 (2) c) of the Notified Decision provides that capacity allocation of regulated capacities is subject to the general legal provisions on capacity allocation at the respective point in time. It further specifies that, on the basis of the currently applicable provisions, this requires auctioning of OPAL capacities on the PRISMA primary platform. Further reference is made to the annual auction of capacities on the PRISMA primary platform on 3 March 2014. The Commission points out that the obligation to allocate capacities on the basis of auctions also requires participation in auctions of a shorter timeframe (currently quarterly, monthly and daily auctions), including prior to participating in the first annual auction following the Final Decision.
- (165) Participation in the auctions has to be transparent and non-discriminatory. This requires in particular informing market participants sufficiently in advance of the auction. Article 11 (8) Regulation (EU) 984/2013 provides that one month before the auction starts, transmission system operators shall notify network users about the amount of technical capacity to be offered for each year for the upcoming annual yearly capacity auction.
- (166) Against this background, the Commission understands that the regulated capacity should be auctioned at the general auctions on Prisma primary platform (including quarterly, monthly and daily auctions). The first annual auction in which the regulated capacity products would be available, and thereby the first auction in which yearly products would be available, is expected to take place on the first Monday in March 2017. The quarterly, monthly and daily auctions can take place earlier as envisaged on Prisma platform.

⁹³ Commission decision of 24 August 2012 on amending 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 231, 28.8.2012, p. 16).

⁹⁴ OJ L 91, 27.3.2014, p. 15-35.

(167) The Commission notes that as of the applicability of Regulation (EU) No 984/2013, capacity allocation in all Member States will follow a common auction calendar. The Commission encourages Member States and National Regulatory Authorities to ensure application of this calendar as early as possible already in advance, in order to enable parallel auctioning and booking of entry and exit capacities in all concerned Member States.

6.1.3. Certification

(168) As stated in the recitals to Directive 2009/73/EC, the provisions of Directive 2009/73/EC should not affect exemptions already granted under Article 22 Directive 2003/55/EC and the continuity of the exemption as decided in the exemption decision should be preserved. In recital 35, final sentence, of the Directive 2009/73/EC the EU legislator confirmed that: "(35) (...) *Exemptions granted under Article 22 of Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted exemption decision.*"

(169) However, in line with its decision-making practice,⁹⁵ the Commission notes that this does not mean that exempted infrastructure under Article 22 of Directive 2003/55/EC, such as the OPAL pipeline, are not subject to any unbundling rules at all. Certain unbundling rules have to be complied with, in particular the rules on legal and functional unbundling as derived from Directive 2003/55/EC. There are also certain additional provisions concerning the unbundling requirements aiming at safeguarding the degree of independence of the business management of OGT from its shareholders that are directly included in the Final Decision.

(170) Furthermore, as the Notified Decision changes the scope of the third party access exemption granted, it is of particular importance that the regulated capacity is marketed independently from any production or supply interests of the shareholders of the pipeline. Therefore, BNetzA has to ensure that the marketing of this capacity takes place independently from supply interests of WIGA and related companies. For this purpose, the Commission notes that the operator of the pipeline should be certified under the provisions of Directive 2009/73/EC. BNetzA will need to assess in its certification decision the compliance of OGT with the Final Decision (as amended under the Notified Decision) and the unbundling rules envisaged already in Directive 2003/55/EC, when the exemption was granted. Therefore, the Commission encourages BNetzA to proceed with the certification sufficiently prior to the first general annual auction (expected for March 2017) in order to ensure that the independence criteria are met.

HAS ADOPTED THIS DECISION:

Article 1

The European Commission approves, in accordance with Article 36(9) of Directive 2009/73/EC, the amendments to the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation laid down in Articles 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC, as submitted in the Notified Decision of

⁹⁵ Commission Decision of 11 December 2012 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Austria – NABUCCO Gas Pipeline International GmbH, C(2012)9575, https://ec.europa.eu/energy/sites/ener/files/documents/2012_045_at_en.pdf

Bundesnetzagentur on 13 May 2016, subject to modifications as requested in the present decision.

Article 2

§1(d)(aa)(ii) of Annex 1 to the Notified Decision shall be amended as follows:

"As exit capacities at the exit point Brandov, the Partly Regulated Decoupled Interconnection Capacities are offered as DZK Interconnection Capacities and FZK Interconnection Capacities in the following volumes:

- *FZK Interconnection Capacities in a volume of 3,200,000 kWh/h, and*
- *DZK Interconnection Capacities in a volume of 12,664,532 kWh/h.*

If at an annual auction, the demand for FZK Interconnection Capacities at the exit point Brandov is equal or greater than 90% of the offer of FZK Interconnection Capacities at the exit point Brandov, the Applicant is obliged to increase the total amount of FZK Interconnection Capacities offered in subsequent annual auctions by 1,600,000 kWh/h, in an economically feasible way, up to a maximum of 6,400,000 kWh/h.

If there is an increase in the offer of FZK Interconnection Capacities, the offer of DZK Interconnection Capacities is decreased by the amount corresponding to such increase only if and to the extent that such decrease is technically required."

Article 3

If demand for FZK capacities at an annual auction exceeds 6,400,000 kWh/h (or the current threshold, if it has been increased before), the threshold for FZK capacities under Article 2 shall be increased by 3,200,000 kWh/h in the following annual auction provided a further increase in FZK capacities is technically feasible, the changes to the competitive situation are such as to justify an increase, and the benefits of an increase outweigh the costs thereof. Where demand for FZK capacities at an annual auction exceeds 6,400,000 kWh/h (or the current threshold, if it has been increased before), the Commission shall confirm whether the above requirements for an increase are met. The Commission shall take due account of Bundesnetzagentur's and OGT's opinion on an eventual increase of FZK capacities. Lack of technical feasibility or disproportionate costs need to be demonstrated by OGT.

If there is an increase in the offer of FZK Interconnection Capacities, the offer of DZK Interconnection Capacities is decreased by the amount corresponding to such increase only if and to the extent that such decrease is technically required.

Article 4

An additional condition shall be imposed in the exemption decision which stipulates that undertakings or groups of undertakings with a dominant position in the Czech Republic or which control more than 50 % of natural gas arriving at Greifswald may bid for FZK capacities on OPAL only at the base price of the capacity. The base price of capacities for FZK products shall not be set higher than the average base price of regulated tariffs on transmission networks from the Gaspool area to the Czech Republic in the same year for comparable products (i.e. FZK Capacities reflecting the period for which they are booked).

Article 5

An additional condition shall be imposed in the exemption decision which stipulates that OGT shall, in cooperation with NET4GAS [CONFIDENTIAL], ensure the availability of firm entry capacity at the interconnection point Brandov to the Czech hub, including via firm short and medium term overbooking, to the extent this is required for the matching of FZK capacities.

Article 6

The exemption decision shall clarify that [CONFIDENTIAL] is obliged to provide [CONFIDENTIAL], and to offer [CONFIDENTIAL] in case the conditions for a further demand-based increase of FZK capacity to be auctioned pursuant to Article 2 of the present decision are fulfilled, under economically feasible conditions to the extent and in so far as the offer of FZK capacities cannot be achieved via economically feasible technical measures.

Article 7

The Commission asks Bundesnetzagentur, in cooperation with the Energy Regulatory Office of the Czech Republic, to continue monitoring closely whether the exemption decision, as amended, is effective in improving competition on the Czech market, in particular as regards pricing and types of capacity products offered as well as the diversity of participants in the capacity auctions.

Article 8

Bundesnetzagentur and the Energy Regulatory Office of the Czech Republic shall, following the first and second annual auction of regulated capacities, as well as subsequently every three years, report to the Commission on the results of the monitoring under Article 7. The report shall include an overview of the application of Articles 2 to 6 of the present decision.

Article 9

The Commission requests Bundesnetzagentur to notify a certification decision for OGT under the provisions of Directive 2009/73/EC and Article 3 Regulation 715/2009 no later than by 28 February 2017, assessing compliance with the unbundling rules in Directive 2003/55/EC and the exemption decision, as amended.

This Decision is addressed to Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, Tulpenfeld 4, 53113 Bonn, Germany.

Done at Brussels, 28.10.2016

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

