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STATEMENT OF OBJECTIONS

of XXX

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

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

(Only the English text is authentic)

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1. INTRODUCTION

(1) This Statement of Objections ('SO') sets out the preliminary conclusions of the European Commission ('Commission') regarding the compatibility of the business practices described below by OAO Gazprom and its 100% subsidiary OOO Gazprom Export in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia, with Article 102 of the Treaty on the Functioning of the European Union ('TFEU')[1] and Article 54 of the EEA Agreement ('EEA').

(2) Subsequently in the text, the term 'Gazprom' will designate without distinction OAO Gazprom or OOO Gazprom Export (hereafter Gazprom Export), unless the specific entity is to be identified.

(3) For the purpose of this investigation, the above mentioned Member States are referred to as Central and Eastern European ('CEE') countries.

(4) This Statement of Objections ('SO') concerns three potentially abusive practices by Gazprom which, in the Commission's preliminary view, is dominant in each of the eight CEE markets for the upstream wholesale supply of natural gas (hereinafter also 'gas'). First, Gazprom included territorial restrictions such as destination clauses and export bans in all its supply agreements with wholesalers and with some industrial customers. Gazprom also hindered the cross-border sale of gas via equivalent measures having the same effect such as metering requirements and a restrictive policy regarding changes of gas delivery points. The purpose was to segment the internal market along national borders in order to protect Gazprom's national pricing policy in the CEE countries. Second, Gazprom pursues an unfair pricing policy by charging prices to some wholesalers in the CEE countries ([redacted], [redacted] and Poland) that are excessive when compared to Gazprom's costs or to benchmark prices, while using price formulae based on oil indexation in these countries which were one-sidedly in favour of Gazprom and contributed to the excessive prices. Third, Gazprom leveraged its dominance by conditioning gas supplies in Poland and [redacted] on obtaining certain non-related commitments from

[1] With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Statement of Objections ('SO'), where appropriate, references to Articles 81 and 82 of the EC Treaty should be understood as references to Articles 101 and 102, respectively, of the TFEU. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this SO.

the respective wholesalers. In Poland, Gazprom used its leverage as dominant gas supplier vis à vis the Polish wholesaler PGNiG to ensure that the gas transit pipeline Yamal would be operated on the basis of an operatorship agreement which conferred investment powers to Europol (co-owned by Gazprom) rather than to an independent Transmission System Operator as required under Gas Directive 2009/73.[2] Gazprom had a veto right in Europol which allowed Gazprom to hinder gas supply diversification in Poland through Yamal. Gazprom also conditioned gas supplies to PGNiG upon the resolution, in Gazprom's favour, of other Europol-related issues in Poland. [redacted]

(5) While some of the abusive behaviour originates in contracts concluded as early as 1996, the duration of the possible infringement starts with the CEE countries' accession to the European Union (1 January 2007 for Bulgaria, 1 May 2004 for the other countries) and is still on-going.

(6) The Commission intends to adopt a decision against Gazprom as provided for in Articles 7 and 23(2) of 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 ('Regulation 1/2003').[3] In accordance with Article 27(1) of Regulation 1/2003, the Commission is giving Gazprom the opportunity to be heard on the matters to which the Commission has taken objection.

2. PROCEDURE

(7) The present case is based on an investigation started *ex officio* by the Commission.

(8) Starting on 27 September 2011, the Commission, assisted by the relevant national competition authorities, carried out on-the-spot inspections under Article 20(4) of Regulation 1/2003[4] at the premises of Centrex Europe Energy & Gas AG ('Centrex Austria'), EconGas GmbH ('Econgas'), OMV Gas GmbH ('OMV'), OMV Gas & Power GmbH (OMV Gas & Power), Central European Gas Hub AG in Austria; Bulgarian Energy Holding EAD ('BEH') and Bulgartransgaz EAD ('Bulgartransgaz') and Bulgargaz EAD ('Bulgargaz') and Overgas Inc. AD ('Overgas Inc.') in Bulgaria; RWE Transgas a.s (now RWE Supply and Trading CZ, but cited as 'RWE Transgas') and Vemex s.r.o. ('Vemex') and Net4Gas in the Czech Republic; AS Eesti Gaas ('Eesti Gaas') in Estonia; E.ON Ruhrgas AG (as of 1 March 2013 E.ON Global Commodities, but cited as 'ERG') and E.ON AG (now 'E.ON SE', but cited as 'E.ON AG'), Gazprom Germania GmbH ('Gazprom Germania'), RWE Supply and Trading GmbH and RWE AG in Germany; E.ON Földgáz Trade Zrt. ('EFT'), PANRUSGÁZ Gázkereskedelmi Zrt. ('Panrusgaz') and Centrex Hungária (Centrex Hungary) in Hungary; JSC Latvijas Gāze ('Latvijas Gaze') and Representative Office of Gazprom in the Republic of Latvia; AB Lietuvos Dujos ('Lietuvos Dujos') in Lithuania; SGT Europol Gaz S.A. ('Europol') and Gaz-System

[2] Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas, OJ L 211 of 14.8.2009, p. 94 (Gas Directive 2009/73).

[3] OJ L 1, 4.1.2003, p. 1, as amended, most recently by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

[4] 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 of 4.1.2003, p. 1.

S.A. ('Gaz-System') and Polskie Górnictwo Naftowe i Gazownictwo ('PGNiG') in Poland; Slovenský plynárenský priemysel, a.s. ('SPP') and Eustream a.s. ('Eustream') in Slovakia. **Annex I** contains an overview of abbreviations for the company names used in this Statement of Objections.

(9) Requests for information were sent out on 20 July 2012 to PGNiG, EFT, BEH, Bulgargaz, Bulgartransgaz, Latvijas Gaze, Lietuvos Dujos, Eesti Gaas, RWE AG, SPP, OMV/OMV Gas & Power and Econgas, OAO Gazprom, GasTerra BV ('GasTerra') in the Netherlands and Statoil AS ('Statoil') in Norway.

(10) On 31 August 2012 the Commission initiated proceedings in the present case within the meaning of Article 2(1) of Council Regulation No 773/2004[5] and Article 11(6) of Council Regulation No 1/2003 of 16 December 2002 ('Regulation 1/2003'). The decision was notified to OAO Gazprom on 4 September 2012. The decision stated that alleged anti-competitive practices relating to, in particular, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia will be investigated.

(11) On 2 October 2012 further information requests were sent to Gasum Oy in Finland, ERG, Wingas GmbH in Germany ('Wingas'), RWE AG, Centrica PLC in the United Kingdom ('Centrica'), GDF Suez S.A. ('GDF') in France and ENI S.p.A. ('ENI') in Italy.

(12) A state of play meeting with lawyers representing OAO Gazprom took place on 12 October 2012.

(13) Further information requests were sent on 11 December 2012 to BEH and Bulgargaz.

(14) On 1 March 2013, information requests were sent to Europol and Gaz-System, Eesti Gaas, Aktsiaselts Elering ('Elering'), Latvijas Gaze and ITERA Latvija ('Itera Latvija'). On 5 and 6 March 2013 information requests were sent to Lietuvos Dujos and other companies located in Lithuania, namely AB Klaipedos Nafta, UAB Kauno Termofikacijos Elektrinė ('KTE'), UAB Haupas ('Haupas'), UAB Dujotekana ('Dujotekana'), AB Achema ('Achema').

(15) On 27 March 2013 information requests were sent to Overgas Inc. and Gazprom Germania. On 11 April 2013 an information request was sent to Gascade Gastransport GmbH ('Gascade') in Germany and on 12 April 2013 to Bulgargaz. On 18 April 2013, information requests were sent to Wingas, Latvijas Gaze, Bulgargaz, Eesti Gaas, ENI, PGNiG, GDF, Lietuvos Dujos, RWE Transgas, ERG, SPP, Econgas, EFT, GasTerra in the Netherlands and Statoil in Norway. An information request was sent to Centrex Hungary on 23 April 2013.

(16) Further information requests were sent out on 28 May 2013 to Eustream, Baumgarten-Oberkappel Gasleitungsgesellschaft m.b.H and GasConnect Austria ('Gas-Connect') and Net4Gas.

(17) On 3 July 2013 an information request was sent to Overgas Inc., and on 9 July 2013 to BEH. On 10 July 2013 an information request was sent to the Ministry of Economy and Energy in Bulgaria. On 12 July 2013 an information request was sent to Overgas Holding and on 16 July 2013 to Bulgartransgaz.

(18) Further information requests were sent to Panrusgaz on 12 August 2013, to RWE Transgas on 10 September 2013, on 13 September 2013 to Panrusgaz, on

[5] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123 of 27.4.2004, p. 18.

25 September 2013 to Lietuvos Energija and 27 September 2013 to Overgas Inc. and Wintershall Erdgas Handelshaus GmbH & Co KG ('WIEH').

(19) An information request to Centrex Hungary was sent on 17 October 2013. Further information requests were sent to BEH and Bulgartransgaz on 31 October 2013, to Panrusgaz on 6 November 2013 and to Gazprom Marketing and Trading Ltd. ('Gazprom Marketing and Trading') on 8 November 2013 and to WIEH on 11 November 2013. Further information requests were sent on 5 December 2013 to BEH and on 20 November 2013 and 13 December 2013 to Europol. On 20 December 2013, information requests were sent to Wingas, Bulgargaz, RWE Transgas, SPP, PGNiG, Lietuvos Dujos, Latvijas Gaze, EFT, ERG and Eesti Gaas.

(20) Further information requests were sent to Europol on 28 March 2014, 2 April 2014 and 14 April 2014. On 16 April 2014 an information request was sent to BEH. On 13 May 2014 an information request was sent to Lietuvos Dujos and on 18 July 2014 to the Ministry of Economy in Poland.

(21) On 8 December 2014, information requests were sent to Magyar Földgázkereskedő Zrt.(successor to EFT), PGNiG, Latvijas Gaze, Bulgargaz, RWE Transgas, Lietuvos Dujo, Eesti Gaas and SPP. Further information requests were sent on 2 February 2015 to Eesti Gaas, E.ON AG, Lietuvos Dujos, PGNiG, Latvijas Gaze, Wingas and Bulgargaz.

(22) On 10 February 2015, information requests were sent to UAB Litgas ('Litgas') and AB Klaipedos Nafta. Further information requests were sent to BEH on 12 February 2015 and Latvijas Gaze on 16 February 2015.

(23) On 2 March 2015, information requests were sent to Magyar Földgázkereskedő Zrt., RWE Transgas and SPP. On 12 March 2015, an information request was sent to Panrusgaz.

(24) A meeting with OAO Gazprom took place on 30 May 2013.[6]

(25) Further meetings with OAO Gazprom took place on 4 October 2013 and on 4 December 2013 as well as on 23 January, 20 February and 5 March 2014. On 21 April 2015, a State-of-Play meeting was held with Gazporm.

3. THE PARTY CONCERNED BY THE STATEMENT OF OBJECTIONS

3.1. The addressees of the Statement of Objections

3.1.1. Description of OAO Gazprom

(26) OAO Gazprom is an open joint stock company, governed by Russian law, which was founded in 1993 to take over the State Gas Concern Gazprom. Its major business activities are geological exploration, production, transportation, storage, processing and marketing of gas. Its headquarters are in Moscow.

(27) The Russian state owns a 50.23% controlling stake in OAO Gazprom. 26.23% of the shares are held by American Depositary Receipt holders and 23.54% by other shareholders.[7] In 2006 the Russian State granted OAO Gazprom a legal monopoly on

[6] See cover email by Gazprom of 3 June 2013, regarding the slide presentation for the meeting in May as prepared by 'OAO Gazprom', ID 5732 (1/1).

[7] http://www.gazprom.com/investors/stock/, ID 8880

gas exports from Russia.[8] Even before, OAO Gazprom had a *de facto* export monopoly through its full ownership of the Russian high pressure gas transmission system (United Gas Supply System, 'UGSS'), the longest pipeline system in the world.

(28) In 2013, Gazprom group produced 487 billion cubic metres (bcm) of natural gas[9] which is more than the total natural gas consumption of the European Union of 462 bcm in 2013.[10] Gazprom accounted for 13% of the world's gas production.[11]

(29) Historically, Gazprom's gas volumes are sold to a large extent within Russia (228.1 bcm in 2013, 49 % of total natural gas sales[12]) at regulated prices.

(30) Gazprom's second biggest market in terms of gas volume is Europe.[13] In 2013 Gazprom delivered to Europe 161.5 bcm[14], i.e. 33% of its produced gas volumes.

(31) Finally, the Commonwealth of Independent States ('CIS') and Baltic countries[15] received 59.4 billion bcm.[16]

(32) In terms of revenues, the proceeds from gas supplies to Europe [17] amounted in 2013 to USD 63.1 billion (47.51 billion Euro[18]), whereas sales to the CIS and the Baltic countries were USD 15.3 billion (11.52 billion Euro).[19]

(33) Gazprom is the largest natural gas exporter in the EU market and has, according to its own figures, for the European market[20] in 2013 30% market share of total gas consumption and 64.3% of total imports. For the EU market these figures were 29.3% and 43.1% respectively.[21]

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8 Federal Law on Gas Export of 18 July 2006, No.117-FZ Article 3. On 1 December 2013 an amendment of Article 3 entered into force. Federal Law of the Russian Federation of 30 November 2013, No. 318-FZ limited the export monopoly. Gazprom still has an export monopoly for gas transported via pipelines (Article 3 (1) of the Federal Law on Gas Exports), but liquefied gas can now also be exported by other producers, see Article 3 (2), for the Russian version http://base.garant ru/12148416/, ID 8369, for the English translation, ID 8373.

9 Gazprom Annual Report 2013, p. 6, ID 8244.

10 Eurogas Press Release 18.03.2014, http://www.eurogas.org/uploads/media/Eurogas_Press_Release_-_Drop_in_2013_EU_gas_demand_emphasises_need_for_swift_change.pdf , ID 8865, p. 1, for EU 28.

11 Gazprom Annual Report 2013, p. 12, ID 8244.

12 Gazprom Annual Report 2013, p. 66, ID 8244.

13 Europe is defined by Gazprom to cover Germany, Turkey, Italy, Poland, UK, Czech Republic, France, Hungary, Slovakia, Austria, Finland, Netherlands, Romania, Bulgaria, Denmark, Greece, Serbia, Slovenia, Switzerland, Bosnia and Herzegovina, Macedonia, see table in Gazprom Questions and answers, p. 52, ID 8862.

14 Gazprom Annual Report 2013, p. 65, ID 8244. Compared to 2012, this is 22.7 bcm more (16%). The figure of 161.5 bcm also covers States outside the European Union. The volume sold to Germany, Italy, Poland, UK, Czech Republic, France, Hungary, Slovakia, Austria, Finland, Netherlands, Romania, Bulgaria, Denmark, Greece and Slovenia was 143.1.bcm in 2013. See table in Gazprom Questions and answers, p. 52, ID 8862.

15 CIS countries as listed in Gazprom document 'Question and answers': Ukraine, Belarus, Kazakhstan, Moldova, Armenia, Georgia, South Ossetia, Baltic countries: Lithuania, Latvia, Estonia. See table in Gazprom Questions and answers, p. 52, ID 8862.

16 Gazprom Questions and answers, p. 52, ID 8862.

17 See above fn. 13.

18 The average EUR/USD currency exchange rate for the year 2013 published by the European Central Bank: 1,3281.

19 **Error! Hyperlink reference not valid.**http://www.gazprom.com/f/posts/53/907625/presentation-press-conf-2014-06-03-en.pdf, p.3-5 ID8863.

20 See above definition of Europe, fn. 13.

21 Figure for 2013, see Gazprom Annual Report 2013, p.63, ID 8244.

(34) OAO Gazprom's and Gazprom group's turnover and profits[22] in 2013 were as follows[23]:

	Turnover in million RUB	Turnover in million EUR	Net profit in million RUB	Net profit in million EUR
Gazprom group	5,247,300	123,941	811,542	19,169
OAO Gazprom	3,933,335	92,905	628,311	14,841

(35) Gazprom acts as an intermediary for gas exports from certain former Soviet Republics (such as Kazakhstan, Kyrgyzia, Tajikistan, Turkmenistan and Uzbekistan) to the EU. Gazprom purchases certain volumes of gas in Central Asia (37.8 bcm in 2010)[24], which is then sold in Russia or exported. Gazprom's export monopoly for gas also covers the re-export of foreign gas.[25]

(36) Gazprom also holds very high gas reserves, which constitutes 17% of the world's gas reserves and 72% of the Russian gas reserves.[26]

(37) OAO Gazprom's commercial activities are steered by the Management Committee, which is formed by the management staff of OAO Gazprom and its subsidiaries. This committee is a collective executive body of OAO Gazprom that exercises general governance of its current activities, in particular the elaboration of the annual budget, investment programmes, the transportation and sale of gas and the exercise of control over the functioning of the UGSS.[27]

3.1.2. Description of Gazprom Export

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

3.2. Gazprom's fully controlled entities located in Europe

3.2.1. Gazprom Germania

(39) Berlin-based Gazprom Germania is a 100% subsidiary of Gazprom Export. Gazprom Germania's core business areas include natural gas production, trading and storage. It sells Russian and Central Asian natural gas in Germany and in Eastern and Western Europe.

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22 Gazprom Annual Report 2013, pp.6 and 7, ID 8244.

23 The average EUR/RUB currency exchange rate for the year 2013 published by the European Central Bank: 42.3370.

24 http://www.gazprom.com/about/production/central-asia/, ID 8394.

25 According to Article 3 of the Federal Law on Gas Export in its form of 30 November 2013, the export monopoly is given to the owner of the unified gas supply system of Russia ('UGSS'), regardless of the source of the gas. The owner of UGSS is Gazprom, see http://www.gazprom.com/about/production/transportation/, ID 8375.

26 Annual Report Gazprom 2013, p. 12, ID 8244, see also http://www.gazprom.com/about/, ID 6801 (1/2), which states that in 2010 the gas reserves were 33.1 trillion cubic meters of gas.

27 See Article 2.2, 2) of the Regulation on OAO Gazprom Management Committee, http://www.gazprom.com/f/posts/94/225493/2008-06-27-regulation-management-committee-en.pdf, ID 8398.

3.2.2. Gazprom Marketing and Trading

(40) Gazprom Marketing and Trading with headquarters in London offers various products in gas and electricity marketing. Gazprom Marketing & Trading is involved in gas trading operations selling European gas and Russian gas on the spot market.[28] It is a 100% subsidiary of Gazprom Germania.[29]

3.2.3. Others

(41) Other fully owned subsidiaries of Gazprom in Europe include Gazprom UK Ltd. which is an investment company located in London, United Kingdom and Gazprom Schweiz AG, located in Zürich, Switzerland, which is a wholly-owned subsidiary of Gazprom Germania.

3.3. Gazprom's joint ventures in Europe

3.3.1. Bulgaria – Overgas Inc.

(42) The joint stock company Overgas Inc. AD ('Overgas Inc.') was incorporated in Bulgaria in 1991.[30] In 1995, OAO Gazprom became a 50% shareholder in Overgas Inc.[31] Since at least 2007, Overgas Inc. is owned by Gazprom Export (49.51% shareholding), OAO Gazprom (0.49% shareholding) and Overgas Holding AD ('Overgas Holding', 50% shareholding).[32] Overgas Inc.'s activities include the building and operation of the Bulgarian gas distribution networks. It also delivers gas to final consumers. Since the beginning of 2013, Overgas Inc. acts to a limited extent as a wholesaler in Bulgaria.

(43) Until the end of 2012, Overgas Inc. acted as an intermediary in the supply chain between Gazprom Export and Bulgargaz and used to supply gas to the Bulgarian wholesaler Bulgargaz. This intermediary role was its only activity at the wholesale level.

3.3.2. Germany – Wingas and WIEH

(44) Via its 100% subsidiary Gazprom Germania, Gazprom Export has ownership in the German wholesalers Wingas and Wintershall Erdgas Handelshaus GmbH & Co. KG ('WIEH').

(45) The German wholesaler Wingas was set up as wholly owned subsidiary of W&G Beteiligungs- GmbH & Co. KG ('W&G'), which currently is jointly owned by Wintershall Erdgas Beteiligungs GmbH (50.02%, 'WIBG')[33] and Gazprom Germania (49.98%).

(46) In the past W&G was responsible for the supply and storage business, which Gazprom and Wintershall established in 1993. As part of an internal restructuring to

28 [redacted]

29 Information on Gazprom Germania's website, ID 7000 (2/3).

30 [redacted]

31 [redacted]

32 [redacted]

33 WIBG is a wholly owned Wintershall subsidiary.

comply with the unbundling requirements under Directive 2009/73/EC[34], supply and transmission activities were separated. Wingas continues W&G's supply activities. The transmission activities are carried out by Gascade, which functions as an independent transmission operator.[35]

(47) WIEH is jointly owned and controlled by WIBG and Gazprom Germania (50%/50% shareholding). It was founded in 1990 as a downstream gas supplier for Germany which Wintershall and Gazprom had agreed at the time. This function has however been taken over by WIEH's wholly owned subsidiary Wintershall Erdgas Handelshaus Zug AG ('WIEE'). [redacted]

(48) On 3 December 2013, the Commission approved a merger (case M.6910) by which Gazprom acquired sole control of Wingas and WIEH from Wintershall in Germany.[36] By 15 September 2014, the merger had not yet been implemented.[37] According to recent press sources, the asset swap between Gazprom and Wintershall is not likely be implemented.[38]

3.3.3. Hungary – Panrusgáz Gázkereskedelmi Zrt. ('Panrusgaz')

(49) [redacted]

(50) Budapest-based Panrusgaz is mainly active in the purchase of natural gas from Gazprom and its subsequent sale in Hungary. Its current shareholders are Gazprom Export (40%), the 100% State owned Hungarian energy group MVM Magyar Villamos Művek Zártkörűen Működő Részvénytársaság, (50%)[39] and Centrex Hungary (10%).[40]

3.3.4. Poland – Europol

(51) OAO Gazprom has partial ownership, via its participation in SGT Europol Gaz S.A. ('Europol'), of the Polish section of Yamal-Europe gas pipeline. The Yamal-Europe pipeline connects the Russian gas system with Germany, via Belarus and Poland.

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34 Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas, OJ L 211 of 14.8.2009, p. 94 (Gas Directive 2009/73).

35 Gascade is a transmission system operator for gas in Germany operating a gas transmission network of approx. 2300 km.

36 Press release of 4 December 2013, IP/13/1207.

37 Reuters press article of 15 September 2014, ID 8371.

38 BASF press release of 18 December 2014, ID 8764. The merger was based on a Basic Asset Swap Agreement, by which Wintershall would be granted shares in gas fields in Siberia. Wingas and WIEH would have been solely controlled by Gazprom.

39 Formerly the shares of MVM were held by E.ON Portfolio GmbH and earlier E.ON Ruhrgas International GmbH. The shareholding structure changed on 13 February 2015 when MVM replaced E.ON Ruhrgas Portfolio GmbH as a shareholder, see reply by Panrusgaz of 16 March 2015 to the Commission's information request of 12 March 2015, ID 8872, (1/2). See also http://www.panrusgaz.hu/, ID 8837

40 In 2006, the shares of former shareholders MOL Magyar Olaj- és Gázipari Részvénytársaság's shares were transferred to E.ON Ruhrgas International GmbH and those of Interprocom Ltd. to Centrex Hungary.

(52) Europol is a joint-venture by OAO Gazprom (48%), the Polish gas incumbent PGNiG (48%) and a minority shareholder, Gas-Trading S.A. ('Gas-Trading') (4%). Europol was registered in 1993 and was created to build and operate the Polish section of the Yamal-Europe pipeline.

(53) Since 2011, Yamal has been operated by the Polish Transmission System Operator Gaz-System S.A. (Gaz-System[41]) based on an operatorship agreement concluded between Europol and Gaz-System on 25 October 2010[42].

3.3.5. Switzerland – WIEE

(54) Wintershall Erdgas Handelshaus Zug AG ('WIEE'), located in Zug, Switzerland is a fully owned subsidiary of WIEH, see above, paragraph (47).

(55) Wintershall and Gazprom have been cooperating in the gas sector since 1990. Within the scope of this cooperation, WIEE was founded in 1993 for the purpose of supplying Russian natural gas to South-Eastern European countries and developing related investments in the respective countries. WIEE was providing gas to Bulgargaz in Bulgaria until the end of 2012 as an intermediary between Gazprom Export, Gazprom Germania and Bulgargaz.

(56) As stated in paragraph (48) above, following the approval of merger M.6910, WIEE's parent company WIEH would be fully controlled by OAO Gazprom, but according to press information the merger is not likely to be implemented.

3.3.6. CEE – Gazprom's ownership in wholesalers

(57) Gazprom also had shareholdings in some of the CEE wholesalers. This will be described in the section below, which sets forth Gazprom's contractual relations with CEE wholesalers.

4. DESCRIPTION OF GAZPROM'S MAIN CONTRACT PARTNERS FOR THE UPSTREAM SUPPLY OF GAS IN THE CEE

(58) This section describes the main CEE wholesalers that purchase gas from OAO Gazprom or Gazprom Export on the upstream level.[43] In some instances, Gazprom Export sells the gas to the upstream wholesaler via a gas supply chain with intermediaries.[44]

4.1. Bulgaria – Bulgargaz

(59) Since [redacted], Gazprom Export has been supplying gas to Bulgaria through a contract with the national wholesaler Bulgargaz EAD ('Bulgargaz'), which was concluded on [redacted]

(60) Until [redacted], Gazprom's gas was either supplied directly by Gazprom Export to Bulgargaz, or via the intermediaries Overgas Inc. and WIEE.

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41 Gaz-System is the national gas transmission system operator in Poland. It is 100% owned by the Polish state.

42 See section 13 for details.

43 Wholesale supply consists of the upstream wholesale level, on which gas is sold to gas wholesalers within a given geographic area, e.g. when a wholesaler or importer purchases gas from a domestic or foreign producer/exporter for onwards sale to customers in downstream markets, see in greater detail below paragraph (94).

44 See below section 15.2.1 on market definition, which includes these intermediaries in the market definition of upstream gas supply.

(61) Bulgargaz is a 100% subsidiary of Bulgarian Energy Holding EAD ('BEH'). Bulgargaz is the largest supplier of natural gas for Bulgaria.

(62) BEH is wholly-owned by the Bulgarian State, represented by the Minister of Economy and Energy. As a vertically integrated company, BEH controls several Bulgarian energy companies including the main electricity and gas incumbents in the country.

4.2. Czech Republic - RWE Transgas

(63) RWE AG is a European electricity and gas producer with headquarters in Essen, Germany.

(64) RWE Transgas a.s. ('RWE Transgas', after 1 January 2013, RWE Supply and Trading CZ[45]) with headquarters in Prague is a 100% owned subsidiary of RWE AG. It is active on the Czech market as a gas wholesaler.

(65) Upstream gas supply from Gazprom within the RWE group is managed by RWE Supply and Trading GmbH in Germany and RWE Transgas.[46]

4.3. Estonia – Eesti Gaas

(66) AS Eesti Gaas ('Eesti Gaas') is the national Estonian wholesaler. Its main shareholders are Fortum Heat and Gas OY (51.38%) and OAO Gazprom (37.03%) as well as Itera Latvija (10.02%).[47]

(67) Eesti Gaas sells gas to distribution networks and end customers.

4.4. Hungary – EFT and Centrex Hungary

4.4.1. EFT

(68) EFT is the main Hungarian wholesaler. EFT sells gas to regional gas distributors, other natural gas traders, power and heating plants and industrial customers in Hungary. Until 2013, it belonged to the E.ON group and was a wholly-controlled subsidiary of E.ON Ruhrgas International GmbH, which is controlled by E.ON Global Commodities SE (former ERG)[48] and ultimately by E.ON SE (formerly E.ON AG), the ultimate mother company of the E.ON group, located in Düsseldorf, Germany.

(69) Gazprom's gas is supplied to EFT by Gazprom Export via the intermediary Panrusgaz.

(70) On 30 September 2013, E.ON sold its 100% stake in EFT and E.ON Földgáz Storage to MVM Hungarian Electricity Ltd (Magyar Földgázkereskedő Zrt.).[49]

4.4.2. Centrex Hungária Rt. ('Centrex Hungary')

(71) Gazprom Export also supplies gas to the wholesaler Centrex Hungary which sells to natural gas traders and other customers in and outside Europe. Centrex Hungary is

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45 As of 1 January 2013, RWE Česká Republika took over the control role over RWE CZ Group. The initial group's leader, RWE Transgas, changed its name to RWE Supply & Trading CZ and will only be concerned with energy wholesale in future. http://www rwe.cz/en/press-releases-13256/, ID 6804 (1/1).

46 Reply by RWE AG of 17 September 2012 to the Commission's information request 20 July 2012, ID 8041-25 (3/40).

47 Data reflects shareholding on September 2014. Information taken from Eesti Gaas' website, http://www.gaas.ee/en/group/shareholders/, ID 8666 (2/3).

48 As explained above, as of 2 May 2013 E.ON Global Commodities became the legal successor of ERG.

49 Press Release Magyar Földgázkereskedő Zrt, ID 8378.

100% held by Centrex Europe Energy & Gas AG, registered in Austria ('Centrex Austria').

(72) Centrex Austria is part of the Centrex Group located in Vienna, Austria. Centrex Group focuses on the development and utilisation of energy and gas production facilities, the trading and distribution of oil and natural gas products and the arrangement of sales, purchase and consumption contracts.

(73) Gazprom does not have any direct ownership in the Centrex Group. Gazprombank controls the Centrex Group and is the ultimate owner of the Centrex Group since 2010. OAO Gazprom currently holds 35.54% of the shares in Gazprombank while the largest shares of Gazprombank are held by NPF Gazfond. NPF Gazfond is the largest non-governmental pension fund in Russia. Centrex Hungary stated that Gazprom does not control Gazprombank as Gazprom neither controls the majority of voting rights in Gazprombank's general shareholder meetings nor does it have any other veto rights that would grant it control over Gazprombank today.[50]

4.5. Latvia - Latvijas Gaze

(74) The wholesaler JSC Latvijas Gāze ('Latvijas Gaze') sells gas to various customers, including to industrial and end consumers. It also provides transmission services to Estonia, Lithuania and the Russian Federation. The company also provides storage at the Incukalns Gas Storage Facility ('IUGS') to Estonia, Russia and Lithuania.

(75) One of its shareholders is OAO Gazprom with a 34% ownership. The other main shareholders are E.ON Ruhrgas International GmbH (47.23%) and Itera Latvija (16%).[51]

4.6. Lithuania – Wholesalers Lietuvos Dujos, Dujotekana and Haupas and industrial customer Achema

(76) Lietuvos Dujos AB ('Lietuvos Dujos') is the main gas wholesaler in Lithuania. It supplies gas to distribution networks, heat producers, industrial customers and end consumers.

(77) Until 2014, the Lithuanian state energy company Lietuvos Energija, UAB had a 56.6% share, OAO Gazprom 37.1% and smaller shareholders 6.3% in Lietuvos Dujos. In June 2014, Lietuvos Energija, UAB acquired Gazprom's shares and now has a 96.64% stake in Lietuvos Dujos.[52] In 2014, a separation between gas distribution activities and supply activities was made. Lietuvos Dujos is now only responsible for the infrastructure of gas distribution, its maintenance and development as well as in the provision of distribution services. For supplies, a new company, UAB Lietuvos duju tiekimas was registered in 2014 and it took over from Lietuvos Dujos all gas supply agreements concluded with Gazprom and Lithuanian consumers.[53]

(78) OAO Gazprom also delivers gas to the wholesaler UAB Dujotekana ('Dujotekana') whose main activities include the wholesale trading in natural and liquefied gas and the supply of combined heat and power in Lithuania.

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50 See for the information on Centrex Group organisation, Centrex Hungary reply of 13 May 2013 to the Commission's request for information of 23 April 2013, ID 5442, (2-5/6).

51 Website Latvijas Gaze, ID 6808, p. 1.

52 Website Lietuvos Dujos, ID 8242 and Lietuvos Dujos press release, ID 8367.

53 Reply of AB Lietuvos Dujos and UAB Lietuvos duju tiekimas of 12 February 2015 to the Commission's request for information of 2 February 2015, ID 8642 (2/3).

(79) More limited gas supplies are delivered by OAO Gazprom to the wholesaler UAB Haupas ('Haupas'). Haupas resells imported natural gas to households and non-household customers in Lithuania.

(80) In Lithuania, OAO Gazprom also delivers to industrial customer AB Achema ('Achema'), which is a manufacturer of nitrogen fertilizers and chemical products in Lithuania and the Baltics.

4.7. Poland – PGNiG

(81) Polskie Górnictwo Naftowe i Gazownictwo ('PGNiG') is Poland's largest oil and gas company. It is a wholesaler of gas and also a gas producer.

(82) In 1996, the then State-owned company PGNiG was transformed into a joint stock company. The government presently holds 72.4% of PGNiG's shares, the rest is held by private shareholders.[54]

4.8. Slovakia - SPP

(83) Slovenský plynárenský priemysel, a.s. ('SPP') is the Slovak wholesaler. It is active in the supply of natural gas to consumers and gas traders in the Slovak Republic.

(84) SPP is owned by the Slovak Republic, via a 100% shareholding of the Ministry of Economy.[55]

5. THE PRODUCT: NATURAL GAS

5.1. Natural gas

(85) Natural gas is a primary source of energy consisting of hydrocarbons (mainly methane). Its main three applications are in industrial processes as fuel and raw material, for electricity generation, and by households for heating and cooking.

(86) Gas is a largely homogeneous product which from the users' perspective is interchangeable with regard to its origin of extraction and how it is transported. Its quality, i.e. the methane content can vary. High-calorific gas (H-gas) has the highest quality due to its high methane content (between 87% and 99%). Low-calorific gas (L-gas) is natural gas with a lower methane content of between 80% and 87%. Russian natural gas is H-gas with 98% methane content.[56] No L-gas is sold within the CEE countries.

(87) While gas is often found in geographical vicinity to oil, consumers are mostly not able to substitute natural gas by oil. Substitution is costly and in some cases may be carried out only over a long period of time as it would require large investments (e.g. building new power plants, installing new heating systems, etc.). In the short to medium term gas consumers have to continue to rely on natural gas. Also, the entire transport system from the producer to the end customer is specifically designed for the transmission of gas.[57]

(88) Liquefied natural gas (LNG) is natural gas which has been liquefied for storage and transportation purposes. Cooling natural gas to about -162°C at normal pressure reduces its volume by a factor of 600. The reduction in volume makes the gas

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54 Website PGNiG, ID 8377.

55 Website SPP, http://www.spp.sk/en/, ID 8372.

56 http://www.gazprom-germania.de/en/natural-gas html, ID 6815, p. 2.

57 The Commission considers that oil is not a substitute for gas, see e.g. Commission decision of 29.9.1999, M.1532, paragraph 16. See later in this document, section on market definition 15.2.1.

practical to transport and store. This makes LNG cost efficient to transport over long distances where pipelines do not exist.

5.2. The gas supply chain

(89) The natural gas supply chain contains several levels.

(90) *Exploration*: the finding of new gas reserves is generally described as on-shore or off-shore 'exploration', which is carried out by exploration companies or governments.

(91) *Development* concerns the setting up of adequate infrastructure for future production. Exploration and development are both very time and capital intensive.

(92) *Gas production* comprises the extraction of gas from the subsurface as well as the collection and treatment for transportation. Without this treatment, the gas could not be transported through the pipelines.

(93) *Gas supply* means the contractual sale, including resale, of natural gas to customers.[58] A distinction is to be made between the wholesale supply of gas and the retail supply to end customers.

(94) Wholesale supply consists of two levels. The *upstream wholesale* level, on which gas is sold to gas wholesalers within a given geographic area, e.g. when a wholesaler or importer purchases gas from a domestic or foreign producer/exporter for onwards sale to customers in downstream markets. Within the upstream wholesale level, gas is sometimes contractually sold by the producer/exporter via intermediaries which sell it on to the national wholesaler. The *downstream wholesale* supply concerns the sale of gas by the wholesalers and importers to retailers or other downstream wholesalers (e.g. distribution companies) within the relevant geographic area.

(95) *Retail supply* of gas concerns gas that is supplied to final customers, i.e. gas fired power plants, large industrial customers, smaller industrial customers and households.

(96) *Gas trading hubs* are wholesale trading points providing services to facilitate exchanges between gas buyers and sellers, optimising their risk exposure and providing price indications. The first gas trading hub was created in the UK, the National Balancing Point (1996, NBP), and is considered one of the most mature and liquid gas trading hubs in the EU.

(97) As of 2000, continental hubs developed in Belgium (2000, Zeebrugge), Germany (2002, HubCo, which became Gaspool in 2009), Netherlands (2003, Title Transfer Facility, TTF), Italy (2003, Punte de Scambio Virtuale, PSV), France (2004, Points d'échange de gaz, PEG), Austria (2005, Central European Gas Hub, CEGH), and a second gas trading hub in Germany (2006, E.ON Gas Transport, which became Net Connect Germany, NCG in 2009).[59]

(98) Gas hubs can be virtual or physical. Physical hubs are placed at one location and gas must be transported to them. Of the above listed hubs, only Zeebrugge and CEGH are physical hubs. A virtual hub is a gas trading point which has no precise geographic location. That is the case when the hub is based on all or part of a

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

[59] Patrick Heather, 'Continental European Gas Hubs: Are they fit for purpose?', Oxford Institute for Energy Studies June 2012, ID 5828, p. 10.

transmission network, whether it is national or regional. All of the gas injected into this network at the various entry points is considered to be potentially available for purchase or sale and deliverable at any delivery point in this network. Shippers are only required to nominate quantities entering and/or exiting the network but not the transport route which the gas should physically follow – that part is handled by the network operator. For example, the NBP hub encompasses the whole of the UK transmission grid while the TTF market area includes the Netherlands.

5.3. Gas infrastructure

5.3.1. Transport

(99) Gas can be transported over long distances via transportation pipelines. Pipelines can be mono- or bi-directional depending on whether they can flow gas in one direction only or in both directions. Natural gas needs to be pressurized in order to flow through the pipeline. Therefore pipeline companies install compressor stations along the route. The transport capacity of a pipeline mainly depends on its diameter. The largest pipelines can transport up to 30 bcm of natural gas per year, while pipelines with parallel stretches of pipes are able to transport 100 bcm of natural gas per year (ca 20% of the consumption of the EU). Construction of gas pipelines, stretching across countries or continents, is very capital and time intensive.

(100) The long distance transport of gas through high pressure networks is called transmission.[60] Transmission networks are connected to local distribution networks, as well as to certain large final customers such as power plants or large industrial customers. Distribution networks distribute gas locally to smaller final customers, in particular households. Gas Directive 2009/73 requires transmission/distribution network operators to be unbundled from natural gas producers and suppliers. Gas transmission network operators need to be certified, approved and designated as transmission system operators (TSO license).[61]

(101) Gas can also be transported over very long distances in liquefied state (LNG) via sea vessels called LNG carriers. Liquefied gas can be purchased worldwide. However, in order to bring it to a given market area, a receiving LNG terminal is needed. Delivery by LNG carriers requires high up-front investments into receiving infrastructure. The time needed to build an LNG terminal is usually at least five years and requires, *inter alia*, a lengthy process of obtaining the necessary permits.

5.3.2. Storage and other sources of flexibility

(102) Natural gas can be stored in underground storage facilities ('UGS') for later usage. An UGS can serve as a tool to balance demand and supply, mainly for seasonal variations of demand. UGSs are also used to balance the flow in the pipeline or to fulfil regulatory requirements. In case of a high degree of dependence on a single source of supply, UGSs may provide important back-up in case of supply disruptions.

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60 See Article 2(1) of Gas Directive 2009/73 according to which 'transmission' means the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply. Upstream pipelines within the meaning of Gas Directive 2009/73 are pipelines operated/constructed as part of a production project.

61 Gas Directive 2009/73, see fn. 58, Article 10.

(103) Flexibility can also be provided by other tools and measures, such as interruptibility, modulation of customer demand, flexible supply contracts, gas trading or line pack, i.e. storage in transport.[62]

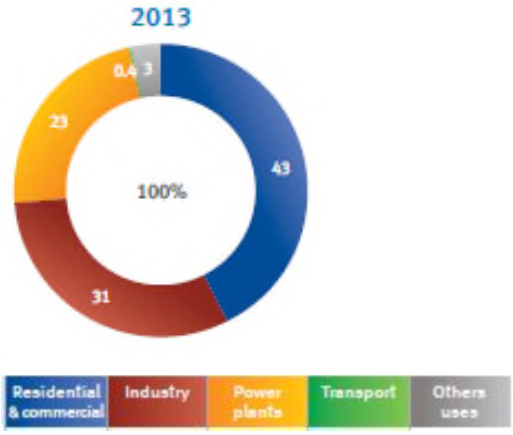
6. THE CEE GAS MARKETS

(104) Natural gas is the second most important energy source in the EU after oil, accounting for 23% of gross energy consumption in 2012.[63]

6.1. Demand

(105) Natural gas is used for different purposes, the three most important of these are: residential and commercial heating, power generation, and industrial use.

Figure 1: Natural gas sales by sector EU 28 (2013)



Source: Eurogas, Statistical report 2014, ID 8671 (7/16)

(106) Demand for natural gas has different characteristics across the three main usage types.

(107) Gas is the primary heating source for homes and commercial sector premises (e.g. schools, hospitals, offices) throughout Europe. The most important factor that influences household and commercial demand is the temperature: in colder weather more gas is used than in warm weather. Demand responds to changes in temperature rapidly. Demand is cyclical and volatile; more gas is consumed during winter than summer and consumption increases as the temperature drops.

(108) In the long-term, demand is also influenced by the price of alternative fuels and of the costs of better isolation. However, switching to alternative fuels other than gas is very limited for this group of consumers. Therefore household and commercial natural gas demand is less influenced by the price of alternative fuels than by temperatures or cost of isolation.

(109) Household demand is considered to be largely inelastic with respect to price as it is mostly the outside temperate that dictates how much gas is used. In the short term, only limited demand response exists in the form of slightly increasing or decreasing inside temperature.

(110) Gas is used in many different industrial processes. For example, it is a major feedstock for the production of fertilizers.

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62 Commission Decision COMP/M.3868 – Dong/Elsam/Energi, paragraph 15.

63 Eurostat, EU ENERGY in figures – pocketbook 2014, ID 8801, p. 22.

(111) Industrial demand depends mostly on the state of the economy and to a lesser degree on the price of alternative fuels as there is only limited possibility of fuel switching.

(112) Natural gas demand for power generation depends on the difference between the price of electricity and the price of gas. Whenever wholesale electricity prices are higher than the cost of producing electricity from gas, gas-fired power plants will start producing electricity and consuming gas.[64] Otherwise, these power plants will not operate and not consume gas. Electricity prices are influenced by many factors including economic output, temperature (more electricity is used when it is cold or very hot), price of fuels (e.g. coal, gas) and output by renewables (which in turn largely depends on whether conditions).

(113) Prices of alternative fuels used for power generation are also important in determining natural gas demand for power generation. Only those power plant fuels would be used that produce electricity at a competitive price. Therefore, only the power plants which are fuelled by the relatively cheaper fuels would be used at any given time (as it is usually not possible to switch between fuels within one power plant today). Therefore, if the price of alternative fuels is high then for any given price power generators would use more natural gas.

(114) Total demand for natural gas, thus, mostly depends on economic output, temperature and fuel switching.

6.2. Supply

(115) Due to technical reasons, gas production from developed gas fields is mostly steady. This means that volume output from such fields cannot be increased or decreased significantly in the mid-term (during several years). Therefore, the amount of natural gas a producer can offer is determined by this (limited) production flexibility and the storage facilities it has at its disposal. If the price of natural gas increases the producers would be willing to increase their production to the maximum and withdraw the highest possible quantity from storage. Conversely, if prices were low, they would produce the minimum quantity that is technically possible and would also try to store as much gas as possible.

(116) This limited flexibility is reflected in long-term supply contracts addressed by this SO which stipulate a fixed annual quantity to be delivered (annual contract quantity). This quantity can be reduced at the request of the buyer by up to around 15% (minimum annual quantity, see take-or-pay description below). A higher quantity than stipulated in long-term contracts ('LTCs') can be agreed upon but the seller does not guarantee the availability and delivery of additional gas volumes.

(117) Production of natural gas in the CEE is limited. Significant domestic production only exists in Hungary, Poland and, to a lesser extent, in Bulgaria (see table below). The remaining demand is covered by imports. The majority of imported volumes come from the East, most importantly from Russia.

Figure 2: Production of natural gas in CEE countries 2004-2014 (% of total consumption)

BG	CZ	EE	HU	LV	LT	PL	SK
0-14%	0-2%	0%	19-28%	0%	0%	28-31%	2-3%

Source: National Regulatory Authorities, see sources below Figure 57.

[64] The price of emission certificates is another relevant cost element.

6.3. Consumption

(118) The table below shows the annual natural gas consumption of CEE countries for the period 2004-2013.

Figure 3: Natural gas consumption in CEE countries 2004-2013 (bcm)[65]

Year	BG	CZ	EE	HU	LV	LT	PL	SK
2004		9.7	1.0	14.5	1.6	2.9	13.6	6.5
2005		9.6	1.0	14.7	1.7	3.1	13.8	6.3
2006		9.3	1.0	14.7	1.7	3.1	13.9	6.2
2007	3.4	8.7	1.0	13.2	1.7	3.6	13.7	5.7
2008	3.3	8.7	1.0	14.0	1.7	3.2	14.3	5.9
2009	2.5	8.2	0.7	11.1	1.5	2.7	13.3	5.4
2010	2.7	9.0	0.7	11.9	1.8	3.1	14.4	5.5
2011	3.0	8.1	0.6	10.7	1.6	3.4	14.4	5.5
2012	2.7	8.2	0.7	10.4	1.5	3.3	15.4	5.2
2013	2.9	8.3	0.7	10.1	1.5	2.7	14.7	5.2

Source: National Regulatory Authorities, see sources below Figure 57.

(119) While natural gas consumption in Latvia and Lithuania remained largely unchanged between 2004 and 2013, it increased in Poland. In Poland, coal is slowly being substituted by gas as a result of environmental legislation and the increase in coal price in 2009-2011.

(120) Consumption in other CEE countries decreased between 2004 and 2012. This was caused by the economic crisis, the high prices of natural gas and improvements in energy efficiency. The most significant decline in consumption occurred in Hungary where the use of natural gas fell by one third during the period in question.

6.4. Infrastructure

(121) Gas infrastructure in CEE markets is dominated by pipelines originating in Russia. Most of them were built during Soviet Union times and in the 1990s and reflect the historical dependence of the region on Russian gas. The pipelines are owned or co-owned by Gazprom. The below description will also demonstrate that for most of the CEE territory there are currently no alternative infrastructures available. This is not likely to change in the near future, as the lead times for building alternative infrastructure are long and investments are capital-intensive.

6.4.1. Pipelines

(122) There are three major gas transit lines supplying gas to the CEE, namely the Yamal-Europe pipeline, the Brotherhood pipelines and the Balkan corridor pipelines. Other pipelines supplying the Baltic countries have a more local character.

[65] Gas volumes in Poland are measured in Polish norm (under different atmospheric conditions than in other CEE countries) and thus figures are not directly comparable.

Figure 4: Major gas pipelines

Source: Wikipedia /Major gas pipelines in CEE (since the publication of this map the Nord Stream and Opal pipelines have already been built)

(123) *Yamal-Europe pipeline*[66] ('Yamal') is an over 2.000 km long pipeline connecting the Russian gas system with Germany via Belarus and Poland.[67] Its maximum technical capacity is 32.9 bcm/year.[68] It is predominantly (ca. 90%) used to transport Russian gas to Germany. The Yamal pipeline is also used for supplies to Poland (2.7 bcm, ca 18% of Poland's consumption in 2012). Yamal is owned by Europol, a joint-venture of Gazprom, PGNiG and by Gas-Trading, a minority shareholder.

(124) *Brotherhood pipeline* is the largest gas transportation pipeline in Europe. It crosses Ukraine and Slovakia, and could carry up to 100 bcm of gas.[69] The Brotherhood pipeline is divided into two strands, one transporting Russian gas to the Czech Republic, Germany and other Western EU members, while the second strand brings gas to Hungary, Austria, Italy and countries in South East Europe.

66 Gazprom Export website: www.gazpromexport ru/en/projects/transportation/, ID 6810.

67 Gazprom's website: www.gazprom.com/about/production/projects/pipelines/yamal-evropa, ID 6811. The 'Europe trunk' of Yamal stretches from Torzhok gas transmission hub in Russia to Mallnow in Germany and covers around 400 km in Russia, 575km in Belarus, 680 km in Poland and the remaining distance in Germany.

68 Gazprom's website: www.gazprom.com/about/production/projects/pipelines/yamal-evropa, ID 6811.

69 Gazprom Export website: www.gazpromexport ru/en/projects/transportation/, ID 6810.

(125) The *Balkan corridor* comprises gas pipelines in Eastern Romania which connect the transit pipelines coming from Russia via Ukraine with the Bulgarian gas transmission networks. Its total capacity is 28 bcm/year and is used for the transportation of natural gas from the Russian Federation to Bulgaria, Greece, Turkey and Former Yugoslav Republic of Macedonia. The Balkan corridor is the only possible transport route for gas imports to Bulgaria.[70]

(126) The three Baltic countries are supplied via several direct pipelines from Russia. Gas to Lithuania is transported predominantly through Belarus (*Minsk-Vilnius-Kaliningrad pipeline*). This pipeline is used for supplies to Lithuanian customers but also for gas transit for customers in the Kaliningrad Region of Russia.[71] It can carry 6.5 bcm/year of natural gas.[72]

(127) Gas to Latvia is imported directly from Russia via the pipeline *Valdai-Pskov-Riga* with a capacity of 5.3 bcm/year.

(128) Gas to Estonia is imported via several routes. In the period from May to October, the supply of gas takes place mainly directly from Russia through the *Saint Petersburg-Tallinn pipeline* with a capacity of 0.2 bcm/year and the Varska interconnection to *Valdai-Pskov-Riga pipeline* with a capacity of 1.4 bcm/year. In addition, Estonia has an interconnection with Latvia, via a pipeline that can transport 2.6 bcm/year of natural gas from Latvia to Estonia (mainly used for gas supplies from the Latvian IUGS to Estonia from November to April).[73]

6.4.2. Reverse flows

(129) The above-mentioned pipelines in CEE were designed and built to transport natural gas from East to West only. As part of the liberalisation of EU gas markets, these pipelines are in the process of being gradually upgraded to allow gas supplies in the opposite direction, the so called reverse flow. The possibility of using reverse flows is very important for gas markets as reverse flows contribute to gas market development, security of supply and supply diversification.

(130) Two types of reverse flows can be distinguished: physical and virtual. The latter is also called contractual reverse flow.

(131) The *physical reverse flow* ('PRF') requires that the gas transport in the usual direction be stopped. Gas can then flow in the opposite direction provided that the pipeline is equipped with the necessary technical installations, such as compressor stations. PRF was enabled on Yamal in 2014.[74] On Brotherhood PRF has been in place between Germany, the Czech Republic and Slovakia since 2011.

(132) When gas flows in the usual direction (for example from A to B), a transmission system operator can offer 'virtual' reverse flows ('VRF') from B to A. In this scenario, the gas molecules are not physically moved from B to A, but instead the gas flow requested is subtracted from the gas flowing in the initial direction (i.e. some of the gas that was supposed to flow from A to B remains at A). VRF is

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70 Presentation of the Romanian transmission system operator SNTGN Transgaz S.A. Mediaş: http://media.hotnews.ro/media_server1/document-2011-07-7-9308532-0-strategia-interconectare-transgaz.pdf, ID 6812 (25-30/42).

71 Gas Transmission System in Lithuania, ID 6929.

72 Analysis of the costs and benefits of the regional liquefied natural gas solution in the East-Baltic area, ID 6809 (38/106).

73 Estonian electricity and gas market report 2011, p. 79-80, ID 6850.

74 Gaz-System website, ID 8323.

normally offered as an 'interruptible' product. This is because VRF depends on sufficient gas quantities physically flowing in the pipeline so that there is gas available for off-take at the exit points. As long as there is no guarantee of sufficient available gas quantities, VRF cannot be offered as 'firm' product.

(133) However, if there is a flow commitment in place (a supplier guarantees that it will deliver from A to B a specific volume) or if the pipeline is bidirectional and could also transport gas from B to A, VRF can also be offered as 'firm' capacity. In the latter case (that of a bidirectional pipeline), the VRF would become an actual physical flow should the pipeline change the direction of physical flows.

(134) Recently, possibilities for reverse flows have been established in the following countries:

- Germany – Poland: The Yamal pipeline transporting gas from Russia to Germany has recently been equipped with an extended possibility of physical reverse flows to Poland thereby allowing for firm reverse capacity. It is now possible to physically turn the gas flow and to transport up to approximately 57 TWh/year (5.5 bcm/ year)[75] of natural gas from Germany to the East.[76]
- Czech Republic – Slovakia: Russian gas is transported via the Transgas pipeline from East to West through Slovakia to the Czech Republic and to Austria. Since 2011, a reverse flow from the Czech Republic to Slovakia is possible with a technical capacity of 244 TWh/year (approximately 23.5 bcm/year) via the interconnector Lanzhot.[77]
- Austria – Slovakia: The reverse flow capacity from Austria to Slovakia reaches approximately 148 TWh/year at Baumgarten and Láb together (approximately 14.3 bcm/year).[78]

6.4.3. LNG terminals

(135) In Poland a LNG terminal is planned to be operational in 2016, with an initial yearly capacity of 5 bcm. Second, in Lithuania a floating LNG terminal in Klaipeda has become operational at the beginning of 2015. It has an initial yearly capacity of 1.4 bcm which is supposed to increase to 4 bcm/year in the future.[79] So far, only the legal and technical minimum of approximately 5.6 TWh/year (540 mcm/year) of LNG is imported by the company Litgas, a subsidiary of Lietuvos Energija. This quantity is being sold to regulated energy companies in Lithuania under a purchase obligation.[80]

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75 A conversion factor of 10.37 for converting cubic metre into kWh was used (1 cubic metre = 10.37 kWh), see footnote 396.

76 Press-release of Gas-System of 8 January 2015 'New opportunities for importing natural gas to Poland from the West' as published on Gas-System's website: http://en.gaz-system.pl/centrum-prasowe/aktualnosci/informacja/artykul/202017/, ID 8726.

77 Entsog indicates 696 GWh/day at Lanzhot, http://www.entsog.eu/maps/transmission-capacity-map, ID 8725; website of Net4Gas on reverse flow: http://www net4gas.cz/en/reverse-flow-in-direction-west-east/, ID 8895.

78 Entsog indicates 248 GWh/day for the direction from Austria to Slovakia at Baumgarten and 175 GWh/day at Láb, http://www.entsog.eu/maps/transmission-capacity-map, ID 8725.

79 See http://litgas.lt/en/about-us/, ID 8838.

80 Reply by Litgas of 27 February 2015 of to the Commission's information request of 10 February 2015, para. 20, ID 8781.

6.4.4. Cross-border interconnections

(136) For historical reasons, explained in paragraph (121), the capacity of interconnectors (i.e. pipelines connecting two neighbouring countries) between CEE countries is often scarce. The situation is gradually improving but investments into interconnectors are capital intensive and time consuming. Long lead times also result from the fact that the countries concerned must agree on the details of the project in terms of financing and planning.

(137) The following interconnections have been established in the recent past:

- Germany – Czech Republic: The pipeline Gazelle (finalised beginning 2013) connects the German pipelines OPAL and MEGAL and thereby crosses the Czech Republic. Gas quantities taken up by Gazelle at its starting point in Brandov will be directly shipped to Waidhaus (Germany) and can only exit there.[81] At the interconnection point Hora Svatè Kateřiny, the Czech transmission system operated by Net4Gas is connected to the German pipeline STEGAL (at the point Olbernhau) operated by Wingas as well as to the German pipeline system operated by Ontras VNG (at Deutschneudorf (Sayda)). The total technical capacity for gas flows from Germany to the Czech Republic amounts to 139 TWh/year (approximately 13.4 bcm/year).[82]
- Austria – Hungary: Up to 45 TWh/year of natural gas (approximately 4.1 bcm/year) may be transported through an interconnector from Austria to Hungary.[83]
- Romania-Hungary: Gas may be transported from Romania to Hungary via an interconnection with a capacity of 51 TWh/year (approximately 1.7 bcm/year).[84]
- Czech Republic – Poland: The Stork interconnector (2011) between the Czech Republic and Poland allows transporting approximately 5.2 TWh/year of natural gas (0.5 bcm/year) from the Czech Republic to Poland.[85]

(138) The three Baltic countries, while isolated from the rest of CEE countries, have important interconnector capacity between them. For example, the Lithuanian gas transmission system is linked to the Latvian gas transmission system with a bi-directional interconnector (since 2013 its capacity is 2.2 bcm/year in both directions). However, due to technical and legal restrictions the interconnector with Latvia has been mainly used for balancing needs and in emergency situations.[86]

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81 Commission Decision on the exemption of the 'Gazelle' interconnector according to Article 36 of Directive 2009/73/EC, recital 9. https://ec.europa.eu/energy/sites/ener/files/documents/2011_gazelle_unbundling_decision_en.pdf

82 Entsog indicates a capacity of 319.7 GWh/day at Olbernhau, 77.5 GWh/day at Hora Svaté Kateřiny as interconnector capacity, http://www.entsog.eu/maps/transmission-capacity-map, ID 8725.

83 Entsog indicates a capacity of 129.2 GWh/day for the direction Austria-Hungary at Mosonmagyarovar which is connected to the interconnector between Austria and Slovakia at Baumgarten, http://www.entsog.eu/maps/transmission-capacity-map, ID 8725.

84 Entsog indicates a capacity of 51 GWh/day (corresponding to 1.6 bcm/year) at Csanadpalota, http://www.entsog.eu/maps/transmission-capacity-map, ID 8725.

85 Website of Net4Gas: http://www.net4gas.cz/en/czech-polish-interconnector/, ID 8727. Website of Gaz-System: http://en.gaz-system.pl/en/press-centre/news/information-for-the-media/artykul/201276/, ID 8896.

86 The Latvian-Lithuanian interconnection, ID 6929.

6.4.5. Storage

(139) Gas storage capacity in CEE countries, while being an important source of emergency supplies, does not present an alternative to gas supplies from Gazprom. Availability of storage within CEE varies significantly from country to country. In relation to yearly domestic consumption, the largest storage capacity is available in Hungary (6.3 bcm, covering more than half of Hungary's yearly consumption of 10.4 bcm in 2012). Lithuania and Estonia have no storage on their territory.[87] Other CEE countries have storage which could cover an important share of their yearly gas consumption, i.e.16% in Poland, around 20% in Bulgaria and up to 40% in Slovakia.

7. DESCRIPTION OF GAZPROM'S MAIN GAS SUPPLY CONTRACTS WITH CEE WHOLESALERS AND INDUSTRIAL CUSTOMERS

7.1. Introduction

(140) In all CEE countries, Gazprom provides gas to CEE wholesalers and industrial customers under long-term gas supply contracts of typically [redacted] duration.[88] In some countries Gazprom in addition concluded short-term contracts with CEE wholesalers (often yearly contracts).

(141) This section will describe Gazprom's supply relations with CEE wholesalers and industrial customers. In some countries where the national wholesalers in the past were also the operators of the domestic transport infrastructure, Gazprom supplied gas on the basis of gas transportation contracts (or transit contracts).[89] In these transportation contracts the parties agreed that Gazprom, instead of paying money for the transport services by the wholesalers, would deliver specified amounts of gas as remuneration. Most of these clauses in the transportation contracts were repealed or expired between 2006 and 2009.

(142) The description below is not exhaustive and does not cover *all* contracts of Gazprom in the CEE, but will describe the most important gas supply (and transportation) contracts. To illustrate the economic importance of the CEE contracts, the annual contractual volume figure in billion cubic metres (bcm) is provided for the year 2013 for each of the contracts.

(143) The contractual volume figures[90] for the period 2004-2013[91] are set out in **Annex II** to the Statement of Objections. **Annex II** provides an overview regarding the contract partners, the duration of the contracts and the yearly contractual volumes. **Annex II** only lists contracts with a volume above 0.5 bcm/year.

7.1.1. The three Baltic countries – supply contracts with OAO Gazprom

(144) [redacted]

87 Both countries use the storage facility in Incukalns in Latvia.

88 [redacted] and between Gazprom Export and the Polish wholesaler PGNiG (26 years).

89 [redacted]

90 The annual contractual quantities might differ from the quantities actually sold.

91 2013-2014 data is only available for some of the countries. For the other countries, 2012 data are used in this section.

7.1.1.1. Estonia

(145) [redacted]

7.1.1.2. Latvia

(146) [redacted]

7.1.1.3. Lithuania

(147) [redacted]

(148) [redacted]

(149) [redacted]

(150) [redacted]

7.1.2. The other five CEE countries – supply contracts with Gazprom Export

(151) In the other five CEE countries, Gazprom Export is the contract partner for the gas supply agreements. These contracts are either concluded between Gazprom Export and national wholesalers ([redacted] Poland [redacted]) or between Gazprom Export and [redacted].

92 [redacted]

93 [redacted]

94 [redacted]

95 [redacted]

96 [redacted]

97 [redacted]

98 [redacted]

7.1.2.1. The Czech Republic

(152) [redacted]

(153) [redacted]

(154) [redacted]

7.1.2.2. Poland

(155) In Poland, the gas supply contract between Gazprom Export and PGNiG dates from 25 September 1996 and will expire on 31 December 2022.[103] The contractual volumes for 2013 were 10.2 bcm.

7.1.2.3. Slovakia

(156) [redacted]

(157) [redacted]

99 [redacted]

100 [redacted]

101 [redacted]

102 [redacted]

103 Gas Supply Contract between PGNiG and Gazprom Export of 25 September 1996, ID 8040-49 (24/59).

104 [redacted]

105 [redacted]

106 [redacted]

7.1.2.4. Bulgaria

(158) [redacted]

(159) [redacted]

Supply contracts between Gazprom Export, intermediary Overgas Inc., and Bulgargaz

(160) [redacted]g-

(161) [redacted]

[redacted]

107 [redacted]

108 [redacted]

109 [redacted]

110 [redacted]

111 [redacted]

112 [redacted]

113 [redacted]

114 [redacted]

[redacted]

(162) [redacted]

(163) [redacted]

(164) [redacted]

– [redacted]

115 [redacted]

116 [redacted]

117 [redacted]

118 [redacted]

[redacted]

– [redacted]

– [redacted]

(165) [redacted]

---

119 [redacted]

120 [redacted]

121 [redacted]

122 [redacted]

[redacted]

[redacted]

(166) [redacted]

Supply contracts between Gazprom Export, intermediaries Gazprom Germania and WIEE, and Bulgargaz

(167) [redacted]

---

124 [redacted]

125 [redacted]

126 [redacted]

127 [redacted] See also https://www.gazprom-germania.de/unternehmen/portrait/geschichte html, ID 7000 regarding the history of Gazprom Germania, which shows that Gazprom Germania became the legal successor of ZMB.

128 [redacted]

[redacted]

(168) [redacted]

(169) [redacted]

(170) [redacted]

[redacted] See also https://www.gazprom-germania.de/unternehmen/portrait/geschichte.html, ID 7000 regarding the history of Gazprom Germania.

129 [redacted].

130 [redacted]

131 [redacted]

132 [redacted]

133 [redacted]

[redacted]

(171) [redacted]

(172) [redacted]

(173) [redacted]

134 [redacted]

135 [redacted]

136 [redacted]

137 [redacted]

138 [redacted]As stated in previous footnotes, Gazprom Germania was the legal successor of ZMB GmbH, Germany, see https://www.gazprom-germania.de/unternehmen/portrait/geschichte.html, ID 7000.

(174) [redacted]

(175) [redacted]

(176) [redacted]

(177) [redacted]

---

139 [redacted]

140 [redacted]

141 [redacted]

142 [redacted]

143 [redacted]

[redacted]

(178) [redacted]

(179) [redacted]

(180) [redacted]

Supply contracts between Gazprom Export, intermediaries Overgas Inc. and WIEE, and Bulgargaz

144 [redacted]

145 [redacted]

146 [redacted]

147 [redacted]

148 [redacted]

149 [redacted]

(181) [redacted]

(182) [redacted]

Supply contract between Gazprom Export and Bulgargaz for [redacted]

(183) [redacted]

[redacted]*contract between Gazprom Export and Bulgartransgaz*

(184) [redacted]

7.1.2.5. Hungary

(185) [redacted]

150 [redacted]

151 [redacted]

152 [redacted]

153 [redacted]

154 [redacted]

[redacted]

Supply contracts between Gazprom Export, intermediary Panrusgaz, and EFT

(186) [redacted]

(187) [redacted]

(188) [redacted]

(189) [redacted]

(190) [redacted]

155 [redacted]

156 [redacted]

157 [redacted]

[redacted]

159 [redacted]

[redacted]

(191) [redacted]

(192) [redacted]

(193) [redacted]

(194) [redacted]

160 [redacted]

161 [redacted]

162 [redacted]

163 [redacted]

164 [redacted]

(195) [redacted]

(196) [redacted]

(197) [redacted]

(198) [redacted]

(199) [redacted]

(200) [redacted]

(201) [redacted]

---

165 [redacted]

166 [redacted]

167 [redacted]

168 [redacted]

[redacted]

— [redacted]

— [redacted]

— [redacted]

— [redacted]

169 [redacted]

170 [redacted]

171 [redacted]

172 [redacted]

173 [redacted]

174 [redacted]

175 [redacted]

176 [redacted]

177 [redacted]

178 [redacted]

Centrex Hungary

(202) [redacted]

7.2. Overview of typical clauses of a gas supply contract

(203) This section will describe the main contractual provisions of a long-term supply contract between Gazprom and a European wholesaler, [redacted]

7.2.1. Clauses on contractual quantities

(204) All supply contracts stipulate an Annual Contract Quantity ('ACQ').[183] This SO focuses on contracts where the ACQ is at least 0.5 bcm (equivalent to around 4.9 TWh).

(205) Contracts also stipulate a Minimum Annual Quantity ('MAQ'). The MAQ is normally calculated as a percentage of the ACQ less defaults[184] for not having made the agreed quantity available. [redacted]

7.2.2. Clauses on delivery period/duration and points of delivery

(206) All supply contracts define the date when the delivery of the natural gas starts and when the delivery ends. The Statement of Objections focuses on long-term contracts, i.e. contracts with duration of at least 3 years.

[redacted]

179 [redacted]

180 [redacted]

181 [redacted]

182 [redacted]

183 [redacted]

184 Defaults, which are to be deducted from the MAQ, is the total sum of all quantities not made available for whatever reason by the Seller and which are not compensated, and of all quantities not taken by the Buyer due to *Force Majeur* or agreed repair works.

(207) *Delivery obligations (delivery point):* the contracts stipulate a geographic location at which point the seller is obliged to make the contractual gas quantity available and at which the buyer has the right to off-take the gas quantity.[185] This location is normally called the delivery point.

(208) [redacted]

(209) Some contracts[187] with Gazprom stipulate more than one contractual delivery point. The CEE contracts normally do not provide for any particular procedures for changing - upon the request of the buyer- a contractual delivery point to a delivery point not specified in the contract.

(210) [redacted]

(211) *Metering requirements*: gas supply contracts normally contain a chapter on metering.[188] It provides that the quantity and the quality of the gas are to be measured and determined at the delivery point in order to establish that the contractual conditions of the gas supply under the contract are fulfilled. The quality certificate is done jointly by the parties. Some contracts also establish that the measuring of the quantity of the gas delivered is to be established in a protocol which is signed jointly by the contract partners.[189]

(212) *Duration*: the contracts stipulate the duration (see the table in **Annex II** to this Statement of Objections which lists the duration of each relevant supply contract). On average, the duration of gas supply contracts ranges from 15 to 20 years.

7.2.3. Clauses on take-or-pay obligations

(213) The supply contracts stipulate that if the buyer does not respect the minimum annual off-take (MAQ) as stipulated in the contract, the buyer needs to pay Gazprom for the difference between the actual off-take and the minimum quantity. In other words, the buyer has an obligation to either 'take-or-pay'. The price to be paid for this quantity

185 [redacted]

186 [redacted]

187 [redacted]

188 [redacted]

189 [redacted]

is expressed as a percentage of the average of the contract price applicable in the relevant delivery year. This percentage is referred to as the minimum pay (e.g. for [redacted]

(214) The contracts specify that the buyer can receive paid-for but not off-taken gas ('make-up gas') during subsequent years. However, make-up gas can be received only after the buyer has off-taken the full MAQ in a given year. When the gas is received the buyer pays the difference between the purchase price and the amount already paid.[191]

7.2.4. Penalty clauses

(215) [redacted]

(216) Not all CEE contracts contain penalty clauses. [redacted]

7.2.5. Clauses setting the price formulae

(217) Gas prices in Gazprom's long-term supply contracts in CEE countries are not fixed for the entire duration of the contract. They are linked to an index which in turn is linked to the price of certain reference products such as fuel oil, gasoil, coal or gas sold on gas hubs.

(218) [redacted]

190 [redacted]

191 [redacted]

192 [redacted]

193 [redacted]

(219) [redacted]

(220) [redacted]

(221) [redacted] In Poland (since 2012) [redacted]

(222) The table below summarises the products used in Gazprom's LTC price formulae in CEE Member States.

Figure 5: Reference prices used in Gazprom's LTC price formulae[195]

Country (wholesaler)	Reference prices in 2004	Reference prices in 2012
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
Poland (PGNiG)	fuel oil, gasoil	fuel oil, gasoil, hub
[redacted]	[redacted]	[redacted]

Source: Data and references to the raw data are in the spreadsheet ID 8351.

(223) The price formulae differ from contract to contract and result in different development of the gas price even in those cases where the prices are indexed to the same (oil) product(s). Depending on the formulae's parameters, gas prices are more responsive to changes in oil prices in some countries than in other countries.

(224) [redacted]

(1) [redacted]

(2) [redacted]

(3) [redacted]

194 [redacted]

195 [redacted]

7.2.6. Price revision clauses

(225) [redacted] most of Gazprom's long-term supply contracts contain price revision clauses. These clauses enable the parties to ask for price revisions in case of changed market circumstances. A typical clause would first describe the conditions under which a price review can be triggered and would then set out the parameters for the material price review, i.e. according to which criteria the contract price should be adapted.

(226) [redacted]

(227) [redacted]

(228) [redacted]

(229) The contracts between Gazprom Export [redacted] and PGNiG contain similar revision clauses.[197] [redacted]

196 [redacted]

197 [redacted] For Poland, see Gas Supply Contract between PGNiG and Gazprom Export of 25 September 1996, ID 8040-49 (35-36/59).

[redacted]

(230) The precise conditions for a price revision may differ from contract to contract. [redacted]

(231) The right to demand a price revision is normally limited. The contracts usually stipulate that no party has the right to request a revision earlier than three years after the entry into force of the last agreement on such revision. Extraordinary revisions are usually limited to two times during the entire duration of the contract. Price revisions apply retroactively from the date of the receipt of the request for revision by the other party.

(232) The revision clauses normally also provide some guidance as to how the new price level should be set. [redacted]

(233) [redacted], the supply contracts do not contain any specific price revision clauses. [redacted]

(234) [redacted]

198 [redacted]

199 [redacted].

200 [redacted]

201 [redacted]

7.2.7. Arbitration clauses

(235) Contracts in the CEE countries [redacted] have price revision clauses that typically stipulate that if no agreement is reached on the price revision, each party has the right to refer the case to arbitration. The contract sets forth the place of arbitration and stipulates that the ruling of the arbitration court is final and binding on the parties. [redacted] contracts [redacted] also contain an arbitration clause but this is a general clause which refers all disputes relating to the contract to arbitration.[202]

(236) Arbitration proceedings are considered costly, might produce uncertain results and are time consuming. The parties therefore often prefer to reach a commercial solution. [redacted]

(237) [redacted] CEE wholesalers went to arbitration over price revisions or payment-related matters [redacted] Polish [redacted] wholesalers). In [redacted]

(238) [redacted]

(239) [redacted]

202 [redacted]

203 [redacted]

204 [redacted]

205 [redacted]

[redacted]

(240) [redacted]

(241) [redacted]

(242) [redacted]

Price arbitrations in Poland, [redacted]

(243) Price arbitration proceedings against Gazprom Export were launched by the Polish wholesaler PGNiG in February 2012. The proceedings were dropped in November 2012 after the parties agreed on a new price. [redacted] In October 2012, the Lithuanian State initiated arbitration proceedings against OAO Gazprom with regard to the pricing formula and to claim damages for having paid a too high price in the past.[210]

206 [redacted]

207 [redacted]

208 [redacted]

209 [redacted]

210 See http://www.foxnews.com/world/2012/10/03/lithuania-hits-russia-gazprom-with-1-billion-arbitration-claim-for-alleged/, ID 7210.

7.2.8. Hardship clauses[211]

(244) Some, but not all, gas supply contracts contain a hardship clause. This type of clause stipulates that in case of material changes of a commercial, financial and legal and/or technological nature which occur at any time during the term of the contract and which were not reasonably foreseeable by the parties at the time of concluding the agreement and cause hardship to any party in meeting its obligation under the contract, the party experiencing such hardship has the right to notify their other party in writing and propose negotiations to determine whether the changes have taken place and if so, to which extent they justify an amendment of the contract.

7.2.9. Territorial restriction clauses

(245) [redacted] supply contracts also contained territorial restrictions for the re-sale of gas. These territorial restrictions will be described in detail below in section 8.2.

8. GAZPROM'S POLICY OF MARKET SEGMENTATION

(246) This section will demonstrate that (i) Gazprom has been pursuing a strategy of market segmentation in CEE countries via contractual territorial restrictions and equivalent measures; (ii) Gazprom has been preventing intra-brand competition by prohibiting its contractual partners from re-selling Gazprom's gas outside their domestic countries; (iii) Gazprom's market segmentation policy has the purpose of maintaining price differentials between Member States and allowing Gazprom to charge higher prices.

(247) The resale restrictions were implemented mainly by explicit contractual export bans and destination clauses (for a definition of destination clause see paragraph (258). Such clauses were present until recently in all of the CEE supply contracts and continue to be in force in some contracts, see section 8.2.

(248) In addition, Gazprom in some countries has been pursuing its market segmentation strategy by different other contractual provisions as well as non-contractual means with an equivalent effect to contractual territorial restrictions, see section 8.3. [redacted] In Poland, Gazprom Export refused changing the delivery points of gas which would have enabled Western wholesalers to sell gas to Poland. The attempts of the Polish wholesaler PGNiG to receive gas supplies during and after the 2009 gas crisis from Western wholesalers were frustrated because Gazprom Export would not agree to a change of gas delivery points along the Yamal pipeline, see section 8.3.3. Gazprom also prevented the re-routing of natural gas from the Ukrainian/Hungarian to the Ukrainian/Polish border by refusing to change gas metering stations, see section 8.3.4.

(249) [redacted]

211 [redacted]

[redacted]

8.1. Gazprom's strategy to partition markets along national borders

(250) Gazprom's stated strategy is to avoid that Russian gas competes with Russian gas by artificially segmenting markets along national borders.[212] Preventing and/or hindering gas flows across borders allows Gazprom to charge higher prices since cheaper gas cannot be sold in countries with higher prices.[213]

(251) [redacted]

(252) [redacted]

212 [redacted]

213 [redacted]

214 [redacted]

215 [redacted]

216 [redacted]

217 [redacted]

218 [redacted]

219 [redacted]

220 [redacted]

(253) [redacted]

(254) [redacted]

(255) [redacted]

(256) [redacted]

(257) [redacted]

---

221 [redacted]

222 [redacted]

223 [redacted]

224 [redacted]

225 [redacted]

8.2. Territorial restrictions in the form of contractual export bans or destination clauses in all eight CEE countries

(258) The territorial restrictions in the form of contractual clauses are formulated in different manners in Gazprom's gas supply contracts. In some contracts, the relevant clause explicitly prohibits the resale of gas outside the country and states e.g. that the '*the sale of gas to third countries (re-export) is not allowed'* or '*gas should not be re-exported to third countries without the seller's consent'* (export ban). In other contracts, the territorial restriction is formulated as a destination clause stipulating that the buyer could only use the gas within the country of destination. A destination clause or use restriction typically states that '*the gas must be used within the country of delivery'* or by '*customers in country x.'* All contracts with wholesalers in CEE Member States included (or still include) either destination clauses, export bans or a combination of both.

(259) [redacted] contracts in CEE countries used to contain explicit territorial restrictions. These restrictions continued to apply after the accession of the CEE Member States to the EU, i.e. May 2004 and January 2007 (Bulgaria). Some clauses were removed in 2011, the majority of the clauses even later. Some territorial restrictions are still in force. Two contracts [redacted] also contained resale restrictions which prevent the buyer from selling to other customers within the country.[226]

(260) In the following paragraphs, the Commission will describe the territorial restrictions in the Gazprom contracts with wholesalers in the CEE countries. **Annex III** to this Statement of Objections provides an overview of all territorial restrictions and customer resale restrictions contained in contracts with wholesalers from CEE countries and the duration of the restrictions.

8.2.1. The territorial restrictions in gas supply contracts in CEE countries

8.2.1.1. Bulgaria

(261) [redacted]

Supply relation between Gazprom Export and Bulgargaz (via intermediary Overgas Inc.)[227]

(262) [redacted]

(263) [redacted]

---

226 [redacted]

227 [redacted]

[redacted]

Supply relation between Gazprom Export and Bulgargaz (via intermediaries Gazprom Germania and WIEE)[230]

(264) [redacted]

(265) [redacted]

Supply relation between Gazprom Export and Bulgargaz (via intermediaries Overgas Inc. and WIEE)[233]

(266) [redacted]

(267) [redacted]

228 [redacted]

229 [redacted]

230 [redacted]

231 [redacted]

232 [redacted]

233 [redacted]

234 [redacted]

235 [redacted]

[redacted]

Contract between Gazprom Export and Bulgargaz [redacted]

(268) [redacted]

(269) [redacted]

(270) [redacted]

---

236 [redacted]

237 [redacted]

238 [redacted]

239 [redacted]

240 [redacted]

[redacted]

8.2.1.2. Czech Republic

(271) [redacted]

(272) [redacted]

8.2.1.3. Estonia

(273) [redacted]

(274) [redacted]

241 [redacted]

242 [redacted]

243 [redacted]

244 [redacted]

245 [redacted]

246 [redacted]

247 [redacted]

248 [redacted]

[redacted]

(275) [redacted]

(276) [redacted]

(277) [redacted]

8.2.1.4. Hungary

(278) [redacted]

(279) [redacted]

(280) [redacted]

249 [redacted]

250 [redacted]

251 [redacted]

252 [redacted]

253 [redacted]

254 [redacted]

255 [redacted]

256 [redacted]

257 [redacted]

(281) [redacted]

8.2.1.5. Latvia

(282) [redacted]

8.2.1.6. Lithuania

(283) [redacted]

(284) [redacted]

258 [redacted]

259 [redacted]

260 [redacted]

261 [redacted]

262 [redacted]

263 [redacted]

264 [redacted]

265 [redacted]

(285) [redacted]

(286) [redacted]

(287) [redacted]

(288) [redacted]

(289) [redacted]

8.2.1.7. Poland

(290) PGNiG's main supply contract (Yamal Contract) with Gazprom Export of 1996 contained a re-export restriction. Clause 17.3 stated: '*Gas supplies under this contract should be used in Poland and will not be re-exported to third countries without the consent of the seller*.'[273] The clause was deleted on 29 October 2010.[274]

266 [redacted]

267 [redacted]

268 [redacted]

269 [redacted]

270 [redacted]

271 [redacted]

272 [redacted]

273 Gas Supply Agreement between PGNiG and Gazprom Export of 25 September 1996, ID 8040-49 (46/59).

(291) Until 1 February 2011 the Statute of Yamal's owner Europol contained a provision (Art. 18) that it is the responsibility of the bodies of Europol not to allow gas export from Poland.[275]

8.2.1.8. Slovakia

(292) [redacted]

(293) [redacted]

8.2.2. The implementation and enforcement by Gazprom of the territorial restrictions in gas supply contracts

(294) Gazprom applied and enforced the territorial restrictions. Despite various requests by Gazprom's customers to remove the restrictions, also in view of their illegality under EU competition rules, Gazprom did not agree to or ignored such requests. In some instances, Gazprom would consider lifting the restrictions in return for additional benefits for Gazprom such as the conclusion of the Yamal Deal[279] in Poland (see section 13). Gazprom also monitored the adherence of its customers to the territorial restrictions and would warn or threaten customers that did not comply with them or were planning not to comply with them.

8.2.2.1. Gazprom rejected or ignored requests to remove the territorial restrictions by customers

(295) The territorial restrictions were challenged by Gazprom's contract partners on various occasions. However, such requests were either rejected (see below for [redacted] or simply ignored by Gazprom [redacted]. On other

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274 Annex No 35 to supply contract No 2012-14/RZ-1/25/96 between PGNiG and Gazprom Export of 25 September 1996, ID 8040-54, (24/26).

275 [redacted]

276 [redacted]

277 [redacted]

278 [redacted]

279 The 'Yamal Deal' refers to renegotiations of the long-term contract between PGNiG and Gazprom Export in the years 2009-2010. The Yamal Deal negotiations went beyond conditions of gas supplies to PGNiG and included also issues relating to the management of Yamal's owner Europol, the decrease of transit tariffs via Yamal and the settlement of outstanding financial disputes between PGNiG and Gazprom. According to PGNiG, Gazprom did not agree to discuss the removal of the territorial restriction before the Yamal Deal was finalised, see the draft reply of the Polish Ministry of Economy of 19 July 2010 to the Commission, ID 0604 (46/68) and the report of PGNiG to the Ministry of Economy of 14 July 2010, ID 8040-63 (19/43).

occasions, Gazprom considered lifting the restrictions but only in return for additional benefits from its contract partners such as the conclusion of the Yamal Deal in Poland. [redacted]

(296) Except for Poland [redacted], where the territorial restrictions ended in 2010 [redacted]

(297) While wholesalers in some instances expressed concerns about the legality of the respective clauses vis-à-vis Gazprom, they often did not insist on the deletion of the clauses in order not to endanger their relationship with Gazprom. Wholesalers were also careful to give the impression of adhering to the clause and reflected upon the question whether any export activity could be detected by Gazprom. The following paragraphs provide examples of Gazprom's refusal to lift the territorial restrictions in the CEE Member States.

Bulgaria

(298) [redacted]

(299) [redacted]

Czech Republic

(300) [redacted]

(301) [redacted]

280 [redacted]

281 [redacted]

282 [redacted]

283 [redacted]

[redacted]

Estonia

(302) [redacted]

Hungary

(303) [redacted]

Latvia

(304) [redacted]

---

284 [redacted]

285 [redacted]

286 [redacted]

287 [redacted]

288 [redacted]

[redacted]

Lithuania

(305) [redacted]

Poland

(306) PGNiG considered the removal of the re-export clause from its supply contract with Gazprom Export since 2006.[290] Initially it discussed the territorial restriction with the Polish Competition Authority.[291] The issue was also subject to discussions between PGNiG and Gazprom Export during the Yamal Deal negotiations in 2009-2010.[292] According to PGNiG, Gazprom linked the removal of the re-export ban with the conclusion of the Yamal Deal. Gazprom Export did not agree to discuss the deletion of the territorial restriction before the Yamal Deal was finalised.[293] The export ban was removed from the supply contract with entry into force of Annex 35[294] on 29 October 2010 together with the conclusion of the Yamal Deal.

Slovakia

(307) [redacted]

289 [redacted]

290 Press statement of 22 April 2010 of deputy CEO of PGNiG, Radoslaw Dudzinski, ID 17.

291 Minutes of the meeting between PGNiG and the Polish Competition Authority of 9 June 2006 regarding the removal of re-export ban from the supply contract of PGNiG, ID 4519 (1-2/2).

292 Minutes of the meeting between PGNiG and Gazprom Export of 10 November 2009, ID 8040-57 (20-21/29).

293 Report of PGNiG to the Polish Ministry of Economy of 14 July 2010, ID 8040-63 (19/43); draft reply of the Polish Ministry of Economy to the Commission of 19 July 2010, ID 0604 (46/68).

294 Annex 35 of 29 October 2010 to the gas supply agreement between PGNiG and Gazprom Export, ID 8040-54 (24/26).

295 [redacted]

[redacted]

(308) [redacted]

(309) [redacted]

8.2.2.2. Gazprom monitors compliance with the territorial restrictions

(310) Gazprom monitored the respect of the territorial restriction clauses by at least two contract partners [redacted].

(311) [redacted]

[redacted] *by Czech wholesaler RWE Transgas and Slovak* [redacted]

(312) [redacted]

(313) [redacted]

296 [redacted]

297 [redacted]

298 [redacted]

299 [redacted]

300 [redacted]

[redacted]

(314) [redacted]

(315) [redacted]

Gazprom threatened CEE wholesalers with retaliatory measures

[redacted]

(316) [redacted]

(317) [redacted],

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301 [redacted]

302 [redacted]

303 [redacted]

304 [redacted]

305 [redacted]

306 [redacted]

[redacted]

(318) [redacted]

(319) [redacted]

(320) [redacted]

(321) [redacted]

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307 [redacted]

308 [redacted]

309 [redacted]

310 [redacted]

311 [redacted]

312 [redacted]

313 [redacted]

8.3. Other contractual provisions and measures which have the effect of preventing the export of gas similar to the territorial restriction clauses

(322) At least two supply contracts contain provisions which – without constituting export bans or destination clauses – have the effect of preventing the re-export of gas and hence have an equivalent effect to an explicit territorial restriction. With regard to gas deliveries to Poland, Gazprom Export refused to either change the delivery point of gas or the location where the gas is metered. The three equivalent measures can be summarized as follows:

(a) The gas supply contract between Gazprom Export [redacted]

(b) The gas supply contract between Gazprom Export [redacted]

(c) Gazprom Export did not agree to **changing contractual delivery points** for Western European wholesalers interested to deliver gas on the Yamal pipeline. Thereby Gazprom Export prevented gas supplies to Poland.

(d) Gazprom Export refuses to **change metering stations** for gas deliveries from Hungary to Poland.

8.3.1. Czech Republic [redacted]

(323) [redacted]

(324) It reads: [redacted]

314 [redacted]

315 [redacted]

(325) [redacted]

(326) [redacted]

(327) [redacted]

(328) [redacted]

(329) [redacted]

8.3.2. *Bulgaria -* [redacted]

(330) [redacted]

316 [redacted]

317 [redacted]

318 [redacted]

319 [redacted]

320 [redacted]

321 [redacted]

322 [redacted]

[redacted]

(331) [redacted]

8.3.2.1. Export restriction through gas metering

(332) [redacted]

(333) [redacted]

(334) [redacted]

---

323 [redacted]

324 [redacted]

325 [redacted]

326 [redacted]

327 [redacted]

[redacted]

(335) [redacted]

(336) [redacted]

8.3.2.2. Resale restriction through gas metering

(337) [redacted]

(338) [redacted]

(339) [redacted]

(340) [redacted]

(341) [redacted]

328 [redacted]

329 [redacted]

8.3.3. Gazprom Export's refusals to change gas delivery points

8.3.3.1. Gazprom Export's delivery point policy

(342) This section explains the importance of delivery points in gas supply contracts, as well as Gazprom Export's policy on delivery points.

(343) Long-term gas supply contracts by Gazprom normally provide for one (or in a few cases several) gas delivery points. The delivery point is the geographic location, where the gas is made available by the seller to the buyer who has a right and obligation (take-or-pay obligation) to off-take it at this point (see section 7.2.2). In many contracts, the delivery point is also the point where the *legal transfer* of the title of gas takes place and where the risk of payment and loss of gas are passed from seller to buyer. Normally delivery points are located where a pipeline crosses the border.[330]

(344) The contractual delivery points under gas supply agreements are normally border points, but not necessarily located at the border of the country for which the gas is intended. [redacted]

(345) As already stated in paragraph (209), some gas supply contracts stipulate more than one delivery point. For example, PGNiG's contract with Gazprom Export (then Gazexport) in 2003 provided for four delivery points for deliveries to Poland (Kondratki, Wysokoje and Tietierowka at the Belarus/Polish border and in Drozdovici at the Ukrainean/Polish border).[331]

(346) The location of the contractual delivery point is important for a wholesaler's ability to export gas to other countries. From the CEE wholesalers' perspective, the export possibilities are better if the legal delivery point is located in the East. If the title changes at an Eastern point, the wholesaler – being the owner of the gas – can sell gas easily to countries which are on the way or in the vicinity of the destination market. If the title, however, changes at a more Western point, the wholesaler would, in order to sell gas to countries in the East, use the possibility of reverse flow. Physical reverse flow means that the gas flows back into the direction from which it originated (see also section 6.4.2). Physical reverse flow might not always be technically possible and it incurs additional transport costs.

(347) [redacted]

330 Sometimes contracts also specify that the gas quality and quantity is measured at gas metering stations located at the delivery point in order to establish that the seller fulfilled its contractual obligations. However, the legal delivery point and the technical delivery point where quality and volumes are determined are not necessarily identical.

331 Annex No 20 of June 2003 to Gas Supply Contract between PGNiG and Gazprom Export of 25 September 1996, ID 8040-53 (3/21).

(348) [redacted]

(349) [redacted]

(350) [redacted]

(351) In general, Gazprom Export is not willing to change delivery points to accommodate its customers' interest. [redacted]

(352) As Gazprom Export's supply contracts in CEE do not provide for any mechanism under which a shift of delivery points can be demanded by the wholesaler, Gazprom Export has ample opportunity to refuse such demands, even if such a change of delivery point could be done without Gazprom Export incurring any additional costs. The parties could agree that any additional costs arising from the change of the delivery point are to be borne by the wholesaler who requested it.

(353) Technically, changes in delivery points should not be very cumbersome for the supplier of natural gas.. Since gas is transported through gas pipelines (in CEE), there is no need to re-route transport vehicles.

332 [redacted]

333 [redacted]

334 [redacted]

335 [redacted]

336 [redacted]

(354) Further, the responsibility for gas transport lies exclusively with the TSOs in the European Union. This means that the supplier only needs to inform the TSO about the change in delivery point and the TSO would then change the transport route. Such a change could result in higher or lower transport costs for the supplier. The supplier could in turn pass on these changed costs to the buyer.

(355) Currently, most EU Member States have an entry-exit system, in which suppliers may book independently the entry and exit capacities at any point on the network that has free capacity.[337] As capacities are freely allocated within the market area and can be booked by network users according to their needs, in general there is no necessity for changing delivery points. Entry exit systems normally have virtual trading points where gas is traded independently of its location.[338]

(356) Even in EU Member States in which traditional distance-based tariff systems are still in place, Gazprom would be very unlikely to face any obstacle in changing delivery points. This is in particular true for changes of delivery points if the original and the new delivery points are located on the same pipeline. If there is capacity at an exit point along a pipeline, Gazprom can simply book this capacity and exit its gas there.[339] The costs for such a change of delivery point would be small and could normally be paid by the customer. In certain cases, when the new delivery point is physically located before the contractual delivery point, the applicable tariff to be borne by the supplier or a customer may be lower.

(357) [redacted]

(358) [redacted]

337 Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 states that all TSOs should have an entry-exit system.

338 https://ec.europa.eu/energy/sites/ener/files/documents/201307-entry-exit-regimes-in-gas-parta.pdf, ID 8969, p.5,6,19-23.

339 [redacted]

340 [redacted]

341 [redacted]

342 [redacted]

8.3.3.2. Attempts to change delivery points on Yamal following disruption in supply in 2009

(359) When gas supplies from Russia via Ukraine were disrupted in 2009, Gazprom Export refused to give its contractually required consent to temporary changes of delivery points. A change of delivery point would have enabled PGNiG to import gas from Western Europe and to replace the missing quantities.

(360) In January 2009, gas supplies to Poland by the Ukraine based intermediary of Gazprom, RosUkrEnergo ('RUE'), stopped.[343] As a result, the Polish wholesaler lost 2.5 bcm of contracted supplies (ca. 18% of Polish consumption).

(361) PGNiG attempted to procure gas from several suppliers from Western Europe, namely ERG and two other undertakings active on the gas market.[344] The new delivery points envisaged by PGNiG were at: (i) Yamal's exit points in Poland or (ii) Mallnow, Yamal's exit point on the Polish/German border.[345]

(362) Both of these supply options required Gazprom Export's approval or co-operation to change the delivery point for some of its supplies along the Yamal pipeline.[346] Such an agreement was necessary because, when the gas quantities in question were supplied by Gazprom through the Yamal pipeline, Gazprom Export remained the owner of the gas until it reached the initial delivery point further West.

(363) Gazprom's active co-operation in another form was needed in other cases when gas could be made available at Mallnow by the Western wholesaler but it was not delivered there by Gazprom (then Gazprom's agreement was necessary for e.g. a swap transactions).

(364) PGNiG, at the time, expected Gazprom's reaction to these requests to be negative[347] but considered that it was left with '*no other possibility.*'[348] In January 2009, PGNiG requested Gazprom Export to approve the necessary change of delivery point but Gazprom Export never replied to this request.[349]

(365) ERG and PGNiG started negotiations about gas supplies in January 2009. ERG's original delivery point for the gas it bought from Gazprom Export was in Mallnow.[350] Deliveries via the Polish section of Yamal were discussed as of March

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343 Gas supplies from RUE were delivered at Drozdovichi on the Ukrainian/Polish border, ID 3805. RosUkrEnergo is a subsidiary of Gazprom (50%) delivering gas to Ukraine and CEE countries, ID 8390.

344 PGNiG's reply of 17 September 2012 to the Commission´s request for information of 20 July 2012, ID 7918 (30/46). See also internal note by PGNiG of 23 March 2009 summarising gas supplies to Poland from abroad, ID 8040-46 (12/38) and PGNiG's internal note of 9 September 2010 summarising its attempts to diversify its gas supplies, ID 8040-9 (30/44).

345 PGNiG's reply of 17 September 2012 to the Commission´s request for information of 20 July 2012, ID 7918 (30/46).

346 PGNiG's reply of 17 September 2012 to the Commission´s request for information of 20 July 2012, ID 7918 (30/46). See also PGNiG's internal note of 9 September 2010 summarising its attempts to procure gas from alternative suppliers, ID 8040-9 (30/44) as well as PGNiG's letter of 16 August 2010 to the Polish Ministry of Economy summarising its attempts to procure gas from alternative sources following the disruption of supplies from RUE, ID 8040-6 (14/124).

347 PGNiG's letter of 16 August 2010 to the Polish Ministry of Economy summarising its attempts to procure gas from alternative sources following the disruption of supplies from RUE, ID 8040-6 (14/124).

348 Minutes of the meeting by PGNiG of the meeting in Prime Minister's office on 28 April 2009, ID 8040-92 (97/100).

349 PGNiG's reply of 17 September 2012 to the Commission´s request for information of 20 July 2012, ID 7918 (30/46).

350 Data and references to the raw data are in the spreadsheet, ID 8351.

2009. On 13 May 2009, ERG informed PGNiG about the absence of Gazprom Export's consent to off-take gas from the Yamal pipeline in Poland.[351] ERG also signalled its interest in supplying gas to PGNiG at Mallnow.[352]

(366) In the beginning of 2010, PGNiG and ERG again discussed deliveries to Poland via Yamal. On 13 January 2010 ERG informed PGNiG that such a transaction was not possible because of the negative position of Gazprom Export.[353]

(367) In January and February 2009, a company active on the gas market which also received gas via the Yamal pipeline, offered to supply gas to PGNiG with delivery at the Polish section of the Yamal pipeline (up to 3 million m^3 per day).[354] On 28 January 2009 PGNiG requested the agreement of both OAO Gazprom and Gazprom Export for deliveries on the Yamal pipeline by this unspecified supplier. PGNiG highlighted the transitory character of its request and the threat to the stability of the Polish gas system caused by the discontinuation of gas supplies by RUE.[355] According to PGNiG, neither Gazprom nor Gazprom Export replied, which PGNiG considered to be a negative reply to its request for a temporary shift of the delivery point from Germany to the Polish section of Yamal.

(368) In December 2009 and in January 2010, another gas wholesaler confirmed that it was ready to supply gas to PGNiG at the delivery point at Mallnow with the right to off-take gas in Wloclawek or Lwowek (0.5 bcm).[356] PGNiG requested Gazprom's agreement to the transaction on 6 January 2010. On the same day PGNiG also sent a request to Gazprom Export. In its request PGNiG asked Gazprom Export to agree to a 'swap' transaction between Mallnow and Wloclawek/Lwowek points so that it could receive gas supplies from a Western European wholesaler.[357] Gazprom did not reply to this request.[358]

8.3.4. [redacted] *– Gazprom Export refuses to change metering station*

(369) Since [redacted] as a result of its high take-or-pay obligations, had excess gas volumes which it could not – or at least not profitably – sell in [redacted].[360] Therefore, [redacted] was interested in finding alternative outlets for its gas. Poland

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351 PGNiG's internal document summarising its contacts with ERG with respect to additional gas supplies between 26/01/2009 and 06/01/2010, ID 8040-9 (41/44).

352 PGNiG's internal note of 9 September 2010 summarising its attempts to procure gas from alternative suppliers, ID 8040-9 (41/44).

353 Minutes of the conference call between PGNiG and ERG of 13 January 2010, ID 8040-8 (26/84).

354 See summary of contacts between PGNiG and the Company, ID 8040-6 (64/124) also letter of PGNiG to Gazprom Export, ID 8040-6 (72/124) and PGNiG's reply of 17 September 2012 to the Commission´s request for information of 20 July 2012, ID 7918 (30/46).

355 Letter from PGNiG to Gazprom of 28 January 2009, ID 8040-119 (19/26). PGNiG's reply of 17 September 2012 to the Commission's request for information of 20 July 2012, ID 7918 (30/46).

356 Letter from the Company to PGNiG of 24 December 2009, ID 8040-5 (70/85), also letter from PGNiG to the Company of 5 January 2010, ID 8040-5 (72/85) and letter from the Company to PGNiG of 6 January 2010, ID 8040-5 (71/85).

357 Letter from PGNiG to Gazprom of 6 January 2010, ID 8040-6 (2/124).

358 PGNiG's internal note on attempts to procure additional volumes of non-Russian gas for the 1st quarter of 2010, ID 8040-8 (68/84).

359 Reply of [redacted] of 3 September 2012 to the Commission's information request of 20 July 2012 ID 7133, (12/23).

360 [redacted], in its reply of 3 September 2012 to the Commission's request for information of 20 July 2012, states: [redacted]

became a potential market for [redacted] after RUE stopped supplying gas to Poland on 1 January 2009, leaving PGNiG with a severe gas shortage.[361] [redacted] attempted to re-route gas from [redacted].

(370) As shown in the subsequent paragraphs, on two occasions, in 2009 and 2010, E.ON[362] and PGNiG pre-agreed on gas supply contracts. In both cases, the envisaged method of supply was to re-route gas from Beregovo (close to the Ukrainian-Hungarian border, on the territory of the Ukraine) to Drozdovichi (close to the Ukrainian-Polish border).

(371) In October 2009, an interim gas sales agreement between EFT and PGNiG for gas deliveries for the period 2010-2014 was signed.[363] The interim agreement was conditional upon EFT arranging the transport of gas through Ukraine to the Ukrainian/Polish border. The final agreement was not signed and the supply 'deal' was cancelled after Gazprom announced that it would supply the additional gas volumes needed by PGNiG.[364]

(372) However, the announced gas supply deal between Gazprom and PGNiG did not materialise and negotiations between E.ON and PGNiG were restarted in January 2010.[365] On 3 May 2010, E.ON and PGNiG signed another interim gas supply agreement,[366] and it was planned that gas deliveries would start on 1 June 2010.[367] But the supply agreement was cancelled when Gazprom announced, and this time concluded, an agreement with PGNiG to increase gas volumes under the existing long-term contract.

(373) In parallel to these negotiations, E.ON considered two options for delivering gas to Poland: (i) request a change of delivery point, and (ii) arrange the transport of gas from [redacted]

(374) The first option (**change of delivery point**)[368] would have required the active co-operation of Gazprom: [redacted] Under this option, the gas would have been transported through a different route [redacted] This would have probably been the most cost effective way to deliver the gas to [redacted]

(375) The second option (**change of gas metering station)** envisaged 'normal' delivery by Gazprom in [redacted] This could have been implemented by transporting gas from within [redacted]

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361 See letter by [redacted], [redacted] and also internal e-mails of [redacted], in which possible supply scenarios are discussed.

362 In this section of the Statement of Objections the notion 'E.ON' will be used for ERG and EFT as both companies of the E.ON were involved.

363 PGNiG's internal document summarising gas supply negotiations with ERG, ID 8040-9 (42/44).

364 Internal e-mail of E.ON of 6 November 2009, ID 7723 (7/8), *'The third party indicated to us that PGNiG has no room to purchase 700 Mio. m3/a from E.ON Ruhrgas and that the transportation capacity at Dnozdowicze has been booked and therefore the capacity is no longer available to E.ON Ruhrgas.*'

365 PGNiG's internal note from 2010 summarising its attempts to procure gas from alternative suppliers, ID 8040-9 (44/44).

366 Gas Supply Agreement between PGNiG and E.ON of 30 April / 3 May 2010, ID 7724 (6/33, letterhead and 21/33 for the signature).

367 Gas Supply Agreement between PGNiG and E.ON of 30 April / 3 May 2010, ID 7724 (7/33).

368 Internal correspondence within [redacted]

[redacted]. Technically, such transport could have been realised only as a 'virtual' transport (by making the relevant contractual arrangement).[369] This meant that the capacity would have been interruptible[370] and the transport within [redacted] had to be paid by E.ON.[371]

(376) Although E.ON identified the disadvantages of the second option, it still decided to explore it and disregarded the first option.[372] E.ON stated that '*The re-export itself is feasible, but is not the cost optimum for EFT, since it has to book back-haul capacity* [redacted]'[373]

(377) E.ON's internal analysis of the second option concluded that Gazprom would realise [redacted]

(378) E.ON also recognised that Gazprom would not only be aware of any gas supply from Hungary to Poland but that Gazprom would need to agree to such supply. [redacted]

369 Internal [redacted]

370 Interruptible gas delivery is subject to interruption at the option of the pipeline, i.e. the customer is not guaranteed to receive deliveries. Tariffs for interruptible service are cheaper than firm service.

371 Internal correspondence within [redacted]

372 Internal [redacted] document on the preparation of a meeting between Gazprom Export and [redacted] The document lists the advantages and disadvantages of option 2 and states that the option has the advantage of not constituting a 'change of delivery point', but a question of protocol. [redacted]

373 Internal [redacted]

374 [redacted]

375 [redacted]

376 Clause [redacted] of the Gas Supply Contract between [redacted] (2,5/153).

377 See clause [redacted] of the Gas Supply Contract between [redacted] (2,3/153).

378 See clause 4.2 of the gas supply contract [redacted] and clause [redacted] in the gas supply contract Gazprom Export and [redacted].

(379) [redacted]

(380) Gazprom would not have been negatively affected by agreeing to a shift of gas metering [redacted] approval. According to an internal document of PGNiG, E.ON stated that it had pre-announced to Gazprom the possibilities of supplies to Drozdovichi but that '*it would not fight with Gazprom, if it was considered against its* [Gazprom's] *interests.*'[381]

(381) [redacted]

(382) [redacted]

(383) [redacted]

379 Internal e-mail [redacted], and of [redacted] (90/219).

380 [redacted]

381 Minutes of the meeting between PGNiG and ERG of 29 September 2009, ID 8040-93 (12/22).

382 Letter by [redacted] to Gazprom of [redacted].

383 Internal memorandum of [redacted]

384 Internal email of [redacted] '[…] *hat unseren Wunsch nach Protokolländerung abgelehnt, um den Transit zu erleichtern.'*

385 Fax from Gazprom Export to [redacted]

(384) Gazprom's formal reply was sent only when the change of delivery protocols no longer had any commercial purpose for E.ON because a solution between Gazprom and PGNiG had been found. Even then, Gazprom did not agree to the change. Gazprom was unwilling to accept re-routing of gas even in a case where it was not required to change delivery points.

(385) [redacted] sent another letter to OAO Gazprom, asking it to instruct Gazprom Export to agree to the necessary modifications of the metering protocols so [redacted] E.ON pointed out that such cooperation would be beneficial to all parties, by alleviating [redacted] problems [redacted] increasing total sales of Russian gas in the region. Gazprom would also not suffer any disadvantages from such a shift of volumes to [redacted]

(386) Finally, [redacted] had to accept that OAO Gazprom and Gazprom Export would not change their view on changing the gas metering protocols and thus making supplies [redacted][387]

8.4. Gazprom is aware of the illegal nature of the strategy

(387) The Commission's file shows that Gazprom is fully aware of the illegal nature of at least some of the various contractual and non-contractual measures which prevent exports and thereby segment markets and maintain different price levels (see section 15.7 for the preliminary assessment of the legality of the respective clauses and measures). Gazprom had already been made aware of the illegality by the Commission and by various wholesalers [redacted]

(388) In 2003 and 2005, the European Commission and Gazprom reached an informal settlement concerning different types of territorial restrictions contained in Gazprom's contracts with certain European wholesalers which the Commission had challenged as being incompatible with European competition law.[388] [redacted]

(389) [redacted]

(390) [redacted]

386 [redacted]

387 [redacted]

388 See Commission press release IP/03/1345, http://europa.eu/rapid/press-release_IP-03-1345_en htm and Commission press release IP/05/710, http://europa.eu/rapid/press-release_IP-05-710_en.htm.

[redacted]

(391) [redacted]

(392) [redacted]

(393) [redacted]

9. GAZPROM'S GAS PRICES IN FIVE CEE COUNTRIES AND RELEVANT BENCHMARKS

(394) In this section, the Commission will present Gazprom's long-term gas prices (in five CEE countries and Germany) and Gazprom's costs.

[redacted]

389 [redacted]

390 [redacted]

391 [redacted]

392 [redacted]

393 [redacted]

9.1. Gazprom's gas prices in Bulgaria, Estonia, Latvia, Lithuania and Poland

(395) Gazprom's export prices have varied largely across countries and time. Prices are based on different formulae (see **Annex IV** for the five CEE countries which will be focused on in this chapter) and can differ significantly from each other.[394] For the region as a whole gas prices charged by Gazprom have more than tripled between 2004 and 2014. The evolution of Gazprom's gas prices charged to customers in CEE countries from January 2004 until December 2014 is presented in Figure 6 below. The full list of contracts to which the prices relate can be found in **Annex II**.

(396) All prices in the chart relate to *long-term supply contracts* that were concluded either directly or indirectly between Gazprom and national wholesalers.

(397) Prices in the chart below were provided by CEE wholesalers in response to requests for information.[395] Only data relating to gas supply contracts with an ACQ of at least 0.5 bcm was requested by the Commission.

(398) Traditionally, gas supply contract prices refer to the price of 1000 m^3 of gas. The Commission asked gas wholesalers to provide prices both for volumes in 1000 m^3 and for energy output in MWh.[396] Prices in the chart below are given in EUR/MWh.

(399) On some occasions, price adjustments [redacted]

(400) With the exception of Poland in 2006, all known retroactive changes are included in the prices analysed by the Commission.[397] The non-inclusion of the retroactive change in Poland in 2006 – that concerned a price amendment in favour of Gazprom - led to lower reported prices than those paid effectively.

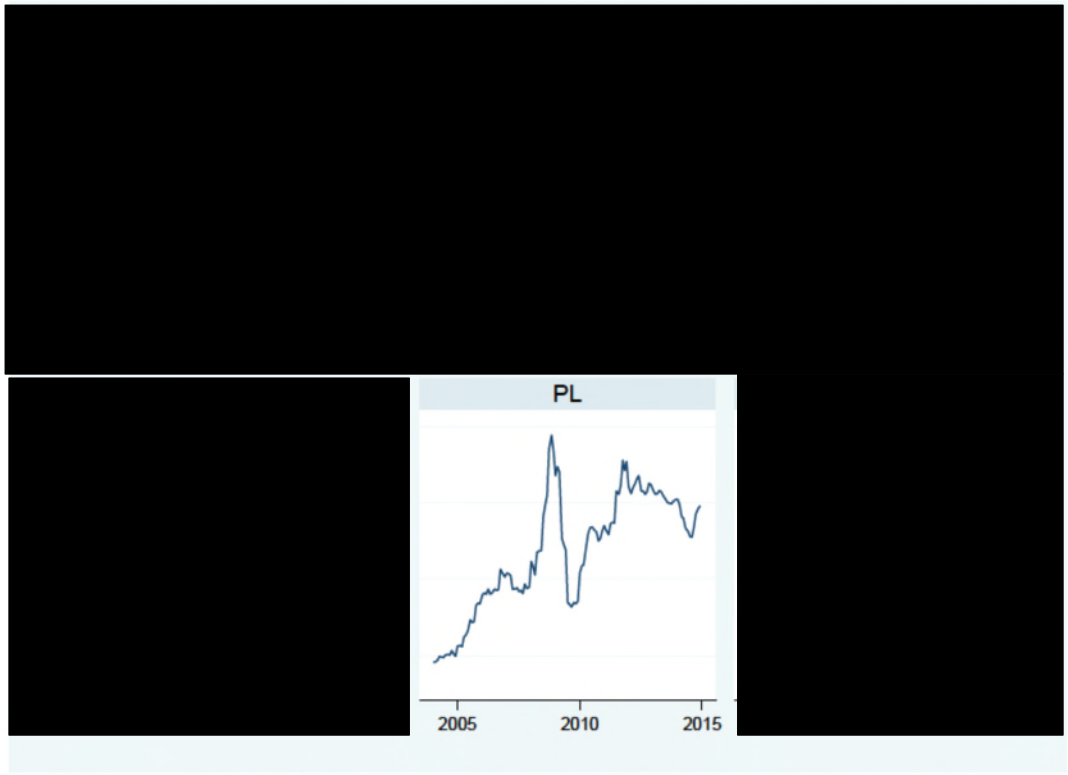
394 See Commission's calculation on the contract prices in ID 8351 for all CEE countries.

395 Information on prices is based on the Commission's own calculations. Data and references to the raw data are in the spreadsheet ID 8351.

396 It was decided to use conversion factors provided by the wholesalers in order to reflect the energy content (calorific value) of the gas actually delivered. The average conversion factors used by the wholesalers ranged between 10.01 and 10.50, with an average of 10.37. This corresponds to the usual heating capacity of Russian gas.

397 The retroactive price adjustment in Poland in November 2006 affected prices as of November 2005. Part of the sum that was due retroactively was paid in a lump-sum and was not added to the price. The rest of the retroactive adjustments were added to the (then) future prices by increasing them by USD 11/1000 m^3 (see below in section 9.1.5).

Figure 6: Gazprom's contract prices in Bulgaria, Estonia, Latvia, Lithuania and Poland 2004-2014



Source: Commission's calculations, based on ID 8351.

(401) In the period 2004-2008, gas prices were rising steadily following continuous price increases in oil product prices to which Gazprom's gas prices are indexed. A further factor contributed to gas price increases in CEE: following the countries' EU accession, Gazprom accelerated price increases so that price levels – which had traditionally been low since Soviet Union times in Eastern Europe – would reach 'European price levels'.[398]

(402) In early 2009, gas prices increased significantly following the large increase in oil prices in 2008 (as gas prices in oil-indexed long-term contracts are calculated using oil prices of the preceding 6-9 months, see section 7.2.5). This increase was followed by a significant decrease of gas prices as the economic crisis led to a large fall in oil prices and thus oil-indexed gas prices. However, due to strong demand for oil in Asia, oil prices recovered during 2011 and 2012. This oil price increase resulted again in increasing natural gas prices in CEE.

9.1.1. Bulgaria

(403)

[398] Eesti Gaas noted in 2005: '*pursuant to the proposal made by Gazprom a transition period commences ending in 2008. During the transition period the prices will be unified with the prices in the European Union.*'

(404) [redacted]

(405) [redacted]

(406) [redacted]

(407) [redacted]

399 [redacted]

400 [redacted]

401 [redacted]

402 [redacted]

403 [redacted]

Figure 7: Natural gas prices in Bulgaria by contract (2004-2014)

Source: Commission's calculations, based on ID 8351.

(408)

Figure 8: Weighted average prices in Bulgaria (2004-2014)

Source: Commission's calculations, based on ID 8351.

9.1.2. Estonia

(409)

(410)

404

405

[redacted]

Figure 9: Natural gas contract prices in Estonia (2004-2014)

Source: Commission's calculations, based on ID 8351.

9.1.3. Latvia

(411) [redacted]

406 [redacted]

407

408

Figure 10: Natural gas contract prices in Latvia (2004-2014)

Source: Commission's calculations, based on ID 8351.

9.1.4. Lithuania

(412)

(413)

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411

[redacted] Lithuania was, according to a public statement by OAO Gazprom, penalised by Gazprom by not receiving the price discount that customers in the two other Baltic countries received.[413] [redacted]

Figure 11: Natural gas contract prices in Lithuania (2004-2014)

Source: Commission's calculations, based on ID 8351.

(414) [redacted]

412 The Third Energy Package is a package of legislative proposals for electricity and gas, which was adopted by the European Commission on 19 September 2007. It aims at creating a competitive and integrated energy market in the EU. The unbundling rules are set forth in Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas, OJ L 211 of 14.8.2009, p. 94 (Gas Directive 2009/73).

413 Transcript of a radio interview of 29 December 2010 with Sergei Kuprijanov, OAO Gazprom's press secretary, ID 6849 (11/18). [redacted]

Figure 12: Natural gas contract prices in the Baltic countries 2004-2014

Source: Commission's calculations, based on ID 8351.

9.1.5. Poland

(415) During the period 2004-2014 there was one contract in force between Gazprom Export and the Polish wholesaler PGNiG. The price formula of this contract remained unchanged until the end of October 2006.

(416) In November 2006 a new pricing formula was introduced retroactively as of November 2005 following a price revision request by Gazprom. The new formula resulted in higher prices for PGNiG.[414] The retroactive price adjustment meant that PGNiG had to pay USD 175.9 million for the period 1 November 2005 to 30 October 2006. PGNiG paid a lump-sum of USD 96 million at the time of the price adjustment and the rest was agreed to be paid through a temporary price increase (11 USD/1000 m^3) as of January 2007 until the sum was paid in full.[415]

(417) By the end of January 2008 the full amount payable to Gazprom Export was paid, therefore the extra 11 USD/1000 m^3 was removed from the contract price formula. The formula then remained unchanged (save for the adjustment of the gasoil index due to discontinuation) until January 2010 when contract quantities were increased. The contract price formula remained in effect but it was agreed that quantities above the MCQ would be priced at a discount of 3-7% (depending on the quantities).[416]

414 According to PGNiG's calculations the price increase was 10-11%. PGNiG's internal document, ID 8040-63 (17/43).

415 Annex 26 of 17 November 2006 to PGNiG's gas supply contract, ID 8040-10 (61/79).

416 PGNiG's reply of 7 December 2012 to the Commission's request of information of 20 July 2012, ID 3805, sheet '1(a) Kontrakty (długoterminowe)'.

(418) In November 2011 the P_0 was lowered (retroactively, according to the agreement signed in November 2012). In January 2012 a new price formula was introduced. It had a lower P_0 and price changes due to changes in oil prices were limited to +/- 2.5 EUR/MWh around the hub price for 40% of the price.[417] In July 2012 this share was increased to 50% with a further P_0 decrease.[418]

Figure 13: Natural gas contract prices in Poland (2004-2014)

Source: Commission's calculations, based on ID 8351.

9.1.6. Average CEE5 prices

(419) [redacted]

417 Annex 40 of 5 November 2012 to the Polish gas supply contract, ID 3919.

418 The price formulae in January-June 2012 was: Pn = 0.6 * Poil1 + 0.4 * Poil2; where Poil1 = P0*(0.5*Mn/M0 + 0.5 *Gn/G0); and Poil2 = Poil1 - S, where S=0 if Pgap1≤Poil1≤Pgap2; and S=Poil1-Pgap1 if Poil1>Pgap1; and S=Poil1-Pgap2 if Poil1<Pgap2; where Pgap1 = (TTFfm + 2,5 euro/MWh)* k* n and Pgap2 = (TTFfm - 2,5 euro/MWh) *k* n, The formula in July 2012 changed to Pn = 0.5 * Poil1 + 0.5 * Poil2, ID 3919.

Figure 14: Natural gas weighted average contract prices in Bulgaria, Estonia, Latvia, Lithuania and Poland (2004-2014)

Source: Commission's calculations, based on ID 8351.

9.2. Gazprom's costs

(420) Gazprom benefited from the gas price increases in the CEE countries and in other markets. The below table shows that while Gazprom's gas production between 2006 and 2013 declined by more than 12%, its net profits in Russian Rubles increased by 47%.[419]

Figure 15: Gazprom group's gas production and net profit

Gazprom Group	2006	2007	2008	2009	2010	2011	2012	2013
Gas production (bcm)	556	548.6	549.7	461.5	508.6	513.2	487	487.4
Net profit (RUB billion)	552	493	506	634	771	995	746	812
Change in production	-	-1.3%	-1.1%	-17.0%	-8.5%	-7.7%	-12.4%	-12.3%
Change in net profit	-	-10.7%	-8.3%	14.9%	39.7%	80.3%	35.1%	47.1%

Source: Gazprom[420]

(421) Most of Gazprom's revenues and profits come from gas exports but it also has significant revenues in other areas such as domestic gas supply. Therefore Gazprom's net profits and their increase cannot be fully attributed to Gazprom's gas exports. In order to determine the specific costs of gas exports to the EU, the Commission undertook a detailed analysis of Gazprom's cost data.

419 [redacted]

420 Gazprom in Figures 2006-2010, p. 19, ID 5795; Gazprom in Figures 2008-2012, p. 18, ID 5796; Gazprom Annual Report 2012, p. 6, ID 6632, Gazprom Annual Report 2013, p. 6, ID 8244.

(422) On 20 July 2012, the Commission asked Gazprom to provide information about its production and transportation costs. Gazprom provided cost figures based on publicly available data for 2006-2011.[421] Gazprom also provided an explanation as to how to calculate the appropriate unit cost figures.[422] The Commission modified this calculation method to obtain unit costs that can be directly compared to prices[423], which is explained in the paragraphs below.

(423) The income statements in Gazprom's audited financial reports contain an item called 'Cost of goods, products, work, services sold – gas'. [redacted] From this aggregate cost item it is not possible to ascertain how different costs (such as capital expenditures, etc.) are accounted for.

(424) The 'Cost of goods, products, work, services sold – gas' is broken down into costs within Russia and outside Russia. The latter has a sub-category for gas exported to 'far abroad' countries.[424] According Gazprom's figures, the unit costs for 'far abroad' and Former Soviet Union ('FSU')[425] countries are different from the unit costs for gas sold in Russia.

(425) In its calculation, Gazprom uses total costs of gas exported to 'far abroad' countries in arriving at total average unit costs for gas exported to the EU. Gazprom gives no explanation why these costs differ across the three regions. The average unit costs are not only different for each region but they also develop differently during 2006-2013. For 'far abroad' countries costs increase almost eightfold, for Russia costs triple, while costs for FSU countries decrease by 20% during this period.

(426) [redacted] Such differentiation could be justified if some of the gas produced could not be exported due to the lack of transport infrastructure. Also, if some gas fields were connected to pipelines which allow only the export of the gas then the production costs of this field could be exclusively assigned to export. However, the Russian gas transmission system (Unified Gas Supply System) is well connected and thus in all likelihood it is possible to transport gas from any of the (major) gas fields to both domestic consumers and to export markets. Therefore, Russian and foreign consumers receive gas from the same sources and thus it does not seem justified to differentiate costs according to whether the gas is sold within or outside Russia.

(427) The separation of costs within export sales into FSU and 'far abroad' countries is even less plausible. The biggest FSU customers [redacted] are supplied through the same pipelines which are used for delivering gas to countries that fall into the 'far abroad' category (e.g. [redacted]

421 Gazprom's reply of 31 October 2012 to the Commission's request for information of 20 July 2012, ID 3497, sheet '2(a) Production costs'.

422 Gazprom's reply of 28 November 2012 to clarification request on the Commission's request for information of 20 July 2012, ID 3627 (2/3).

423 Commission's cost calculations, ID 8954.

424 [redacted]

425 [redacted]

426 Gazprom's largest FSU consumers are Ukraine (55%), Belarus (21%) and Kazakhstan (11%). Gazprom, Annual Report 2012 p. 80, ID 6632.

[redacted] This also implies that they are supplied from the same gas fields. Therefore, differentiating costs for 'far abroad' and FSU countries cannot be but artificial.

(428) For the above reasons, the Commission uses the cost item 'Cost of goods, products, work, services sold – gas' and not its subgroups inside Russia and outside Russia.

(429) In order to arrive at the average cost of gas at the Russian border, 'selling expenses' and 'administrative expenses' were added to the main cost item, 'Cost of goods, products, work, services sold – gas' – as indicated by Gazprom.

(430) 'Selling expenses' largely consist of gas transportation costs (around 99%) and to a small part of 'other costs'. Transportation costs are further broken down into 'transportation costs inside Russia' and 'transportation costs outside Russia'. Transportation costs outside Russia were subtracted from the 'selling expenses' in order to arrive at costs for gas delivered at the Russian border.[427]

(431) The remaining part of the 'selling expenses' and all 'administrative expenses' were added to the 'Cost of goods, products, work, services sold – gas.' They were allocated in their entirety to the gas segment thus assuming that other segments do not contribute to common costs.

Figure 16**: Calculation of Gazprom's cost of gas at the Russian border (in thousand RUB)**[428]

Source: Commission's calculations ID 8954.

(432) Gazprom's total cost of gas at the Russian border was divided by the total volume of gas supplied (inside and outside Russia). Thereby the avarege cost of gas at the Russian border was determined.

(433) Finally, transportation costs from the Russian border to the EU border were added to the average cost of gas at the Russian border in order to arrive at average costs at the EU border.[429] The calculation of transportation costs from Russia to the EU was based on figures provided by Gazprom[430] and on an estimated average distance.[431] The average distance between Russia and the EU is estimated at 800 km. [432]

427 Transports costs inside Russia are not further differentiated with regard to the country of final delivery.

428 Shaded rows indicate the cost items that were included into the cost of gas at the Russian border.

429 Average costs at the EU border will then be compared to prices (net of EU transport costs) at the EU border in section 10.1. An alternative approach would be to calculate country-specific costs (adding EU transport costs to average costs) and then compare those with prices at actual delivery points.

430 [redacted]

(434) The Commission's cost calculation is conservative because it allocates all of Gazprom's common costs to the gas segment.[433]

Figure 17: Gazprom's calculated average cost of gas

Year	Cost per MWh
2009	[redacted]
2010	
2011	
2012	
2013	

Source: Commission's calculations ID 8954

9.3. Gazprom's prices in Germany

(435) Gazprom sells large amounts of natural gas in Europe and in particular to EU Member States. The biggest export market of Gazprom is Germany where it sold around 41 bcm (around 420 TWh) of natural gas in 2013.[434] Most of the gas is sold through long-term gas supply contracts with similar basic characteristics (see section 7.2).

(436) The two most important customers of Gazprom in Germany are [redacted] (the ownership structure of Wingas is explained in section 3.3.2).

(437) [redacted]

(438) [redacted]

431 Commission's calculations, ID 8954.

432 The approximate distance between the Polish border and Russia on the Yamal pipeline is 500 km while the distance on the Brotherhood pipeline between Russia and Slovakia/Hungary and the pipeline to Romania is around 1100 km.

433 The Commission's cost estimates are confirmed by a study that calculates supply costs for natural gas. The study estimates that gas supply costs from Russia to the EU border for 2010-2020 are between 3.11– 7.93 EUR/MWh depending on gas fields and pipelines used. To arrive at this figure, January 2011 USD/EUR exchange rates were used as the data relates to the period 2010-2020. However, had January 2001 exchange rates been used (the year when the study was published) it would have translated into an interval between 5.87–11.23 EUR/MWh. Source: Observatoire Mediterraneen de l'Energie: Assessment of internal and external gas supply options for the EU, evaluation of the supply costs of new natural gas supply projects to the EU and an investigation of related dinancial requirements and tools, Executive summary, 2011, p. 11, at http://ec.europa.eu/energy/gas_electricity/studies/doc/gas/2001_10_external_gas_supply.pdf, ID 6977.

434 Gazprom, Annual Report 2013, p. 64, ID 8244.

435 [redacted]

[redacted]

(439) [redacted]

(440) [redacted]

(441) [redacted]

Figure 18: ERG's natural gas contract prices with Gazprom Export (2004-2014)

Source: Commission's calculations, based on ID 8351.

436 [redacted]

437

438

(442) [redacted]

(443) [redacted]

Figure 19: Wingas' natural gas contract prices with Gazprom by contract (2004-2014)

Source: Commission's calculations, based on ID 8351.

439 [redacted]

440

(444) [redacted]

Figure 20: Wingas' weighted average contract prices with Gazprom (2004-2014)

Source: Commission's calculations, based on ID 8351.

9.4. Hub prices

(445) Gas hubs have become increasingly important market places in Europe. As explained in section 5.2 above, the NBP emerged as the first liquid gas hub in Europe. As other gas hubs have become more liquid prices across all liquid hubs converged. As trading on hubs has reached a critical level, hubs have started to attract more participants and liquidity, which creates confidence in hub prices. Mature hubs thereby have become the main price signal for gas wholesale markets in recent years.[441] As a result, even contracts not traded on the hub start to rely on hub prices as the reference price. The TTF successfully went through this development and became one of the most important gas market places in Europe. '*As an increased number of physical participants use TTF for trading and hedging, spot prices for gas traded there are gaining credibility among firms that would have previously used long-term contracts linked to the price of oil.*' [442]

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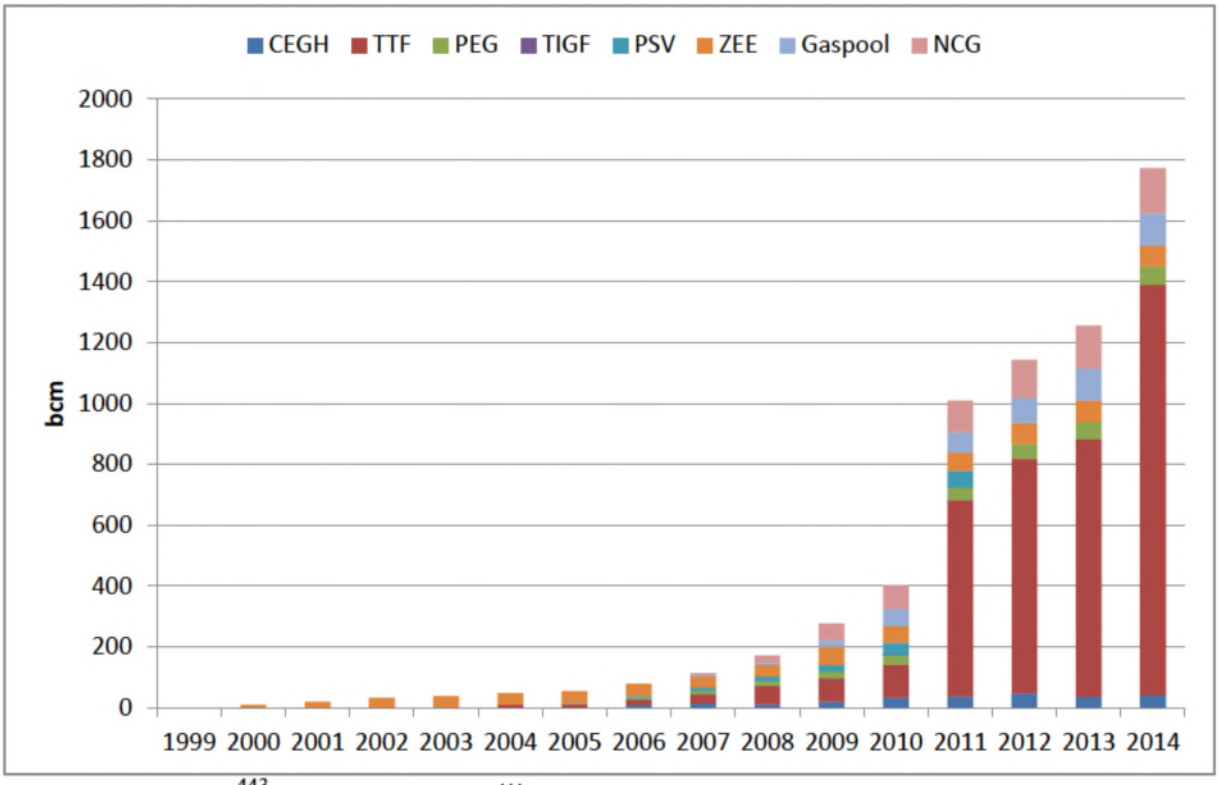
441 As the International Energy Agency notes: '*The deregulation of the market and the arrival of hubs represented a major change to consumers. The price of gas is related to supply and demand fundamentals, and consumers (especially larger ones) were directly exposed to changing price signals. Hence gas procurement became an active process, rather than a passive one.*' Source: Development of Competitive Gas Trading in Continental Europe, IEA Information Paper, ID 6331, p. 68.

442 Gillian Carr: TTF benefits from growing liquidity among European gas hubs, at http://www.risk net/energy-risk/feature/2238015/ttf-benefits-from-growing-liquidity-among-european-gas-hubs, ID 5827 (4/14).

Figure 21: Development of traded volumes at Continental European gas hubs



Source: Heather 2012[443], gas TSOs post 2011[444]

(446) Total European gas trading amounted to around 37 859 TWh in 2014[445], over seven times the EU gas consumption in 2013.[446] The most important and most liquid European hubs are the NBP in the UK (that is not shown in the above chart), the TTF in the Netherlands and the German hubs NCG and GASPOOL. In 2014, trading on the NBP amounted to 18 600 TWh, on the TTF to 13 928 TWh and on the two German hubs to 2 746 TWh.[447]

(447) Traded volumes on continental gas hub have been growing exponentially. Traded volumes in continental Europe surpassed 100 bcm in 2007. In the same year, at the

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443 Patrick Heather: 2012, ID 5828 (37/76). Traded volumes are in excess of physical volumes sold on the hubs because a given physical quantity may be sold multiple times on the hub. As from 2011 the volumes include all OTC and exchange transactions.

444 http://www.gaspool.de/fileadmin/download/gaspool_hub/trade_volumes_gaspool_hub_150317.xls, ID 8933
http://www.huberator.com/en/information/hub_volumes, ID 8939, ID 8938, ID 8937, ID 8936, ID 8935, ID 8934
http://www.smart.grtgaz.com/en/echanges_peg?startDate=2015-02-05&endDate=2015-03-07&range=yearly, ID 8948
http://www.cegh.at/cegh-exchange-traded-gas-volumes-increased-2014-61-compared-2013, ID 8949
https://www.net-connect-germany.de/en-gb/Information-Services/Balancing-Group-Managers/Virtual-Trading-Point/Development-of-Trading-volumes, ID 8950
As from 2011 the volumes include all OTC and exchange transactions while before only OTC transactions are included.

445 Platts press article, ID 8827, http://www.platts.com/latest-news/natural-gas/london/european-natural-gas-traded-volumes-up-41-on-26986656.

446 EU gas consumption in 2013 was around 17 957 000TJ which is about 5000 TWh, ID 8904, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Natural_gas_consumption_statistics.

447 Platts press article, ID 8827, http://www.platts.com/latest-news/natural-gas/london/european-natural-gas-traded-volumes-up-41-on-26986656.

NBP traded volumes amounted to 915 bcm.[448] The physical gas volume exchanged on the hub was just over half of the gas delivered in the UK. The NBP gross churn rate was 10 which means that on average gas was traded 10 times on the hub before it was delivered to final consumers.[449] The churn rate on the TTF increased from around 5 in 2008-2010 to above 10 by 2011[450] and to over 30 in 2014[451].

(448) Physical volumes sold on gas hubs do not encompass all natural gas consumed in the country/market area. However, increasingly large volumes of gas traded outside the hubs through long-term contracts are priced at hub prices (see section 11.2). This is not captured by the churn rate, even though it strengthens the price signal established at the hub.

(449) Further, the convergence of prices at continental hubs and the NBP shows that hub prices are reliable and stable indicators of supply and demand for natural gas in Europe.[452]

(450) Most of the gas trading comprises short-term trading (day ahead) and medium term trading (month ahead or front month). For 'day ahead' contracts gas is delivered the next day. For 'front month' contracts gas is delivered every day of the month following the trading date. There are also longer term forward contracts (quarterly, seasonal, yearly) but trading in these contracts is usually less liquid.

(451) Trading on gas hubs can be conducted either through over-the-counter (OTC) transactions[453] or through a gas exchange. Prices for OTC transactions are assessed and published by price reporting agencies such as Platts or Argus and gas exchange trading indices are published by the gas exchange. The following graph shows the 'day ahead' and 'front month' prices on the NBP hub.

448 This data refers to OTC trades only. Source: OFGEM, Liquidity in the GB wholesale energy markets, ID 6687 (16/117)

449 IEA, Natural Gas Market Review 2007, ID 7097 (209/290). This definition of churn shows how many times traded volumes exceed the consumption of the given market area. With the classical definition of churn (how many times traded volumes exceed net traded volumes, i.e. the physical gas quantity traded) the churn rate of the NBP was around 20 in 2007.

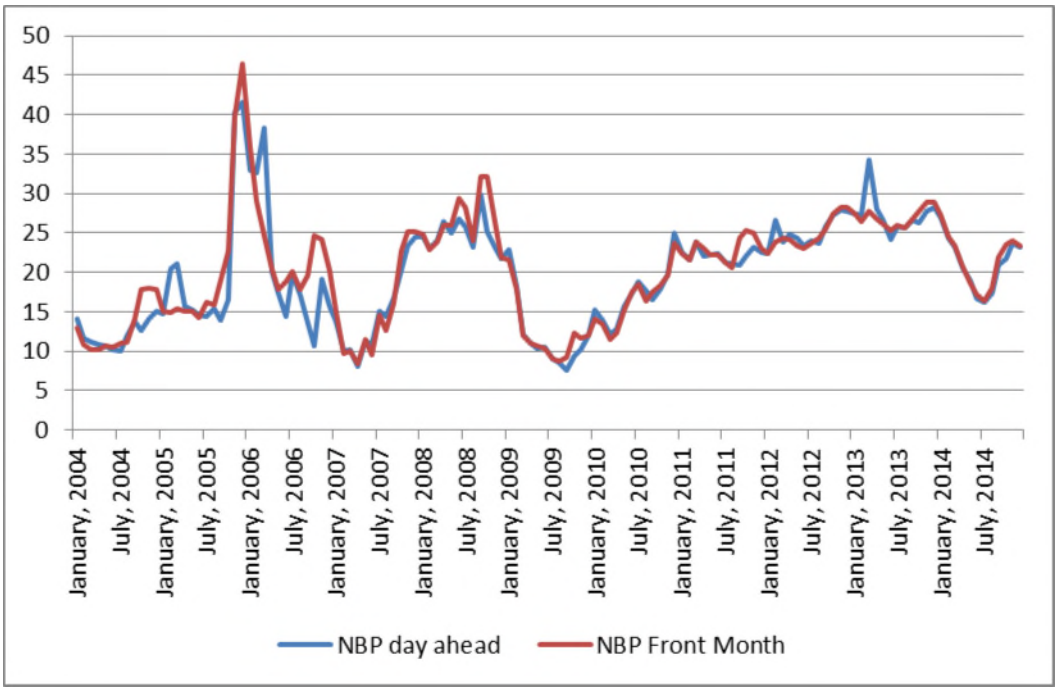
450 Jonathan P. Stern, 'Continental European Long-Term Gas Contracts: is a transition away from oil product-linked pricing inevitable and imminent?', Oxford Institute for Energy Studies September 2009, ID 5824 (12/30) and Patrick Heather, 'Continental European Gas Hubs: Are they fit for purpose?', Oxford Institute for Energy Studies June 2012, ID 5828 (39/76).

451 Gasunie information on TTF, ID 8829, http://www.gasunietransportservices.nl/en/transportinformation/ttf-volume-development,

452 Conversely, the price assessment process for the oil indexes referenced in CEE gas contracts is an opaque process based on a few daily transactions that represent a small percentage of OTC trades of those products.

453 Bilateral transactions without supervision of an exchange.

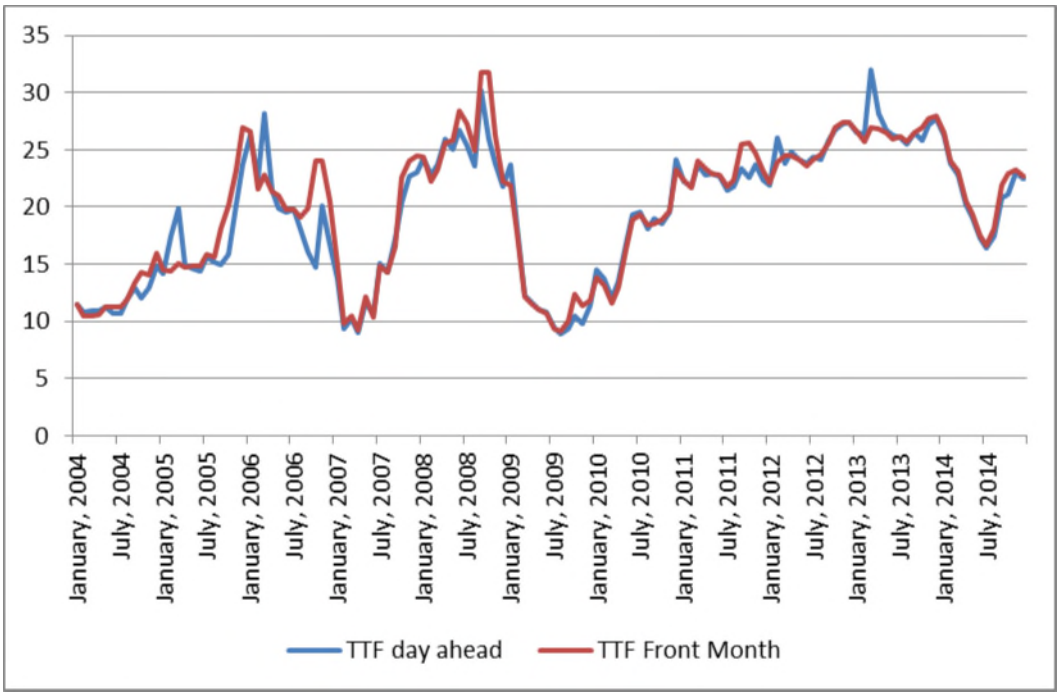
Figure 22: NBP contract prices (in EUR/MWh)



Source: Platts, see ID 8351

(452) Day ahead and front month prices on the TTF show a similar pattern to the one on NBP: day ahead prices exhibit a higher volatility than front month prices.

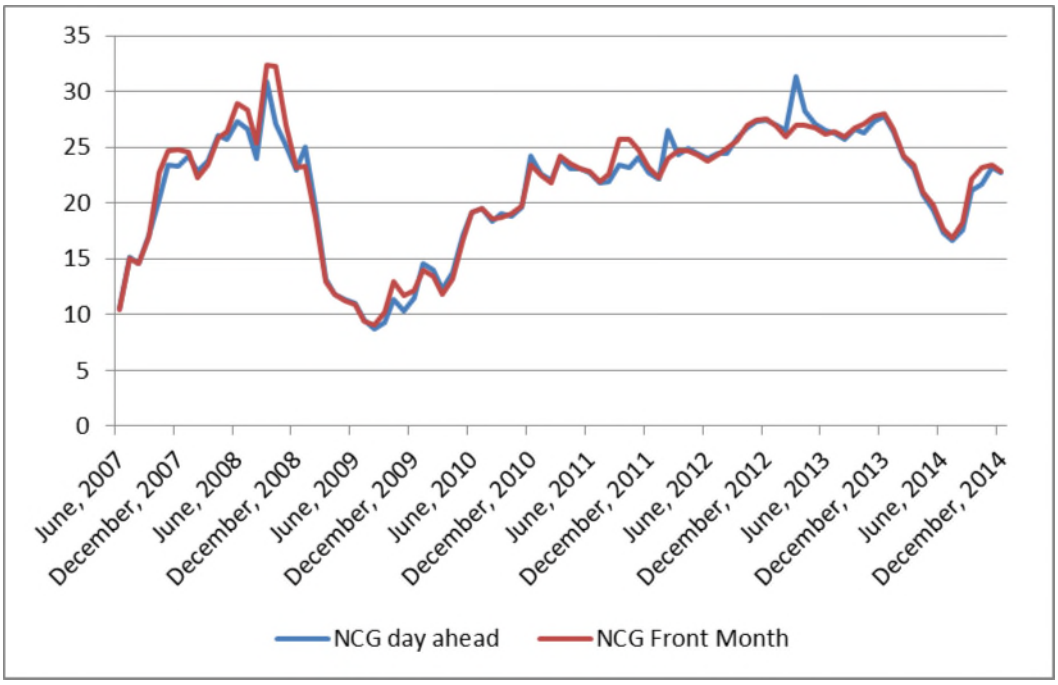
Figure 23: TTF contract prices (in EUR/MWh)



Source: Platts, see ID 8351

(453) The following graph shows the day ahead and front month prices on the NCG hub.

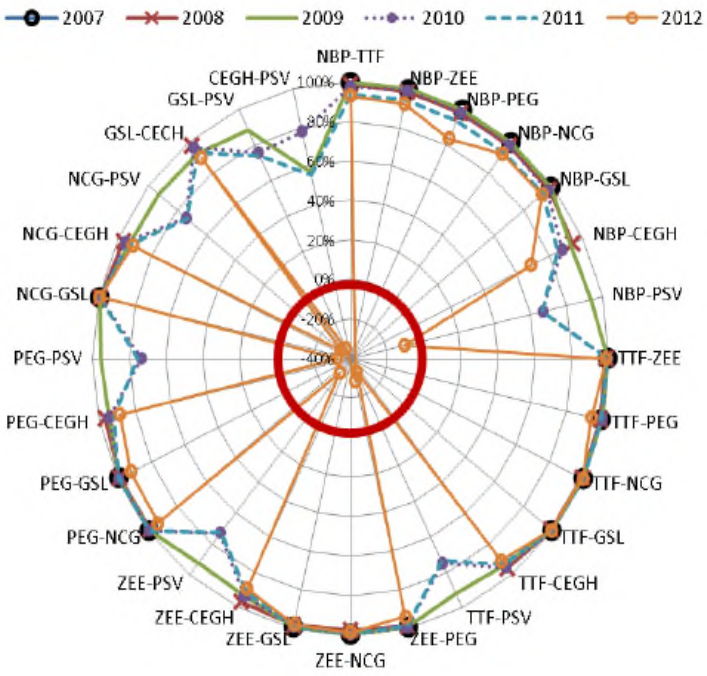
Figure 24: NCG contract prices (in EUR/MWh)



Source: Platts, see ID 8351

(454) Prices on the NBP, TTF, NCG and GASPOOL hubs correlate to a very high degree both for day ahead and front month contracts.[454] The degree of correlation is relevant to assess how much prices on the hubs move together.

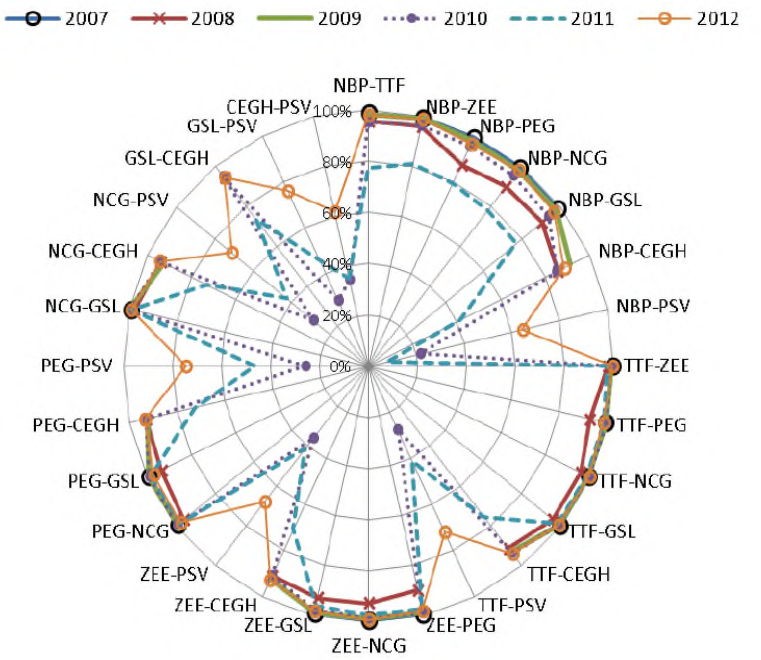
Figure 25: Pairwise correlation of front month prices between hubs (2007-2012 H1)



Source: Petrovich 2013[455]

454 Beatrice Petrovich, 'European gas hubs: How strong is price correlation?', Oxford Institute for Energy Studies October 2013, ID 6641 (41 and 43/72).

Figure 26: Pairwise correlation of day ahead prices between hubs (2007-2012)



Source: Petrovich 2013[456]

(455) For front month prices the correlation between the main hubs (NBP, TTF, NCG and GASPOOL) is close to 100% for the period 2007 to first half of 2012. For day ahead prices the correlation is still above 95% with the exception of NBP, in particular in 2011[457]. A somewhat lower correlation for day ahead prices may reflect temporary disruptions in transport infrastructure or insufficient transport capacity in certain peak consumption periods.

(456) Liquidity on the NBP was already sufficient to be the main pricing reference in 2007 when trading volumes amounted to around ten times the UK gas consumption. At the same time prices on the major European hubs were converging closely (see Figure 25 and Figure 26 above). Consequently, hubs can be considered as relevant and reliable price indicators from 2007 onwards.

(457) While the NBP still has the largest trading volumes in the EU, there are indications that the TTF is now the main reference hub in the EU. When comparing the relationship between European gas hubs, correlation with TTF is higher in all paired comparisons than with NBP (for both day ahead and front month contracts).[458] This means that movements in TTF prices are followed most closely by prices on other hubs.

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455 Beatrice Petrovich, 'European gas hubs: How strong is price correlation?', Oxford Institute for Energy Studies October 2013, ID 6641 (43/71).

456 Beatrice Petrovich, 'European gas hubs: How strong is price correlation?', Oxford Institute for Energy Studies October 2013, ID 6641 (41/71)

457 Pipeline closures in 2011 are the most like cause of poor correlation coefficients with NBP for that year.

458 Beatrice Petrovich, 'European gas hubs: How strong is price correlation?', Oxford Institute for Energy Studies October 2013, ID 6641 (46/71).

10. COMPARISON OF GAZPROM'S CEE PRICES WITH RELEVANT BENCHMARKS

(458) In this section, Gazprom's LTC prices in five CEE countries are compared with Gazprom's costs, with gas market prices and with Gazprom's LTC prices charged in Germany. It will be shown that the long-term gas prices charged by Gazprom in the five CEE countries significantly exceed: (i) Gazprom's costs, (ii) Gazprom's long-term contract gas prices in Germany and (iii) relevant hub prices.

(459) Between 2009 and 2013 Gazprom's CEE prices in [redacted] and Poland exceeded Gazprom's costs on average by [redacted]. Prices in these CEE countries also exceeded Gazprom's average LTC prices in Germany by up to [redacted] and surpassed gas hub prices by up to [redacted] in 2009-2014.

10.1. Comparison between Gazprom's costs and Gazprom's prices in Bulgaria, Estonia, Latvia, Lithuania and Poland

(460) Section 9.2 above presents Gazprom's average total costs of delivering gas to the EU border. Section 9.1 shows prices for wholesalers in CEE countries.

(461) Gazprom's prices cannot be directly compared with costs as an export duty is levied on Gazprom's sales to the EU. This export tax was 30% of the price during 2006 to 2013.[459] To calculate the price received by Gazprom (net price) this tax was subtracted from the actual prices.[460] The net [redacted] prices per MWh together with the total costs per MWh are shown in the graph below.

Figure 27: Gazprom's costs and average net CEE5 prices (without export levy) and mark-ups

Year	Cost per MWh	CEE price per MWh	Mark-up
2009	[redacted]		
2010			
2011			
2012			
2013			
Average			

Source: Commission's calculations ID 8954 and ID 8351.

(462) According to the Commission's estimate, Gazprom's average cost of exploring, producing, marketing and transporting gas to the EU border was far below Gazprom's average net sales prices in the [redacted]. Based on the Commission's cost calculation, Gazprom's mark-up varied between [redacted] between 2009 and 2013. The (weighted) average mark-up over costs was [redacted] for this period.

(463) The table below presents, by country, the differences between net [redacted] contract prices (without export levy) and Gazprom's costs as a percentage of the latter.

459 Gazprom Databook 2010, ID 5798, sheet 'Taxes' and press article ID 8859.

460 The Commission asked Gazprom to clarify whether the export tax is levied on net prices at the EU border or on net prices at the Russian border. However, Gazprom did not reply. Therefore, the Commission made the conservative assumption that the export tax is levied on net prices at the EU border. This assumption results in lower mark-ups than the alternative.

Figure 28: Gazprom's net CEE5 prices (without export levy) relative to costs by country

Year	[redacted]
2009	
2010	
2011	
2012	
2013	
Average	

Source: Commission's calculations ID 8954 and ID 8351.

(464) According to the Commission's estimate, Gazprom's average cost of exploring, producing, marketing and transporting gas to the EU border was far below Gazprom's net sales prices in the five CEE countries.

10.2. Comparison between Gazprom's prices in Bulgaria, Estonia, Latvia, Lithuania and Poland and relevant benchmark prices

(465) In the following section Gazprom's prices in the [redacted] are benchmarked to two relevant gas prices, namely Gazprom's LTC prices in Germany and European hub prices.

10.2.1. Gazprom's prices in Bulgaria, Estonia, Latvia, Lithuania and Poland versus Gazprom's prices in Germany

10.2.1.1. Germany as a relevant benchmark

(466) The first benchmarking method is a comparison between prices charged by Gazprom in CEE and in Germany. This comparison is done with regard to Gazprom's LTC prices in Germany. In Germany, Gazprom sold around [redacted] natural gas through LTCs in 2014 (to [redacted]). In the five CEE countries, Gazprom sold [redacted] of natural gas in the same year.

(467) Germany is an appropriate benchmark country for this comparison for several reasons.

(468) Germany is supplied by several upstream suppliers and is therefore a somewhat more competitive market than CEE. Apart from Gazprom, GasTerra and Statoil also deliver natural gas to Germany and there is also some German production.

(469) Germany's gas consumption is the second largest in the EU which makes it an important market to any gas supplier.[461] For Gazprom Germany is the biggest export market.

(470) Germany is, similarly to CEE countries, heavily reliant on gas imports through pipelines. Until October 2012, all deliveries of Russian gas to Germany went through the Yamal and Brotherhood pipelines. Since then, Gazprom also delivers directly to Germany through the Nord Stream pipeline but Yamal and Brotherhood remain important transport routes. Both Yamal and Brotherhood run through CEE countries (Poland, Slovakia and the Czech Republic). Poland, Slovakia, the Czech Republic

[461] In terms of gas consumption, UK is the biggest market closely followed by Germany and Italy. Source: Eurostat, ID 7261.

and indirectly Hungary[462] are supplied with gas of the same quality and from the same source(es) as Germany.

(471) The German price benchmark comprises of long-term contract prices of [redacted] and [redacted] The prices of these two companies were similar though [redacted] prices were slightly lower, especially in 2010-2011.

10.2.1.2. Comparison of Gazprom's CEE LTC prices with Gazprom's LTC prices in Germany

(472) The following table compares Gazprom's LTC prices in CEE countries with LTC prices in Germany (long-term contracts with both [redacted] and long-term contract prices with ERG).

Figure 29**: Gazprom's contract prices in CEE5 and Germany (Wingas and ERG) (€/MWh)**

Year	[redacted]
2009	
2010	
2011	
2012	
2013	
2014	

Source: Commission's calculations based on ID 8351**.**

(473) [redacted]

(474) [redacted]

Figure 30**: Gazprom's contract prices – CEE5 relative to Germany ([redacted])**

Year	[redacted]
2009	
2010	
2011	
2012	
2013	
2014	
Average	

Source: Commission's calculations based on ID 8351**.**

(475) [redacted]

462 The Brotherhood pipeline does not cross Hungary; however, the deliveries are done via branches of the Brotherhood pipeline.

463 [redacted]

[redacted]

(476) In order to arrive at comparable prices, the Commission subtracted transit costs within the EU from German contract prices (i.e. German prices were normalised to 'EU border prices' as the [redacted] are at the EU border).[464] For any given contract where multiple delivery points were indicated by the wholesalers the most eastern delivery point was used for transport cost calculations. This is a conservative assumption as this is likely to overestimate prices net of transport costs for these wholesalers.

(477) The resulting 'net prices' (prices net of transport costs) were used for the table below. The table presents the differences between net [redacted] contract prices and net German contract prices as a percentage of the latter.

Figure 31: Gazprom's contract prices net of transport costs - CEE relative to Germany (Wingas and ERG)

Year	[redacted]
2009	
2010	
2011	
2012	
2013	
2014	
Average	

Source: Commission's calculations based on ID 8351 and ID 8957.

(478) The prices net of transport costs in Figure 31 show an even greater difference between German and CEE long-term contract prices than those in Figure 30. The reason is that Gazprom [redacted]

(479) The chart in Figure 32 below shows Gazprom's average CEE contract prices and German average LTC prices, both net of transport costs.

464 Specifically, actual transit costs that were paid by Gazprom or Gazprom subsidiaries were collected from regulators in Slovakia, the Czech Republic, Austria and Poland for 2004-2012. There is a specific [redacted]

Figure 32: Gazprom's long-term contract prices (net of transport costs) – CEE5 relative to Germany

Source: Commission's calculations based on ID 8351 and ID 8957.

(480) The table in Figure 31 shows Gazprom's CEE prices relative to the average of [redacted] and [redacted] LTC prices in Germany. The table in Figure 33 below compares CEE prices with only [redacted] German LTC prices, i.e. excluding [redacted] German LTC prices.

Figure 33: Gazprom's contract prices net of transport costs – CEE5 relative to Germany (only ERG)

Year	[redacted]
2009	
2010	
2011	
2012	
2013	
2014	
Average	

Source: Commission's calculations based on ID 8351 and ID 8957.

(481) As Gazprom charges [redacted] higher prices than it charges [redacted], price differences in Figure 33 are slightly smaller than in Figure 31.

(482) The table in Figure 34 below compares CEE prices with only [redacted] German LTC prices, i.e. excluding [redacted] German LTC prices.

Figure 34: Gazprom's contract prices net of transport costs – CEE5 relative to Germany (only Wingas)

Year	[redacted]
2009	
2010	
2011	
2012	
2013	
2014	
Average	

Source: Commission's calculations based on ID 8351 and ID 8957.

(483) As Gazprom charges [redacted] lower prices than it charges [redacted], price differences in Figure 34 are larger than in Figure 31.

(484) Russian gas exported to the EU is a homogeneous product that is transported in the same manner via pipelines. Further, gas supply contracts do not specify from which source the gas is delivered from. Therefore, Gazprom's production costs should be considered the same for supplying natural gas to any EU Member State. Significant price differences (such as those illustrated in Figure 31) cannot be explained through differences in production costs.

(485) The Commission has also examined whether there are scale economies in the transaction costs of supplying natural gas. However, the transaction costs of negotiating gas supply contracts and the administrative costs associated with the supply are very small relative to the value of gas. [redacted]

10.2.2. CEE prices versus hub prices

10.2.2.1. The TTF hub as relevant benchmark

(486) The second benchmarking method compares Gazprom's CEE prices with hub prices.

(487) Globally, the US has the largest gas production and consumption and it is also considered to be the most competitive gas market. US gas prices, in particular the Henry Hub prices, could serve as a benchmark for competitive prices.[465] However, since no appreciable amount of gas can be traded between the US and the EU due to the long geographical distance between the US and Europe and in view of the different regulatory frameworks the US market may not be a relevant benchmark for CEE gas markets.

(488) Conversely, due to geographic proximity and similarities in the regulatory environment the EU and CEE gas markets can be considered as sufficiently comparable.[466]

(489) The competitive situation of the gas markets within the EU exhibits some similarities but also significant differences. Most of the EU Member States have some domestic gas production but not enough to satisfy domestic demand, thus they rely on imports

[465] Since at least January 2010, prices on the Henry Hub have been substantially lower than on European gas hubs.

[466] Malta and Cyprus constitute, for geographical reasons, an exception.

from outside the EU. The only EU Member State which exports large amounts of gas is the Netherlands.

(490) The most important non-EU suppliers are Gazprom, Statoil and Sonatrach[467]. Together, they cover around 77% of all natural gas imports into the EU (2012 data).[468] Gazprom mostly supplies the CEE countries, Germany, Italy, the UK and France. Statoil sells mostly in Germany, UK and France. Sonatrach's main EU markets are Italy, Spain and France.[469]

(491) The combined market share of the three largest external gas suppliers in the EU is 54% (2013 data).[470] If Dutch GasTerra is included, the market share of the four largest suppliers amounts to 70% (2013 data).[471] This market shares indicate that EU gas markets are highly concentrated and that these suppliers have very significant market power. But even these high market shares do not fully capture the market power of the main suppliers because at least the three largest suppliers (Gazprom, Statoil and GasTerra) are essential for satisfying gas consumption in the EU. None of the three suppliers' output can be fully replaced by any other gas producer without additional investments into pipeline capacity or LNG terminals.

(492) None of the EU gas market prices therefore represent fully competitive prices. Prices reflect the limited (oligopolistic) competition between gas producers.

(493) Within the above limitations the Commission undertook to identify an adequate benchmark. On the major gas hubs transactions are carried out continuously. The overall number of transactions and the total volume of gas exchanged on these hubs ensure that prices properly reflect supply and demand in a large part of the EU. Among the major hubs, the TTF provides the most recognised reference price for continental Europe (see section 9.4). Therefore, the most appropriate hub price benchmark to compare CEE prices with is the price on the TTF. In addition, since Gazprom's prices in Germany were used as a benchmark, the largest German hub, NCG, is also included into the price comparison.[472]

(494) [redacted]

10.2.2.2. The comparison of Gazprom's long-term CEE prices with hub prices

(495) In section 9.4 above, 'day ahead' and 'front month' prices were presented for European hubs. Long-term gas supply contracts usually define prices on a monthly or quarterly basis, i.e. for any given month/quarter the price is the same for every day. In all hub-related CEE contracts, prices are calculated this way.

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467 Sonatrach is an Algerian government-owned gas and oil producer and supplier.

468 Eurostat, Main origin of primary energy imports, EU-27, 2002-2012, ID 8908.

469 Sonatrach, An International Gas Dimension, ID 7099 (8/12), http://www.sonatrach.com/en/PDF/Sonatrach_gas.pdf.

470 All imports originating from Algeria, Russia and Norway were calculated for this figure. Source: Eurostat, datasets nrg_103a, nrg_103m, nrg_124a, downloaded as ID 7264.

471 All imports originating from Algeria, Russia and Norway were added to Dutch primary production to calculate this figure. Source: Eurostat, datasets nrg_103a, nrg_103m, nrg_124a, downloaded as ID 7264.

472 As discussed in section 9.4, prices on the NCG hub closely follow prices on the TTF.

473 [redacted]

(496) Day ahead prices are more volatile as they react more strongly to events affecting supply and demand. Often these events are known to be temporary (e.g. pipline maintenance, drop in temperature) thus they have no or little effect on prices further in the future. Temporary increases or decreases of day-ahead prices due to short-term events do not reflect fundamental changes in supply and demand for natural gas and thus are of lower significance for long-term supply contracts. [redacted]

(497) Front month prices are determined every trading day for the following month. It is possible to use any of the front-month prices (e.g. the one determined on the first or last trading day) for comparison with Gazprom's CEE prices.[475] However, in order to retain the most information the Commission considers that the average of all daily front-month prices is the most appropriate value for price comparisons.

(498) A comparison of average front month prices on the main EU hubs with Gazprom's average CEE prices reveals significant differences with the long-term contract prices in excess of hub prices since 2007 (i.e. since hub prices became widely accepted price signals, see section 9.4). In the period 2009-2014, long-term contract prices in CEE were up [redacted] higher than TTF hub prices.[476]

(499) The following chart compares the average CEE prices and the TTF front month prices.

474 [redacted]

475 [redacted] In the Polish price formula, the index published on the last working day of the month before the relevant delivery month is used. See Annex 40 of 5 November 2012 to the Polish gas supply contract between PGNiG and Gazprom Export, ID 3919.

476 [redacted]

Figure 35: CEE5 prices compared to TTF prices (2007-2014)

Source: Commission's calculations, based on ID 8351

(500) Until the end of 2006, prices in the [redacted] were below TTF front month prices. In 2007, when the TTF had already sufficient liquidity for its prices to be perceived as market prices this changed dramatically: the large price decrease on TTF was not followed by prices in the [redacted]. As a result, average prices in the five CEE countries in 2007 were up to [redacted] above the TTF price. After a short period of convergence, prices diverged again from around mid-2008. Since then prices in the [redacted] have been constantly higher than TTF front month prices.

(501) The following chart illustrates average prices in the [redacted] as percentage of TTF front month prices.

Figure 36: Price difference between Gazprom's CEE5 prices and TTF front month prices (2007-2014)

Source: Commission's calculations, based on ID 8351.

(502) During the period January 2009 to December 2014 wholesalers in the [redacted] paid on average [redacted] more for the gas they received from Gazprom than if they had paid the TTF price. Calculated on the basis of gas volumes delivered by Gazprom to the wholesalers concerned this price difference amounts to around EUR [redacted]

(503) The table below shows the yearly differences between CEE contract prices per country and TTF front month hub prices as a percentage of hub prices.

Figure 37: Gazprom's contract prices – CEE5 relative to TTF front month prices

Year	[redacted]
2009	
2010	
2011	
2012	
2013	
2014	
Average	

Source: Commission's calculations, based on ID 8351.

(504) The Commission also compared prices in the [redacted] with hub prices in Germany. As NCG and TTF prices move very closely together, the results of the comparison between NCG and CEE prices were very similar to the above results.

(505) As a result of contract prices being above NCG front month prices, Gazprom made extra profits of [redacted] over the period January 2009 – December 2014 in the five CEE countries and the average mark-up over the NCG price was [redacted].

(506) The following graph shows Gazprom's prices in the [redacted] in comparison with Gazprom's German prices, TTF hub prices and Gazprom's costs. [redacted]

Figure 38: Gazprom's long-term contract prices (net of transport costs and export duty) in CEE5 compared to the three benchmarks

[redacted]

Source: Commission's calculations ID 8954, ID 8957 and ID 8351.

11. PRICING METHODS (AND THEIR RELEVANCE FOR CEE)

11.1. Oil-indexation

(507) The CEE prices described in section 9.1 are set on the basis of price formulae in the individual gas supply contracts between Gazprom and its CEE customers. A common element of Gazprom's LTC price formulae in CEE Member States is that the formulae make reference to the price of fuel oil and gasoil (see section 7.2.5 above).[477]

11.1.1. Historic reasons for oil-indexation

(508) Oil-indexation was adopted in LTCs for natural gas for the following main historical reasons.

(509) First, oil-indexation for gas prices was introduced in the Netherlands in the 1960s after the first gas fields had been discovered there. Oil-indexation was used because no gas markets and hence no gas prices existed. The development of gas fields and the construction of gas transportation infrastructure required large investments. Not having a (generally accepted) market price for gas would have made such

477 [redacted]

investments too risky because producers could not expect the market conform cash-flow and return on investment.

(510) Second, gas, an emerging fuel, was competing directly with oil products in some areas (e.g. heating, power generation). In this situation, oil-indexation enabled wholesalers to sell on the gas in downstream markets at a price that was competitive with respect to oil. For heating, industrial processes and, to a lesser extent, in power generation the main competing fuels were gasoil and fuel oil. In power generation coal was often the main competing fuel. As a result, in some cases gas prices are partially linked to coal prices.

(511) Third, natural gas was initially produced as a by-product of oil which meant that oil and gas shared the costs of exploration and development and of production.

11.1.2. Oil-indexation is no longer relevant

(512) The original rationale for oil-indexation has largely disappeared in Europe since at least the 1990s.[478]

(513) There are now functioning market places (gas hubs) where the price of gas is determined. Gas hubs provide reliable price signals reflecting supply and demand for gas and the availability of transportation as well as storage infrastructures.

(514) Inter-fuel competition between oil and gas is today very limited. Most users of natural gas have no real choice to switch to oil and *vice versa*. This results in a demand for natural gas that is independent of the demand for oil.

(515) Natural gas sold in Europe is not a by-product of oil production but comes from dedicated gas fields (which produce very little oil). This means that gas and oil do not necessarily share the same production costs. The two fuels also have very different costs of processing and transportation.[479]

11.1.2.1. Limited short- and mid-term substitutability between oil and gas

(516) Oil and natural gas are primary energy sources which can, in theory, be used for the same purposes. In practice, however, oil and natural gas are largely used for distinct purposes.

(517) The figure below shows the composition of the primary energy entering the energy system of the EU in 2010, and where this primary energy was used, either as consumption or as transformation losses by specific sectors of the economy.

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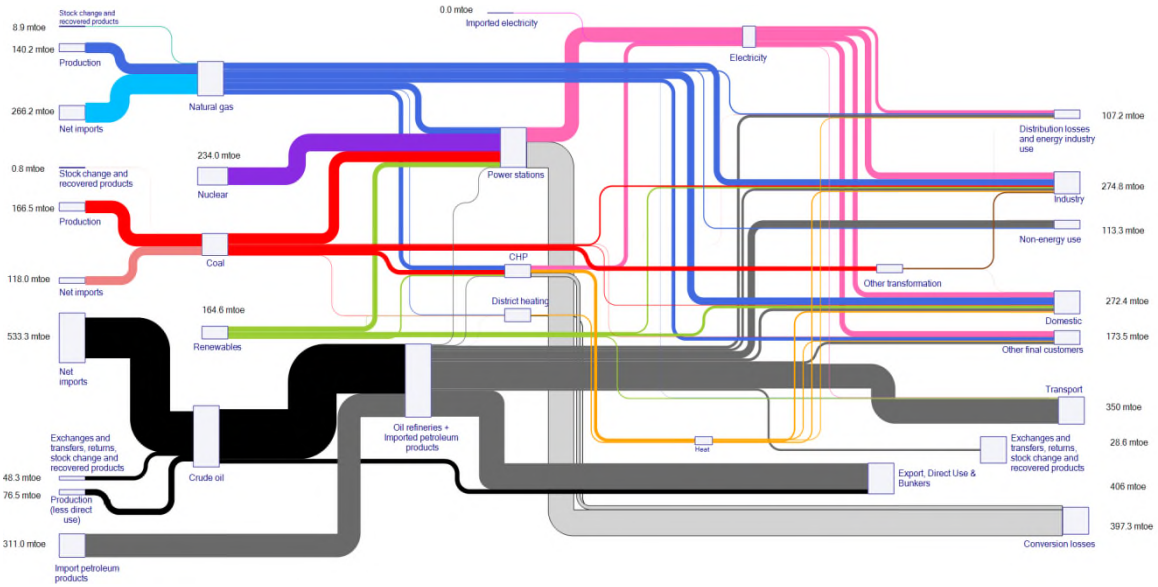
478 A large body of academic literature supports this claim. See, for example, Jonathan P. Stern, 'Is there a rationale for the continuing link to oil product prices in continental European long-term gas contracts?', International Journal of Energy Sector Management 2007, Vol. 1 Iss: 3 pp. 221 – 239, (ID 5823); Jonathan P. Stern, 'Continental European Long-Term Gas Contracts: is a transition away from oil product-linked pricing inevitable and imminent?', Oxford Institute for Energy Studies September 2009, (ID 5824); Jonathan Stern and Howard Rogers, 'The Transition to Hub-Based Gas Pricing in Continental Europe', Oxford Institute for Energy Studies March 2011, (ID 5825); Miharu Kanai, 'Decoupling the Oil and Gas Prices: Natural Gas Pricing in the Post-Financial Crisis Market', Institut Français des relations Internationales (IFRI) May 2011, (ID 5821) and Patrick Heather, 'Continental European Gas Hubs: Are they fit for purpose?', Oxford Institute for Energy Studies June 2012, (ID 5828).

479 Ramberg, David J. and Parsons, John E., The Weak Tie Between Natural Gas and Oil Prices, The Energy Journal 2012, Vol. 33, No. 2., ID 6802 (5/25)

Figure 39: Overall picture of the energy system in the EU



Source: European Environment Agency, ID 6910

(518) Primary energy input is shown on the left hand side and final energy consumption on the right hand side. Oil is depicted in black and gas in blue. The above graph illustrates that there is almost no overlap in the usage of these two energy sources. Oil is primarily used for transportation whereas natural gas is used for heating, power generation and by industry.

(519) The greatest potential for substitution between oil and gas is in the electricity sector. Oil and gas used to be competing fuels in power generation. However, substitutability has declined substantially: the installed capacity of oil-fired power plants in the EU decreased from around 10.2% of the total generation capacity in 2000 to around 6.4% in 2010. [480]

(520) Electricity production by oil-fired power plants has dropped even lower, to 2.2% of total electricity production in 2011 (see Figure 40). This is because oil fired power plants are usually not profitable and many of the existing oil-fired plants are kept only as backup generation capacity.

(521) In parallel, the share of electricity produced from gas has more than doubled between 1990 and 2011 (from 8.6% to around 22.2%, see Figure 40). This growth has been influenced by the liberalisation of electricity markets and the implementation of environmental legislation, such as the Large Combustion Plant Directive[481] and the requirements for investing in pollution abatement technologies to lower emissions of air pollutants such as SO2 and NOx. Low gas prices for much of the 1990s and investment in transportation infrastructure have also contributed to the increased use of gas in power generation.

480 Commission's calculations based on Eurelectric, Power Statistics & Trends 2011, Synopsys, ID 6697 (15/25).

481 The overall aim of the Large Combustion Plant Directive (LCP Directive) is to reduce emissions of acidifying pollutants, particles, and ozone precursors. The LCP Directive entered into force on 27 November 2001.

Figure 40: Gross electricity generation by fuel in the EU

Share of Total (%)	Nuclear	Solid Fuels	Gases	Renewables	Petroleum and Products
1990	30.7	39.4	**8.6**	12.5	**8.6**
1991	31.2	38.9	**8.2**	12.8	**8.7**
1992	31.6	37.3	**8.1**	13.5	**9.1**
1993	33	35.6	**9.1**	13.8	**8.3**
1994	32.3	35.2	**10.1**	14	**8**
1995	32.2	34.6	**10.7**	13.8	**8.3**
1996	32.7	33.7	**12**	13.3	**7.9**
1997	32.9	31.7	**13.8**	13.7	**7.4**
1998	32	31.3	**14.5**	14.2	**7.4**
1999	32.1	29.9	**16.6**	14.2	**6.8**
2000	31.2	30.8	**16.9**	14.6	**5.9**
2001	31.5	30.2	**17**	15.1	**5.5**
2002	31.6	30.4	**17.7**	13.8	**5.9**
2003	30.9	31.4	**18.4**	13.6	**5.1**
2004	30.7	29.9	**19.7**	14.6	**4.4**
2005	30.1	29.2	**21**	14.7	**4.2**
2006	29.5	29.4	**21.3**	15.3	**4**
2007	27.8	28.5	**22.9**	16.2	**3.3**
2008	27.8	26.6	**24**	17.4	**3.1**
2009	27.9	25.6	**23.5**	19.3	**3**
2010	27.4	24.8	**23.6**	20.9	**2.6**
2011	27.6	25.9	**22.2**	21.3	**2.2**

Source: Eurostat[482]

(522) In CEE countries the relevance of oil as fuel in power generation has become marginal.[483] The table below shows the share of oil ('petroleum and products') and natural gas ('gases') in electricity generation in CEE countries in 2011. The figures show that with the exception of Lithuania (4.2%) oil plays no role in CEE power generation (less than 1% in five CEE countries). Natural gas, on the other hand, is an important fuel in power generation which in turn makes up a significant part of the overall demand for natural gas.

[482] EU Energy Figures, Statistical Pocketbook 2013, Eurostat, ID 7037 (43/129), http://ec.europa.eu/energy/publications/doc/2013_pocketbook.pdf.

[483] '*Oil-fired generating units are still used for peaking purposes, i.e. in times of high electricity demand. Furthermore, some countries, especially small island systems such as Malta, Cyprus and many non-interconnected islands of Greece still rely on oil to generate their electricity, although a shift towards gas is envisaged*.' Source: Eurelectric, Power Statistics & Trends 2011, Synopsys, ID 6697 (15/25).

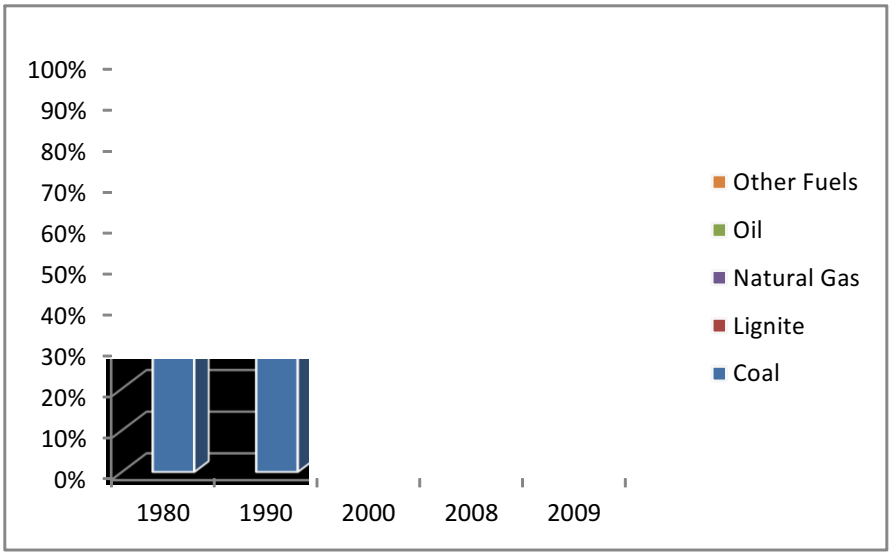
Figure 41: Gross electricity generation by oil and gas in CEE (2011)

Share of Total (%)	Petroleum and Products	Gases
BG	0.2%	4.1%
CZ	0.1%	4.6%
EE	0.0%	5.4%
LV	0.0%	49.2%
LT	4.2%	56.3%
HU	0.3%	30.0%
PL	1.5%	4.5%
SK	2.1%	12.5%
Average	**1.0%**	**20.8%**

Source: Commission's calculations based on Eurostat data[484]

(523) The chart below shows the development of fuel usage in electricity generation in CEE. As can be seen, oil was never an important fuel for power generation in CEE. Coal and lignite have played the most important role in these countries.

Figure 42: Fuel consumption for electricity generation in CEE



Source: Eurelectric[485]

(524) The International Energy Agency (IEA) confirms that the potential for short-term switching between oil and gas in power generation is non-existent or at best limited in CEE Member States.[486]

(525) For example, in case of the Czech Republic, the IEA finds that '*The potential for short-term switching out of gas into other fuel is limited. In the transformation sector, most gas-fired power stations are used for meeting peak electricity demand*

484 EU Energy Figures, Statistical Pocketbook 2013, Eurostat, ID 7037 (42/129), http://ec.europa.eu/energy/publications/doc/2013_pocketbook.pdf

485 Eurelectric, Power Statistics & Trends 2011, Full report, data is only available for Bulgaria, Hungary, the Czech Republic, Poland, Latvia and Lithuania, country data on several pages, starting from p. 114, ID 5814.

486 See IEA country publications *Oil and Gas Emergency Policy* (individual references below).

and do not have the capacity to switch fuel sources.'[487] For switching from oil to other fuels the IEA's conclusion is similar.[488]

(526) The conclusion for switching from oil to gas in power generation in Slovakia is similar: '*The potential to switch in the short term away from the use of oil to another fuel source is inconsequential in the Slovak Republic. The bulk of oil consumption (50%) is in the transport sector, where there is no capacity for short-term switching. Oil used in power plants is for the stabilization of production, rather than electricity generation or heat generation, and therefore offers no opportunity for potential fuel switching.*'[489] For switching from gas to other fuels the IEA's conclusion is similar.[490]

(527) In Poland, '*fuel switching capacity in the transformation sector is estimated to be insignificant. The share of oil as fuel for power generation in Poland was only 1.5% in 2008.*'[491]

(528) In case of Hungary, the IEA concludes that '*there is virtually no ability to switch from oil to other fuels. A limited amount of fuel switching from natural gas to oil exists.*'[492]

(529) Heat generation for industrial processes and heating of residential and commercial properties constitutes a significant part of energy consumption. Both oil and gas can be used for heat generation. However, this does not mean that there is any short to medium term substitutability.

(530) The table below shows that the main fuel for heat generation in the EU is gas followed by solid fuels (mostly coal and lignite). Oil has, with just above 6%, a relatively low and decreasing share. In CEE oil generates only 2.7% of the total heat output.

(531) As far as heating is concerned, oil was never the predominant heating fuel in CEE. For example, in Poland and the Czech Republic coal/lignite have been used.[493] This means that gas fuelled heating substituted coal/lignite rather than oil.

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487 International Energy Agency, *Oil and Gas Secutity, Emergency Response of IAE countries, Czech Republic*, 2010, ID 7041 (18/19).

488 International Energy Agency, *Oil and Gas Secutity, Emergency Response of IAE countries, Czech Republic*, 2010, ID 7041 (14/19).

489 International Energy Agency, *Oil and Gas Secutity, Emergency Response of IAE countries, Slovak Republic*, 2011, ID 7042 (14/19).

490 International Energy Agency, *Oil and Gas Secutity, Emergency Response of IAE countries, Slovak Republic*, 2011, ID 7042 (18/19).

491 International Energy Agency, *Oil and Gas Secutity, Emergency Response of IAE countries, Poland*, 2011, ID 7040 (12/19).

492 International Energy Agency, *Oil and Gas Secutity, Emergency Response of IAE countries, Hungary*, 2012, ID 7039 (16/24).

493 For example, in Poland in 2009 households covered only 0.6% of their energy needs (excluding car fuels) from oil, ID 6364 (65/126).

Figure 43: Gross heat production by fuel (2011)

Share	Gross Heat Generation	Gases	Solid Fuels	Renewables	Petroleum and Products	Nuclear	Other
EU-27	100%	42.8%	28.5%	16.5%	6.1%	0.2%	5.9%
BG	100%	48.6%	39.0%	0.3%	5.3%	1.5%	5.1%
CZ	100%	29.8%	62.2%	3.8%	1.1%	0.7%	2.4%
EE	100%	47.2%	16.6%	31.0%	5.2%	0.0%	0.0%
LV	100%	80.8%	1.2%	16.0%	2.0%	0.0%	0.0%
LT	100%	58.0%	0.4%	17.4%	2.0%	22.2%	0.0%
HU	100%	83.6%	6.7%	7.1%	0.4%	1.0%	1.0%
PL	100%	10.1%	81.9%	5.0%	1.9%	1.1%	0.0%
SK	100%	46.2%	25.6%	10.5%	12.1%	5.0%	0.7%
CEE		**31.8%**	**54.8%**	**7.0%**	**2.7%**	**2.7%**	**1.0%**

Source: Commission's calculations based on Eurostat data[494]

(532) A large number of households and businesses that used oil heating have switched to gas heating and no reverse trend is to be observed.[495] Switching from oil to gas heating requires significant investments. After incurring such investment costs, households and businesses are unlikely to switch back to oil heating. Switching back to oil heating is also discouraged by environmental regulation. Therefore, the residential sector is a captive market because the customers' switching decision determines their use of fuel for the future.

11.1.2.2. Demand and supply for oil and gas

(533) Oil markets are global in nature because oil can be transported to most destinations at reasonable costs over long distances. The Brent crude oil benchmark is used in around 60% of the world's crude oil contracts despite the fact that the benchmark is based solely on the price of North Sea crude oil.[496]

(534) On gas markets there is no global benchmark. Gas can be transported through pipelines or on LNG carriers but due to the much lower energy density of gas both methods are more expensive than transporting oil. Road transportation over long distances is prohibitively expensive which also limits the flexibility of delivering gas. This results in regional gas markets.

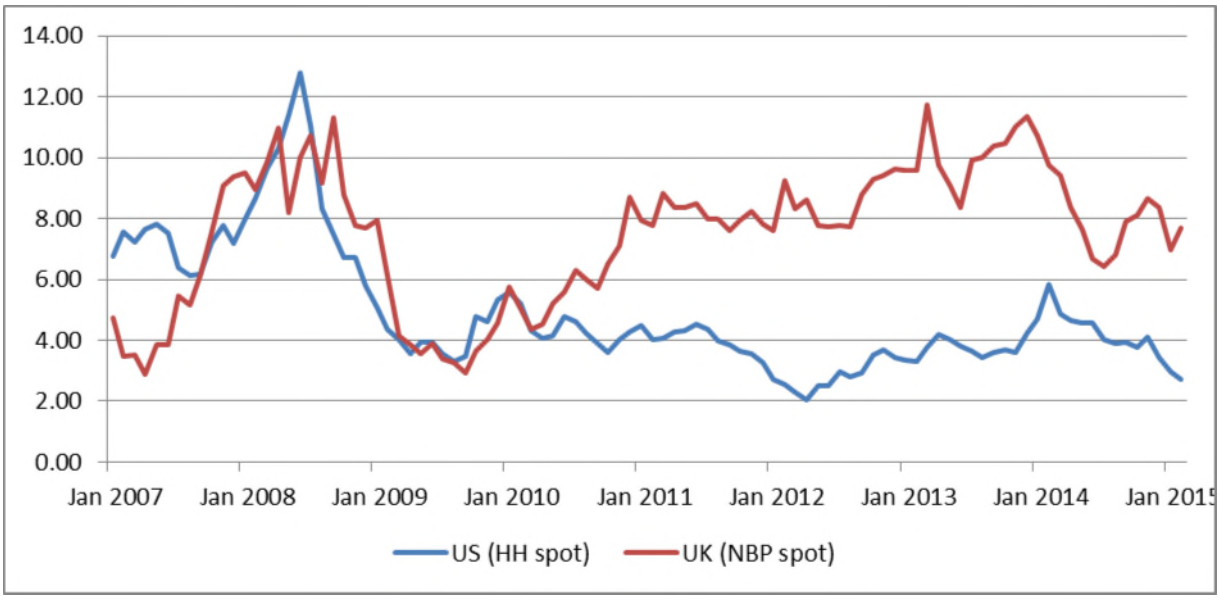
(535) The chart below shows the evolution of US and UK gas hub prices. In the US, gas supply expanded significantly as a consequence of large-scale domestic production of shale gas. This resulted in the divergence of US and UK prices.

494 EU Energy Figures, Statistical Pocketbook 2013, Eurostat, ID 7037 (51/129), http://ec.europa.eu/energy/publications/doc/2013_pocketbook.pdf.

495 For example, in Hungary, the share of households connected to the natural gas network has nearly doubled from 42% in 1990 to almost 80% in 2010. See data from the Hungarian Statistical Office, ID 5817.

496 ICE Crude and Refined Products, ID 7126 (1/10), https://www.theice.com/publicdocs/ICE_Crude_Refined_Oil_Products.pdf.

Figure 44: US and UK hub prices



Source: Thomson Reuters and Platts, see ID 8956.

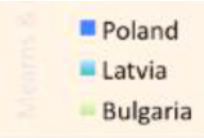
(536) When demand for oil increases in Asia oil prices increase globally. Increased demand for gas in Asia does not or only marginally affect gas prices in other regions, e.g. Europe, North America. Similarly, political turmoil in an oil exporting country may reduce supply and thus push up oil prices globally, as happened during the Gulf Wars in 1990 and 2003.

(537) An interruption of gas supplies affects gas prices only regionally. For example, when gas supplies by Gazprom to Europe were interrupted in 2009 gas prices in Europe increased but US prices remained stable since there is no real connection between the markets.

(538) Oil and gas do share some common factors that influence their demand. In particular, economic growth and income are important drivers for both oil and gas demand. During times of increasing economic output, demand for gas by industrial users increases and demand for oil by industrial users and by the transport sector increases as well. The opposite is valid for economic recessions.

(539) Other factors influencing demand for oil and gas are unrelated. For example, during cold winters demand for gas for heating purposes increases. Demand for oil is generally not affected by cold temperatures because the proportion of oil (fuel oil and gasoil) used for heating puposes is low. The below chart shows that oil consumption in the Member States that joined the EU since 2004 actually peaks during the summer.

Figure 45: Total oil products consumption in new EU Member States



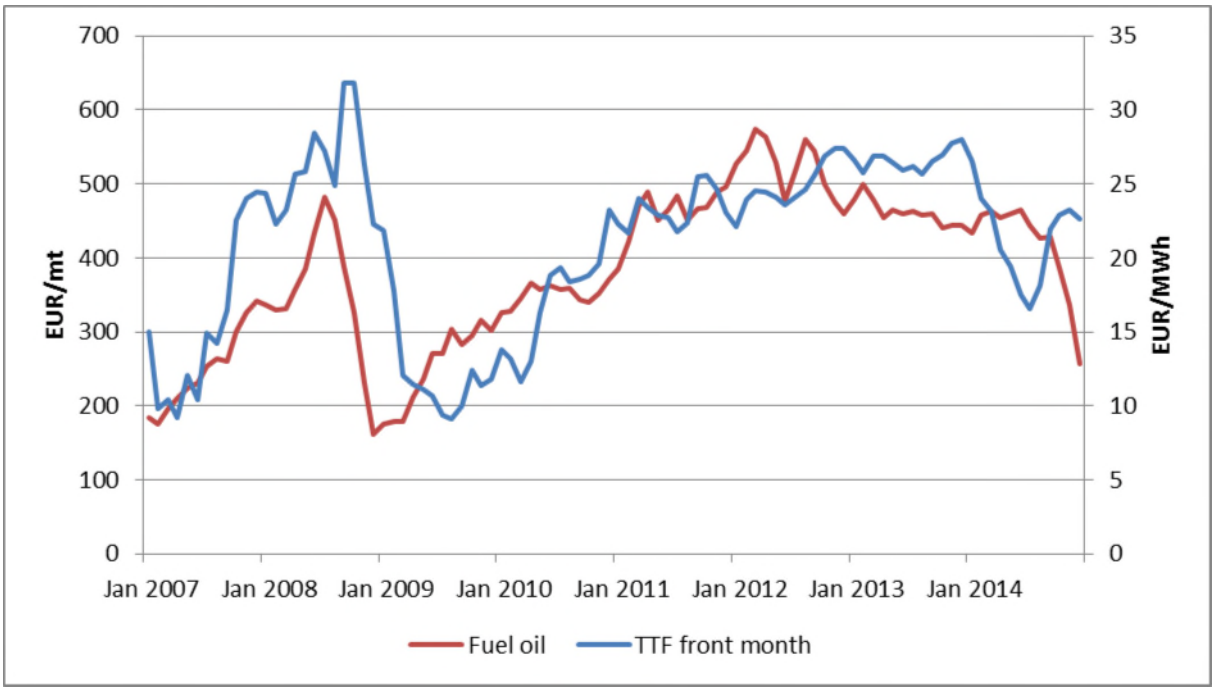
Source: The Oil Drum[497]

11.1.2.3. Evolution of oil and gas prices

(540) Since at least 2007, European hub prices have become relevant price indicators for gas markets (see section 9.4 above). This means that at least from this time onwards gas could be priced on its own merit, without the necessity to index it to another product, namely fuel oil and gasoil.

[497] The Oil Drum, ID 7127, http://www.theoildrum.com/node/9713.

Figure 46: Gas hub and fuel oil prices



Source: Platts and Argus, see IDs 8351 and 8956

(541) Figure 46 shows similar patterns in long-term evolution of TTF hub prices and the price of fuel oil which could indicate some relationship between the two prices. Indeed, as both gas and oil are energy products some long-term relationship between the two prices can be expected. However, Figure 46 also shows that any short- to medium-term relationship between fuel oil and TTF prices is weak because prices of the two commodities follow very different patterns for several months at a time (e.g. one decreasing and the other increasing, etc.). It is also supported by recent academic studies. A study by the MIT Center for Energy and Environmental Policy Research analyses historical US price data and finds that there is a weak link between natural gas and oil prices.[498]

(542) In particular, the paper concludes that '*First, there is an enormous amount of unexplained volatility in natural gas prices at short horizons. Hence, any simple formulaic relationship between the prices* [of oil and gas] *will leave a large portion of the natural gas price unexplained. Second, the cointegrating relationship does not appear to be stable through time. The prices may be tied, but the relationship can shift dramatically over time. Therefore, although the two price series may be cointegrated, the confidence intervals for both short and long time horizons are large.*'[499]

(543) Another study by the University of Stavanger using UK gas prices finds that there was a change in the relationship between oil and (UK) gas prices both in 2006 and 2007. The authors also find that the evidence for oil and gas prices moving together is much weaker after 2007.[500]

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498 David J. Ramberg and John E. Parsons, The Weak Tie Between Natural Gas and Oil Prices, The Energy Journal, Vol. 33, No. 2., 2012 ID 6802.

499 David J. Ramberg and John E. Parsons, The Weak Tie Between Natural Gas and Oil Prices, The Energy Journal, Vol. 33, No. 2., 2012 ID 6802.

500 Dahl et al., 'Are oil and natural gas going separate ways in the United Kingdom? Cointegration tests with structural shifts', The Journal of Energy Markets 2012, ID 6911.

(544) A. Medvedev also recognised in a meeting of Europol's supervisory board that the link between oil and gas prices is weak: '*there is no direct correlation between price of oil and price of gas.*'[501]

(545) In view of the above, namely the limited short- and medium-term substitutability between oil and gas, the different patterns of demand and supply for oil and gas and the weaker link between oil and gas prices, the reasons that originally led to the introduction of oil-indexation for gas prices have to a large extent disappeared.

11.2. Alternative pricing methods

(546) Oil-indexation used to be a widely applied industry practice. However, there have been significant changes in gas markets over the past decade, in particular the emergence of gas hubs.

(547) Other producers, but also Gazprom itself in other markets such as the UK and Germany, have been using pricing methods other than oil-indexation. In the UK, the most competitive European gas market, oil-indexed contracts cover barely 10% of consumption.[502] In continental Europe, the proportion of oil-indexed gas volumes was considerably higher in 2012, above 30% in North-Western Europe[503] decreasing to 20% in 2013. Share of oil-indexed gas volumes also decreased in Central Europe in 2013 to 35%. In other areas of Europe oil-indexation remained predominant with 85% to 100% share.[504]

(548) Alternatives to oil-indexation can be grouped into four main sets of pricing mechanisms: full hub pricing, hub-related pricing, partial hub-related pricing and other pricing mechanisms.

(549) **Full hub pricing** means that natural gas is sold through LTCs at the price set on gas hubs. The hub price that is referenced can either be the spot price (average of daily quotations) or the price of a forward product (day ahead, month ahead, quarter ahead, year ahead, etc.). In some cases, the price of a particular gas hub is referenced. In other cases, the reference price is the average of the price on more than one gas hub.

(550) **Hub-related pricing** can take many forms. The simplest form of this pricing method is when LTC contract prices equal hub prices plus a (positive or negative) premium. Another hub-related pricing practice is the hub-price corridor, where the price of oil-indexed contracts is constrained in an interval around the price of gas hubs (e.g., the hub price +/- EUR 3). A third hub-related pricing practice is hub-indexation, where, similarly to oil-indexation, there is a base price and this base price is adjusted in accordance with price changes on a reference gas hub. If the base price is set at the hub price of the base period, hub-indexation leads to the same result as full hub pricing.

(551) **Partial hub-related pricing** is a pricing method when hub-pricing or hub-related pricing is applied to less than 100% of the contractual volumes.

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501 Transcript of recording of Europol's Supervisory Board meeting of 18 November 2009, ID 595 (8/47).

502 Melling 2010, ID 5822 (20/130).

503 International Gas Union, Wholesale Gas Price Survey - 2013 Edition, ID 7038 (8/33) http://www.igu.org/gas-knowhow/publications/igu-publications/Wholesale%20Gas%20Price%20Survey%20-%202013%20Edition.pdf.

504 International Gas Union, Wholesale Gas Price Survey 2014, ID 8890 (25-26/33), http://igu.org/sites/default/files/node-document-field_file/IGU_GasPriceReport%20_2014_reduced.pdf Central Europe includes: Czech Republic, Hungary, Poland and Slovakia; other areas of Europe include: Bulgaria, Estonia, Latvia and Lithuania.

(552) **Other pricing** mechanisms include fixed-price contracts and when LTC prices are indexed to other energy products than oil or gas (like coal, wood pellet, electricity, etc.) or to other statistics (such as inflation, energy inflation, economic growth, etc).

11.2.1. Alternatives used by other producers

(553) Northwest Europe has seen the most dramatic change in price formation mechanisms, with a complete reversal from 72% oil-indexation and 27% gas market prices in 2005 to 28% oil-indexation and 72% gas pricing in 2012, as a result of increased hub trading and contract renegotiations, as noted above, most notably in the Netherlands where hub pricing became universal by 2012.[505]

(554) The Dutch producer GasTerra since at least 2007 offers its customers a choice of pricing methods ranging from contracts linked to spot market prices to fixed-priced contracts.[506]

(555) The Norwegian producer Statoil has publicly stated in 2012 that it is changing the pricing method in its contracts from oil-indexation to alternative pricing methods.[507] In a presentation to the European Commission, Statoil showed that in 2012 around half of its gas portfolio was priced with reference to hubs while the other half was oil-indexed. Statoil also envisages further transition to hub-pricing: by 2015, around 75% of its gas portfolio will be sold at hub-based prices.[508] In a recent interview Statoil stated that 75% of Statoil's portfolio is sold at hub prices while oil-indexed contracts account for only 15% of sales' volumes (the remaining 10% is indexed to other products such as coal and electricity).[509]

(556) Gazprom's 2012 annual report also makes reference to Statoil's pricing strategy: '*Norway is actively moving to 100% gas-indexed pricing, which contributes to expansion of its customer base.*'[510]

11.2.2. Alternatives used by Gazprom in Western Europe

(557) In the UK, most gas is sold through short- and medium-term contracts. Long-term contracts on the UK market usually have three-year duration. [redacted]

(558) [redacted]

505 International Gas Union, Wholesale Gas Price Survey - 2013 Edition, ID 7038 (8/33) http://www.igu.org/gas-knowhow/publications/igu-publications/Wholesale%20Gas%20Price%20Survey%20-%202013%20Edition.pdf.

506 GasTerra website, ID 6460.

507 Quarterly Report on European Gas Markets, Market Observatory for Energy, DG Energy, Volume 5, issue 4, Fourth quarter 2012, p.18, ID 7043 http://ec.europa.eu/energy/observatory/gas/doc/quarterly_report_on_eu_gas_markets_q4_2012.pdf.

508 Statoil's Presentation on Long Term Gas Sales Agreements to the Commission of 18 April 2013, ID 6278 (16/20).

509 Reuters press article of 30 August 2014, ID 8380.

510 Gazprom Annual Report 2012 p. 76, ID 6632.

511 Reuters press article of 20 September 2012, ID 5894.

512 [redacted]

[redacted]

(559) [redacted]

(560) [redacted]

(561) [redacted]

(562) [redacted][7]

11.2.3. Alternatives used by Gazprom in CEE markets

(563) As will be shown in the following, Gazprom also introduced some hub-related alternatives to oil-indexation in CEE in [redacted] and Poland. Further, as a result of a [redacted]

11.2.3.1. [redacted]

(564) [redacted]

513 [redacted]

514 [redacted]

515 [redacted]

516 [redacted]

517 [redacted]

518 [redacted]

[redacted]

(565) [redacted]

11.2.3.2. [redacted]

(566) [redacted]

11.2.3.3. The Polish hub-related formula

(567) In Poland, PGNiG was granted a partially hub-related price formula as of 2012. The pricing formula is similar to the corridor formula of ERG and Wingas in Germany. It is an oil-indexed price but a percentage of the price moves in a corridor around the hub price. Between January-July 2012, for 40% of the volumes under the long-term contract the maximum increase linked to oil indexation was limited to 2.5 EUR/MWh. As of July 2012, the share of gas priced according to this method was increased to 50%.[523]

(568) Despite the introduction of the partial hub related price-capping in the Polish gas supply contract, prices remained well above German prices. The reason was that a smaller share of gas is priced in relation to hub (50% versus 60%) and that the purely oil-indexed part of the formula leads to higher prices in Poland than in the case of Wingas or ERG (which are also linked to coal).

11.2.3.4. [redacted]

(569) [redacted]

519 [redacted]

520 [redacted]

521 [redacted]

522 [redacted]

523 Annex 40 of 5 November 2012 to the Polish gas supply contract, ID 3919.

adjusted in line with changes [redacted]

(570) [redacted]

11.3. Price re-negotiations in Bulgaria, Estonia, Latvia, Lithuania and Poland

(571) [redacted]

(572) [redacted]

(573) [redacted]

524 [redacted]

525 [redacted]

526 [redacted]

[redacted]

11.3.1. Bulgaria

(574) [redacted]

(575) [redacted]

(576) [redacted] (see section 12).

(577) [redacted]

(578) [redacted]

(579) [redacted]

527 [redacted]

528 [redacted]

529 [redacted]

530 [redacted]

531 [redacted]

532 [redacted]

533 [redacted]

534 [redacted]

11.3.2. Latvia

(580) [redacted]

(581) [redacted]

(582) [redacted]

11.3.3. Lithuania

(583) [redacted]

(584) [redacted]

(585) [redacted]

535 [redacted]

536 [redacted]

537 [redacted]

538 [redacted]

539 [redacted]

540 [redacted]

541 [redacted]

542 [redacted]

(586) [redacted] (also see paragraph (413)).[543]

(587) [redacted]

11.3.4. Poland

(588) In Poland, PGNiG first signalled its wish to incorporate hub pricing into the pricing formula in 2010. It made a formal price revision request on 31 March 2011. In its request, PGNiG argued that it wanted to incorporate a hub element into the price in order to reflect the fundamental change of circumstances that had occurred in the energy market in Europe and because the price of raw material from the Yamal Contract did not reflect the level of prices on the European energy market. As negotiations did not progress, PGNiG updated its request on 10 February 2012 and asked for a price formula with 70% hub pricing.[545]

(589) Gazprom argued during the negotiations of 2011-2012 that gas which is sold on hubs is a product other than gas sold in the long-term contracts and that the application of hub-prices would be against the intention of the Polish gas supply contract.[546]

(590) No agreement could be reached and PGNiG initiated formal arbitration proceedings against Gazprom on 20 February 2012.[547]

(591) Later in 2012 Gazprom accepted to mitigate the risk incurred by PGNiG and the two companies signed an amendment on 5 November 2012[548] introducing a new price formula into the gas supply contract between PGNiG and Gazprom that caps the increase of the gas price resulting from an increase of oil prices (corridor mechanism) starting in January 2012. For the first half of 2012 the base price, P_0 was further reduced and 40% of price was constrained by a +/-2.5 EUR corridor around the hub price. In July 2012 the corridor was extended to 50% of volumes. The amendment also included retroactive rebates for November-December 2011.

543 [redacted].

544 [redacted]

545 PGNiG's reply of 17 September 2012 to the Commission's information request of 20 July 2012, ID 7918 (20/46).

546 PGNiG's reply of 17 September 2012 to the Commission's information request of 20 July 2012, ID 7918 (20/46).

547 PGNiG's reply of 17 September 2012 to the Commission's information request of 20 July 2012, ID 7918 (20/46).

548 Annex 40 of 5 November 2012 to the Polish gas supply contract, ID 3919.

Figure 47: Gazprom's response to requests to revise prices

Country	Wholesaler	Date of request	Gazprom's reply
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
Poland	PGNiG	November 2011	Base price adjustment as of November 2011. Corridor mechanism for 40% of contract volumes as of 1 January 2012 and 50% as of 1 July 2012. Agreement was reached under a condition that PGNiG would withdraw its complaint from the arbitration tribunal.

11.4. Gazprom's price formulae based on oil-indexation resulted in excessive prices

(592) Contracting parties may choose to link (index) contract prices to the prices of other products. In case of long-term gas contract price formulae, gas is still indexed in some contracts in particular to fuel oil products even if the original reasons for oil-indexation in gas supply contracts may no longer be valid (see section 11.1.2). If oil-indexation is chosen by the contracting parties, indexed prices may fluctuate above or below the chosen benchmark price but, in contracts where the supplier has a dominant position, on average such fluctuations should not result in a price that benefits mainly or exclusively only that supplier.

(593) However, the oil-indexed gas price formulae in Gazprom's contracts in the [redacted] (described in section 9.1) during the relevant period, i.e. as of 2009, one-sidedly benefitted Gazprom. This happened because, as a result of the application of the price formulae, for different fuel oil price levels contract prices would – with very few exceptions – consistently and significantly exceed the average TTF hub prices (see below).

(594) An oil-indexed gas price formula is a mathematical relationship between the gas contract price and the price of one or several oil products, i.e. for any given price level of the oil product (e.g. fuel oil price) there is a corresponding contract price (see section 7.2.5). This is a 'definite' relationship, i.e. for each level of fuel oil price there is only *one* gas contract price.

(595) While fuel oil prices and TTF hub prices follow very different patterns at times and the short- to medium-term relationship is weak (see paragraphs (541) to (545)), a certain statistical relationship can nevertheless be observed on the basis of historical/observed data. While this does not result in a 'definite relationship' between fuel oil prices and TTF hub prices as in the case of the application of the price formula, it allows for determining the average TTF hub price for each level of fuel oil prices. Thus, on the basis of historical data, for each level of fuel oil prices the average TTF gas hub price can be established.

(596) In order to establish whether a gas price formula benefits more one contracting party than the other, for each possible fuel oil price, the corresponding gas contract price can be compared with the average gas hub price. If, for all or most possible fuel oil price levels gas contract prices significantly exceed the average gas hub price, then the formula is likely to benefit more the seller of the gas and will most likely lead to excessive prices. This is what happened in the [redacted] at least as of 2009. The charts below demonstrate this finding.

(597) The TTF hub curve (dashed line) in the charts represents the average relationship between the TTF gas hub price and the fuel oil price. The curve shows the average TTF hub price for different fuel oil price levels. The relationship was determined on the basis of historical data.[549]

(598) The other curves represent Gazprom's different contract price formulae in a given country.[550] A given solid line shows the exact relationship between fuel oil and gas contract prices, i.e. for any given level of fuel oil price the corresponding gas contract price is shown. The dates in the legend of each solid line show as of which point in time the price formula[551] was applied. [552]

(599) The chart below (Figure 48) shows the [redacted] Gazprom in Estonia during the relevant period as of 2009 in the past (F200801) and currently (F201105) and compares it to the average relationship between the fuel oil price and the TTF hub price. For example, the green solid line represents the price formula [redacted] (when the F201105 formula represented by a solid orange line came into force). [redacted] The chart also shows, by way of example, that during the relevant period, the average TTF hub price for a fuel oil price of [redacted][553]

(600) [redacted]

549 A linear regression was calculated to describe the relationship between fuel oil prices [redacted] and TTF front month prices [redacted] for 2007-2014, ID 8956, ID 8351. The described statistical relationship between fuel oil and gas hub prices does not change significantly when historical data for different time periods is used for the regression. Seasonality of TTF prices was not taken into account as it does not play significant role given the long-term nature of the contracts and renegotiation cycles.

550 [redacted]

551 Information on price formulae can be found in **Annex IV**.

552 [redacted]

553 As the relationship between the TTF hub price and the fuel oil price is a statistical relationship, it is possible that the *actual* TTF hub price turned out to be below or above this average level, yet on average the gas contract price was significantly above the TTF hub price.

Figure 48: Gazprom's price formulae in Eesti Gaas' contracts

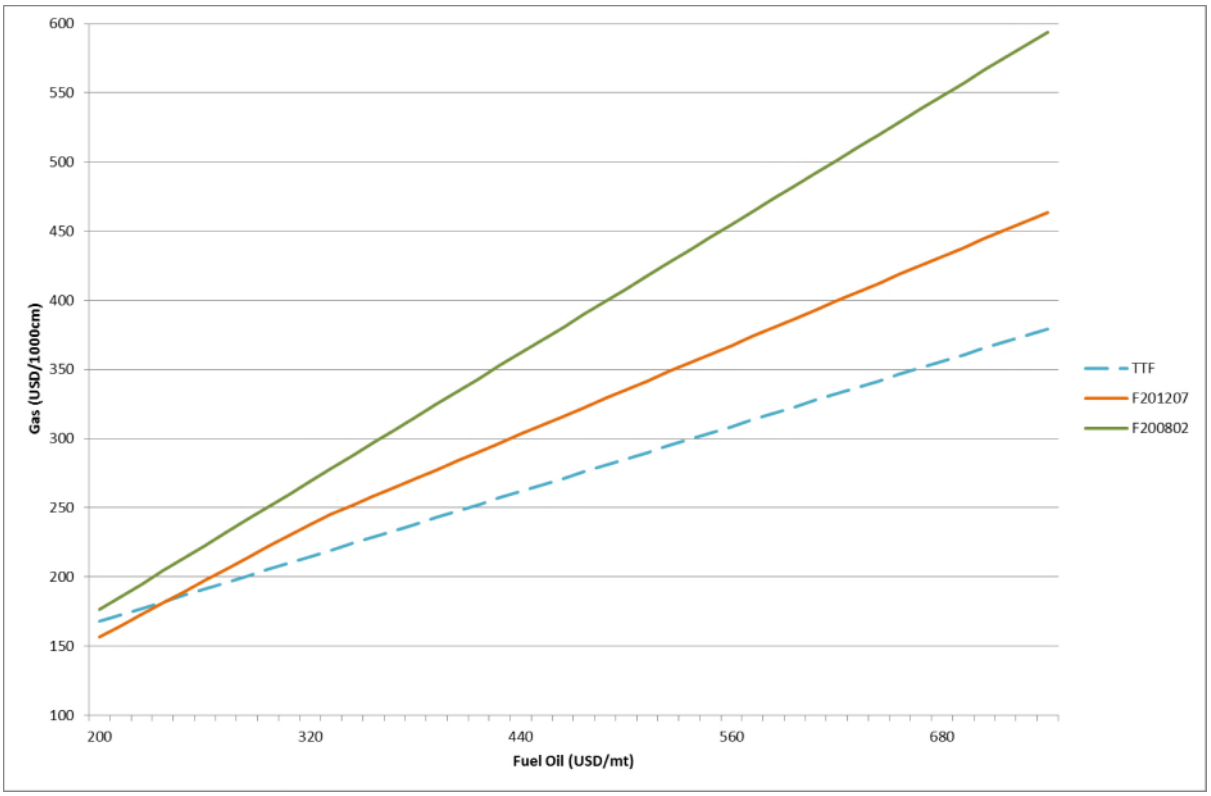
(601)

554

Figure 49: Gazprom's price formulae in Latvijas Gaze's contracts

(602) The chart below shows the relationship between fuel oil and gas prices in Gazprom's oil-indexed price formulae applied in Poland in the past (F200802) and currently (F201207) and compares it to the average relationship between the fuel oil price and the TTF hub price. All price formulae used by Gazprom in Poland resulted in contract prices that were consistently higher than the average TTF price for fuel oil prices above 240 USD/mt.

Figure 50: Gazprom's price formulae in PGNiG's contract



(603) [redacted]

555 [redacted] stands for the contract between [redacted]

Figure 51: Gazprom's price formulae in Bulgaria

(604)

Figure 52: Gazprom's price formulae in Lietuvos Dujos' contracts

(605) The charts demonstrate that the price formulae in the [redacted] systematically produced contract prices that were – with very few exceptions for low fuel oil prices – consistently above the average TTF price and hence one-sidedly benefitted Gazprom.

(606) Moreover, the historical level of fuel oil prices in the period 2009-2014 (for which excessive prices were shown in section 10) was far higher than the levels necessary for contract prices to be below the average TTF price. [redacted] For the fuel oil prices [redacted] price formulae in all [redacted] result in contract prices higher than average TTF prices. This explains why the prices were excessive and one-sidedly in favour of Gazprom.

(607) While the [redacted] in contract prices below average TTF hub prices, these formulae cannot be considered to benefit both parties equally. In particular, already on the basis of the 2013 fuel oil price levels, as discussed in detail below, the corresponding prices would be significantly above the average TTF prices.

(608) The above charts therefore demonstrate that the price formulae over a long period of time consistently – with exceptions for low fuel price levels which were only rarely reached – benefitted Gazprom in a one-sided manner.

(609) In the following, it will be shown that Gazprom could also expect that its price formulae would result in contract prices significantly above the TTF hub prices at the time when the respective price formulae entered into force. The charts below consider expected contract gas prices resulting from applying the up-dated, respective formula on the basis of the futures' prices for the underlying oil

products[556]. They compare these contract gas prices with the average TTF hub prices calculated on the basis of the same fuel price levels, i.e. the prices of futures' contracts for the underlying oil products. The comparison was done for those points in time when major formula changes were introduced, namely [redacted] (Figure 53) [redacted](Figure 54) and [redacted] (Figure 55).

(610) The charts show that Gazprom, at all major modifications to the formulae, could expect the contract prices to be significantly above the expected average TTF price.

Figure 53: Expected formula price on the basis of fuel oil futures' prices compared with average TTF prices as of 1 January 2013

Figure 54: Expected updated formula price on the basis of fuel oil futures' prices compared with average TTF prices as of 1 January 2011

556 [redacted]

Figure 55: Expected updated formula price on the basis of fuel oil futures' prices compared with average TTF prices as of 1 January 2008

12. GAZPROM'S STRATEGY OF MAKING GAS SUPPLIES CONDITIONAL ON INFRASTRUCTURE RELATED ISSUES

(611) Competitive gas markets require sufficient transmission capacity in gas infrastructure and non-discriminatory access to such infrastructure. For historical reasons the CEE gas markets are not sufficiently interconnected as the infrastructure was originally built to only transport gas from East to West. Building gas infrastructure is capital and time intensive, projects take years or even decades to be realised. Moreover, the process of liberalisation of gas markets has been slower in CEE countries than in other, more competitive, gas markets.

(612) Gazprom pursued a strategy of leveraging its dominant position as gas supplier to gain control over the development and usage of certain key gas infrastructures in CEE countries in order to maintain and extend its dominance in the region, as well as to obtain benefits which in case of functioning competition it would not have been able to attain. The strategy was implemented at least in Poland [redacted] by making the conclusion or modification of gas supply contracts conditional upon infrastructure-related commitments and obligations of its contract partners. These infrastructure-related commitments concerned both existing and new infrastructure.

(613) In Poland, Gazprom used its dominance to increase its control over existing gas infrastructure enabling it to hamper the investments or measures necessary to allow for gas supply diversification. [redacted]

557 [redacted]

558 [redacted]

(614) Gazprom used its leverage as dominant gas supplier and made the renegotiation of the gas supply contract with Polish wholesaler PGNiG dependent upon PGNiG's agreement in 2010 that the Polish section of the Yamal-Europe pipeline ('Yamal') would be operated on the basis of an operatorship agreement which was favourable for Gazprom. The agreement allowed Gazprom to maintain control over investments in Yamal via its co-ownership of Europol. The Operatorship Agreement of 25 October 2010 ('OA') imposed by Gazprom vis à vis PGNiG sets out that development planning and carrying out expansions remain with Yamal's owner Europol (which is co-owned 48% by Gazprom and 48% by PGNiG). Therefore these tasks do not fall within the competence of the Polish transmission system operator ('TSO') Gaz-System as would be required under Gas Directive 2009/73. Gazprom also ensured that within Europol's statutory bodies it has the right to veto any investment decisions, including those that would allow for the diversification of gas supplies to Poland and for the improvement of Poland's security of supply. Gazprom's aim was to make sure that it can delay or even block decisions on investments regarding the Yamal pipeline that could serve to import gas from alternative suppliers and that could therefore have weakened Gazprom's market position in Poland.

(615) [redacted]

(616) Gazprom's strategy in Poland [redacted] will be described in sections 13 and 14 below.

13. GAS SUPPLIES MADE CONDITIONAL UPON UNRELATED COMMITMENTS IN POLAND

13.1. Operation of the Yamal pipeline before the Yamal Deal[559]

(617) The Yamal-Europe pipeline ('Yamal') is a mono-directional pipeline of over 2 000 km connecting Russia with Germany. The Polish strand of Yamal extends from the border with Belarus to Germany. Its maximum technical capacity is 32.9 bcm/year[560] which is predominantly (ca. 90%) used to transport Russian gas to Germany.

559 The 'Yamal Deal' refers to the agreements reached on 24 October 2010 as a result of the renegotiations of the long-term gas supply contract between PGNiG and Gazprom Export in the years 2009-2010. The Yamal Deal negotiations went beyond conditions of gas supplies to PGNiG and included also issues relating to the management of Yamal's owner Europol, the decrease of transit tariffs via Yamal and the settlement of outstanding financial disputes between PGNiG and Gazprom.

560 Gazprom's website, ID 8368.

Figure 56: Yamal pipeline[561]

Source: www.gazprom.com

(618) The Yamal pipeline is one of the main pipelines for gas imports into Poland (covering almost 20% of Poland's demand) and a key transit pipeline for Gazprom's exports into Western Europe. Yamal has two exit points into the Polish gas network in Poland (Lwowek and Wloclawek). There are no entry points from the Polish gas network into Yamal. Yamal's exit points in Poland have a total theoretical capacity of 5.4 bcm/year which could meet around 35% of yearly gas consumption in Poland (in 2012, Yamal covered 18% of Poland's yearly gas consumption, i.e. 2.7 bcm).

(619) The Polish section of Yamal is owned by Europol, whose shareholders are OAO Gazprom (48%), Polish wholesaler PGNiG (48%) and Gas Trading[562] (4%). In its negotiations with PGNiG in 2009 and 2010, during and following the gas crisis, Gazprom Export made the conclusion of a gas supply agreement with PGNiG *inter alia* dependent on (i) limiting the powers of the TSO Gaz-System over investments regarding Yamal in the operatorship agreement between Gaz-System and Europol and conferring such rights instead to Yamal's owner Europol and (ii) ending negotiations with PGNiG about the new statute of Europol in Gazprom's favour.[563] Europol's powers over investments under the operatorship agreement and the allocation of competences between Europol's statutory bodies under the new statute of Europol ensured Gazprom's ability to delay or even block investments regarding Yamal. Such investments would include those required to technically allow more gas imports, e.g. from the German gas market via reverse flows.

561 Gazprom's website, ID 8393.

562 90% of Gas Trading's shares are held by PGNiG, Gazprom Export, and Bartimpex. See http://www.naturalgaseurope.com/gazprom-europol-yamal-pipeline-two, ID 8953

563 Gazprom made the conclusion of the supply agreement dependent also on other elements, such as the decrease of the gas transit tariff for Yamal and the settlement of outstanding financial disputes.

13.1.1. Europol: owner of the Yamal pipeline

(620) Europol was incorporated on 23 September 1993. PGNiG and Gazprom Export, apart from holding a share of 48% each in Europol, are also shareholders in Gas-Trading with 43.41% and 15.58% shares respectively. Taking into account their indirect shares in Gas-Trading, PGNiG's ownership in Europol amounts to 49.74%, Gazprom Export's to 48.68%.

(621) According to Europol's statute[564] of 1993,[565] Europol's principal objective was '*the construction of the system of transit pipelines for the transit of Russian gas to Europe and Kaliningrad via the territory of Poland as well as for the Polish economy*' (§4), which meant the construction of the Polish section of the Yamal pipeline. Europol's other activities included gas transport, the organisation of investments and the construction of infrastructure necessary for the exploitation of the system of transit pipelines Yamal-Europe (§4). Its initial capital was PLN 80 million, equivalent to around EUR 20 million (§7).[566]

13.1.2. Day-to-day operation of the Yamal pipeline

(622) On 16 November 1999 PGNiG and Europol signed an operatorship agreement for the Yamal pipeline. Under this agreement PGNiG was responsible for a number of technical functions[567] related to the implementation of gas transportation contracts[568] e.g. steering gas flows in Yamal. The agreement was valid until 31 December 2009.

(623) On 1 August 2005, following the implementation under Polish law of Gas Directive 2003/55[569], PGNiG concluded a service agreement with the Polish gas transmission system operator (TSO) Gaz-System.[570] The service agreement provided Gaz-System with a limited range of technical functions as regards the operation of Yamal.[571] All other functions of a pipeline operator, such as pipeline renovation, modernisation and maintenance[572] or pipeline investments were to be performed by Europol.

(624) By 2009, the 2005 operatorship agreement[573] between Europol and Gaz-System had to be amended for a number of reasons. First, PGNiG's gas transmission licence was going to expire on 16 May 2009, invalidating the service agreement with Gaz-System. Second, the scope of tasks with which Gaz-System was entrusted was not in

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564 The Statute of Europol is a document describing Europol's objectives, its statutory bodies and their obligations and rights as well as internal rules and procedures.

565 Europol's Statute of 23 September 1993 in force until 1 February 2011, reply of Europol of 4 July 2013 to information request of 1 March 2013,ID 5913 (1/21).

566 Europol's Statute of 23 September 1993 in force until 1 February 2011, reply of Europol of 4 July 2013 to information request of 1 March 2013, ID 5913 (2-4/21).

567 Gas flow management, balancing, cooperation with transmission system operators and administrative tasks.

568 Internal memorandum of PGNiG of 6 June 2008, ID 8040-91 (33/42).

569 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 July 2003, p. 57. Under Gas Directive 2003/55 transmission and distribution systems had to be operated through legally separate entities in case of a vertically integrated undertaking.

570 PGNiG's letter of 20 June 2008 to the Polish authorities regarding operatorship of the Yamal pipeline, ID 8040-130 (5/62).

571 Note of the Polish Ministry of Economy of 30 September 2009, ID 0600 (5/22). At the same time, PGNiG's licence to perform transit and gas distribution expired on 15 May 2009. Therefore the operatorship agreement with Gaz-System which was to expire on 31 December 2009, became invalid, ID 8040-130 (6/62).

572 Protocol No 38/2009 of Europol's Supervisory Board of 18 November 2009, ID 6246 (23/26).

573 The operatorship agreement between Europol and Gaz-System was an agreement which included a division of tasks between both undertakings with respect to Yamal's operations.

accordance with Gas Directive 2003/55.[574] Third, Yamal's owner Europol was a joint venture of vertically integrated companies and had a licence to trade gas. Therefore it was legally not permitted to act as TSO for the Yamal pipeline under the Gas Directive 2003/55.[575]

(625) This urgent need to conclude a new operatorship agreement for Yamal was known to the Polish authorities, to Gaz-System[576] and to PGNiG.[577] PGNiG and the Polish chairman of Europol were concerned that finding an agreement with Gazprom, in particular with respect to the tasks with which the TSO would be entrusted, would be difficult.[578]

13.1.3. The operation of the Yamal pipeline before the Yamal Deal

(626) Prior to the Yamal Deal, Gaz-System performed on Yamal only very limited and mainly technical functions, i.e. steering gas flows.[579] Strategic decisions regarding the pipeline, including about its expansion and investment planning, were within the competence of Europol. Europol therefore also had the power to make decisions and the investments necessary to diversify gas supplies to Poland (e.g. via reverse flows which would allow wholesalers to buy gas in Germany and off-take it in Poland) or improve Poland's security of supply (e.g. via a direct connection of Yamal with storage facilities). Despite the urgent need to ensure the compliance of Yamal's operation with Polish and EU law, Gazprom and PGNiG did not agree on the content of a new operatorship agreement to be concluded between Gaz-System and Europol until the conclusion of the Yamal Deal in October 2010.

13.1.4. Competences for investments and decision making rules in Europol before the Yamal Deal

(627) As described above, before the Yamal Deal Europol had the competence over any investment related decisions such as the planning, development or expansion of the Polish section of the Yamal pipeline.

(628) The decision making rules (including for investments) were set forth in Europol's statute ('Statute') and in the rules of the Management Board ('MB Rules'). The following sections describe these decision making rules and the powers of Europol's statutory bodies before Europol's new statute entered into force as it had been agreed under the Yamal Deal. Europol's new statute entered into force on 2 February 2011 (the 'New Statute'). It is described in paragraphs (679)-(684).

(629) The responsibility for investments was divided between Europol's statutory bodies, the Management Board ('MB') and the Supervisory Board ('SB'). The General

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574 According to Gas Directive 2003/55 the transmission system operator was responsible for *'maintenance of'* and, if necessary, *'developing the transmission system*' as well as for '*ensuring the long-term ability of the system to meet reasonable demands for the transportation of gas*', see Article 1 (4).

575 On 25 June 2009, the Commission issued a reasoned opinion against Poland for non-implementation of Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, OJ L 289 of 3.11.2005, p.1 with respect to conditions of access to Yamal; see press release of the Commission of 14 July 2010, ID 7966.

576 Note of the Polish Ministry of Economy of 30 September 2009, ID 0600 (5/22).

577 Internal memorandum of PGNiG of 6 June 2008, ID 8040-91 (34/42).

578 Note of the Polish Ministry of Economy of 30 September 2009, ID 0600 (4/22).

579 Note of the Polish Ministry of Economy of 30 September 2009, ID 0600 (5/22).

Meeting of Shareholders ('GMS') was not vested with investment powers and therefore will not be described further.[580]

13.1.4.1. Decision making rules and competences of Europol's statutory bodies under the Statute

Supervisory Board

(630) The competences of the SB included, in particular, the supervision of Europol's activities, the evaluation and approval of the yearly reports of the MB and decisions over any issues, including investments, the value of which exceeded 20% of the initial capital of Europol (i.e. around EUR 4 million).

(631) According to the Statute, the shareholders appointed one SB member per 10% share. In addition, Gazprom and PGNiG had the right to appoint two additional SB members each and Gas-Trading one additional member (§25).[581] In practice, this meant up to 6 members in the SB each from Gazprom and PGNiG; and 1 member from Gas-Trading. Each had one vote.

(632) Under the Statute, the SB chairman was recommended by the Russian shareholder having the highest number of shares (i.e. Gazprom). The deputy chairman of the SB was recommended by the Polish shareholder with the highest number of shares (PGNiG) (§25). SB resolutions were adopted by a majority of votes of members present and required the votes of '*all founding shareholders having a minimum of 30% of shares under the condition that all members of the SB were invited to the meeting*' (§28), i.e. the votes of Gazprom and PGNiG.[582] The same article of the Statute stated that '*in case of an equal number of votes, the vote of the chairman of the Supervisory Board is decisive.*'[583]

(633) The SB chairman was therefore effectively a Gazprom representative and Gazprom formally had a decisive vote in the SB. However, because passing resolutions as a matter of principle required the representatives of both shareholders present at the meeting to vote in line, this decisive vote could only become relevant in a few very specific and highly theoretical scenarios.[584] In practice, Gazprom and PGNiG therefore both had a *de facto* veto right regarding SB resolutions.

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580 The competences of the GMS included the approval of MB's reports, balance sheets, profit and loss accounts, divisions of profits and dividends, evaluations of operations of subsidiaries, cessation of activities, liquidation of the company, changes of the statute and nomination and dismissal of the MB members.

581 Europol's Statute of 23 September 1993 in force until 1 February 2011, reply of Europol of 4 July 2013 to information request of 1 March 2013, ID 5913 (14/21).

582 The text of §28 reads: *'The resolutions of the Supervisory Board are adopted by a simple majority of members present, including votes cast in favour of the resolution of all representatives of the founding shareholders representing at least 30% of the share capital provided that all members of the SB were invited to the meeting. In case of an equal number of votes, the vote of the chairman of the SB is decisive*.'

583 §28 of Europol Statute, ID 5913 (16/21).

584 This could happen in case PGNiG's representatives would not attend the SB meeting (or would attend but not vote) and only one Gazprom representative would attend. If in such a situation the only representative of Gazprom (necessarily the SB chairman) would vote differently than the only representative of the minority shareholder Gas-Trading, the vote of the SB chairman would be decisive. If, in the opposite scenario, the only PGNiG representative would vote against Gas-Trading's representative, the SB resolution would not be adopted. Alternatively, this could also happen in case one of PGNiG's representatives would not attend the SB meeting (or would attend but not vote) and all Gazprom representatives would attend. If in such a situation the representatives of Gazprom (necessarily the SB chairman) would vote differently than the present PGNiG's representatives and the

Management Board

(634) Day-to-day activities of Europol were conducted by the MB. Under the Statute the MB's competences included '*current management and representation'* of the company (§31).[585] The MB consisted of 3 to 7 members. The MB chairman was appointed by the GMS '*upon the recommendation of the Polish shareholder with the largest amount of shares*' (§30), i.e. PGNiG. The MB deputy chairman was appointed in the same way but upon the recommendation of the largest Russian shareholder, i.e. Gazprom. All members were elected by the following procedure: a majority of the GMS had to vote in favour, provided that among that majority there were all founding shareholders having 30%. In practice there appear to have been only four MB members, two each from Gazprom and PGNiG.[586]

(635) Following an amendment of the Statute in 1997, the MB chairman (recommended by PGNiG) obtained a veto right with respect to all MB resolutions (§32).[587] In practice, PGNiG therefore had a veto right in the MB.

(636) The MB could adopt decisions with financial implications (including investments) exceeding 0.5% of Europol's initial capital, i.e. around EUR 100.000 (§32) and of up to 20% of Europol's initial capital (§33) (i.e. up to around EUR 4 million). The MB also had the power to take loans or undertake liabilities amounting to 20% of the initial capital in a given calendar year (§33). Since 1998, the MB had the additional right to decide on the implementation of investment decisions approved by the SB exceeding 20% of Europol's initial capital.[588] Europol's MB therefore had the power to decide on new investments of up to around EUR 4 million[589] and to implement investments of any value once approved by the SB.

13.1.4.2. Management Board Rules

(637) The functions of the MB, the voting rules for MB meetings as well as the rights of individual MB members were set forth in the MB Rules. They were approved by the SB on 2 March 1994[590] and since then were amended twice, in 1995[591] and in 2000.[592]

(638) According to the MB Rules, the MB was the *executive body* of Europol and its *representation* vis-à-vis third parties (§1).

(639) The MB Rules specified the responsibilities of the MB's chairman and of the MB's deputy chairman (§18). The MB chairman (recommended by PGNiG and appointed by the GMS), was responsible for the overall '*management of the company*' and, in particular, for Europol's '*finances, supervision of the company's strategy and development*' as well as for the '*financing of Yamal's construction and other*

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representatives of the minority shareholder Gas-Trading, the vote of the SB chairman would be decisive.

585 Europol's Statute of 23 September 1993 with later changes, ID 5917 (9/11).

586 This stems from various board meeting reports in which only four MB members were present, see e.g. ID 6239. See also the financial statement of Europol for 2007 which lists four MB active throughout 2007, ID 4426 (3/34).

587 Protocol of the General Meeting of Shareholders of 30 June 1997, decision No 3 related to changes of §32 of the Statute, ID 5918 (1-2/2).

588 Protocol of Shareholders' Meeting of 2 June 1998, decision No 8 related to changes of §33/1 of the Statute, ID 5919 (1-2/2).

589 The initial capital of Europol was expressed in Polish currency and amounted to PLN 80.000.000.

590 §31 of Europol's Statute of 23 September 1993, ID 5917 (9/11).

591 Changes to Rules of Europol's Management Board from 16 June 1995, ID 5915.

592 Rules of Europol's Management Board of 21 June 2000, ID 5916.

investments'. The MB deputy chairman (recommended by Gazprom and appointed by the GMS) was mainly responsible for the '*supervision and monitoring of the construction of the Yamal pipeline*' and of '*associated infrastructure*'. He/she was also in charge of the technical monitoring of Yamal and of cooperation with foreign partners.[593]

(640) The MB Rules set forth the voting rules for MB meetings (§14). They stipulated that MB resolutions were adopted with a '*simple majority of Board members present at a meeting*', unless the MB chairman voted against it. Therefore, the chairman's veto right under the Statute was repeated in the MB Rules. It is important to note that the MB Rules also provided the MB chairman with a decisive vote in case of equal number of votes.[594] However, in practice Gazprom's MB members since 2005 contested the validity of the MB chairman's decisive vote following changes in the Polish Code of Commercial Companies ('Polish Company Code') which provided that a decisive vote had to be set forth in a company's statute (see below 13.1.4.3). Valid MB resolutions required the presence of 2/3 of the MB members but no less than two MB members.[595]

(641) The MB Rules also listed the issues subject to MB resolutions. These included in particular the '*development of the strategy of Europol*, and *drawing up Europol's yearly business plans*' (§17).

13.1.4.3. Dispute between Gazprom and PGNiG about the validity of the decisive vote of the chairman of the Management Board

(642) Gazprom and PGNiG had different views about whether the decisive vote of the MB chairman (recommended by PGNiG) under the MB Rules was legally valid following changes to the Polish Company Code which entered into force in 2001.

(643) As stated above, the MB Rules (§14) provided for the decisive vote of the MB chairman in case of an equal number of votes cast. The decisive vote of the MB chairman for many years raised no objections. According to PGNiG, the arrangement was practical because it avoided decisional deadlocks in Europol's executive body.[596] Because of the decisive vote of the MB chairman under the MB Rules, PGNiG was able to decide *inter alia* on investment decisions of up to EUR 4 million regarding Yamal. Such decisions also included investments such as those needed to technically enable reverse flows on the Yamal pipeline (e.g. the expansion of Yamal's exit point in Wloclawek was estimated to cost EUR 2.5 million).

(644) In 2005, Gazprom started disputing the validity of the decisive vote of the MB chairman because under the amended Polish Company Code of 2000[597] a decisive vote would only be lawful if it was set forth in a company's statute (and not, e.g., in

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593 Europol's reply of 4 July 2013 to the Commission's information request of 1 March 2013, resolution No 30/9/95 of Supervisory Board of 16 May 1995 concerning a change of the Rules of the Management Board, ID 5915.

594 The MB Rules stated in §14 (3): '*in case of an equal number of votes for and against a resolution, the chairing person's vote is decisive, if this function is performed by the Chairman or Vice Chairman of the Management Board*'.

595 Rules of Europol's Management Board of 21 June 2000, ID 5916 (5/10).

596 Internal document of PGNiG '*Problems of Europol in relations with the Russian partners*', ID 8040-110 (2/128). Legal opinion of SALANS for Russian members of the MB of Europol of 25 April 2006, ID 0605 (40/64).

597 The Code of Commercial Companies of 15 September 2000, ID 7888.

the MB Rules).[598] MB resolutions by default would require an absolute majority of votes unless the company's statute could provide for a decisive vote of the MB chairman. The amended law had entered into force on 1 January 2001. Companies had three years, i.e. until 1 January 2004, to adapt their statutes and by-laws to the new law.

(645) Gazprom and PGNiG disagreed about the interpretation of the amended Polish Company Code. Several legal opinions were prepared for Europol in this context. Some concluded that the MB chairman retained his/her decisive vote also under the new law.[599] One legal opinion concluded the opposite.[600]

(646) Since 2005, several legal actions were initiated by MB members of PGNiG[601] and Gazprom[602] in order to establish whether the MB chairman had a valid decisive vote. However, until 2010 PGNiG and Gazprom continued to interpret the legal situation differently and this dispute was not clarified by the Polish courts, either for procedural reasons[603] or because the legal actions were withdrawn.[604] The dispute was only settled through the conclusion of the Yamal Deal on 24 October 2010 when Gazprom and PGNiG agreed on the New Statute for Europol. The New Statute does not provide for a decisive vote of the MB chairman. It explicitly stipulates that MB resolutions must be adopted by unanimity and hence confers a veto right to both Gazprom and PGNiG.[605]

13.2. Gas supplies made conditional by Gazprom on maintaining control over investments in Yamal

(647) As will be shown below, PGNiG was in urgent need of gas in 2009 and 2010 and at risk of not being able to fully supply its customers. The critical supply situation of PGNiG provided Gazprom with a powerful leverage over PGNiG. Gazprom used this leverage to ensure that it could control investments on Yamal including those which would have permitted the import of gas from other suppliers.

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598 Article 371 of the Polish Company Code of 15 September 2000, ID 7888 (92/183). See also a reservation to the Protocol No 53/IV/2005 of Europol's Management Board Meeting of 6 December 2005, ID 0559 (14/49). Art. 371 § 2 stipulates that in case of management boards composed of several board members '*the resolutions of the management board shall be adopted by an absolute majority of votes, unless the statutes provide otherwise. The statutes may provide that in the case of an equal number of votes, the chairman of the management board shall have the casting vote, as well as grant him certain powers in the management of the operations of the management board*.'

599 External legal opinions, ID 0653 (12-24/83, 32-40/83, 41-56/83).

600 Legal opinion of Salans for Russian members of the MB of Europol of 25 April 2006, ID 0605 (40/64).

601 Following a legal action of Mr Kwiatkowski in 2006, the Warsaw court of first instance in May 2007 confirmed the interpretation of the Polish law according to which the decisive vote should be stipulated in the Statute. However, the appeal court held that the first instance court should not have ruled on substance. The appeal court found that Mr Kwiatkowski had no legitimate interest as a plaintiff. Hence the appeal court did not analyse the legality of the decisive vote under the Polish Company Code. For the judgments see ID 7806 and ID 7807.

602 On 10 February 2006, Gazprom MB members Evgeny Vasyukow and Yury Kaluzhskiy brought separate legal actions against Europol before a regional court and a district court respectively, to establish whether the MB resolution of 22 November 2005, which had been adopted with the decisive vote of the MB chairman, was valid or not, ID 7890.

603 The court of appeal ruled that the MB chairman had no legitimate interest as a plaintiff and that the National Register Court would be competent to clarify the issue of the decisive vote of the MB chairman, ID 7806 and ID 7807.

604 The legal action of Mr Vasyukow was withdrawn on 18 December 2006 without reasoning. The legal action of Mr Kaluzhskiy was withdrawn on 30 April 2008.

605 Statute of Europol in force as of 2 February 2011, ID 0547 (30/58). The decisive vote of the MB chairman was not removed from the MB Rules but was superseded by the New Statute.

PGNiG's critical supply situation in 2009 and 2010

(648) On 5 January 2009, PGNiG was informed by RosUkrEnergo ('RUE')[606] that gas deliveries by RUE to PGNiG had ended as from 1 January 2009.[607] For PGNiG the lack of supplies from RUE meant a gap of 25% in its gas imports[608], equivalent to around 15% of Poland's total gas consumption. The respective negotiations between PGNiG and Gazprom on the additional gas supplies needed to fill this gap dragged on until 29 October 2010, when an Annex to the supply agreement with Gazprom Export, as part of the Yamal Deal, was signed. During the negotiations PGNiG was on the verge of not being able to fully supply its customers. This put PGNiG in a very difficult negotiation position with Gazprom.

(649) In February 2009, PGNiG estimated that without alternative supplies and without a new contract with Gazprom Export, gas supplies to final customers in Poland would have to be stopped in the 4th quarter of 2009.[609] In April 2009, PGNiG's CEO Mr Szubski considered that without additional supplies from Gazprom Export, PGNiG would be unable to fill up the storage facilities prior to the 2009/2010 winter season. This would require the declaration of a state of emergency for the economy as of 1 June 2009.[610] The state of emergency was not introduced because Gazprom Export and PGNiG agreed on short-term 'summer supplies'[611] to cover PGNiG's immediate gas needs.

(650) PGNiG's risk of not having enough gas continued in 2010. In July 2010, Gazprom Export reminded PGNiG that – based on PGNiG's consumption patterns – it would have off-taken all gas quantities under its current supply contract with Gazprom Export by 20 October 2010. According to Gazprom, after this date there would be no contractual obligation for Gazprom to supply additional gas to PGNiG in 2010.[612] On 8 October 2010, PGNiG informed the Polish government that, in case negotiations about a new supply agreement with Gazprom would not be concluded quickly, the volumes under the existing supply contract would be fully exhausted by 17 October 2010. This would put at risk supplies to PGNiG's customers during months of high gas demand in November and December.[613]

(651) As described above in detail in section 8.3.3.2, from the beginning of the gas crisis in January 2009 until January 2010, PGNiG attempted to source emergency supplies of gas from alternative suppliers. Because of infrastructure limitations, the most realistic option for PGNiG was to buy gas destined for the German market and off-take it from Yamal in Poland or from Drozdovichi on the Polish/Ukrainian border. However, any such transaction required Gazprom's agreement. Despite several written requests from PGNiG and other wholesalers, Gazprom did not agree or did not reply to such requests.[614] Therefore, the only remaining possibility for PGNiG to cover its gas needs following the disruption of supplies from RUE was to buy additional volumes from Gazprom Export.

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606 More information on RUE see footnote 343.

607 Internal document of PGNiG listing supply problems via Ukraine, ID 8040-78 (10/75).

608 Letter from PGNiG of 19 February 2009 to the Minister of Foreign Affairs regarding lack of supplies from Ukraine in January 2009, ID 8040-57 (3/29).

609 Letter from PGNiG of 19 February 2009 to the Minister of Foreign Affairs regarding lack of supplies from Ukraine in January 2009, ID 8040-57 (3/29).

610 Minutes by PGNiG of the meeting in Prime Minister's office on 28 April 2009, ID 8040-92 (97/100).

611 Minutes by PGNiG of the meeting with Gazprom Export on 4 September 2009, ID 8040-81 (3/26).

612 Letter from Gazprom Export to PGNiG of 5 July 2010, ID 8040-6 (19-20/124).

613 Report of PGNiG to the Polish Ministry of Treasury of 28 March 2011, ID 8040-58 (24/33).

614 Internal note of PGNiG of 23 March 2009, ID 8040-46 (12/38).

Gazprom made gas supplies conditional upon unrelated issues

(652) Due to its leverage as the only supplier able to supply sufficient additional gas volumes to PGNiG during the gas crisis, Gazprom succeeded to impose on PGNiG to agree as shareholder in Europol to an operatorship agreement concerning Yamal between Europol and the TSO Gaz-System in the form as requested by Gazprom. This agreement conferred important powers over investments onto the owner Europol as opposed to the TSO Gaz-System as would be required under Gas Directive 2009/73. PGNiG had instead advocated giving investment powers to the TSO. As a result of Europol's investment powers under the operatorship agreement, Gazprom – through its veto rights in Europol's statutory bodies - was able to maintain control over investments regarding Yamal.

(653) It will also be shown below that Gazprom conditioned gas supplies on other Europol related issues (e.g. the competences of the MB) vis à vis PGNiG. In particular, as a result of its leverage Gazprom was able to end the dispute about the decisive vote in the MB and to 'push through' its position that the decisive vote of the MB chairman (appointed by PGNiG) would not be included in Europol's New Statute. In addition, the SB – where Gazprom already had a veto right - was given greater powers over investments. Due to Gazprom's veto rights in Europol's MB and SB, Gazprom therefore was in a position which allowed it to obstruct investments concerning Yamal.

(654) Finally, it will be shown that Gazprom conditioned gas supplies on the opening of IGA negotiations in 2009.

13.2.1. Gas supplies made conditional by Gazprom on an operatorship agreement with limited tasks for the TSO

13.2.1.1. Legal obligation to appoint a new TSO for Yamal in 2010

(655) As explained above at paragraph (624) a new TSO for Yamal had to be appointed as of 2010 under Polish Energy Law. According to the Polish Energy Law, the TSO functions could only be exercised by a 100% State-owned undertaking active in gas transmission. The only undertaking fulfilling this criterion was Gaz-System, the national gas transmission operator.[615] Following the entry into force of the new Polish Energy Law on 11 March 2010, Europol was legally obliged to entrust Gaz-System with a number of executive functions in order to appoint it as the TSO for Yamal. For that purpose the parties agreed that these functions should be laid down in an operatorship agreement.[616] Under the new provisions of the Polish Energy Law, Europol was obliged to submit a request to the Polish Energy Regulator to appoint Gaz-System by 11 September 2010. If Europol failed to do so, the Energy Regulator would appoint the operator *ex-officio*.[617]

(656) Europol failed to make a valid request to the Polish Energy Regulator to appoint Gaz-System as the TSO of Yamal by the legal deadline of 11 September 2010. While Europol did submit a request to appoint Gaz-System on 10 September 2010, Europol's submission was deemed incomplete by the Energy Regulator because it did not contain a signed operatorship agreement between Europol and Gaz-System. As a

615 See Article 9k of the Polish Energy Law from 10 April 1997.

616 See letter from Europol to the Energy Regulator of 28 May 2010, ID 0576 (21/25).

617 Draft reply of the Polish Minister of Economy to the European Commission (DG ENER) of 19 July 2010, ID 0604 (39/68).

result, the Energy Regulator decided to appoint Gaz-System *ex-officio* as the operator of Yamal. The appointment took effect on 17 November 2010.[618]

(657) One of the key objectives of the new regulatory regime for Yamal was to put its eventual development in the hands of an independent TSO, in line with the Third Energy Package[619] (which was supposed to be transposed in Poland by 3 March 2011), so that the TSO could have '*full control on exploitation, maintenance and development*'[620] of the pipeline. This would allow the expansion of Yamal through measures such as the construction of new exit points, or the increase of capacity of existing exit points in case of a market need.

13.2.1.2. Negotiations about the operatorship agreement and different positions regarding the scope of the TSO's tasks between PGNiG and Gazprom

(658) The negotiations regarding the scope of the functions of the TSO under the operatorship agreement between Europol and Gaz-System started in the beginning of 2010 and continued until October 2010. The negotiations mainly took place between Gaz-System and Europol but Europol's shareholders Gazprom and PGNiG were also involved directly. During these negotiations, Gazprom on the one hand and PGNiG and Gaz-System on the other hand took different positions regarding the scope of tasks to be provided for the TSO. Gazprom used the urgent need of PGNiG for additional gas supplies during the period of negotiation in order to condition gas supplies upon the conclusion of an operatorship agreement that would reflect Gazprom's position.

(659) Gazprom directly[621] as well as via its representatives in Europol's MB argued that the powers of the new TSO should be limited, including for investments regarding Yamal. PGNiG, directly[622] or indirectly[623], via its representatives in Europol, was involved in these negotiations. In August 2010, A. Medvedev pointed out to Europol that the draft OA prepared by Europol '*contains an extremely broad list of tasks to be*

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618 Decision of the Energy Regulator of 17 November 2010 appointing Gaz-System as the operator of Yamal, ID 8118-33 (54-67/96).

619 Before the Yamal Deal, investment decisions were decided solely by Europol and its shareholders. With the implementation of Third Energy Package rules as regards Yamal, Europol would be involved in investment decisions to the extent this would be permitted by one of the three models foreseen by Gas Directive 2009/73. Under the Ownership Unbundling ('OU') model Europol, would have to be separated from its shareholders Gazprom and PGNiG, and would independently decide its investment programme. Under the Independent System Operator ('ISO') model, investments would be decided by a transmission system operator and implemented by Europol. According to the Independent Transmission System Operator ('ITO') model, it would be Europol deciding on and implementing eventual investments for Yamal. Only if Yamal was subject to the OU model, Gazprom and PGNiG would lose any influence on the development of the pipeline. In 2014 Gaz-System was subject to a certification procedure under Gas Directive 2009/73 as an ISO. In the opinion on the certification of Gaz-System as an ISO for the Polish section of the Yamal pipeline adopted on 19 March 2015 the Commission noted that Europol should not have any prerogatives with regard to investments that go beyond its obligations laid down in the Gas Directive and that Gaz-System should be legally and in practice able to independently decide on investments on the Yamal pipeline.

620 Note of Gaz-System of 18 August 2010 on the Polish Energy Regulator's views on Yamal's operatorship, ID 8118-31 (21/53). Regarding Gaz-System's plans to control the expansion of the Yamal pipeline see also a protocol of the meeting between Polish authorities and DG ENER of 25 August 2010, ID 8118-5 (68/82).

621 See letter from Gazprom to Europol of 7 September 2010, ID 0576 (2/25).

622 See letter from Gazprom to Europol and PGNiG of 13 October 2010, ID 8118-5 (24/82).

623 Letter from Gazprom's representatives in Europol's Management Board to Gaz-System, PGNiG and Gazprom of 7 October 2010, ID 8118-5 (39/82).

allocated to the TSO.'[624] According to A. Medvedev, Polish law did not forbid to equip the TSO with only technical functions.

(660) In September 2010, Gazprom Export in a letter to PGNiG disagreed with the scope of tasks to be attributed to the TSO and proposed its own draft with a list of more limited tasks for the TSO.[625]

(661) On 5 October 2010, during the final stages of the Yamal Deal negotiations, the then CEO of Gazprom Export A. Medvedev criticized the draft operatorship agreement ('draft OA'). He considered that any investment programme of Europol should be '*defined* and *implemented*' by Europol (and not by the new operator of Yamal, Gaz-System).[626] On 7 October 2010, Gazprom submitted a draft OA according to which only Europol would be responsible for the '*maintenance and repairs of the system of transit pipelines* (Yamal), *as well as its eventual expansion and drawing up a development plan for the system of transit pipelines*'.[627]

(662) On 15 October 2010, Gazprom submitted a draft OA from which it had even removed the need for Europol to consult the TSO on the development, expansion and drawing of development plans of Yamal.[628] Conversely, PGNiG and Gaz-System in October 2010 proposed a draft OA to Gazprom and Europol, under which the TSO would be entrusted not only with technical functions but also with managerial functions, including the planning of investments.[629]

13.2.1.3. Gazprom made supplies to PGNiG conditional upon an operatorship agreement with only limited tasks for the TSO

(663) Gazprom conditioned gas supplies to PGNiG upon an operatorship agreement that would confer investment powers to Europol and not to the TSO. The conditional link between the gas supply agreement and the OA is illustrated in particular by Annex 35 of 29 October 2010[630] to the supply contract providing for increased supplies by Gazprom Export to PGNiG. Annex 35 was signed together with an agreement on the entry into force and termination of Annex 35 on 29 October 2010.[631] According to the latter agreement, the entry into force of the supply agreement for additional gas was conditioned, among other things, on the entry into force of the OA which had been agreed and signed on 25 October 2010.[632] Furthermore, the agreement on the entry into force and termination stipulated that the agreement for additional gas supplies would *'cease to apply at the initiative of the Seller should any of the below conditions occur:…c) changes in the function of the operator…'*. This evidences that the additional gas supplies were contractually linked to the OA and that any change in the OA would give Gazprom the right to terminate the supply agreement.

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624 Letter from Gazprom Export to Europol of 19 August 2010, ID 0594 (35/49).

625 Letter from Gazprom Export to PGNiG and Europol of 28 September 2010, ID 0572 (37-40/89).

626 Minutes of the meeting of 5 October 2010 between OAO Gazprom, PGNiG, Europol and Gaz-System, ID 0582 (24/33).

627 Draft Operatorship Agreement sent by Russian Board Members to the Polish Energy Regulator, PGNiG and Gazprom on 7 October 2010, ID 8118-5 (47/82).

628 Draft proposal of Operatorship Agreement by Gazprom of 15 October 2010, ID 8118-29 (2/17).

629 [redacted]

630 Annex No 35 to the supply contract between PGNiG and Gazprom Export No 2012-14/RZ-1/25/96 of 25 September 1996, ID 8040-54 (21-26/26).

631 Agreement on entry into force and termination of Annex No 35 to supply agreement No 2012-14/RZ-1/25/96, ID 8040-54 (16/26).

632 Agreement on entry into force and termination of Annex No 35 to supply agreement No 2012-14/RZ-1/25/96, ID 8040-54 (17/26).

(664) [redacted]

(665) In 2011, after the conclusion of the Yamal negotiations, Gazprom Export's CEO reminded PGNiG of the conditional character of the Yamal Deal. During discussions about the implementation of the Yamal Deal with respect to Europol's gas tariff[634], A. Medvedev stated in the SB meeting on 28 June 2011 that a disagreement about Europol's tariff could *'disrupt commitments of both parties included in the package*.'[635] During the same meeting Gazprom's representative [redacted] said that the agreements between Gazprom, PGNiG and Europol, the IGA and the renegotiated supply contract signed in 2010 were '*all closely related and if you won't be fulfilling your commitments all the agreements may change*.'[636]

(666) [redacted]

13.2.1.4. The OA signed on 25 October 2010 only provided for limited tasks of the TSO and hence reflected Gazprom's requests in the negotiations

(667) The OA signed on 25 October 2010 provided only for limited tasks of the TSO - as had been requested by Gazprom against the wishes of PGNiG. The OA allocated the functions between the TSO and Yamal's owner Europol to the effect that the TSO would be equipped mainly with technical functions and certain commercial functions.[638] As had been requested by Gazprom in the negotiations (see paragraph (659) the OA did not provide the TSO with the powers for the development or expansion of Yamal.[639] Under the OA it is for Europol and not for the TSO to plan

633 [redacted]

634 The level of transit tariffs charged to Gazprom between 2006-2009 and future tariffs for gas transit were also part of the package during the Yamal Deal negotiations.

635 Transcript of the Supervisory Board meeting of 28 June 2011, ID 0652 (3/14).

636 Transcript of the Supervisory Board meeting of 28 June 2011, ID 0652 (4/14).

637 [redacted]

638 Draft Operatorship Agreement of 10 September 2010 by Gazprom's representatives in Europol's MB, ID 8118-19 (47/92). See also a draft Operatorship Agreement of Gazprom of 15 Octobr 2010, ID 8118-26 (8/102).

639 Internal presentation of Europol, ID 0546 (55-56/65).

Yamal's development and to implement Yamal's expansion. The TSO, Gaz-System, is only 'consulted' on Europol's development plans whereas under the Gas Directive 2009/73 the TSO should be responsible for such planning.[640] According to Article 2 point 3c of the OA Europol is responsible for:

'carrying out maintenance and repair of the system of transit pipelines (Yamal), as well as its eventual expansion and drawing up a development plan for the system of transit pipelines (Yamal), after consultation with the TSO.'[641]

(668) The OA therefore did not provide the TSO with sufficient powers to independently develop Yamal. This is confirmed by Gaz-System's internal analysis, according to which '*only the development of a system of transit pipelines (*i.e. Yamal*) has not been entrusted directly to the Operator.*'[642] External legal opinions prepared for the TSO Gaz-System[643] also concluded that *de facto* both the TSO and owner are responsible for network development although the initiative lies with Yamal's owner Europol. One legal opinion stated that the OA was not in line with the Gas Directive 2009/73 in particular with respect to the '*development of Yamal*'.[644]

*13.2.2. **Gas supplies made conditional by Gazprom on other Europol-related issues***

(669) During its gas supply negotiations with PGNiG in 2009, Gazprom Export repeated its earlier requests that the distribution of competences between Europol's statutory bodies should be changed. In particular, it requested that the rights to decide over investments of up to EUR 4 million be moved from the MB to the SB. Gazprom also disagreed with the validity of the decisive vote of the MB chairman.

13.2.2.1. Disagreement between Gazprom and PGNiG about Europol-related issues

(670) Since at least 2006, Gazprom and PGNiG conducted negotiations about several contentious issues concerning Europol, in particular regarding the decisive vote of the MB chairman and about the distribution of investment powers between the MB and the SB. For this purpose working groups were created, one of which was devoted to the Statute ('Statute WG'). The aim of the Statute WG was to identify problems and propose compromise solutions acceptable for PGNiG and Gazprom. The Statute WG also aimed at adapting the Statute to the Polish Company Code.[645]

(671) According to PGNiG, Gazprom wanted to use the legal obligation to adapt the Statute in certain respects to the new Polish Company Code to '*change the decision making within the MB'* i.e. to remove the decisive vote of the chairman of the MB (appointed by PGNiG). PGNiG was interested in keeping the status quo because the decisive vote was of '*high importance for the balance of powers in Europol.*'[646]

(672) Gazprom's aim in the Statute WG was not to include the decisive vote of the MB chairman in Europol's future statute, i.e. to achieve parity voting in the MB.[647] An internal document of PGNiG of 15 March 2007 states that Gazprom Export '*demands an increased role of its representatives in the management*' of Europol

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640 According to Article 14 (4) of Gas Directive 2009/73 the TSO should be responsible for planning and developing the transmission system.

641 Final Operatorship Agreement of 25 October 2010, ID 8118-11 (8/105).

642 Internal legal analysis of Gaz-System of 21 October 2010, ID 8118-14 (48/56).

643 See memoranda and opinions prepared for Gaz-System, ID 8118-33 (28-50/96).

644 See legal opinion prepared for Gaz-System, ID 8118-33 (38/96).

645 Internal Memorandum of PGNiG of 20 June 2008 on Working Group of Gazprom and PGNiG on Statute, ID 8040-122 (10/48).

646 Internal note of PGNiG of 17 June 2008, ID 8040-96 (29/48).

647 Internal note of PGNiG of 15 March 2007, ID 8040-122 (10/48).

compared to what was decided when Europol was set up in 1993.[648] Gazprom Export also aimed at the '*limitation of powers of PGNiG's representatives, imposing the need of consensus in all important issues.*'[649] In the SB meeting of 16 January 2007, Gazprom proposed that until the disputed issues (including the Statute) would be resolved and until PGNiG would agree with Gazprom's position, no SB meetings should be organised. PGNiG considered such a threat to be unacceptable and dangerous for the functioning of Europol and did not agree. During several months no SB meeting was organised but both parties continued negotiations. In parallel, since June 2006, Gazprom had been blocking PGNiG's candidates for the MB chairman within the GMS[650] by conditioning the decision on '*changes in Europol's statute and management*'. In July 2008, Gazprom proposed that '*decisions and acts of Europol would be made together by Gazprom and PGNiG.*'[651] Gazprom's proposal for parity voting meant that the New Statute would not include the decisive vote of the MB chairman which was set forth in the MB Rules.

(673) On 25 July 2008, Gazprom also proposed that the list of issues to be decided by the SB instead of the MB should be extended.[652] Such issues included Yamal's tariffs, legal actions regarding the construction of new pipelines and budgetary and financial planning such as the drawing up of business plans.[653] Gazprom proposed to remove the right of Europol's MB to decide on issues such as investments with a value of up to 20% of Europol's initial capital, i.e. EUR 4 million. In its proposal Gazprom did not specify the new ceiling for investments to be decided by the MB.[654] Gazprom also argued that Europol's representation vis à vis third parties should require joint participation of Gazprom's and PGNiG's representatives.[655]

(674) PGNiG disagreed with Gazprom's proposals because they would lead to a '*decisional deadlock*' in Europol.[656] According to PGNiG, the MB should be able to act without '*a need to engage shareholders in the day to day activities of Europol.*'[657] In PGNiG's opinion, Gazprom's proposals were contrary to the Polish Company Code as they would lead to *'engaging Supervisory Board and Shareholders in day-to-day management of the company'*.[658] PGNiG also argued that the MB chairman should have the right to represent Europol vis à vis third parties, except for a number of particularly sensitive issues such as tariff applications to the Regulator.[659] In its proposal of 15 July 2008 PGNiG had therefore suggested maintaining the decisive vote of the MB chairman and the right of the MB chairman to make statements on behalf of Europol; it also had proposed a lower financial

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648 Internal note of PGNiG of 15 March 2007, ID 8040-122 (13/48).

649 Internal note of PGNiG of 15 March 2007, ID 8040-122 (9/48).

650 The GMS was responsible for the nomination and dismissal of MB members. The mandate of the MB chairman had expired and PGNiG wanted to appoint a new one.

651 E-mail from Gazprom's legal department of 25 July 2008, ID 8040-89 (25/40).

652 Gazprom's comments of 25 July 2008 in response to PGNiG's proposal of 15 July 2008, ID 8040-110 (106/128).

653 E-mail from Gazprom's legal department of 25 July 2008, ID 8040-89 (25/40).

654 Gazprom's comments of 25 July 2008 in response to PGNiG's proposal of 15 July 2008, ID 8040-110 (107/128).

655 Internal note of PGNiG of 15 March 2007, ID 8040-122 (12/48).

656 Internal note of PGNiG of 15 March 2007, ID 8040-122 (16/48).

657 Internal note of PGNiG of 15 March 2007, ID 8040-122 (10/48).

658 Internal note of PGNiG of 15 March 2007, ID 8040-122 (10/48), also Art. 375 of the Code of Companies.

659 PGNiG's proposal of 8 August 2008 on Europol's Statute, ID 8040-110 (111/128).

ceiling for decisions and investments to be taken by the MB without having to seek the approval of the SB.[660]

13.2.2.2. Gazprom made gas supplies conditional upon PGNiG agreeing to solve Europol-related issues in Gazprom's favour

(675) Gazprom Export was able to use its leverage as the only potential supplier of the gas volumes needed by PGNiG to condition such supplies on the resolution of all outstanding issues with PGNiG with respect to Europol.[661] Gazprom referred to this as a 'package' of issues which had to be agreed at the same time.

(676) Gazprom insisted on this 'package' approach on several occasions. For example, during negotiations in Moscow on 26 August 2009 A. Medvedev stated that supplies had to be settled together with the functioning of Europol.[662] On 18 November 2009, during another round of negotiations, A. Medvedev said that '*all this is a package*'[663] (i.e. gas supplies and the operation of Europol).

(677) The way negotiations proceeded also shows that gas supplies and decision-making powers in Europol were closely linked. PGNiG in a meeting in August 2009 insisted that additional gas supplies were an absolute priority, whereas Gazprom emphasized that as a shareholder of Europol, Gazprom *'should not have less influence'* regarding the functioning of Europol than PGNiG. A. Medvedev cited the examples of other companies, in which Gazprom was a shareholder, such as Wingas where decisions were taken on a consensus basis.[664] According to PGNiG's summary of the negotiations in 2009, Gazprom, similar to 2007 and 2008, '*all the time aimed at limiting powers of Europol's MB and in particular of its chairman, disagreeing with its decisive vote and postulating moving as many responsibilities, including those related to everyday functioning of the company, from the Management Board to the Supervisory Board.*'[665]

(678) According to PGNiG, the negotiations of the new supply agreement with Gazprom Export took place '*in combination with statutory changes in Europol and Europol's infrastructure*'; for the '*Russian side these issues were perceived as a package.*'[666] The 'package' approach and its importance for the supplies to PGNiG were confirmed by Gazprom in 2011 (see paragraphs (663) and seq.). PGNiG was against negotiations of Europol issues in a package with gas supplies.[667]

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660 PGNiG's proposal from 15 July 2008 with Gazprom's comments of 25 July 2008, ID 8040-110 (107/128).

661 The « package » included, apart from changes to the Statute, also: (i) the annulment of outstanding payments from Gazprom to Europol for unpaid tariffs between 2006-2009, (ii) the waiver of PGNiG's claims against Gazprom's subsidiary RUE following disruptions of supplies in January 2009, (iii) Europol's future tariff for Gazprom's gas transit, (iv) the withdrawal of PGNiG's claim against Gazprom before the Court in Moscow for due tariff payment from Gazprom Export for 2007.

662 PGNiG's minutes of the meeting with Gazprom Export of 26 August 2009, ID 8040-88 (17/26).

663 Transcript of Europol's Supervisory Board meeting on 18 November 2009, ID 0595 (17/47).

664 PGNiG's minutes of the meeting with Gazprom Export of 26 August 2009, ID 8040-88 (18/26).

665 PGNiG's letter to the Minister of Treasury of 15 September 2009, ID 8040-101 (10/12).

666 PGNiG's reply of 17 September 2012 to a request for information of 20 July 2012, ID 7918 (23/46).

667 Internal e-mail from PGNiG of 18 November 2008, ID 8040-138 (2/4).

13.2.2.3. The voting rights and the allocation of competences in the MB and SB were changed as Gazprom had requested

(679) The New Statute was endorsed by the GMS on 6 December 2010.[668] It entered into force on 2 February 2011[669]. The New Statute included all the changes that Gazprom Export had requested with respect to the competences and decision making rules of the MB and SB in its negotiations with PGNiG regarding additional gas supplies during the gas crisis.

(680) The New Statute provides in particular that resolutions of the MB have to be adopted unanimously by all MB members (§32). Neither PGNiG nor Gazprom therefore have a decisive vote in the MB, both parties have a veto right.

(681) Moreover, the New Statute provides that the representation of Europol vis à vis third parties must be made by Gazprom's and PGNiG's representative together (§31).

(682) The New Statute also increased the powers of the SB at the expense of the MB. According to the New Statute, the MB must seek the agreement of the SB when deciding on matters, liabilities or investments the value of which exceeds 0.3% of the initial capital of Europol (EUR 60.000). Under the Statute, the respective value had been 20% (around EUR 4 million). The MB's previous right to take financial decisions of up to around EUR 4 million was therefore reduced to EUR 60.000. This *de facto* ended the longstanding dispute between Gazprom and PGNiG about the issue of the decisive vote of the MB chairman since the most important competences of the MB were thereby transferred to the SB. The MB can decide on investments higher than 0.3% without the agreement of the SB if they are included in a multiannual investment plan and in a business plan of Europol (§33). Moreover, the New Statute provided the SB with the right to give an opinion on annual and multiannual plans of Europol drawn up by the GMS (§29).

(683) The decision making procedures embedded in the New Statute did not include a decisive vote of the MB chairman (which previously was held by PGNiG). The New Statute provided for voting by unanimity and hence provided for a veto right of both Gazprom and PGNiG.

(684) Under the New Statute, both shareholders of Europol had equal rights. The New Statute also limited the powers of the MB by entrusting decisions of any significant value to the SB and, in case of a disagreement within the SB to the GMS where both shareholders had a veto right. According to PGNiG, the new division of powers within Europol could lead to a '*paralysis of decision making of Europol*'[670] and the need to refer all important or controversial decisions to the SB or to the GMS.

13.2.2.4. Gas supplies made conditional by Gazprom on the opening of IGA negotiations

(685) Prior to the disruption of supplies by RUE in January 2009, Gazprom had indicated to PGNiG on several occasions that it could take over the RUE supply quantities after 2010. However, Gazprom made such additional gas supplies dependent on the Polish and Russian governments signing a protocol to the inter-governmental agreement from 1993 ('the IGA') between Poland and Russia.

668 Europol's reply to the clarification request of 4 July 2013 to the Request for Information of 1 March 2013, ID 5920 (3/5).

669 Statute of Europol in force as of 2 February 2011, ID 0547 (30/58).

670 Letter of CEO of Europol to deputy Prime Minister of Poland of 4 May 2009, ID 0596 (26/26).

(686) PGNiG was against parallel negotiations at company and inter-governmental level because of '*a risk that during such negotiations the Russian party could 'add' additional 'elements' ...a repetition of what was done on 17 November 2006*.' According to PGNiG, Gazprom Export had at the time succeeded in imposing a price increase in its long-term supply agreement with PGNiG by linking it with the prolongation of the short-term gas contract of RUE with PGNiG. The Polish government, while being ready to negotiate an additional Protocol to the IGA, wanted the details of the supply contract to be reached at company level. In January 2009, the Polish government prepared a draft Protocol to the 1993 IGA but left the details of the mid-terms supplies (2009-2014) to be negotiated by the undertakings: '*conditions of supplies to Poland shall be determined in mid-term contracts between Polish and Russian undertakings*.'

(687) In February 2009, PGNiG asked Gazprom Export to supply the missing volumes. In line with its earlier position, Gazprom Export agreed to provide emergency supplies to PGNiG for 2009 under the initial condition that the Polish government would initiate negotiations about the IGA or later under the condition that the Polish government would sign the IGA. For some time the emergency supplies were blocked because the IGA negotiations had not yet been initiated. This significantly worsened PGNiG's supply situation. Finally, once the IGA negotiations had started at the beginning of 2009 Gazprom also agreed to renegotiate the supply agreement which was eventually signed on 29 October 2010.

13.3. Gazprom delayed and attempted to block measures aiming at gas supply diversification

(688) The sections above demonstrate that Gazprom's overall objective was to keep control over investment decisions regarding Yamal within Europol (as opposed to conferring them to an independent TSO, as would be required under the Gas Directive 2009/73).[671] For the same reason, Gazprom also aimed at having as 'strong' decision-making powers within Europol as possible because – as a result of the limited investment powers of the TSO Gaz-System - it was Europol that was responsible for important investments. Such investments also included measures which could lead to supply diversification. The above sections show that Gazprom achieved these objectives by leveraging its position in the Yamal Deal negotiations as the only supplier that could provide additional gas supplies to PGNiG. In the following it will be shown that Gazprom not only has an incentive to use Europol's investment powers (and its own powers within Europol's decision making bodies) but has actually used its powers after the Yamal Deal to delay or even try to block Yamal investments.

13.3.1. The need for further gas supply diversification in Poland

(689) Gas demand in Poland is predicted to continue increasing[672] and [redacted]e [redacted] In order to meet this additional demand, Poland would have to further increase its dependency on Gazprom because existing physical interconnection capacity with Germany and the Czech Republic is limited to 2 bcm/year and is already fully used. Neither domestic production (currently

671 See, regarding ISOs, Article 14, in particular paragraph 4, and regarding ITOs, Article 17, in particular paragraph 2(e) and (f).

672 Internal analysis of Gaz-System, ID 8132 (27/220). See also strategy of PGNiG until 2015 by Roland Berger, ID 8040-104 (34/275).

673 [redacted]

supplying approximately 30% of the Polish demand) nor the LNG terminal planned to start operation in 2016 (5 bcm/year) would be able to fully satisfy the additional demand. Virtual reverse flow available on Yamal since November 2011, which initially contributed up to 2.3 bcm/year and since 1 January 2015 could contribute to up to 5.5 bcm/year[674] of import capacity to Poland would also not be sufficient to cover the expected growth in gas demand.

(690) As a result, important investments into new interconnection capacity with neighbouring gas markets are needed to allow for additional gas imports. Such investments are time consuming and costly. A quicker and cheaper solution would be to increase the capacity of reverse flows on the Yamal pipeline and to off-take in Poland Russian gas that is transported to Germany. The installation of physical reverse flow on Yamal would allow flowing gas eastwards from Germany to Poland via Yamal, in times when the flow in the usual westward direction would stop. This would significantly increase the possibility of gas imports to Poland and enhance Poland's security of supply and also enhance the quality of virtual reverse flow.

(691) The potential of the Yamal pipeline in this respect is very significant as almost 30 bcm/year crosses Poland from East to West (the total annual gas demand of Poland was 15 bcm in 2012). There are existing exit points from the Yamal pipeline to the Polish transmission network which could be used for that purpose. The entry points are currently partially used for direct supplies from Gazprom Export to PGNiG and since November 2011 for virtual reverse flow. The extension of existing entry points from Yamal and the construction of physical reverse flow would require smaller scale investments than building a new interconnection point with Germany.

(692) Bidirectional gas flows on Yamal would contribute to the integration of the Polish and German gas markets. This would lead to a positive development of the Polish gas market and could facilitate the creation of a local gas hub[675]. Hubs generally operate in connection with neighbouring gas markets.[676]

13.3.2. Gazprom's opposition to investments on Yamal which would enhance supply diversification

(693) As shown in paragraph (664), Gazprom was interested in controlling the development and eventual expansion of Yamal.

(694) As explained previously, Gazprom used the Yamal Deal negotiations to ensure that Europol – and not Yamal's TSO Gaz-System – retained the right to independently initiate investments. An example of how Yamal investments were decided after the entry into force of the OA is illustrated by letters exchanged between Europol and the TSO Gaz-System in the period December 2011 - January 2012 concerning the 2-year development plan for Yamal. The initial proposal of the development plan made by Europol did not include any new investments except for those necessary for operating the pipeline.[677] When Gaz-System was consulted by Europol on the development plan, it requested Europol in several letters to also include investments such as the extension of capacity of Yamal's exit points and enabling physical reverse

674 Press-release of Gas-System of 8 January 2015 'New opportunities for importing natural gas to Poland from the West' as published on Gas-System's website: http://en.gaz-system.pl/centrum-prasowe/aktualnosci/informacja/artykul/202017/, ID 8726

675 Analysis by PricewaterhouseCoopers for Gaz-System, ID 8118-3 (64/281).

676 Analysis by PricewaterhouseCoopers for Gaz-System, ID 8118-3 (207/281).

677 Europol reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Europol dated 28 March 2012, ID 6236 (20/43).

flows in line with market demand. Europol refused Gaz-System's requests.[678] Later, Europol made capacity extensions on Yamal dependent on receiving '*corporate agreements*'[679] of its shareholders.

(695) The refusal to include investments enabling gas supply diversification was formally a Europol decision since, in line with the OA, the development plan was presented by Europol. However, there are certain indications that Gazprom was the driving force behind the refusal.

(696) It was Gazprom that had insisted that the investment powers should stay within Europol and not be delegated to Gaz-System.

(697) In addition, in July 2011 Europol asked its shareholders Gazprom and PGNiG to assign representatives who would have to be consulted on any planned expansion of Yamal and on applications for new connections to the pipeline. The aim was to safeguard the '*interests of the company and its shareholders with respect to development of Yamal and third party access.*'[680] PGNiG refused to participate in such consultations because it considered them to be against the independence of the operator of Yamal Gaz-System as required under the Gas Directive 2009/73 and under the Polish Energy Law.[681] Gazprom, on the other hand, proposed a number of representatives who were to be consulted.[682]

(698) According to Yamal's network code[683] ('Netwok Code')[684], a decision of Europol was required in case of requests to flow more gas which would involve adaptations of the pipeline's assets. However, as explained in paragraphs (667) seq., following the Yamal Deal the OA entrusted significant investment powers to Europol which, as a result of Gazprom's veto rights within Europol, provided Gazprom with the possibility to block Yamal's development plans and the carrying out of expansions.

13.3.3. Gazprom's attempt to obstruct the implementation of virtual reverse flows on Yamal

(699) [redacted]

(700) [redacted]

678 Gaz-System's reply of 28 March 2013 to the Commission's information request of 1 March 2013, ID 4692 and ID 4693 (1/21).

679 Europol reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Europol dated 14 December 2011, ID 6236 (8/43).

680 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, ID 6233 (1/43).

681 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, ID 6233 (3/43).

682 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, ID 6233 (5-6/43).

683 Yamal's Network Code defines the rules on the basis of which transit services are offered by Yamal's operator Gaz-System. The Network Code was prepared by Gaz-System and adopted by the Energy Regulator. The Network Code of Yamal is binding for Europol, Gaz-System and any third party using Yamal.

684 Yamal's Network Code of August 2011, Gaz-System's website ID 6799 and ID 6800.

685 [redacted]

686 [redacted]

[redacted] Since 1 January 2015 the available import capacity has increased to 5.5 bcm/year from Germany to the East.[688] The entire remaining capacity of the entry points was used by direct deliveries by Gazprom Export to Poland.[689]

(701) The introduction of VRF on Yamal required, *inter alia*, a change of the allocation procedure in Mallnow (the compressor station on the German stretch of Yamal) and an agreement between the adjacent TSOs, Gaz-System and Wingas Transport[690] with the participation of Europol.[691] Both measures required the direct involvement of Europol[692] and hence indirectly of Gazprom Export.

(702) The agreement between Gaz-System and Wingas Transport as well as the new allocation procedure in Mallnow were agreed in 2011. However, according to Gaz-System, until 28 October 2011 (i.e. 3 days before the launching of VRF) Europol '*did not take the decision to sign it*' and was '*not able to take the decision*' with respect to VRF implementation.[693]

(703) Europol's MB minutes show that it was Gazprom within Europol's MB that blocked the implementation of the necessary procedural and contractual changes needed for the reverse flows. After months of negotiations and several meetings in mid-October 2011, Europol, Gaz-System and Gazprom Export had agreed on the necessary procedural and contractual adaptations to be implemented to allow VRF. However, on 24 October 2011 Gazprom Export refused to recognise any of the earlier agreements and to implement the changes.[694] Consequently, Gazprom's MB members in Europol did not vote in favour of the necessary adaptations in the allocation procedure in Mallnow. Since the New Statute required unanimous voting in the MB, the resolution of the MB concerning the agreement and the new allocation procedure in Mallnow were not adopted.[695] Europol therefore did not reply to Gaz-System.

(704) Despite Europol's refusal to allow for VRF as a result of the exercise by Gazprom of its veto right in the MB, Gaz-System was legally obliged to offer the service. According to Yamal's Network Code applicable to the Polish section of Yamal, Gaz-System as of 1 November 2011 had to offer transmission services on the Yamal pipeline, in particular, VRF services. Therefore, Gaz-System signed a bilateral

687 [redacted]

688 Press-release of Gas-System of 8 January 2015 'New opportunities for importing natural gas to Poland from the West' as published on Gas-System's website: http://en.gaz-system.pl/centrum-prasowe/aktualnosci/informacja/artykul/202017/, ID 8726

689 Total theoretical (i.e. technical) capacity of the two existing exit points from Yamal to the Polish gas system, i.e. 5.4 bcm/year.

690 The German TSO Wingas Transport GmbH had to be involved because it operated the Mallnow station which was required for the gas flow allocation and the metering of gas coming from the Polish strand of Yamal.

691 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 28 October 2012, ID 6238 (11/24).

692 According to Yamal's Network Code Europol, as Yamal's owner, should be a party to all agreements which involve its assets, ID 6242 (45/69).

693 Gaz-System's letter of 28 October 2011 to Europol, ID 6238.

694 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, minutes of the Management Board of 25-26 October 2011, ID 6242 (43/69).

695 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, minutes of the Management Board of 25-26 October 2011, ID 6242 (46/69).

agreement with Wingas Transport in order to avoid possible fines under the Polish Energy Law.[696] Gaz-System concluded this agreement with Wingas Transport without Europol's participation. Gaz-System also finalized the necessary procedures and offered the service as of 1 November 2011[697] from when on also first requests from the market were received.[698]

(705) The launching of VRF, which meant that physically more gas was flowing through Yamal's exit points in Poland instead of to Germany, triggered a negative reaction of Europol, which accused Gaz-System of acting against the 2010 OA. Europol also signalled that the transported volumes of gas were not in line with transit contracts of Gazprom Export and Europol.[699]

(706) The exercise by Gazprom of its veto right within Europol regarding the implementation of VRF on Yamal illustrates that under the New Statute Gazprom is able to at least delay if not block important decisions on investments. It also shows that Gazprom was opposed to VRF and used its powers within Europol to try and block it. In this particular case, the TSO Gaz-System eventually succeeded to bypass Europol and to introduce the VRF through a bilateral agreement with the TSO Wingas Transport. It did so on the basis of the Polish Energy Law and Yamal's Network Code, according to which all available capacity had to be offered to the market. VRF was considered to be such free capacity.[700]

13.3.4. Gazprom's obstruction of the expansion of virtual reverse flows on Yamal

(707) Between 16 August and 7 September 2012, Gaz-System carried out a regular market screening procedure regarding the demand for additional VRF capacity in Mallnow with off-takes in Poland. The market screening aimed at evaluating the need for potential investment decisions on Yamal's exit points. 23 undertakings took part in the market screening, including final gas consumers and shippers from Poland, Germany and France.[701] The results showed that demand significantly exceeded the available capacity of the existing exit points to the Polish gas network.

(708) As a result, Gaz-System concluded that the existing exit capacity from Yamal needed to be expanded. According to Gaz-System, this investment was '*urgently*' needed.[702] Due to the concentration of demand in central Poland the exit point in Wloclawek in central Poland was considered best suited for such expansion.[703]

(709) On 31 October 2012, Gaz-System applied to Europol to conduct an analysis of the economic and technical conditions for increased gas off-takes at the Wloclawek exit

696 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 28 October 2011, ID 6238 (14/24).

697 Gaz-System's website, ID 6229.

698 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 28 October 2011, ID 6238 (14/24).

699 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 28 October 2011, ID 6238 (16/24).

700 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 30 October 2012, ID 6242 (47/69).

701 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 30 October 2012, ID 6234 (14/43).

702 Gaz-System's clarification of 15 November 2013 to the Commission's information request of 1 March 2013, ID 6865 (6/9).

703 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, ID 6233 (13/43).

point.[704] The request was supplemented on 14 November 2012.[705] Under Yamal's Network Code this was a necessary step in order to offer Yamal's capacity to a third party.

(710) Following the application of Gaz-System, Europol brought forward a number of reasons to delay its reply. On 29 November 2012, Europol informed Gaz-System that its decision about the expansion of the Wloclawek exit point would be delayed by 10 days due to the '*necessary corporate procedures*'.[706]

(711) On 6 December 2012, Europol finalised its internal analysis regarding the increased off-takes in Wloclawek. It concluded that the cost of the investment for the expansion of the metering station at Wloclawek would amount to EUR 2.5 million (PLN 10 million) and that it was economically beneficial for Europol.[707]

(712) Despite this positive conclusion, Europol requested further extensions for its reply, first until 15 February 2013[708] and then until 12 March 2013.[709] It explained the delay by internal procedures which required the project to be presented to '*the Supervisory Board, as required by the Statute*'. According to Europol, the SB could not meet because of the holiday period '*of its shareholder*' and later also due to the '*celebration of the 20th anniversary of Gazprom and funeral of the former CEO of Gazprom.*'[710]

(713) On 8 March 2013, Europol replied positively to Gaz-System in line with its initial internal analysis from December 2012 which had concluded that the project was economically sound and technically feasible.[711] The investment was going to be financed from the tariffs to be charged by Europol approved by the Energy Regulator.[712]

(714) The minutes of the MB meetings show that it was Gazprom's MB representatives who requested to consult with the Europol's shareholders about the investment.[713] Moreover, under the New Statute, the issue had to be brought before the SB. The SB's decision was then delayed for Gazprom-related reasons such as Gazprom Export's 20th anniversary.

(715) The agreement between Europol and Gaz-System regarding the expansion of the Wloclawek exit point was concluded in September 2013. The expansion of Wloclawek was accomplished in November 2014.

(716) The discussions on the expansion of Wloclawek illustrate how Gazprom is able to at least delay or obstruct a project such as the expansion of VRF as a result of the OA which vested Europol – and not the TSO - with the right to independently initiate and implement investments such as 'expansions'. Since the OA confers such rights to Europol, Gazprom is able to use its veto rights in the MB and in the SB.

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704 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 31 October 2012, ID 6234 (7/43).

705 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, letter from Gaz-System to Europol of 14 November 2012, ID 6234 (18/43).

706 See letter from Europol to Gaz-System of 29 November 2012, ID 6234 (28/43).

707 See internal communication within Europol of 6 December 2012, ID 6234 (21/43).

708 See letter from Europol to Gaz-System of 18 January 2013, ID 6234 (37/43).

709 See letter from Europol to Gaz-System of 14 February 2013, ID 6234 (39/43).

710 See letter from Europol to Gaz-System of 14 February 2013, ID 6234 (39/43).

711 See internal communication within Europol of 6 December 2012, ID 6234 (21/43).

712 See letter from Europol to Gaz-System of 14 February 2013, ID 6234 (40/43).

713 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, protocol No 5/2013 of Europol's MB of 7 February 2013, ID 6245 (11/21).

(717) Despite the positive economic and technical analysis by Europol, and despite the very limited investment needs of around EUR 2.5 million, Europol's decision was delayed by three months. This delay was caused by Gazprom and its representatives in Europol's MB and SB where Gazprom has a veto right. This illustrates Gazprom's ability to obstruct or at least delay such projects. Gazprom was able to do so because Europol (and not the TSO) had remained competent for decisions regarding the expansion of Yamal under the OA (as pushed for by Gazprom) and because Gazprom had veto rights in Europol's MB and SB.

13.3.5. Gazprom obstructed and delayed physical reverse flows on Yamal

(718) The following paragraphs will show that since 2004 Gazprom delayed and attempted to obstruct the implementation of physical reverse flows on Yamal directly or through Europol.

(719) Yamal is a mono-directional pipeline and was built to flow gas only from East to West. The introduction of PRF on Yamal was very important for Poland, in particular for security of supply reasons in case supplies from the East would be interrupted. PRF would also contribute to the integration and development of the gas market in Poland.[714] PRF would also significantly improve existing usage of Yamal by increasing the reliability of the VRF offered on this pipeline (in case no gas would flow from East to West, gas could be flown physically from Germany to Poland). In practice, ensuring PRF capacity on Yamal would allow offering VRF on a firm basis,[715] which would improve access to and gas trading with the '*competitive German gas market*'[716].

(720) In order to enable PRF on Yamal a number of conditions had to be fulfilled. First, a physical flow of gas in the opposite direction, i.e. from Germany to Poland, would require an interruption of gas flow in the usual direction. Second, a technical adjustment of the compressor and metering station in Mallnow was required. Finally, a number of contractual adjustments were needed, such as a change of nomination system[717] on Yamal and an agreement between the adjacent TSOs in Poland and Germany.[718]

(721) The required technical and contractual modifications concerned and depended on Gazprom. First, the Mallnow station belonged to Wingas Transport GmbH (today Gascade), which at the time was co-owned by Gazprom. Second, the system of nominations between the Polish and German stretch of Yamal had to be agreed by Europol, where Gazprom had a veto right.

(722) The introduction of PRF in Mallnow had been discussed between Gazprom and PGNiG as early as 2004. At the time, Gazprom agreed to bear the associated costs and was supposed to implement PRF directly with Wingas Transport. On this basis PGNiG, Gazprom, Europol and Gas-Trading signed an agreement on 28 May

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714 Gaz-System's reply of 28 March 2013 to the Commission's information request of 1 March 2013, ID 8264-130 (1/1).

715 Europol reply's of 19 March 2013 to the Commission's information request of 1 March 2013, ID 6238 (23/24).

716 Gaz-System's reply of 26 March 2013 to the Commission's information request of 1 March 2013, ID 8264-45 (29/30).

717 Before the gas day, shippers send nominations to the TSO informing it how they will be using their contracted capacity. During the subsequent matching procedure the TSO checks the nominations. Typically, the nominations in the portfolio of a network user should be balanced.

718 Internal memo by Europol of 29 July 2011, ID 0646 (3/21).

2004[719], according to which Gazprom was obliged to enable technical emergency supplies from Germany via Mallnow. According to PGNiG, Gazprom never fulfilled its obligation under the agreement and did not make the necessary investments allowing gas to flow from Mallnow to Poland. Later in 2004, Gazprom came back to the issue but requested changes of Europol's Statute and shareholding in its favour in exchange.[720] The necessary changes allowing PRF were not implemented.[721]

13.3.5.1. Gazprom suspends the negotiations in 2009-2010 on physical reverse flows in mid-2010

(723) In 2009, PRF was negotiated between Europol and Wingas Transport. The discussions mainly related to the necessary technical and contractual adaptations for PRF to enter into force i.e. metering, nominations and the matching and settlement procedure in Mallnow. Wingas Transport informed Europol that Gazprom Export was willing to introduce PRF. However, Wingas Transport stressed that '*anyway all contracted gas volumes would flow from the Belarus border to the German border. Gazprom Export would receive all contracted gas in Mallnow*.'[722] This statement indicated that, at the time, Gazprom Export was not against PRF per se because it believed that it would in any event not be used due to the constant flows to Germany.

(724) In December 2009, a draft agreement regarding PRF in Mallnow ('the Mallnow Agreement') was agreed between Europol and Wingas Transport. Further progress was dependent on Gazprom Export's agreement on the new settlement and nomination procedure because of an earlier trilateral agreement of 2008 regarding the exploitation of Yamal (e.g. nomination procedures).[723] However, according to Europol, further talks were '*suspended*' by Gazprom in the middle of 2010 once negotiations about the OA by Gaz-System commenced, despite Gazprom's pre-agreement reached at a technical level in 2009 and at the beginning of 2010.[724]

13.3.5.2. Gazprom blocks physical reverse flows in 2011

(725) In 2011, the negotiations for the Mallnow Agreement concerning PRF restarted again at the initiative of Gaz-System, the new TSO of Yamal.

(726) Between March and October 2011, a number of technical discussions took place, similar in substance to those in 2009. Gazprom did not participate in these meetings directly but asked to be informed about their results.[725] During one of the meetings Europol stated vis à vis Gaz-System that for the new settlement and nomination procedure it needed to '*think over the issues taking into account Gazprom Export's opinion.*'[726] The final Mallnow Agreement was subject to the acceptance of the MB of Europol.[727]

(727) In October 2011, the MB of Europol was supposed to decide on nomination procedures on Yamal and on the Mallnow Agreement between Wingas Transport,

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719 Annex 4 to the Agreement on Yamal transit capacity management.

720 Internal document of PGNiG, ID 8040-65 (27-28/58).

721 PRF required the participation of Gazprom because Gazprom was party to the transit agreement.

722 Minutes of the meeting of 29 October 2009 between Europol and Wingas Transport GmbH, ID 0563 (3/13).

723 Internal memo by Europol of 29 July 2011, ID 0646 (2/21).

724 Internal memo by Europol of 29 July 2011, ID 0646 (3/21).

725 See letter from Gazprom Export to Russian Board Member of Europol of 28 February 2011, ID 0629 (5/8).

726 E-mail of Gaz-System of 26 May 2011 on the Interconnection Agreement, ID 0649 (2/9).

727 Internal memo by Europol of 29 July 2011, ID 0646 (4/21).

Gaz-System and Europol. Gazprom, after several months of working on the issues, changed its position and blocked the new nomination procedure and the Mallnow Agreement by not voting in favour. According to Europol's MB chairman, the negative vote meant that the Mallnow Agreement between Europol and Wingas Transport did not enter into force and PRF could not be implemented.[728]

13.3.5.3. Negotiations of physical reverse flows with Gascade in 2012-2013

(728) Gaz-System brought up the issue of PRF again in 2012.[729] The TSO Gaz-System was obliged to introduce PRF because of Regulation No 994/2010[730] ('the SoS Regulation'). The SoS Regulation stipulated that PRF had to be introduced on all gas cross-border interconnectors as of 3 December 2013.

(729) Between 16 August 2012 and 7 September 2012, Gaz-System conducted a market screening procedure, which showed significant market interest in PRF for the period 2014-2028.[731] This was a clear signal for Gaz-System that there was a large market demand for PRF and that the necessary up-grades of the Mallnow station should be implemented. Moreover, the investment needed for the project was rather limited and, according to Gascade (the owner of the German stretch of Yamal) amounted to around EUR 1.8 million.[732] These costs were mainly due to the required expansion of the metering station in Mallnow.[733]

(730) When asked by Gaz-System in 2011, Europol refused to finance the necessary investment despite its responsibility for investments on the Polish section of Yamal.[734] This was surprising taking into account the fact that the possibility of PRF would appear to result in a significant increase of revenues for Europol from the tariff on VRF because virtual capacity from Germany could then be offered on a firm rather than interruptible basis.[735]

(731) In order to implement PRF, Gaz-System had to cooperate with Gascade, Wingas Transport's successor and the owner of the German stretch of Yamal. Gascade was and still is co-owned by Gazprom. According to Gaz-System, cooperation with Gascade on PRF was '*very difficult*'. Gascade's approach was characterised by Gaz-System as negative and '*delaying*' despite the fact that Gaz-System offered to finance the project[736]. In Gascade's view the project was neither needed from a business point of view nor from a security of supply point of view (for Germany).

728 Europol's reply of 19 March 2013 to the Commission's information request of 1 March 2013, ID 6242 (46/69).

729 Gaz-System's reply of 26 March 2013 to the Commission's information request of 1 March 2013, ID 8264-45 (2/30).

730 Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295, 12.11.2010, p.1.

731 Gaz-System's reply of 1 April 2014 to the Commission's information request of 1 March 2013, ID 7814 (5/5).

732 Minutes of meeting of 8 August 2012 between Gaz-System and Wingas-Transport regarding physical reverse flow on Mallnow, ID 8264-104 (1/3).

733 Agreement for the expansion of the Mallnow metering station between Gaz-System and Gascade, ID 7547-86.

734 Europol's letter of 15 November 2011 to Gaz-System concerning Yamal's development plan, ID 6236 (5/43).

735 Gaz-System's website, ID 8327

736 Gaz-System's reply of 26 March 2013 to the Commission's information request of 1 March 2013. internal note of 26 September 2009, ID 8264-52 (1/1).

Moreover, according to Gascade, the probability of gas flow disruptions from the East was very low so PRF would not add much value.[737]

(732) There are also indications that Gascade's negative attitude towards PRF was not based on economic reasoning but was rather related to Gascade's shareholder, Gazprom (49%). On 19 July 2012, Gascade informed the Polish TSO during negotiations that Gazprom '*might not be an obstacle in this issue anymore.*'[738] The statement was made in the context of the negotiations of the operational balancing account (OBA), which is an instrument for grid operators shifting the balancing risk from shippers. [redacted][739] Without the OBA Gazprom had the ability to obstruct the implementation of the reverse flows in Mallnow claiming risks to its existing transit contracts. [redacted]

(733) There was a risk that the investment project would not be finished before the deadline set by the SoS Regulation, i.e. December 2013. Both TSOs agreed to apply to their respective energy regulators to obtain a one year derogation from the SoS Regulation.[741] Contrary to this agreement, Gascade applied to the German Energy Regulator for a permanent exemption[742] while Gaz-System requested a temporary change of the deadline as agreed.[743] The Regulators did not grant the requested exemptions.

(734) Finally, a positive investment decision was taken by the two TSOs on 21 November 2012 under the condition that the Polish TSO would cover all costs. The project was implemented in March 2014.[744]

14. GAS SUPPLIES MADE CONDITIONAL ON INFRASTRUCTURAL COMMITMENTS IN BULGARIA

14.1. Introduction

(735) Bulgaria has very limited domestic gas production which covered between 0% and 14% of total demand in the period 2004 to 2014.[745] All gas imports come from the Russian Federation, supplied directly or indirectly by Gazprom Export.

(736) [redacted]

737 Gaz-System's reply of 26 March 2013 to the Commission's information request of 1 March 2013, ID 8264-45 (3/30).

738 [redacted]

739 [redacted]

740 Gascade's reply of 13 June 2013 to the Commission's information request of 4 June 2013, ID 5785 (1/103).

741 Gaz-System's reply of 26 March 2013 to the Commission's information request of 1 March 2013, ID 8264-45 (8/30).

742 Gaz-System's reply of 26 March 2013 to the Commission's information request of 1 March 2013, ID 8264-45 (15/30).

743 Gaz-System's reply of 26 March 2013 to the Commission's information request of 1 March 2013, ID 8264-45 (14/30).

744 Gaz-System website, ID 8323.

745 See Figure 2 above.

[redacted]

14.2. Gas supplies made conditional on infrastructure-related commitments by BEH

(737) [redacted]

746 According to Gazprom, the aim of the South Stream project was to mitigate transit risks of gas flows from Russia to Europe, as well as to increase Gazprom's export capacities to the European countries. The South Stream pipeline was planned to run from the Russian Federation via the Black Sea and the territories of Bulgaria, Serbia, Hungary and Slovenia, ending in Northern Italy and with a branch to Austria. The technical capacity of the gas pipeline in Bulgaria was planned with 63 bcm/year, comprising a pipeline towards Serbia (around 40 bcm/year) and a second pipeline which was to be connected to the Bulgarian network, transporting Russian gas to Turkey, Greece and Former Yugoslav Republic of Macedonia, and thus to provide new transport route for Russian gas to these countries avoiding the Balkan corridor. The full capacity of the South Stream pipeline in Bulgaria was to be booked by a subsidiary of Gazprom. Following an announcement on 1 December 2014 on the South Stream project cancellation by the president of the Russian Federation, the chairman of OAO Gazprom's Management Committee, A. Miller, publicly confirmed the decision Gazprom to abandon the project. The impossibility to return to South Stream in its initially proposed form was further reiterated by the Russian president in other public statements. However, the announced termination has neither been discussed nor agreed on between Gazprom and BEH. See at: http://www.reuters.com/article/2014/12/01/russia-gas-gazprom-pipeline-idUSL6N0TL44D20141201 ID 8905; http://www.vesti.ru/doc.html?id=2179690 ID 8903; http://www.energypost.eu/gazprom-ceo-alexei-miller-beginning-end-gazproms-model/ ID 8901; http://sputniknews.com/politics/20150218/1018401770.html ID 8899. [redacted]

See Gas Regional Investment Plan, Southern Corridor 2012-2021, Annex B, http://www.entsog.eu/public/uploads/files/publications/GRIPs/2012/GRIP_SC_AnnexB.pdf, ID 7088 (54, 52/64)., [redacted].

747 [redacted]

748 [redacted]

[redacted]

(738) [redacted]

14.2.1. Gazprom made negotiations about a direct gas supply contract conditional upon the completion of the feasibility study for the [redacted] project in 2009 [751]

(739) [redacted]

(740) [redacted]

749 [redacted]

750 [redacted]

751 [redacted]

752 [redacted]

[redacted]

14.2.2. Gazprom made the terms of its direct gas supply contract with Bulgargaz conditional upon the signing of the [redacted] project roadmap in 2010 and 2011

(741) [redacted]

(742) [redacted]

753 [redacted]

754 [redacted]

755 [redacted]

756 [redacted]

757 [redacted]

[redacted]

(743) [redacted]

(744) [redacted]

(745) [redacted]2

(746) [redacted]

(747) [redacted]

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758 [redacted].

759 [redacted]

760 [redacted]

761 [redacted]

762 [redacted]

763 [redacted]

764 [redacted]

[redacted]

14.2.3. Gazprom made the gas supply contract and gas price reductions conditional upon a positive final investment decision (FID) on the [redacted] project in 2012

(748) [redacted]

(749) [redacted]

(750) [redacted]

765 [redacted]

766 [redacted]

767 [redacted]

768 [redacted]

769 [redacted]

770 [redacted]

[redacted]

(751) [redacted]

(752) [redacted]

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771 [redacted]

772 [redacted]

773 [redacted]

774 [redacted]

(753)

(754)

(755)

(756)

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781

[redacted]

(757) [redacted]

(758) [redacted].

(759) [redacted]

(760) [redacted]

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782 [redacted]

783 [redacted].

784 [redacted]

785 [redacted]

786 [redacted]

[redacted]

(761) [redacted]

(762) [redacted]

14.3. Gas supplies and gas prices were unrelated to the [redacted]

(763) [redacted]

787 [redacted]

788 [redacted]

789 [redacted]

790 [redacted]

791 [redacted]

792 [redacted]

(764) [redacted]

(765) [redacted]

(766) [redacted]

14.4. The conditions of the August 2012 protocol and of the FID placed a substantial financial burden and economic risks on [redacted]

(767) [redacted].

(768) [redacted]

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793 Presentation of the Romanian transmission system operator SNTGN Transgaz S.A. Mediaş: http://media.hotnews.ro/media_server1/document-2011-07-7-9308532-0-strategia-interconectare-transgaz.pdf, ID 6812 (25-30/42).

794 [redacted]

795 [redacted]

(769) [redacted]

(770) [redacted]

(771) [redacted]

(772) [redacted]

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796 [redacted]

797 [redacted]

798 Under the principles of project finance the main, if not only, source of funds available to service the project debt are the future cash flows generated by the project's assets. The project sponsors invest their pro rata share of equity in the project company. The project company raises funds from a variety of sources, with lenders having no or limited recourse to the balance sheets of the project sponsors. Project finance differs from corporate finance where a project investor funds its share of the project costs from

[redacted]

(773) [redacted]

its corporate funds, see Alexandre Chavarot, 'Project finance and risk mitigation', http://www.globelawandbusiness.com/REI/sample.pdf, ID 7094 (2/7).

799 [redacted]

800 [redacted] See also statement by the Bulgarian Prime Minister according to press article of 9 April 2015, http://www.focus-fen net/news/2015/04/09/369025/bulgaria-grid-operator-inks-landmark-changes-to-contracts-with-american-tpps-roundup.html, ID 8963 (2/3).

801 [redacted]

(774) [redacted]

(775) [redacted]

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802 [redacted]

803 Values in EUR on the basis of the European Central Bank reference average exchange rate for 2012, i.e. BGN/EUR = 1.9558.

804 The BEH group's financial result for 2012 was a net loss of around Euro 5.5 million (compared to a net profit of around Euro 135 million in 2011). The BEH group's total revenue for 2012 amounted to around Euro 3.32 billion compared to around Euro 3.1 billion in 2011, see the BEH group's consolidated Financial Statements for 2012, ID 8216-15 (26/61). In addition, the BEH group is involved in different litigations, one of which is the litigation with the Russian company ZAO Atomstroyexport. In 2011, the latter commenced proceedings at the Arbitral Tribunal of the International Chamber of Commerce – Paris against BEH's subsidiary NEK EAD, the electricity incumbent in Bulgaria, and is claiming damages of at least Euro 1 billion in relation to the aborted construction of the 'Belene' nuclear power plant in Bulgaria. No provisions have been made by the BEH group in respect of this litigation, see Notes to the BEH group's consolidated Financial Statements for 2012, ID 8216-16 (5, 39/44), see also Prospectus dated 5 November 2013 regarding BEH's bonds issue, http://www.ise.ie/debt_documents/Prospectus%20-%20Standalone_6944c985-d24b-48dd-bb79-b5bfc8bec92f.PDF, ID 7095 (67/322).

805 See Prospectus dated 5 November 2013 regarding BEH's bonds issue, http://www.ise.ie/debt_documents/Prospectus%20-%20Standalone_6944c985-d24b-48dd-bb79-b5bfc8bec92f.PDF, ID 7095 (17/322). The financial difficulties experienced by BEH have recently further worsened as evidenced by the recent (March 2015) downgrade by Fitch Ratings of BEH group's credit ratings with respect to its vulnerability to default on financial obligations (issuer default ratings). The credit rating agency expects BEH group's liquidity to deteriorate in 2015 due to a projected working capital outflow, which together with capital expenditure will result in negative free cash flow. In Fitch's view, BEH's failure to meet its Eurobond debt covenant (in 2013, BEH issued EUR 500 million bonds) results in limiting its possibility to raise debt and would substantially worsen the group's liquidity position. It could result in a liquidity crunch in 2015, see at https://www.fitchratings.com/creditdesk/press_releases/detail.cfm?pr_id=981515, ID 8900.

15. LEGAL ASSESSMENT

15.1. Undertaking

(776) As stated in section 3.1 above, OAO Gazprom and Gazprom Export are involved in a range of economic activities in the gas sector. They therefore constitute undertakings within the meaning of Articles 101 and 102 TFEU.[806]

15.2. Relevant product market

(777) 'The main purpose of market definition is to establish in a systematic way the competitive constraints that the undertaking[s] involved face[s]. The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. [807]

15.2.1. The market for the supply of gas

(778) The Commission has in the past defined a market for the supply of natural gas (by domestic and foreign producers) to various customers.[808]

(779) The product market for the supply of gas is to be distinguished from the market for the transportation of gas.[809]

(780) Whereas there is one joint market for the exploration of oil and gas,[810] the supply of gas is a distinct market from the supply of oil. Oil and gas have different characteristics and are subject to different cost and pricing constraints and therefore belong to two distinct product markets.[811] Oil is mainly used for transportation, whereas gas is used for power generation and by industry, see section 11.1.2.1.

(781) The supply market comprises domestic production and imports. This effectively limits the market to what is actually consumed in a given geographic market. The market for the supply of gas does not cover gas transiting through that geographic area.

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806 Case C-41/90 *Höfner & Elsner* v *Macrotron* [1991] ECR I-1979, paragraph 21.

807 Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 of 9.12.1997, p.5, paragraph 2, 7.

808 See Commission decision of 3 December 2009, COMP/39.316 *Gaz de France*, paragraphs 11 et seq., Commission decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, paragraph 100, Commission decision of 29 September 2010, COMP/39.315, *ENI*, paragraphs 23 and 25; in Commission decision of 14 March 2006, COMP/M.3868, *DONG* paragraph 17 it was also made clear that supplies also covered sales by importers; Commission decision of 11 April 2011, COMP/M.6068 *ENI/ACEGASAPS/JV*, paragraph 15.

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

810 At the exploration stage it is not obvious, whether gas will be discovered. See Commission decision of 23 January 2003, COMP/M.3052 *Eni/Fortum*, paragraph 11, OJ C 36 of 15.2.2003, p. 26, with reference to COMP/M.1532 *BP Amoco/Arco*, paragraph 14, as well as Commission decision of 19 November 2007, COMP/M.4934 *Kazmunaigaz/Rompetrol*, paragraph 3 with reference to Commission decision of 29 September 1999, COMP/M.1383 *Exxon/Mobil*, paragraph 16, OJ L 103 of 7.4.2004, p. 1.

811 See COMP/M.1532 *BP Amoco/Arco*, paragraph 14 as well as COMP/M.1383 *Exxon/Mobil*, paragraph 16.

(782) The question whether a further market distinction is to be made according to gas quality (e.g. high-calorific vs. low-calorific gas in Germany[812]) can be left open, as in the CEE markets only H gas is used.

(783) No further distinction is to be made according to the duration of gas supply contracts,[813] because gas sold under different contracts has the same properties and can compete within a given geographic area.

(784) Within that supply market, the Commission has in previous decisions made a distinction between gas sales to wholesalers and gas sales to final customers (retail).[814] This will be further discussed below.

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

(785) The wholesale supply market may be divided into an upstream and a downstream wholesale market.

(786) On the upstream wholesale market producers and exporters sell large quantities of gas to wholesalers and importers. The recent merger decision regarding Gazprom Wintershall confirmed that market participants define upstream wholesale gas supply as a separate market.[815] Such upstream sales also cover indirect sales in which the gas is sold by the producer/exporter to the wholesaler/importer on a hub or through an intermediary.[816]

(787) The downstream wholesale level, which concerns the onward sales by the wholesalers and importers to retailers or other downstream wholesalers (e.g. distribution companies), is not considered part of the market.[817]

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

(788) Within the market for the supply of gas to end customers, a distinction is traditionally made between the supply to (large) industrial customers, power plants and to small customers (households and commercial customers).[818]

(789) As to the market for large industrial customers, the Commission's practice has established that large industrial customers have different needs and consumption

812 Commission decision of 4 May 2010, COMP/39.317 *E.ON gas foreclosure*, paragraph 15; COMP/39.316 *Gaz de France* and Commission decision of 14 November 2006, COMP/M.4180 *Gaz de France/Suez*.

813 As shown above, gas supply contracts can be long-term or short-term. For the purpose of the market analysis, all gas supplies are considered relevant.

814 See COMP/39.315 *ENI*, cited above, paragraph 25.

815 See Commission decision of 3.12. 2013, COMP/M.6910 *Gazprom/Wintershall/Target companies*, paragraphs 23, 45, 84 and 85. See also Commission decision of 20.11.2012, COMP/M.6984 – *EPH/Stredoslovenska Energetika*, paragraphs 21-23.

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

817 See on downstream wholesale level COMP/M.6910 *Gazprom/Wintershall/Target companies*, cited above, paragraph 24.

818 COMP 39.315 *ENI*, cited above, paragraph 27 with reference to Commission decision of 9 December 2004, COMP/M.3440 *EDP/GDP/ENI*, paragraph 25; Commission decision of 21 December 2005, COMP/M.3696 *E.ON/MOL*, as of paragraph 116 and Commission decision of 14 March 2006, COMP/M.3868, *DONG/Elsam/Energi*, paragraph 56 (wholesale) and as of paragraph 70 (final customers).

patterns and has made a distinction e.g. as to whether the customer is connected to the transmission or distribution grid.[819]

(790) The sale to large industrial customers may also be carried out by vertically integrated importers or producers. These companies would then act as retailers by supplying large industrial customers directly. The contractual conditions for gas supplies to these customers are largely similar to those for upstream wholesale supplies. OAO Gazprom is directly supplying industrial customers in [redacted] The Commission considers that the question whether sales to large industrial customers form part of the upstream wholesale market or constitute a separate retail market for large industrial customers can be left open as it does not affect the Commission's reasoning for the finding of dominance.

15.2.4. Conclusion on the relevant product market

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

15.3. Relevant geographic markets

(792) 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.[820] 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 distributing gas.[821] 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 can be defined nationally.[822]

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819 COMP/39.316 *Gaz de France*, cited above, paragraph 13.

820 Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 of 9.12.1997, p.5, paragraph 8. Commission Decisions in case COMP/37.451, *Deutsche Telekom AG*, paragraphs 92-93; and case COMP/38.233, *Wanadoo Interactive*, paragraph 205. See also judgment in Case C-27/76 *United Brands* v *Commission*, paragraph 44; judgment in Case 322/81 *Michelin v Commission*, paragraph 26, judgement in Case 247/86 *Alsatel v Novasam*, paragraph 15.

821 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.

822 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

(793) When determining the relevant geographic market the Commission may take various factors into account such as market characteristics, price differences at national or EEA level, transport costs, the regulatory frameworks etc. The level of market integration may also be relevant, e.g. the commercial or technical constraints for exports.

15.3.1. Market players and pricing in the CEE markets for the upstream wholesale gas supply

(794) The markets for the upstream wholesale gas supply are characterised by the fact that generally only one major national wholesaler is present in each country. This wholesaler is a different company for each of the CEE countries concerned (see above section 4, on Gazprom's relation with national wholesalers). Historically only one main wholesaler in each country provides gas to the domestic market.[823] Gazprom has concluded gas supply agreements with each of these national wholesalers in the CEE countries.

(795) Divergent prices in geographic areas can be an indication of the existence of national markets. As set forth in paragraph (395) et seq. and in particular in the tables in Figure 29 and Figure 33 for the five CEE countries, prices differ between CEE countries throughout 2009 to 2014. This is a further indication that the geographic markets for the upstream wholesale gas supply in the CEE countries are national.

15.3.2. Contractual elements

(796) Contractual elements can contribute to the creation of national markets. In the CEE countries, [redacted] gas supply contracts with Gazprom contained territorial restrictions which prohibited the re-sale of gas and which were, in most cases, only deleted in 2012 and in some instances are still ongoing.[824] Gazprom itself considers that, as long as there is no uniform price level, territorial restrictions should serve the purpose of preventing trade flows. As set forth in section 8.2.2.2, in some instances Gazprom also threatened with retaliatory measures, should the wholesaler engage in such exports. Wholesalers thus had an incentive to only supply gas to their national markets.

(797) The high take-or-pay obligations present in all long-term gas supply agreements with CEE wholesalers also hinder the re-sale of gas and thereby contribute to the creation and maintenance of national markets. All gas supply agreements provide for a minimum annual quantity. A large percentage of that minimum annual quantity is subject to the take-or-pay obligation and the customer will have to off-take that amount gas or be subject to a penalty, see section 7.2.3. As the minimum annual quantities and take-or-pay quantities are often calculated in a manner that they cover (almost) the entire gas consumption needs of the country, wholesalers within the CEE are not in the position to purchase additional gas from other sources. While such imports would reduce the quantities that the wholesalers would need to

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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*.

823 [redacted]

824 See in this regard also COMP/M.3696-*E.ON Mol*, cited above, paragraphs 131-133, in which the fact that the gas imported to Hungary served the domestic market and was not re-exported was considered relevant to define the market as national. In Poland and [redacted] the territorial restrictions were already abolished in 2010 and in 2008.

purchase from Gazprom, the take-or-pay obligation would legally bind them to pay for such non off-taken quantities. Take-or-pay obligations therefore constitute a significant constraint on wholesalers to import from other markets.

15.3.3. Commercial constraints

(798) Commercial constraints exist due to transport costs, which so far prevented the development of regional gas markets within the CEE countries or of certain CEE countries with other markets. Customers are unlikely to source from suppliers in other markets if transport costs are significant. For example, the transport cost for natural gas between Velke Kapusany and Waidhaus was [redacted] of the average price of natural gas delivered at Waidhaus in 2009-2012 (and [redacted] of the average price delivered at the EU border).[825] These percentages were above the average sales' margins of CEE wholsalers in the same period.

(799) Further, physically available transport capacity may not always translate into freely available capacity, because the capacity may already be booked. Capacity may also be available during parts of the year (e.g. only summer) but not over a full year, as would at least be required by a wholesaler supplying final customers.

15.3.4. Technical constraints

(800) Technical constraints exist due to insufficient transportation capacity in CEE countries in relation to their consumption level. Moreover, the transportation capacity is often limited by existing contracts.

(801) The Baltic countries (*Lithuania, Latvia and Estonia*) are not connected to any other EU gas market and almost their entire gas demand is covered by OAO Gazprom. There is significant technical interconnection capacity between the Baltic countries. However, each Baltic country constitutes a separate national gas market because the actual usage of the interconnection is limited (as shown in section 6.4.4).

(802) The transmission network in *Bulgaria*, used only for the supply of gas to customers within the country (domestic network), is technically isolated from the neighbouring gas transmission systems. The other Bulgarian transmission network mainly transports Russian gas to Turkey, Greece and the Former Yugoslav Republic of Macedonia. The lack of interconnections which could effectively be used to flow gas from the latter network into the domestic network further is further evidence of the national scope of the Bulgarian market.

(803) In *Poland*, there was only one gas interconnector with another EU country until 2011, Lasow on the Polish-German border (capacity of 1 bcm/year). It allowed imports of only 7% of Poland's yearly gas consumption. This capacity was fully booked over a long period and therefore not available for alternative supplies. While an LNG terminal is under construction in Poland, it will only be available as of 2016. Reverse flow possibilities from Germany have only been increased since early 2015 and it is expected to take some time before such flows will materialise.

(804) While interconnector capacities have been increasing recently, the Commission has no evidence that the finding of national markets will change in the short or medium term. On the contrary, a report by the Agency for the Cooperation of Energy Regulators[826] shows that for the last quarter of 2013 congestion problems exist in

825 Commission calculations based on data from ID 8351 and ID 8957.

826 ACER, Agency for the Cooperation of Energy Regulators, report on contractual congestion at interconnection points Q 4 2013, paragraphs 39, 41 and 52, ID 8389.

several countries, in particular between Germany and Poland and between Germany and the Czech Republic.

(805) In any event, even with developing interconnectors the Commission takes the view that against the background of the current market characteristics of the CEE markets, the contractual elements and commercial constraints as outlined above, markets are national in scope.

15.4. Conclusion on the market definition

(806) The Commission, at this stage considers that the relevant markets should be defined as the national markets for the upstream wholesale supply of natural gas.

15.5. Gazprom's position of dominance

(807) According to settled case law, dominance is '*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*.'[827]

(808) The notion of independence, which is a special feature of dominance,[828] is related to the level of competitive constraints facing the undertaking in question. For dominance to exist, the undertaking concerned must have substantial market power so as to have an appreciable influence on the conditions under which competition will develop.[829]

(809) The existence of a dominant position derives in general from a combination of several factors which, taken separately, are not necessarily determinative.[830] One important factor is the existence of very large market shares, over 50%, which are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.[831] In *Hilti* the Court of Justice accepted that market shares between 70% and 80% are so high that they are in themselves a clear indication of the existence of a dominant position.[832] Other important factors when assessing dominance include the existence of entry barriers, preventing either potential competitors from having access to the market and /or actual competitors from expanding their activities on the market.[833]

15.5.1. Gazprom's market shares in the upstream wholesale gas supply markets in CEE

(810) The relevant markets are the national upstream wholesale supply markets in the CEE countries. Gazprom is the largest gas supplier in CEE with very high market shares in all of these markets. In Bulgaria, Czech Republic, Estonia, Lithuania and Slovakia

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http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Gas%20Contractual%20Congestion%20Report%202014.pdf.

827 Case 27/76 *United Brands and United Brands Continental* v *Commission* [1978] ECR 207, paragraph 65.

828 Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 46, paragraphs 42-48.

829 Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, paragraph 39.

830 Case 27/76 *United Brands and United Brands Continental* v *Commission*, cited above, paragraph 66.

831 Case C-62/86 *Akzo* v *Commission* [1991] ECR-I 3359, paragraph 60; Case T-228/97, *Irish Sugar* v *Commission* [1999] ECR II 2969, paragraph 70; Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, paragraph 41; Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 154.

832 Case C-53/92 P *Hilti AG* v *Commission* [1994] ECR I-667.

833 Case 27/76 *United Brands and United Brands Continental* v *Commission, cited above*, paragraph 129; and Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above.

Gazprom has - and had throughout the years - very significant market shares of almost always above [redacted] and sometimes reaching monopoly positions.Gazprom has also significant market shares in Latvia. Even in markets where there is competition due to domestic gas production or due to supply from other sources (Hungary, Poland), market shares of Gazprom are very high and in most instances well above [redacted].

(811) Other competitors do not have the strength and are not numerous enough to effectively constrain Gazprom's dominant position.[834] On all the markets concerned 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 of CEE countries.

(812) Gazprom enjoyed a stable position of dominance over the last eight years. Only in Poland in 2004 Gazprom's market share was less than 50% (42%), but Gazprom's market share increased to around [redacted] as of 2005 and has remained stable at around [redacted] throughout the relevant period. In particular also in view of the pivotal role of Gazprom for Polish gas supplies, the Commission considers that Gazprom was also dominant in Poland in 2004.

Figure 57: Gazprom's market shares in upstream wholesale gas supply in CEE (with the inclusion of data for industrial customers)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
BG[1]				89%	95%	100%	93%	86%	83%	87%
CZ[2]	77%	88%	93%	94%	100%	75%	83%	91%	88%	87%
EE[3]	82-100%									
HU[4]	72%	69%	59%	63%	70%	67%	57%	56%	50%	57%
LV[5]	70-100%									
LT[6]	100%									
PL[7]	42%	62%	66%	62%	66%	56%	63%	65%	58%	66%
SK[8]	98%	98%	99%	96%	90%	86%	82%	77%	69%	91%

[1] – For Bulgaria, data from the National Energy Regulator was used.[835]

[2] – For the Czech Republic, data for the total consumption was obtained from the National Energy Regulator. Gazprom's sales volumes were provided by RWE Transgas. As RWE Transgas may have sold some of these volumes in other markets Gazprom's market share in the Czech Republic may be overstated.[836]

[3] – For Estonia, an average market share interval of Gazprom is provided. The lower number is calculated from total consumption data provided by the National Energy Regulator, Gazprom's import are based on information provided by Eesti Gaas. In order to balance irregularities caused by volumes put into and withdrawn from the Latvian storage the average market share for 2004-2014 is calculated. [837] Part of the gas supply in Estonia has in the past been covered by the company Itera Oil and Gas via its subsidiary Itera Latvija (approximately 18%). Itera Oil and Gas was in the past partly owned by the Russian gas producer Rosneft which acquired it fully in 2013. Due to Gazprom's export monopoly, no other pipeline gas producer can export gas directly from Russia and depends on Gazprom for conducting the respective sales into Europe. Gazprom will only allow for exports at conditions which do not impair its own interests in the export markets. One can argue that such exports under Gazprom's control can therefore also be considered as part of the Gazprom market position. This perspective is reflected by the upper limit of the interval.[838] In any case, Gazprom's export monopoly would appear to be a factor enhancing its market power in the markets at issue in this SO.

834 Regarding the relevance of the number and strength of competitors see *Case 27/76 United Brands Company and United Brands Continental* v *Commission*, cited above, paragraphs 108-110.

835 State Energy and Water Regulatory Commission, Annual Report 2014, ID 8672 (pages 34-35). Depending on how changes in storage levels are taken into account when calculating the share of imports, in 2013 the alternative method would have given a market share of 90,2%.

836 2013 Annual report of the National Energy Regulator, ID 8358 (page 6), data from RWE Transgas and references to the raw data in ID 8351, and RWE's reply of 6 March 2015 to the Commission's information request of 2 March 2015, ID 8792.

837 Annual Report of National Energy Regulator, ID 8673 (65-66/91) and data from Eesti Gaas and references to the raw data in ID 8351

838 See http://www.rosneft.com/news/pressrelease/02072013 html, ID 8910,

[4] – For Hungary, data from the National Energy Regulator was complemented with information from EFT (for 2006-2014).[839]
[5] – For Latvia, an average market share interval of Gazprom is provided. The lower number is calculated from total consumption data provided by the National Energy Regulator while Gazprom imports are provided by Latvijas Gaze.[840] In order to balance irregularities caused by volumes put into and withdrawn from the Latvian storage the average market share for 2004-2014 is calculated. Regarding the higher limit of the interval, part of the gas supply in Latvia has in the past been supplied by the company Itera Latvija (approximately 30%). The same argumentation applies as indicated in note 3 above regarding Gazprom's export monopoly.[841]
[6] – For Lithuania, information of the National Energy Regulator was used.[842] In 2008-2013 part of Gazprom's gas was imported through another company, LT Gas Stream. According to the Lituanian Regulator, LT Gas Stream acted as an intermediary for Gazprom.[843] This means that Gazprom's market share was effectively 100% during the whole period.
[7] – For Poland, for total consumption data information of the National Energy Regulator was used.[844] For Gazprom's sales volumes information from PGNiG was used.[845] For the period 2005-2008, Gazprom's indirect sales to PGNiG via its Ukraine based subsidiary RUE are included.[846]
[8] – For Slovakia, for total consumption data for 2004-2014 and imports information for 2004-2006 of the National Energy Regulator was used.[847] This was compelemented by data provided by SPP.[848]

15.5.2. Gazprom's market shares in a potential retail market for supplies to large industrial customers

(813) Should a separate market for large industrial gas customers be considered, Gazprom has a market share of around [redacted] for at least the years 2008 to 2013 in Lithuania.[849]

15.5.3. Barriers to entry

(814) Barriers to entry protect Gazprom's dominant position in the eight CEE markets. Entry barriers include the need of competitors to make very large capital investments.[850]

(815) Entry barriers to national gas wholesale markets include the existing lack of available interconnection capacity. Gas infrastructure projects are time-consuming and require substantial investments. CEE countries have no adequate infrastructure to give alternative suppliers real access to the market. While there are interconnectors between some of the CEE countries, the existing interconnection capacity is insufficient to undermine Gazprom's market position. Until 2015, there was no LNG terminal in CEE. In January 2015 the Klaipeda LNG terminal in Lithuania started its operations, see above paragraph (135). So far, the quantities of LNG imported via this terminal are, however, limited. The only company which currently imports LNG is UAB Litgas ('Litgas') which imports the quantity of LNG necessary as technical minimum to operate the terminal, i.e. 0.54 bcm which amounts to around 20% of

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http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=30529668, ID 8913 and http://2011.balticsheart.com/tag/itera-latvija/ , ID 8911.

839 Annual Reports of National Energy Regulator, ID 8356 and ID 8674. ERG data and references to the raw data are in the spreadsheet ID 8351 and in the reply of Magyar Földgázkereskedő Zrt of 6 March 2015 to the Commission's information request of 2 March 2015, ID 8831.

840 Annual Reports of National Energy Regulator, ID 8353 (page 21) and ID 8836 (page 12) and data from Latvijas Gaze and references to the raw data in ID 8351.

841 See http://2011.balticsheart.com/tag/itera-latvija/, ID 8911 and 2007 Annual Report of National Energy Regulator, ID 8912.

842 Annual Reports of National Energy Regulator, ID 8364 and ID 8675.

843 2013 Annual Report of the National Energy Regulator, ID 8675 (8/116).

844 Annual Reports of National Energy Regulators, ID 8359 and ID 8676.

845 Data and references to the raw data are in the spreadsheet ID 8351.

846 PGNiG's reply of 7 December 2012 to the Commission's request for information of 20 July 2012, ID 3805.

847 Annual Reports of National Energy Regulator, ID 8365 and ID 8677.

848 Data and references to the raw data are in the spreadsheet ID 8351 and the reply of SPP of 6 March 2015 to the Commission's information request of 2 March 2015, ID 8794.

849 Market shares of Achema are based on data in energy regulator reports, ID 8364 and 8675 as well as on Eurostat data, ID 8971 (data converted using a TWh - bcm conversion factor of 10.37).

850 Case 27/76 *United Brands Company and United Brands Continental* v *Commission, cited above,* paragraphs 122-124.

Lithuania's consumption (2.7 bcm in 2013).[851] It is to date uncertain whether imports via the LNG terminal will increase in the future. While supplies from certain gas hubs exert competitive pressure on CEE markets, gas hub sales have not been able to seriously undermine Gazprom's dominant position.

(816) A dominant company's own behaviour may also create barriers to entry. Gazprom's long-term contracts further cement its dominant position. Gazprom concludes long-term contracts with its customers, with a typical duration of [redacted] Gazprom's contracts include high minimum purchase obligations (take-or-pay obligation) which cover often the entire or at least a very significant amount of the country's consumption (see section 7.2.3). This means that other suppliers have no opportunity to enter the market during the contract term.

15.5.4. Conclusions on dominance

(817) The Commission preliminarily concludes that Gazprom is dominant on all eight CEE markets for the upstream wholesale supply of gas.

15.6. Abuse of dominant position

(818) Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon, is to include a system ensuring that competition is not distorted.[852]

(819) Article 102 TFEU ensures that competition is not distorted by prohibiting as incompatible with the internal market any abuse by one or more undertakings of a dominant position, insofar as it may affect trade between Member States. The concept of abuse is an objective concept. It relates to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[853]

(820) A dominant undertaking has a special responsibility not to allow its conduct to impair undistorted competition in the Common market.[854] It follows from the nature of the obligations imposed by Article 102 TFEU that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings. It is advisable to ascertain whether an undertaking makes use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.[855]

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851 Reply by Litgas of 27 February 2015 to the Commission's information request of 10 February 2015 paragraph. 20, ID 8781.

852 Case C-52/09 ***Telia Sonera*** [2011] ECR I-527, paragraph 20.

853 Case 85/76 ***Hoffmann-La Roche***, cited above, paragraph 91.

854 Case C-202/07P ***France Telecom*** v ***Commission*** [2009] ECR I-2369, paragraph 105; Case 322/81 ***Nederlandsche Banden-Industrie Michelin*** v ***Commission*** [1983] ECR 3461, paragraph 57.

855 ***United Brands Company and United Brands Continental*** v ***Commission***, cited above, paragraph 249.

(821) Article 102 TFEU provides a non-exhaustive list of practices that may constitute an abuse. The conduct of a dominant undertaking may therefore fall foul of this provision even if it is not expressly listed in the examples of abuses mentioned in the provision.[856]

15.7. First aspect of the abuse: territorial restrictions

(822) The first aspect of Gazprom's abuse consists of partitioning the internal market through different forms of territorial restrictions. Gazprom has introduced in its gas supply agreements clauses which prevent the wholesalers from re-selling the gas outside their country (re-export bans or resale restriction) as well as destination clauses which oblige the wholesalers to use the gas only in their own country or, – in some instances – destination clauses that oblige the wholesalers to only sell to certain customers within their own country.

15.7.1. Principles

(823) A contract that imposes on the purchaser a territorial restriction in the form of an export restriction or a restriction regarding the territory into which goods can be resold may be regarded as a restriction of competition.

(824) The Commission's Regulation on vertical agreements[857] classifies as hard-core restrictions vertical agreements which *'directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object […] the restriction of the territory into which or the customers to whom a buyer party to the agreement […] may sell the contract goods*', except in a limited set of circumstances notably designed to enable a supplier to set up exclusive or selective distribution systems.[858]

(825) The Court ruled with respect to Article 101 TFEU that '*a contract which imposes upon the buyer an obligation to use the goods supplied for his own needs, not to resell the goods in a specified area and to consult the seller before soliciting business in another specified area has as its object the prevention of competition within the common market.*'[859]

(826) A contract provision in United Brands imposed by the seller on wholesalers not to sell bananas while they were still green was found to constitute an abuse under Article 102 TFEU, because the clause limited '*markets to the prejudice of consumers and affected trade between Member States, in particular by partitioning national markets.*'[860]

(827) In the energy sector, the Commission took the view that a clause in a gas transport agreement between GDF and ENI that precluded ENI from selling in France the gas that was being transported through France was a restriction of competition contrary

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856 Case C-333/94 P *Tetra Pak International SA* v *Commission* [1996] ECR I-5951, paragraph 37; Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports a.o.* v *Commission* [2000] ECR I-1365, paragraph 112.

857 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the EU to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1-7, Article 4(b).

858 Commission Guidelines on vertical restraints, OJ C 130, 19.05.2010, p. 1, paragraph 51.

859 Case 319/82 *Société de vente de ciments et béton de l'Est* [1983] ECR 4173, paragraph 6.

860 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraphs 157 and 159. The Court found a restriction despite the fact that the bananas were a perishable good and therefore only had limited possibilities of being re-sold.

to Article 101 TFEU because it prevented customers in France from purchasing this gas.[861]

(828) While Article 102 TFEU does not explicitly refer to the imposition of territorial restrictions, the list of abusive practices set out in Article 102 TFEU is not exhaustive.[862] Practices mentioned explicitly in Article 102 TFEU are mere examples of an abuse.[863] Any practice that leads to a compartmentalisation of the internal market ('market partitioning') is seen by the Court to run counter to the very idea of the Treaty of eliminating national barriers: '*Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers.*'[864]

(829) Article 102 TFEU has been applied on several occasions to the unilateral conduct of dominant undertakings that has hampered export and/or impeded parallel trade between Member States.[865] In *Suiker Unie*, a dominant sugar refinery was found to have violated Article 102 TFEU by threatening to stop sugar supply unless distributors complied with its restrictive export policy. The Court found that by '*compelling dealers to channel their exports to specific consignees or destinations […], RT has restricted the outlets of the dealers and indirectly of* their purchasers, *which is a practice expressly mentioned by Article 86 (b)'* (now Article 102 TFEU).[866]

(830) In *British Leyland*, a dominant company was found to have violated Article 102 TFEU by refusing to issue type certificates for vehicles that had been re-imported to the UK from the continent; the Court held that this refusal manifested 'a *deliberate intention […] to create barriers to re-importations.*'[867]

(831) Article 102 TFEU has also been applied to the behaviour of a dominant company which is based on an anti-competitive agreement.[868] The Courts have confirmed that an abuse can consist in the imposition of contractual conditions.[869]

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861 Commission decision of 26 October 2004, COMP/38.662 *GDF/ENI*, paragraphs 66-69.

862 See Case 6/72 *Europemballage Corp and Continental Can Co Inc* v Commission [1973] ECR 215, paragraph 26; Joined cases C-359/96 P and C-396/96 *P Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 112; Case C-333/94 P Tetra Pak II [1996] ECR I-5951, paragraph 37 and Case C-95/04 P *British Airways* v Commission [2007] ECR I-2331, paragraph 57.

863 See Case T-201/04 *Microsoft Corp* v *Commission* [2007] ECR II-3601, paragraphs 860 and 861; Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 173; and Case C-52/09 *TeliaSonera*, cited above, paragraph 26.

864 Joined cases 56 and 58-64 *Consten and Grundig* v. *Commission* [1966] ECR- 299, 340; see also Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd*, judgment of 4 October 2011, paragraph 139, not yet reported; Case C-501, 513, 515, 519/06 *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-9291, paragraph 61; Joined Cases C-468/06 to C-478/06, *Sot.Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 65.

865 See for example Joined Cases C- 468/06 to C-478/06 *Sot.Lélos kai Sia and Others*, cited above*;* Case 27/76, *BL v Commission* [1978] ECR 207*;* Case T-139/98 *Amministrazione Autonoma dei Monopoli dello Stato v Commission* [2001] ECR II -3413.

866 Joined cases 40-48, 50, 54-56, 111,113 and 114-73, *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission*, [1975] ECR 1663, paragraphs 396 and 398.

867 Case 226/84 *British Leyland Public Limited Company*, [1986] ECR -3263, paragraph 24.

868 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above.

(832) In this regard, it is settled case-law that the fact that an agreement may fall within Article 101 TFEU does not preclude the application of Article 102 TFEU since this latter Article is '*expressly aimed in fact at situations which clearly originate in contractual relations.*'[870]

(833) In view of the common objectives pursued by Articles 101 and 102 TFEU, and their possible alternative or concurrent application to the same contractual practices, agreements concluded by a dominant undertaking which partition the internal market can constitute an abuse under Article 102 TFEU.

15.7.1.1. Criteria for the assessment of territorial restrictions under EU competition rules

(834) Market partitioning cases have mainly been assessed under Article 101 TFEU. In the following, an overview about the main principles according to case-law for anti-competitive agreements will be given. These principles also apply to Article 102 TFEU.

(835) Agreements which aim at partitioning markets along national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101 TFEU.[871] This is the case for export restrictions, for which the Court held that '*by its very nature, a clause prohibiting exports constitutes a restriction of competition.*'[872] It is settled case law that a distribution agreement has a restrictive object if it clearly manifests the will to treat export sales less favourably than national sales and thus leads to a partitioning of the market.[873] Similarly, the ECJ has regarded as inherently restrictive of competition any measures which restrict '*the buyer's freedom to use the goods supplied in accordance with his own economic interest.*'[874]

(836) Also under Article 102 TFEU, certain conduct is by its very nature capable of restricting competition.[875] With reference to its case law regarding market partitioning agreements as a restriction by object under Article 101 TFEU, the Court in *Sot.Lelos* held for the application of Article 102 TFEU: '*In the light of the above*

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869 See Case 127/73 *Belgische Radio en Televisie* v *SV SABAM and NV Fonior* [1974] ECR 313, paragraph 15; Case 247/86 *Alsatel* v *SA Novasam* [1988] ECR 5987, paragraph 10; Case T-83/91 *Tetra Pak International SA* v *EC Commission* [1994] ECR II-755, paragraph 140.

870 Case 85/76 *Hoffmann La Roche & Co AG* v *Commission*, cited above, paragraph 116. Similarly, in *Compagnie Maritime Belge Transports SA* v *Commission* (CMBT), the ECJ held that it is clear from the very wording of Articles 101 and 102 TFEU that the same practice may give rise to an infringement of both provisions and that the simultaneous application of Articles 101 and 102 TFEU cannot therefore be ruled out a priori, see Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA* v *Commission* (CMBT) [2000] ECR I-1365. Also see Case 6/72 *Europemballage Corporation and Continental Can Company Inc*. v *Commission* [1973] ECR 215, paragraph 11 and Joined Cases C-468/06 to C-478/06 *Sot.Lélos kai Sia and Others*, cited above, paragraph 66.

871 Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd*, 2011, paragraph 139; C-501, 513, 515, 519/06 *GlaxoSmithKline Services Unlimited* v *Commission*, cited above, paragraph 61, *Sot.Lélos kai Sia and Others*, cited above, paragraph 65; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium* and Others v Commission [1983] ECR 3369, paragraphs 23 to 27; Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 13 and 14; and Case C-551/03 P *General Motors v Commission*, paragraphs 67 to 69.

872 Case C-19/77, *Miller International Schallplatten* GmbH ECR [1978], paragraph 7.

873 Case C-551/03 *General Motors v Commission*, cited above, paragraph 67, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission*, cited above, paragraphs 23 to 27; Case T-450/05 *Automobiles Peugeot SA, Peugeot Nederland NV* v *Commission* [2009] ECR II-2533, paragraph 46.

874 For parallel trade cases, see Case 319/82 *Société de vente de ciments et béton de l'Est*, cited above, paragraph 6.

875 Case T-286/09 *Intel Corp* v *Commission*, paragraph 85, not yet reported.

mentioned Treaty objective as well as that of ensuring that competition in the internal market is not distorted, there can be no escape from the prohibition laid down in Article 82 EC for the practices of an undertaking in a dominant position which aimed at avoiding all parallel exports from a Member State to other Member States [...].'[876]

(837) Whether a contract clause restricts competition does not depend on how it is formulated, i.e. whether it stipulates an obligation for the buyer to sell the gas only within the territory of destination (destination clause) or whether the buyer is prohibited from selling the goods outside the contractual territory (export ban).[877]

(838) Market partitioning can also be achieved by more indirect means than explicit export bans or destination clauses. In this regard, what counts for establishing a measure's anti-competitive object is whether such measure - by artificially altering the conditions of competition - is obviously capable of inducing traders to give priority to the national market over exports, thereby giving rise to a compartmentalisation of the internal market in contrast to the economic interpenetration desired by the Treaty.[878] Ensuring compliance with the territorial restriction can be achieved by different means, e.g. by reducing discounts or by charging additional fees in the event of sales outside the destination territory.[879] The Vertical Restraint Guidelines stipulate at paragraph 50 that such indirect measures are more likely to constitute hard-core restrictions if the supplier has mechanisms in place to monitor or verify the destination of the products in question.[880]

(839) Moreover, the fact that an agreement with an anti-competitive object pursues also other legitimate purposes is of no relevance for the assessment of the anti-competitive nature of the agreement.[881] Likewise is it irrelevant at whose instigation the clause was adopted and whether the clause was strictly enforced. The very existence of such clauses may create a '*visual and psychological background*' that satisfies customers and contributes to a more or less rigorous division of the markets.[882]

(840) The Court confirmed that an agreement that was found to have an anti-competitive object and affects trade between Member States, constitutes, by its very nature and

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876 Joined Cases C-468/06 to C-478/06 *Sot.Lélos kai Sia* and *Others*, cited above, paragraph 66.

877 Case C-306/96 *Javico*, cited above, paragraph 13 '*to sell only to customers established in the contractual territory*' and paragraph 14, C-70/93 *BMW* v *ALD* [1995] ECR I 3439, paragraphs 19 and 21; Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I -261. The ECJ also made clear that a contract which imposes upon the buyer an obligation to use the goods supplied for his own needs has as its object the prevention of competition within the Common Market, Case 319/82 *Société de vente de ciments et béton de l'Est*, cited above, paragraph 6.

878 Paragraph 71 of the Opinion of Advocate General Tizzano in Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173.

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

880 Guidelines on Vertical Restraints, OJ C 130 of 19.5.2010, p. 1.

881 *Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others* v *Commission*, cited above, paragraph 25.

882 Case 85/76 *Hoffmann La Roche& CoAG* v Commission, cited above, paragraph 89, finding that tying is an abuse, even it is done on the request of the customers of the dominant undertaking, Case 19/77 *Miller International Schallplatten GmbH*, cited above, paragraph 7, for a situation of Article 101 TFEU.

independently of any concrete effect that it may have, an appreciable restriction of competition.[883]

15.7.1.2. Impact on competition

(841) For the application of Article 102 TFEU, the Commission is not required to show that the conduct by a dominant undertaking gives rise to *actual* anti-competitive effects. The Court of Justice has reaffirmed that *'for the purpose of proving an abuse of a dominant position within the meaning of Article 102 TFEU, it is sufficient to show that the abusive conduct tends to restrict competition or that the conduct is capable of having that effec*t.'[884]

(842) The Court has consistently ruled that '*the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market.*'[885]

(843) The Court has held that for certain competition infringements of a serious nature, no effects need to be shown. For the application of Article 101 TFEU the Court held that '*competition rules laid down in the Treaty […] aim to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.*'[886] The Court therefore explicitly confirmed that an agreement can have an anti-competitive object, without it being necessary to find that '*final consumers be deprived of the advantages of effective competition in terms of supply or price.*'[887]

(844) According to settled case-law under Article 101 TFEU, there is no need to take account of the concrete effects of an agreement once it appears that its object is to prevent, restrict or distort competition.[888] The General Court expressly recognised in *Intel* that the Commission is entitled under Article 102 TFEU to rely on the anti-competitive object of certain abusive behaviour and is not required to demonstrate the capability of such behaviour to restrict competition.[889] Certain kind of behaviour is considered by its very nature to be injurious to the proper functioning of normal competition.[890] This is the case for resale restrictions, see above paragraph (825). In *Société de vente des ciments de l'Est*, the Court clearly indicated that territorial resale restrictions should be regarded as having as their object the prevention, restriction or distortion of trade within the common market.[891]

(845) As explained, in the *United Brands* case, the Court took the view that the prohibition on resale of green bananas was a restriction on competition under Article 102 TFEU.[892] The prohibition on resale confined the buyers to the local market and

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883 Case C-226/11, *Expedia Inc* v *Autorité de la Concurrence and Others*, paragraph 37, not yet reported.

884 Case C-549/10P *Tomra Systems and others* v *Commission*, paragraph 68, not yet reported.

885 Case 85/76 *Hoffmann La Roche& CoAG* v *Commission*, cited above, paragraph 91.

886 Case C-501/06, 513/06, 515/06 and 519/06 *GlaxoSmithKline Services Unlimited* v *Commission*, cited above, paragraph 63.

887 Ibid.

888 Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299,342; Case C-272/09 *P KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 65; and Case C-389/10 *P KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 75.

889 Case T-286/09, *Intel Corp* v *Commission*, judgment of 12 June 2014, not yet reported, paragraphs 209 and 210.

890 Case C-226/11 *Expedia Inc* v *Autorité de la concurrence*, cited above, paragraphs 35 et seq.

891 Case 319/82 *Société de vente de ciments et béton de l'Est*, cited above, paragraph 9.

892 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 159.

prevented them from developing their capacity to trade vis-à-vis the supplier. No further effects needed to be shown. [893]

(846) For the finding of an anti-competitive object it is not necessary to quantify any effects of the company's behaviour for consumers under Article 102 TFEU.[894]

15.7.1.3. Objective justification and efficiency considerations

(847) Conduct which *prima facie* constitutes an abuse can escape the prohibition of Article 102 TFEU if the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant undertaking.[895] It is for the company to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied.[896]

(848) Such objective justification can in particular encompass arguments by the dominant undertaking that its behaviour was an objective necessity. Further, dominant companies may provide evidence that the exclusionary effects resulting from its behaviour are counterbalanced or outweighed by advantages in efficiency which also benefit the consumer.[897]

15.7.2. Application of the principles to the case

15.7.2.1. Territorial restrictions in the form of domestic resale restrictions in the supply contracts in [redacted]

(849) OAO Gazprom's and Gazprom Export's supply contracts with wholesalers and with industrial customers in [redacted] contracts contained territorial restrictions which prevented exports. However, some of the contracts also contain resale restrictions concerning the sale of gas *within* a country.

(850) This is the case for OAO Gazprom's contracts [redacted]

(851) In addition, [redacted].

(852) The resale restrictions in Gazprom's contracts [redacted] have a restrictive object and are abusive under Article 102 TFEU. They are also capable of having restrictive effects.

15.7.2.2. Explicit territorial restriction clauses in all CEE gas supply contracts

Territorial restrictions are present in [redacted] gas supply contracts

893 Ibid, paragraph 160.

894 C-501/06, 513/06, 515/06 and 519/06 *GlaxoSmithKline* Services a.o. v *Commission*, cited above, paragraph 63.

895 Case 209/10 *Post Danmark*, cited above, paragraphs 41-42.

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

897 Case C-95/04 *P British Airways* v *Commission* [2007] ECR I-2331, paragraph 86; Case C-52/09 *Telia Sonera*, [2011] ECR I-527, paragraph 76.

(853) Section 8.2.1 and **Annex III** to this Statement of Objections establish that OAO Gazprom and Gazprom Export included territorial restrictions in all CEE gas supply contracts. [redacted]

(854) As shown in section 8.2, the territorial restriction in the [redacted] and in [redacted] is formulated as a destination clause, in [redacted][898] and [redacted] it is formulated as an export ban and in the [redacted] and Polish contracts the two formulations are combined. The contracts with the [redacted] wholesalers in addition contain destination clauses which stipulate that the gas supply is for the national consumer.

(855) The fact that the territorial restrictions were counter-signed by Gazprom's contract partners does not change the qualification of Gazprom's behaviour as abusive (see above paragraph (832), which explains that Article 102.TFEU also applies to contracts).

(856) Some contracts stipulate that the parties can agree 'otherwise' or that the seller can give its consent to a re-export [redacted]. However, the fact remains that the contracts in principle prohibit the re-sale of Gazprom's gas to other countries. The need to seek Gazprom's consent is likely to deter the customer from re-exporting the gas. Contracts which impose upon the buyer an obligation not to resell the goods and to consult the seller before soliciting business in another specified area have as their object the prevention of competition within the common market.[899] Such clauses create psychological barriers for customers to export.[900]

Territorial restrictions deter wholesalers from exporting gas

(857) The deterrent effect of territorial restrictions is illustrated by [redacted]reaction when asked to export gas to a third party. [redacted] insisted that Gazprom's consent would have to be sought because its own prices could otherwise be raised as a retaliatory measure (see paragraphs (316) et seq). Gazprom also openly threatened the [redacted] with setting up its own supply business in [redacted], should [redacted] export gas (paragraph (320)). [redacted] therefore reassured Gazprom that it [redacted] (see paragraph (319)).

(858) In addition, the failure to honour territorial restrictions could give rise to sanctions under the contract. Some supply contracts ([redacted]) explicitly provide for penalties if a party does not respect the contractual obligations. [redacted](see section 7.2.4). These sanctions reinforce Gazprom's customers' adherence to the contractual obligation and further deter them from exports.

The implementation of territorial restrictions by wholesalers is not relevant for finding an abuse

(859) [redacted]

898 [redacted]

899 Case 319/82 *Société de vente de ciments et béton de l'Est*, cited above, paragraph 6.

900 Case 19/77 *Miller International Schallplatten GmbH*, cited above, paragraph 7.

(860) However, for the finding of an abuse under Article 102 TFEU it is irrelevant whether the territorial restriction has been implemented. [redacted]

(861) [redacted].

(862) [redacted]

(863) Gazprom Export also warned wholesalers not to export into other wholesalers' markets and [redacted] (see paragraph (321)).

(864) [redacted] see paragraph (320).

(865) Gazprom at least in some instances monitored compliance with the territorial restrictions, thereby deterring wholesalers from export activities. [redacted], see paragraph (319) seq.

15.7.2.3. Indirect measures having an effect equivalent to explicit export bans

(866) Gazprom also employed other, indirect measures to prevent re-exports with an effect equivalent to an export ban.

[redacted]– *Expansion clause and information obligation*

(867) [redacted]

(868) The expansion clause has the effect of deterring gas exports, in particular as the take-or-pay obligation under the [redacted] is very high [redacted]. Any increase would lead to a surplus of gas which the wholesaler would only be able to sell at a loss. In *GlaxoSmithKline* the Court found that an obligation for pharmaceutical wholesalers to pay a higher price for pharmaceutical

901 [redacted]

902 [redacted]

903 [redacted]

products destined for export in a dual pricing system constituted a restriction by object despite the fact that exports were not explicitly excluded.[904]

(869) [redacted] see paragraph (314).

(870) [redacted] As stated by the Court, the very existence of these clauses can produce a deterrent psychological effect and it would be impossible to ascertain whether – absent the clause – even more exports would have been carried out.

(871) The expansion clause is therefore equivalent to an export ban. It has a restrictive object and is abusive under Article 102 TFEU. It is also capable of having restrictive effects.

[redacted] – *Requirement of Gazprom Export's consent to gas metering*

(872) Wholesalers should be free to export the gas they purchased without the knowledge or approval of their supplier. [redacted]

(873) [redacted]

(874) As explained in paragraphs (334) et seq., the metering protocol is necessary for the contract parties to demonstrate that they fulfilled their contractual obligations. [redacted]

(875) [redacted]

904 Case C-501, 513, 515, 519/06 *GlaxoSmithKline Services Unlimited* v *Commission*, cited above, as of paragraph 54.

905 [redacted]

[redacted]

(876) [redacted]

(877) The contractual requirement to obtain Gazprom's agreement for metering for the purpose of gas exports is therefore equivalent to an export ban. It has a restrictive object and is abusive under Article 102 TFEU. It is also capable of having restrictive effects.

Poland - Gazprom Export's refusals to change delivery points

(878) As explained in section 8.3.3, Gazprom Export on several occasions refused to change gas delivery points which would have allowed CEE wholesalers to export gas into Poland (including during the severe gas shortage in Poland in 2009 and 2010). The refusal of a dominant company to change contractual elements upon the request of its contract partner may not be as such abusive. However, there can be circumstances in which such a refusal no longer reflects acceptable commercial behaviour vis à vis a contract partner and can therefore be abusive under Article 102 a) TFEU (unfair trading conditions) and/or such refusal can also have a restrictive object and be abusive under Article 102 TFEU.

(879) The test under Article 102 a) TFEU as to whether the dominant company imposed unfair trading conditions, is whether the dominant party's behaviour was necessary and proportionate to attaining a legitimate objective, while balancing the interests of the dominant company and its contract partner.[906]

(880) Gazprom Export's agreement for the re-direction of gas to PGNiG was required as long as the legal title had not been transferred at the contractual delivery point to the wholesaler wishing to export. In 2009 and 2010, PGNiG made several attempts to obtain Gazprom's agreement for a change of delivery points under PGNiG's suppy contract with Gazprom Export which would have allowed other wholesalers from outside Poland (e.g. Germany) to supply gas to delivery points other than those envisaged in the supply contracts. Gazprom did not give its agreement for a change of delivery point at the beginning of the crisis in 2009, see paragraph (365) and neither in 2010, see paragraph (366). Gazprom also never replied to PGNiG's requests for delivery point changes regarding potential supplies from two other Western companies, see paragraphs (367) et seq.

(881) All four examples concerned requests for changes of delivery points on the same pipeline, namely Yamal. In all examples, the wholesalers in question were located in Germany to the west of the delivery point requested by PGNiG so that the gas had to travel a shorter distance to the new delivery point than to the contractual delivery point. Gazprom therefore could simply have stopped the gas early at the new

906 Case 127/73 *Belgische Radio en Televisie* v *SV SABAM and NV Fonior* [1974] ECR 313, paragraph 15, Case T-83/91 *Tetra Pak International SA* v *Commission* [1994] ECR II-755, paragraph 140.

delivery point. Any possible additional costs may have been limited and in any event could have been borne by the customer. Gazprom's refusal seems to have been rather a point of principle, as it did not enter into any discussions about possible delivery point changes, during which the parties could have negotiated about costs and feasibility aspects of the wholesalers' requests.

(882) The Commission considers that there was no legitimate objective for Gazprom Export to refuse the change of delivery points vis à vis wholesalers. In none of the examples is there any indication of a legitimate objective to deny the delivery point change such as e.g. technical reasons. On the contrary, the refusal to change delivery points by Gazprom prevented gas exports. The prevention of gas exports was also Gazprom's overall objective with respect to various other measures as established above. The Commission therefore considers that these refusals to agree to delivery point changes form part of Gazprom's overall market segementation strategy. Market segmentation is no legitimate objective. This is further supported by Gazprom's statements towards some wholesalers (RWE Transgas, E.ON and SPP) that delivery points should be moved to the border of the destination countries in order to protect the national price levels, see paragraphs (348) et seq., in particular paragraph (351). In two of the above examples Gazprom did not even reply. In view of Gazprom's special responsibility as dominant undertaking such a refusal to even enter into negotiations on a potential delivery point change goes beyond a legitimate protection of Gazprom's commercial interests.[907]

(883) The refusal by Gazprom was neither necessary nor proportionate. By changing the contractual delivery points, Gazprom's business interests would not have been negatively affected since Gazprom would have sold the same amount of gas at the same price as agreed under its contract. In case additional costs would have accrued, these could have been charged to the wholesaler in question. The fact that the refusal was not necessary or proportionate is also evidenced by the fact that, as can be seen from paragraphs (357) et seq., Gazprom itself has accepted changes of delivery points in some of its gas supply contracts. One of these contracts contains an explicit clause that the respective costs, if any, should be borne by the customer. These respective contracts were concluded long before the Polish gas crisis.[908]

(884) Finally, the balancing of interests also speaks in favour of Gazprom being obliged to giving its agreement to such requests, in particular in view of its special responsibility and the fact that Gazprom in the past had agreed with other wholesalers that delivery points could be changed.

De facto export ban

(885) The refusal by Gazprom to change delivery points prevented gas exports. The prevention of gas exports was also Gazprom's overall objective with respect to various other measures as established above. The restrictive purpose of the refusals is further supported by Gazprom's statements towards some wholesalers ([redacted] that delivery points should be moved to the border of the destination countries in order to protect the national price levels, see paragraphs

907 See T-83/91, *Tetra Pak International SA* v *Commission*, ECR 1994 p. II-755, paragraph 140, which concerned unfair contract clauses which could not be explained by the legitimate interest to protect the company's own commercial interests.

908 [redacted]

(348) seq., in particular paragraph (351). Therefore and in view of the fact that no legitimate objective of such a refusal is apparent (see above) and Gazprom's special responsibility as dominant undertaking the Commission considers that Gazprom's refusals to change delivery points by their very nature restricted competition.

(886) The refusals to change delivery points by Gazprom are therefore equivalent to an export ban. They have a restrictive object and are abusive under Article 102 TFEU. They are also capable of having restrictive effects.

[redacted] - *Gazprom refuses to change metering station*

(887) Gazprom Export prevented exports also through measures other than explicit export bans or destination clauses. [redacted]e-[redacted]

(888) This re-direction of gas did not concern, as in the other examples mentioned in the previous section, a change of the contractual delivery point in the supply contract [redacted] paragraph (874)), gas metering and the signature of a joint gas metering protocol are necessary to establish that both parties fulfilled their contractual obligations. By refusing to sign the respective metering protocols, Gazprom Export could effectively prevent exports.

(889) [redacted]

(890) [redacted]was only able to deliver gas to PGNiG because it had a gas surplus from its high take-or-pay obligation under the contract with [redacted], see paragraph (369). Gazprom's refusal to change metering stations prevented [redacted] from selling at least part of this excess quantity.

(891) Gazprom’s behaviour restricted the freedom of its buyers to sell the gas according to their own economic interests and had a deterrent effect on wholesalers to engage in such exports. The latter is documented by [redacted]

(892) [redacted] on the merits but equivalent to an export ban. In view of Gazprom's special responsibility as dominant undertaking, this behaviour has a restrictive object and is abusive under Article 102 TFEU. It is also capable of having restrictive effects.

(893) The refusal by Gazprom Export to change the metering station was also unfair under Article 102 a) TFEU because there was no legitimate objective for the refusal, the refusal was neither necessary nor appropriate and no particular interest speaks in favour of Gazprom when balancing the interests.

Deterrent effect of the indirect measures

(894) The deterrent effect of indirect measures can be enhanced if they are accompanied by monitoring mechanisms. The fact that such monitoring takes places is evidenced in section 8.2.2.2. Vis à vis [redacted]

15.7.2.4. Territorial restrictions and equivalent measures are based on Gazprom's strategy to partition markets

(895) The explicit territorial restrictions and the equivalent measures are based on a strategy by OAO Gazprom and Gazprom Export with the objective to partition markets along national borders. This strategy is implemented by the introduction of territorial restrictions [redacted] (and where applicable, gas transit contract) with CEE wholesalers and the maintenance of these clauses despite the fact that many wholesalers asked for their removal. As section 8.4 shows, Gazprom was informed by the [redacted]

(896) Gazprom Export explicitly refers to the strategy of keeping markets separate in order to maintain different pricing levels in its correspondence with [redacted] Further Gazprom did not delete the territorial restrictions despite the fact that wholesalers drew Gazprom's attention to their illegality. Gazprom was further aware of the illegality of the territorial restrictions from the 2003 and 2005 informal settlement negotiations with the European Commission, see paragraph (388).

15.7.2.5. Impact on competition

(897) The contractual ('direct') territorial restrictions such as export bans, destination clauses and domestic resale restrictions are likely to deter wholesalers in all CEE countries from exporting gas and from selling gas to other customers within certain

909 [redacted]

CEE countries. Wholesalers were restricted from freely deciding the possibilities of sales according to demand or their own commercial interests. The other, more indirect measures described above may also deter wholesalers from exports, since information obligations and metering requirements ensure that Gazprom Export will be informed about exports.

(898) The territorial restrictions imposed by Gazprom are likely to have an impact on competition in that they limit significantly the customer base on which a wholesaler can rely for a given transaction. This has an immediate potential impact on the liquidity of the wholesale market. Gas intended for the domestic market cannot be sold to other customers or to customers willing to pay for it abroad.

(899) [redacted]

(900) The Commission therefore finds that Gazprom's behaviour restricted competition as it was capable of having an adverse impact on the structure of the market.

15.7.2.6. Objective justification

(901) As stated above, a dominant company can put forward justifications as to why its behaviour may be objectively necessary and/or would bring about efficiencies.

(902) Gazprom so far has not put forward any argument as to why the explicit territorial restrictions or the measures equivalent to such territorial restrictions were objectively necessary. Neither has Gazprom identified any efficiencies which would outweigh the distortion of competition.

15.7.3. Preliminary conclusion on the first part of the abuse (territorial restrictions)

(903) The Commission preliminarily concludes that Gazprom's strategy of segmenting the internal market along national borders in the markets concerned as implemented either through explicit territorial restrictions or by other means having an equivalent effect constitutes an abuse of a dominant position within the meaning of Article 102 TFEU. The territorial restrictions and the equivalent measures have a restrictive object and are abusive under Article 102 TFEU. They are also capable of having restrictive effects. At least some of the territorial restrictions can also be qualified as abusive unfair trading conditions under Article 102 a) TFEU.

15.8. Second aspect of the abuse: unfair pricing

(904) Gazprom pursued an unfair pricing policy by charging prices that are excessive compared to Gazprom's costs, as well as compared to other relevant benchmark prices.

(905) As part of this unfair pricing policy Gazprom has applied price formulae in the supply contracts in the five CEE countries which generally resulted in excessive prices for Gazprom's customers.

15.8.1. Principles for assessing unfair pricing under Article 102 TFEU

(906) Article 102 a) TFEU prohibits the imposition, directly or indirectly, of unfair purchase or selling prices or of other unfair trading conditions.

(907) Dominant undertakings are prohibited from setting prices that are significantly higher than those resulting from effective competition. As the Court stated in *United Brands, 'it is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.*'[910] The Court further found that unfair pricing is established if a price has no reasonable relation to the economic value of the good.[911]

(908) Several methods can be applied for analysing this relation between the price and the economic value to establish unfair pricing.[912] The Court accepted in *United Brands* a comparison between the selling price of a good and its production costs, disclosing the amount of profit margin.[913] Paragraph 252 of United Brands reads: '*the questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.*'

(909) However, in *United Brands* the Court also acknowledged that such a cost price comparison might not always be possible.[914] Especially in a situation in which the cost structure of a dominant undertaking is not precisely identifiable for objective reasons, other price and cost parameters can be considered.[915]

(910) Other methods can therefore be used to establish whether the price charged reflects the economic value of the goods, as already stated in *United Brands*: '*Other ways [than a price to cost comparison] may be devised – and economic theories have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair.* '[916]

(911) Excessive pricing can be established by a comparison between prices charged by the company in the same or different markets.[917] In *General Motors*, the Court accepted that when the same prices are charged for two different inspection services one of which is clearly less costly, the provision of that service at the higher price cannot correspond to its costs.[918]

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910 Case 27/76 United Brands Company and United Brands Continental v Commission, cited above, paragraphs 249.

911 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 250.

912 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 253.

913 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 251.

914 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above; paragraph 254 refers to difficulties in establishing the appropriate costs in a general manner, despite the fact that the Court in that case found that the establishment of the production costs did not present any insuperable problems.

915 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 254; Case C-52/09 *Telia Sonera*, cited above, paragraphs 45-46.

916 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 253.

917 Case 226/84 *British Leyland*, cited above, paragraph 28.

918 Case C-551/03 *General Motors Continental NV* v *Commission*, paragraphs 16 and 18; the Court did not find an infringement of Article 102 TFEU because of the temporary nature of the higher charges and the circumstances of the case.

(912) The fairness of a price can also be determined by a comparison with prices and costs '*of competitors on the same market or other markets*.'[919] In *Micro Leader Business*, the Court accepted as an indication that Community prices were excessive the fact that Canadian products, competing with French products on the French market, were – despite the expense of importing them – significantly lower priced.[920] However, it has to be taken into account that prices on the market on which the dominant firm is present sometimes are not an appropriate benchmark as competition might already be so impaired on that market that prices of competitors do not reflect the economic value of the good.[921]

(913) The Court has also accepted a comparison with prices in *different geographic markets.* In *SACEM and Tournier*, royalties charged by a copyright society were compared with similar undertakings in other Member States. The Court held that the royalties charged in France were appreciably higher. The judgment, however, highlights that such a comparison between two markets needs to be carried out on a consistent basis. If that consistent basis exists and prices are appreciably higher in one of the markets, it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.[922]

(914) In *Bodson*, the European Court accepted a price comparison between prices of a (legal) monopoly and prices that are charged in competitive markets.[923]

(915) The Court in *United Brands* also made clear that not every high price is unfair in the sense of Article 102 a) TFEU.[924] However, neither the Courts nor the Commission have established which level of price difference can be regarded as unfair as this depends very much on the product and the market in question. In the *Deutsche Post* decision an excess of the price by 25% in relation to the company's estimated costs was found to be unfair by the Commission.[925]

(916) An abuse can also consist in the imposition of contractual conditions.[926]

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919 See already in Case 27/76 *United Brands Company and United Brands Continental* v *Commission,* cited above, paragraph 252 (comparison with competing products); C-52/09 *Telia Sonera*, cited above, paragraphs 45-46.

920 Case T-198/98 *Micro Leader Business* [1999] ECR II-3989, paragraphs 54-55. The Court took as an indication that Community prices were excessive the fact that Canadian products competing with French products on the French market were significantly lower priced, despite the costs of importing them. A price comparison with a competitor's products in the same geographic market was also accepted in Case 24/67 *Parke Davis* [1968] ECR 55.

921 See Commission decision of 25 July 2001, COMP/C-1/36.915 *Deutsche Post AG – Interception of cross-border mail*, paragraphs 159 – 162. In this case, the Court accepted a cost estimate as the dominant company had no cost accounting system.

922 Joined Cases 110/88, 241/88 and 242/88 *Francois Lucazeau and others v Societe des Auteurs, Compositeurs et Editeurs de Musique* (SACEM) [1989] ECR 211, paragraph 25; Case 395/87 *Ministére Public v Jean-Louis Tournier* [1989] ECR 2521, paragraph 38. See more recently, Case 351/12 *OSA* v *Léčebne lázně Mariánské Lázně*, paragraph 87, not yet reported.

923 Case 30/87 *Corinne Bodson* v *SA Pompes funèbres des régions libérées* [1988] ECR 2479, paragraph 31.

924 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 252.

925 See COMP/C-1/36.915 *Deutsche Post AG*, cited above, paragraph 166.

926 See Case 127/73 *Belgische Radio en Televisie* v *SV SABAM and NV Fonior* [1974] ECR 313 paragraph, 15; Case 247/86 *Alsatel* v *SA Novasam* [1988] ECR 5987, paragraph 10; Case T-83/91 *Tetra Pak International SA* v *EC Commission* [1994] ECR II-755, paragraph 140.

(917) Case law further clarified that unfair pricing can result from the pricing method applied in a contract. For pricing methods, the Court found in *Kanal 5*, with reference to previous jurisprudence in *Tournier* [927] that, in a situation where two pricing methods are available, using the one which captures less precisely the economic value of the service provided may constitute an abuse if the alternative method is practicable and attains the same legitimate aim (in the case of *Tournier* and *Kanal 5* the interests of authors, etc. to be remunerated by a copyright royalty).[928] In the Commission's decision *DSD Gruener Punkt* a pricing method which did not correspond to the costs of providing a service was considered unfair.[929]

(918) Whether certain contractual clauses infringe Article 102 TFEU is to be assessed with respect to the contractual clause in question, in particular the objectives it attains to achieve and the contract partners' interests.[930] The Court stated in *BRT v Sabem* '… *the fact that an undertaking … occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.*' [931] In order to assess the 'fairness' of contractual clauses it would have to be ascertained whether, in view of the parties' interests, these clauses are necessary and proportionate. In *Tetra Pak*, the Court considered contractual clauses as abusive because they went beyond their ostensible purpose and went beyond the recognised right of an undertaking to protect its commercial interests.[932] Also in *Kanal 5* and *Tournier* the Court refers to the interests of the parties, which the method aims to protect.[933]

(919) An abuse may also be found for existing contract clauses which fulfilled a legitimate objective at the time of the conclusion of the contract, but which – due to changed circumstances – are no longer able to attain the original objective. In *ITT Promedia*, the Court stated: '*A claim for performance of a contractual obligation may also constitute an abuse for the purposes of Article 86 of the Treaty if, in particular, that claim exceeds what the parties could reasonably expect under the contract or if the circumstances applicable at the time of the conclusion of the contract have changed in the meantime*.'[934] In specific circumstances, this can also deprive dominant companies of the right to claim the performance of a contractual obligation, if the circumstances applicable at the time of the conclusion of the agreement have changed in the meantime.[935]

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927 Case C-395/87 *Ministère Public* v *Tournier,* cited above, paragraph 45.

928 Case C-52/07 *Kanal 5 Ltd TV 4 AB v Foreningen Svenska Tonsättares Internationella Musikbyrå* (STIM) upa [2008] ECR 9257, paragraphs 17, 28, 33 and 40.

929 Commission Decision of 20 April 2001, COMP/34.493 DSD, OJ L 166 of 21.6.2001, p.1, paragraph 111.

930 Joined Cases T-191, 212 to 214/98 *Atlantis Container Line and others* v *Commission* (TACA) [2003] ECR II-3275, paragraph 1112 (the company would have to demonstrate that the '*purpose of the practices is reasonably to protect its commercial interests in the face of action taken by certain third parties and that they therefore do not constitute an abuse.'*). In paragraph 1120 the Court states that the practices of the dominant company must '*be proportionate to the objectives they seek to achieve*.'

931 Case 127/73 *Belgische Radio en Televisie* v *SV SABAM and NV Fonior* [1974] ECR 313, paragraph 15.

932 Case T-83/91 *Tetra Pak International SA* v *EC Commission* [1994] ECR II-755, paragraph 140.

933 See Case C-52/07 *Kanal 5 Ltd TV 4 AB* v *Foreningen Svenska Tonsättares Internationella Musikbyrå,* cited above, paragraph 35 and 40, Case C-395/87 *Ministère Public* v *Tournier*, cited above, paragraph 45.

934 Case T-111/96 *ITT Promedia NV* v *Commission,* [1998] ECR II-2937, paragraph 139.

935 Case T-111/96, *ITT Promedia NV* v *Commission*, cited above, paragraph 139.

15.8.2. Application of the principles to the case

(920) The Commission assessed Gazprom's prices and costs in order to establish whether, in line with the *United Brands test*[936], the difference between Gazprom's actual costs and the prices charged by Gazprom to CEE wholesalers is excessive. This comparison demonstrates that this is indeed the case. The fact that gas is a homogeneous product is a relevant factor for the various price comparisons conducted in the present section.

(921) The Commission also applied, within the meaning of the second limb of paragraph 252 of the *United Brands* judgment, other comparison methods by benchmarking CEE prices with hub prices and with Gazprom's own prices in Germany.

(922) As part of its unfair pricing policy, Gazprom used price formulae in the supply contracts which generally resulted in excessive prices for Gazprom's customers.

15.8.2.1. Comparison of Gazprom's CEE prices with production costs in long-term contracts

(923) The Commission calculated Gazprom's costs of producing and selling gas (see section 9.2) and compared the costs with Gazprom's prices charged to its customers in Bulgaria, Estonia, Latvia, Lithuania and Poland (hereafter 'the five CEE countries') for the years 2009-2013 (see section 10.1).

(924) The comparison for the years 2009-2013 shows that Gazprom's average CEE net prices exceeded its costs by a large margin, the average mark-up being [redacted][937], see Figure 27. When comparing Gazprom's net prices to Gazprom's costs in each of the CEE countries, the average mark-up ranges from [redacted], [redacted], [redacted] [redacted]in Poland, see table in Figure 28.

(925) The *United Brands* judgment suggests that, where costs are available, a cost comparison is the primary benchmark for a finding of excessive pricing. Jurisprudence has not indicated which level of difference between costs and prices is excessive. A cost/price difference of 25% was considered sufficient for finding an infringement of Article 102 a) TFEU in the *Deutsche Post* Decision[938]. A mark-up of more than 100% for a homogenous product such as gas is therefore very significant.

15.8.2.2. Comparison of Gazprom's prices in the five CEE countries with Gazprom's prices in Germany

(926) The Commission also compared Gazprom's LTC prices in the five CEE countries with Gazprom's LTC prices charged to ERG in Germany for the period 2009-2014. In line with the above-mentioned case-law in *SACEM* and *Tournier*, price benchmarking can be carried out across different geographic markets, even when the competitive conditions differ. In line with the *Bodson* judgment, markets in which Gazprom enjoys a monopolistic or dominant position such as in the CEE countries can be compared to markets such as Germany where such dominance has not been established and where more competitive prices prevail.

(927) While the price differences vary according to CEE countries and for each year, [redacted] see tables in Figure 31, Figure 33 and Figure 34. The table in Figure 33 compares Gazprom's LTC prices in the five CEE countries with Gazprom's German LTC prices net of transport costs for

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936 Case 27/76 *United Brands Company and United Brands Continental* v *Commission*, cited above, paragraph 252.

937 Weighted average, see explanation in paragraph (462).

938 COMP/C-1/36.915 *Deutsche Post AG*, cited above, paragraph 166.

ERG. On average (for the years 2009-2014), these prices exceed the German price by [redacted] and 22% for Poland. In 2014, the mark-ups ranged from [redacted].

(928) For the other years, while the levels of the mark-ups vary, they exceed [redacted] in many instances and sometimes [redacted] For example, [redacted] These are significant differences, also taking into account that gas is a homogeneous product. As indicated already above (see recital (484)), gas supply contracts do not specify from which Russian source the gas is delivered from exactly. Generally, the gas which is transported in the large pipelines towards Europe is supplied to customers in the different countries which are connected to the relevant pipeline on its way to the West or its extensions. Any cost differences resulting from different production sources could not be attributed to individual destination countries due to the homogeneous nature of the product. Significant price differences (such as those illustrated in Figure 29 and Figure 33) therefore cannot be explained through differences in production costs.

(929) The table in Figure 33 also shows a high level of price volatility. Even if in one year Gazprom's CEE prices are below German prices [redacted] in 2011, both due to price reductions[939]), in the following year CEE prices can again exceed German prices significantly [redacted].

(930) [redacted]. However, even if mark-ups [redacted] on average during the relevant period or smaller mark-ups for certain countries in certain years[940] could seem less significant, this would not change the finding of an unfair pricing abuse. As demonstrated above and in the subsequent section, also for these countries Gazprom's prices are well above costs and hub prices, see section 10.2.2 and table in Figure 37.

15.8.2.3. Comparison of Gazprom's CEE prices in LTCs with prices for competing products sold on hubs

(931) [redacted]

(932) A comparison of the dominant company's prices can be carried out with prices charged for products sold by competitors on the same or other geographical markets. According to the judgements *SACEM* and *Tournier* such comparison has to be made on a consistent basis, see above (913). In order to demonstrate that the price comparison is made on a 'consistent basis', i.e. with the appropriate benchmark, the Commission underlines that gas is a homogeneous product.

(933) The Commission considers that the comparison of Gazprom's CEE LTC prices with European hub prices is the most relevant benchmarking method. European gas hubs are liquid market places and mature hubs have become the main price signal for gas

939 See above paragraphs (410) and (411).

940 [redacted]

wholesale markets. They therefore provide the best indication of what customers are willing to pay for gas and what its economic value is. It should be noted that Gazprom itself is selling on gas hubs.

(934) Gas hub prices consequently constitute an appropriate benchmark to assess whether Gazprom's prices are excessive.

(935) Concretely, the Commission compared Gazprom's prices in the five CEE countries with prices charged on the Dutch TTF hub. The TTF hub is a relevant benchmark and adequate basis for the price comparison. It is a mature hub, whose prices correlate to a very high degree with those of other hubs such as the UK and German hubs, see section 9.4.

(936) The tables show that as of 2009, a constant pattern of higher CEE prices compared to European hub prices evolved.[941]

(937) On average, for the period 2009-2014, prices in the five CEE countries exceeded TTF front month hub prices by [redacted] for Poland, see section 10.2.2, in particular (503) and the table in Figure 37.

(938) In some years, prices in the five CEE countries exceeded hub prices very significantly. Gazprom's prices exceed front month prices on TTF by up to [redacted] (Poland in 2009). In the same year, also the other four CEE countries exceeded hub prices by a margin of between [redacted]. In 2012 there were again very significant disparities for [redacted]. In 2014, prices exceeded hub prices by a range from [redacted].

(939) It should further be underlined that significant price increases of a dominant company over a certain period of time can also be an indicator for excessive prices.[942] E.g. Gazprom's CEE prices tripled from 2004 to 2012, see paragraph (395).

15.8.2.4. Gazprom's pricing methodology contributed to excessive prices

(940) As stated above, the Court's case law in *Kanal 5* and *Tournier*[943] acknowledged that unfair prices can also result from the application of a contractual pricing method by a dominant supplier. In certain circumstances, a pricing method might be unfair within the meaning of Article 102 a) TFEU, if the method has no reasonable relation to the economic value of the product and other methods exist which quantify the value of the good more precisely, while capable of achieving the same legitimate aim to protect the interests of the parties.

(941) [redacted]

(942) The Commission will examine below,

941 The exception is 2011 when oil prices were low and when some of the wholesalers got price reductions.

942 OLG Frankfurt/Main, 11 U 37/09 (Kart) of 21.12.2010. The OLG accepted that a comparison with the supplier's own prices for the same product and in the same geographic market can be made during a given time period. It took into account that the dominant company's prices had increased by around 300% over a period of several years.

943 See Case C-52/07 *Kanal 5 Ltd TV 4 AB v Foreningen Svenska Tonsättares Internationella Musikbyrå*, cited above, paragraph 35 and 40, Case C-395/87 *Ministère Public* v *Tournier*, cited above, paragraph 45.

- whether Gazprom's pricing method in the contracts in the five CEE countries, [redacted] indexation), is able to capture the economic value of gas,
- whether alternative methods exist which quantify the economic value of the gas more precisely,
- whether the alternative method is able to protect the interests of the parties, and
- under which circumstances a claim for performance of a contractual obligation (such as the application of a pricing method) may constitute an abuse for the purposes of Article 102 TFEU.

(943) As explained previously, when the first gas supply agreements in Europe were concluded during the 1970s, gas markets in the form of hubs did not exist, see section 11.1.1. The objective of pricing methods based on oil-indexation was to ensure that gas could be marketed and sold at a competitive price compared to other fuels. As an emerging fuel, gas was competing directly with oil. Gas prices were thus partially linked to oil prices. As section 11.1.2 shows, these reasons for oil indexation are no longer valid:

(944) Firstly, oil and gas today are unrelated products and not easily substitutable. Whereas oil is used mainly for transport, gas is mainly used for power generation and heating purposes (see section 11.1.2.1). In addition, oil and gas have different costs of production and different transport costs, see section 11.1.2.1. These differences lead to differences in the market structure: while oil is sold globally, gas markets are national or smaller than national. Oil and gas therefore constitute different product markets.[944]

(945) Secondly, oil and gas prices do not move in parallel and the correlation between oil and gas prices is weak. This conclusion is supported by academic research as explained in section 11.1.2.3. The CEO of Gazprom Export, A. Medvedev, also acknowledged that *'there is no direct correlation between the price of oil and the price of gas'*, see above paragraph (544).

(946) Thirdly, mature gas hubs have developed which provide reliable price signals reflecting supply and demand for gas and the availability of transportation as well as storage infrastructures. Competitors to Gazprom already changed their pricing patterns and offer their customers a choice of hub based pricing. Gazprom itself sells gas on TTF and NCG hubs, see paragraph (494). Hubs also provide price signals for contracts not traded on hubs and Gazprom has introduced hub pricing elements in some of its contracts.[945]

(947) The submissions of various wholesalers likewise demonstrate that wholesalers and customers trust hub pricing and are ready to have recourse to it for their gas sales (see section 11.3). The [redacted] and Polish wholesalers demanded hub pricing for their contracts. [redacted]

[944] See COMP/M.1532 *BP Amoco/Arco*, cited above, paragraph 14 as well as COMP/M.1383 Exxon/Mobil, cited above, paragraph 16.

[945] See e.g. the description of the Czech, Hungarian and Polish price formulae in 11.2.3.1 to 11.2.3.4.

[redacted]

(948) [redacted]

(949) The Commission does not consider price indexations, including oil indexation, as in itself abusive, even if the reasons for oil-indexation have largely disappeared. The risk of a certain degree of price fluctuations resulting from the indexation to other products or parameters is normally accounted for by the parties under the contract. If properly designed, an indexed price can fluctuate above or below the chosen benchmark price but on average such fluctuations should not result in a price that benefits mainly or exclusively one of the parties, in particular when one of the parties has a dominant position.

(950) Nevertheless, indexing the price of gas to oil although the reasons for such indexation have largely disappeared and the right price signals come from gas hubs, increases the risk that an oil-indexed formula leads to prices which no longer capture the economic value of gas. As shown in section 11.4, Gazprom applied the specific price formulae in the [redacted] which resulted in very high contract prices. These prices generally were – with very few exceptions – consistently above the average TTF hub price at the respective fuel price levels and thus one-sidedly benefitted Gazprom. Gazprom's pricing formulae in the supply contracts in [redacted] contributed to the excessive prices.

(951) Such a method does not adequately capture the economic value of the good, which for gas is today mainly determined on liquid gas hubs. This will be shown below.

Gazprom's price formulae in the [redacted] do not capture the economic value of the good and contribute to the excessive price level

(952) Figure 37 illustrates that price levels of Gazprom's long term contracts in the supply contracts [redacted] consistently exceed TTF hub prices.[947]

(953) Gazprom's price formulae based on oil-indexation in the relevant contracts contributed to these high price levels. This is shown in the graphs in section 11.4 which compare Gazprom's pricing formulae [redacted] with the relationship between average TTF hub prices and a given fuel oil price as determined on the basis of historical data. As explained above, TTF hub prices provide reliable price signals for gas and therefore constitute an appropriate benchmark. However, the comparison in the graphs does not assess Gazprom's long term contract prices over *actual* TTF hub prices[948], but compares Gazprom's prices resulting from its

946 Award of 24 June 2013, paragraph 372 and 377, ID 5938.

947 With the exception of Latvia in 2011.

948 Actual TTF hub prices might be below or above any most probable TTF price, see above paragraph (599) and footnote 553.

price formulae in relation to the average TTF hub price for any given fuel oil price level.

(954) As explained in paragraph (597), the Commission has established average TTF hub prices for different fuel oil levels by establishing a statistical relationship between TTF hub prices and fuel oil prices. The Commission then compared the average TTF prices, see the example of [redacted] described in paragraph (599), with the price formula applied by Gazprom in a given country. The comparison shows that the pricing method applied by Gazprom does not lead to a balanced fluctuation of the contract price, i.e. that the long term contract price raises to levels above the average TTF hub price at high fuel oil prices and, in turn, falls below the average TTF hub price level at low fuel oil prices. Instead the graphs show that generally – with very few exceptions – Gazprom's prices consistently exceed the average TTF hub price over all fuel oil price levels since 2009 for [redacted].[949]

- [redacted]
- [redacted]
- For Poland (price formulae 2008 and 2012), the long term contract prices for the vast majority of fuel oil prices during the relevant period exceed the average TTF gas hub price.
- [redacted]
- [redacted]

(955) This demonstrates that Gazprom consistently applies price formulae in its supply contracts in the [redacted] which one-sidedly benefit Gazprom. Fluctuations of the fuel oil price above the TTF hub price in favour of Gazprom are not structurally evened out by fluctuations of the fuel oil price in favour of the wholesalers below the TTF hub price. As can be seen from paragraph (606), the historical level of fuel oil prices in the period 2009-2014 was high. 90% of the fuel oil prices were above 380 USD/mt. With such high oil prices, wholesalers would only in exceptional circumstances have a chance to pay gas prices which come close to or would even be below the average TTF hub price. The example of [redacted]

[949] The Commission examined the excess of Gazprom's prices as of 2009, as explained above.

illustrates that point, see (603) and Figure 51. As already indicated in paragraph (609) seq., Gazprom could also expect that its price formulae would result in contract prices significantly above TTF hub prices at the time when the respective price formulae entered into force.

(956) Consequently, as a result of the formulae wholesalers since 2009 consistently paid prices which did not adequately reflect the economic value of gas and which – with few exceptions - exceeded average TTF hub prices significantly for the period 2009-2014.

(957) Such a method would in particular raise objections under Article 102 a) TFEU, if an alternative method would easily be available which captures the economic value of the good more precisely and would protect the legitimate objectives of both contract partners.

Alternative methods of gas pricing are available and feasible

(958) The use of hub based pricing in supply contracts constitutes an alternative method, although other methods might exist as well. Gas hub pricing is today widely acknowledged to reflect the supply and demand conditions of gas and is therefore more precise in capturing the economic value of gas than the oil price indexation formulae used by Gazprom [redacted].

(959) Hub based pricing is also easily available and practicable. The major European gas hubs are aligned in their prices and intraday and future gas prices are readily available from the hubs. There are no indications that the use of this method, which is already applied by competitors to Gazprom and Gazprom itself, increases costs or administrative burden.

(960) However, other alternative pricing methods may also exist, such as the introduction of a cap on the price formula to the effect that prices resulting from the specific formula do not exceed hub prices, possibly with a small mark up.

The use of an alternative method respects the interests of the contract partners

(961) Weighing the interest of the parties, there does not appear any reason to maintain the oil pricing method to serve a legitimate interest of Gazprom.

(962) As explained previously, the original objective of the oil indexation methodology was to provide Gazprom (and its customers) with a proxy in order to establish a market price for gas, which was a legitimate objective at the time. Gas supply contracts provided that the seller would normally assume the so-called price risk while the buyer would assume the volume risk (by committing to take or pay obligations) in a long term contract. This provided the supplier with certainty that minimum volumes will be offtaken as the explorations of gas fields would require substantial up front investments by the supplier.

(963) Gazprom's pipeline investments have long been amortised. Today a reliable market price for gas exists, notably hub prices, which enables the seller to calculate future revenues. The industry has also moved away from oil indexation in recent years. As set out in paragraphs (553) et seq., competitors of Gazprom switched from oil indexation to other forms of gas pricing. Also Gazprom itself trades to a limited extent on the hub, see paragraph (494) and uses hub based pricing in its Western and some of its CEE contracts. Hub prices are also relevant in Member States, which are more isolated from other Member States and gas hubs, see above paragraph (947).

(964) Hub based pricing also respects the interest of the wholesalers in paying a price for gas that is market based, rather than being subjected to a price formula which results in significantly higher prices than the hub price. This applies all the more so as the wholesalers are increasingly faced with requests by their own customers to offer hub-based prices (see section 11.3).

(965) Consequently, hub based pricing constitutes an alternative method to the oil indexation formulae currently used [redacted] and is able to achieve the objective of establishing a reliable market price for gas and to balance the interests of the parties adequately.

Adjustment of existing contracts

(966) It does not speak against the finding of an abuse under Article 102 TFEU that the price methodology was part of a contract which was concluded in the past. As the Court found in *ITT Promedia*[950], a claim for performance of a contractual obligation may also constitute an abuse for the purposes of Article 102 TFEU if, in particular, that claim exceeds what the parties could reasonably expect under the contract or if the circumstances applicable at the time of the conclusion of the contract have changed in the meantime.

i) The objective in the pricing formula in the original gas supply agreements

(967) At the time when the first gas supply contracts were concluded, the parties agreed on oil-indexation in order to have a proxy for a market price for gas.

ii) Subsequent change of market conditions

(968) Subsequently, market conditions changed fundamentally. First, oil and gas are no longer demand substitutes in the short- to medium term. Second, European gas hubs developed on which gas prices are set according to supply and demand of that product. Third, oil prices and gas market prices have diverged significantly, i.e. oil indexation is no longer able to reflect the market reality.

iii) The *change in market circumstances was not foreseeable at the time when the gas supply agr*eements were concluded

(969) At the time of the conclusion of Gazprom's supply contracts, these developments were not foreseeable. Gazprom's contracts were mostly concluded in the mid-1990s when oil and gas prices slowly started decoupling. However, the first gas hubs only emerged in 2000 and reached maturity only years after that. This means that at the time of the conclusion of the supply agreements, the parties did not foresee pricing in a situation in which a proper gas market would exist.

iv) Gazprom insists on oil-indexation and refuses to change the gas supply contracts

(970) Gazprom insists on the oil-indexation formula despite requests by wholesalers for hub pricing. The wholesalers, [redacted], asked Gazprom to lower its LTC prices, see paragraphs (571) et seq. [redacted] as well as the Polish wholesaler asked for hub pricing, see section 11.3.

(971) It is Gazprom's stated objective and strategy to maintain oil-indexation. Gazprom refused price adjustments for the [redacted]. In discussions with another wholesaler, i.e. [redacted]

950 Case T-111/96 *ITT Promedia NV* v *Commission*, cited above, paragraph 139.

(972) The parties' expectations at the time of the conclusion of the CEE contracts to have a fair gas price are no longer met and at least some of Gazprom's customers face the risk to purchase gas at a price which no longer matches the market reality. As this is no longer what the parties could reasonably expect at the time of the conclusion of the contract, the insistence on the contractual pricing methodology is abusive under Article 102 a) TFEU.

15.8.2.5. Impact of Gazprom's unfair pricing policy on the customers

(973) In unfair pricing cases under Article 102 a) TFEU, the effect will always be actual as the immediate contract partner of the dominant company directly suffers from the unfair conditions.

(974) As to the general price levels, it can be seen from the respective tables that hub prices and long-term contract Figure 31 prices diverge significantly for the five CEE countries. Section 11.3 shows that four of the five CEE wholesalers complained to Gazprom about the price levels which are too high compared to various benchmarks.

(975) As to the pricing methodology, the [redacted] Polish wholesaler complained to Gazprom and asked for an adjustment of the pricing methodology, see above section 11.3.

(976) This new risk is not mitigated by the fact that most of the CEE contracts contain a price revision clause (and all of them an arbitration clause). Firstly, the application of Article 102 TFEU does not depend on the contractual set-up and whether the parties have contractual means of conflict-solving. It is not necessary for the application of Article 102 TFEU that the parties exhausted all contractual means first.

(977) Secondly, arbitration procedures are lengthy and costly proceedings, which can only be initiated at three-year intervals. [redacted]

(978) Thirdly, it is not guaranteed that price negotiations or even arbitration proceedings will ultimately resolve the issue of excessive prices. [redacted]

(979) In addition, any contract negotiations about price revisions give Gazprom a possibility to link price negotiations with other issues. As illustrated by the examples of [redacted] and Poland in sections 12 to 14, the re-negotiations gave Gazprom the opportunity of linking pricing questions with other issues and imposing supplementary obligations in return for the necessary price adaptation. This is problematic in a situation in which the pricing problem is likely to occur often due to a structural problem in the price formula.

951 [redacted]

15.8.2.6. Objective justification and efficiency considerations

(980) Gazprom has not identified any objective justification or elements suggesting that its pricing policy would bring efficiencies that outweigh the distortion of competition.

15.8.3. Preliminary conclusion on the second part of the abuse (unfair pricing)

(981) In view of the above, the Commission preliminarily concludes that Gazprom pursued an unfair pricing policy under Article 102 a) TFEU by charging prices that are excessive compared to different benchmarks and by making use of price formulae in the supply contracts for five CEE countries which resulted in prices that did not adequately reflect the economic value of gas and which – with few exceptions - exceeded average TTF hub prices significantly for the relevant period, thereby contributing to the excessiveness.

15.9. Third aspect of the abuse: gas supplies made conditional by Gazprom on infrastructural commitments from wholesalers

15.9.1. Principles

(982) The behaviour of a company which uses its dominant position to force a customer into accepting unrelated supplementary conditions can be abusive under Article 102 TFEU.

(983) According to Article 102 d) TFEU, an abuse by a dominant undertaking may, in particular, consist in '*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*.'

(984) Article 102 d) TFEU applies where the dominant undertaking forces its customers to accept other types of distinct 'supplementary obligations' or commitments in order to obtain the product with respect to which the supplier is dominant. The tying behaviour can concern products but also other services or obligations.[952]

(985) For exclusionary tying (or bundling)[953] cases, the European Courts have developed the following criteria in order to assess the conditioning of supplies or a contract with supplementary obligations under Article 102 d) TFEU:

- the conclusion of a contract concerning a product is made dependant on another distinct/supplementary obligation which leaves the customer no choice to obtain the tying product other than by incurring the tied supplementary obligation;
- the undertaking concerned is dominant in the tying market;
- there is no objective justification for the tying practice.[954]

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952 In *British Sugar*, the dominant company tied the sale of sugar to the transport of the sugar to the final destination, *Napier Brown/British Sugar* [1988] OJ L 284/41. In *London European-Sabena*, access to a computer reservation system was made conditional on using ground-handling services, Commission Decision of 4.11.1988 (London European v Sabena), 88/589/EEC, OJ 1988 L 317/47. Also see Case 311/84 [1985] ECR 3261, *Centre Belge d'Etudes de Marche-Télémarketing* v *CLT*. Also see Commission Decision of 24 July 1991 (*Tetra Pak II*), 92/163/EEC, OJ L 72/1, paragraphs 108 and 116; confirmed by the judgement of the European Court of First Instance, T-83/91, *Tetra Pak International SA* v *Commission* [1994] ECR II-755 (tying of maintenance services).

953 Bundling refers to the way products are offered and priced, e.g. by offering a lower price when the customer purchases the bundled products rather than buying them separately.

954 Whether the Commission would also need to prove, as a separate legal condition, that tying has potential anticompetitive effects is an open question. See Case T-201 Microsoft v Commission, cited

(986) The customer is required to assume a 'supplementary obligation' if the two obligations are *distinct* from each other. For this purpose, the Commission may analyse the nature of the products in question or assess whether they are normally sold together ('according to commercial usage').[955]

(987) The fact that other operators on the market supply the products concerned without tying them together, constitutes strong evidence that the products are distinct.[956] Other relevant elements include the fact that the tying and tied products have different functions, that a producer of the tying product also produces alternatives to the tied product to sell them separately, and that the tied product could be purchased from another source.[957]

(988) While the customer is typically left with no choice but to accept the supplementary condition in the traditional tying cases, such elements of coercion can also be indirect. Tying can be implemented via explicit contractual obligations, or the condition can be imposed on the customer *de facto*: the dominant company does not sell the tying products unless the customer agrees to the supplementary conditions.[958] Pressure could also be applied by withdrawing benefits from customers that do not agree to accept supplementary obligations,[959] or by creating pricing incentives (e.g. higher/lower rebates).[960] The notion of denying choice expresses in different words the concept that customers are compelled, directly or indirectly, to accept supplementary obligations.[961]

(989) The above criteria developed by jurisprudence can also be applied to situations other than tying in which the customer has to assume supplementary obligations. As mentioned previously, the list of abusive practices set out in Article 102 TFEU is not exhaustive[962] and practices mentioned explicitly in Article 102 TFEU are mere

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above, paras. 687, 867-868 with reference to Case T-203/01, Michelin v Commission [2003] ECR II-4071 (Michelin II), paragraph 237; 1035 and 1058. In any case, demonstration of potential anticompetitive effects on competition will be shown in this case, even if this is not necessary.

955 However, the Court of Justice of the European Union has stated that even where tied sales are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute an abuse unless they are objectively justified - see Case C-333/94 P *Tetra Pak International SA* v *Commission* [1996] ECR I-5951.

956 See Case T-201/04 *Microsoft Corpn* v C*ommissio*n, cited above, para 927. According to the General Court in Hilti the mere existence of undertakings specialised in the manufacture of the tied product without the tying product is a strong indication of separate markets for the tied and tying products, Case T-30/89 *Hilt AG* v *Commissioni,* paragraph 67; also see Case T-427/08 Confédération européenne des assiations d´horlogers-réparateurs (CEAHR) v Commission [2010] ECR II-5865, paragraph 108.

957 See Case T-201/04 *Microsoft Corpn* v C*ommissio*n, cited above, paragraphs 918 et seq.

958 See Case T-30/89 *Hilti AG* v *Commission,* cited above.

959 See Case *Novo Nordisk,* XXVIth Report on Competition Policy [1996] p. 35.

960 See Cases 85/76 *Hoffmann-La Roche* v *Commission,* cited above, paragraph 71 and IRI/Nielsen, XXVIth Report on Competition Policy [1996] pp. 144-148.

961 See Case T-201/04 *Microsoft Corpn* v *Commission ,* cited above, paragraph 864.

962 See Case 6/72 *Europemballage Corp and Continental Can Co Inc* v Commission [1973] ECR 215, paragraph 26; Joined cases C-359/96 P and C-396/96 *P Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 112; Case C-333/94 P Tetra Pak II [1996] ECR I-5951, paragraph 37 and Case C-95/04 P *British Airways* v Commission [2007] ECR I-2331, paragraph 57.

examples of an abuse.[963] Accordingly, the Commission can rely on Article 102 TFEU in its entirety and not exclusively on Article 102 d) TFEU.[964]

15.9.1.1. Exclusionary abuse

(990) Forcing a customer to accept supplementary conditions can be qualified as an exclusionary abuse. For the finding of an exclusionary abuse under Article 102 TFEU there is no need to prove actual foreclosure effect; it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having that effect.[965] It is irrelevant whether the desired result of, for example, excluding competitors is ultimately achieved.[966]

(991) Anti-competitive foreclosure describes a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking which will ultimately result for instance in higher prices or in some other way limit the consumers' choice. In assessing whether the conduct reduces the likelihood that competitors will enter the market, different elements can be taken into account: the position of the dominant undertaking, the conditions of entry and expansion on the relevant market, the position of competitors, evidence of actual foreclosure and the extent of the allegedly abusive conduct. The stronger the dominant position, the weaker the competitors´ positions are. The weaker the positions of the customers are, the higher is the likelihood that the conduct leads to anti-competitive foreclosure.[967]

15.9.1.2. Exploitative abuse

(992) The behaviour of a dominant company which forces its customer, who is dependent on the dominant company for the supply of a product, to accept 'supplementary obligations' can also constitute an exploitative abuse. The imposition of supplementary conditions limits a dominant company's customer in his supply possibilities and can be exploitative within the meaning of Article 102 TFEU.[968]

(993) Conditioning unrelated products or services upon unfavourable contractual clauses can also constitute an abuse in the form of an imposition of an unfair trading

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963 See Case T-201/04 *Microsoft Corp* v *Commission* [2007] ECR II-3601, paragraphs 860 and 861; Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 173; and Case C-52/09 *TeliaSonera*, cited above, paragraph 26.

964 See Case T-201/04 Microsoft Corp v Commission, cited above, paragraph 861.

965 Case T-203/01 *Michelin* v C*ommission* (Michelin II), cited above, paragraph 239; Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 293; Case T-219/99 *British Airways* v *Commission* [2003] II-5917, paragraph 293; Case T-301/04 *Clearstream* v *Commission* [2009] ECR 2009, II-3155, paragraph 144; Case T-155/06, *Tomra Systems ASA* a.o v *Commission*, cited above, judgment upheld by C-549/10, not yet reported; see also Case T-286/09 *Intel Corp* v *Commission*, not yet reported, paragraph 103.

966 See Case C-52/09 *TeliaSonera*, cited above, paragraphs 62 et seq.; Case C-280/08 P *Deutsche Telekom* v *Commission*, cited above, paragraphs 177 et seq. and 253 et seq.; and Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, cited above, paragraphs 26, 42 and 44; Case T-321/05 *AstraZeneca*, cited above, paragraph 331, confirmed by the Court of Justice of the European Union in Case C-457/10 P *AstraZeneca* v Commission, cited above, paragraphs 109 and 111.

967 Cf. also the argumentation in the Commission's Vertical Guidelines, cited above, paragraphs 219-221.

968 This was the case in T-83/91, *Tetra Pak International SA* v *Commission*, ECR 1994 p. II-755, in which conditioning was found abusive without any foreclosure analsysis. See also the Commission's decision in *Hilti* , Commission decision of 22 December 2987, IV.30.787 and 31.488, paragraph 75, in which the Commission found that the fact that Hilti made the sale of patented cartridge strips conditional upon purchasing corresponding nails '*leaves the consumer with no choice over the source of his nails and as such abusively exploited him.'*

condition under Article 102 a) TFEU. In *Tetra Pak*, the Court found that a tied sale and other contract clauses were 'unfair' and hence abusive. The clauses went beyond their ostensible purposes, were intended to strengthen the dominant position and unreasonable as they could not be explained by any legitimate interest of the dominant supplier to protect its commercial interests.[969] In line with the special responsibility of a dominant company not to impair competition, practices of a dominant company need to be proportionate to the objective they seek to achieve[970], see also the explanations on such proportionality assessment above in paragraph (918).

15.9.1.3. Objective justification

(994) An abusive practice only constitutes an infringement under Article 102 TFEU if there is no objective justification. The burden of proof in this respect is on the dominant company.

15.9.2. Application of the principles to the case

(995) In the context of gas supply negotiations, OAO Gazprom and Gazprom Export imposed on their contract partners in Poland and [redacted] infrastructure-related commitments by making gas supplies and/or a lower gas prices dependent on such commitments. These commitments were distinct from the respective supply contracts (unconnected supplementary obligations).

(996) In **Poland**, Gazprom Export used its leverage as the the only supplier able to supply sufficient gas volumes to Poland to get its wholesaler PGNiG to agree as a shareholder of Europol to an operatorship agreement ('OA') between Europol and the TSO Gaz-System for the Yamal pipeline. This OA was favourable for Gazprom. The OA stipulated, as had been requested by Gazprom during the negotiations, that Yamal's development planning and carrying out expansions would not be decided by the pipeline's operator Gaz-System. The development planning and the carrying out of expansions as regards Yamal would instead be done by Europol, which was the legal owner of the Yamal pipeline and a joint venture between PGNiG and Gazprom. Gazprom used its leverage to ensure that it would be in a position to block decisions, including on investments, within Europol's statutory bodies. Finally, having ensured those veto rights in Europol, Gazprom used those rights to obstruct or at least delay virtual and physical flow via Yamal to Poland.

(997) [redacted]

(998) The following sections assess the situation in Poland and [redacted] separately. However, the practices by which Gazprom's counterparts had to accept supplementary conditions, are very similar in both countries. They are based on the

969 T-83/91, Tetra Pak International SA v Commission, ECR 1994 p. II-755, paragraph 140.

970 Joined Cases T-191 and 212 to 214/98 *Atlantic Container Line and others* v *Commission* ('TACA'), [2003] ECR II-3275, paragraph 112 as well as Case 127/73 *Belgische Radio en Televisie and societé belge des auteur* v *SABAM*, [197] ECR 313, paragraph 11; Commission Decision of 20 April 2001, COMP/34.493, upheld by Case T-151/01 *Duales System Deutschland* v *Commission*, [2007] ECR II-1607.

overall strategy by Gazprom to condition gas supplies on the acceptance by its contract partners of unconnected infrastructural commitments.

(999) While the gas supply negotiations of the wholesalers were typically conducted by Gazprom Export, the discussions on infrastructure also involved OAO Gazprom which is the shareholder in Europol in Poland and which dealt directly with the [redacted]. OAO Gazprom and Gazprom Export were jointly involved in conditioning gas supplies on infrastructural commitments by the wholesalers or their parent companies.[971]

15.9.2.1. Poland – Exclusionary abuse

(1000) In Poland, Gazprom pursued a strategy of conditioning additional gas supplies upon commitments by PGNiG relevant for investments in Yamal.

(1001) Gazprom's objective was to keep control over investments concerning the Yamal pipeline. Gazprom pursued this objective by ensuring that the operatorship agreement (hereafter OA) between Europol and Gaz-Systementrusted investment competences to Europol – rather than to the TSO Gaz-System. As shareholder in Europol, Gazprom would have the possibility to influence the decision-making process on investments. In addition, Gazprom conditioned gas supplies on certain Europol-related issues, namely as regards the competences and certain decision making rules within Europol's statutory bodies. Gazprom thereby aimed at strengthening its decision-making powers within Europol. Gazprom could use its leverage as the key supplier for PGNiG to make sure that the OA of 25 October 2010 and Europol's new statute of 2 February 2011 were in line with Gazprom's requests.

(1002) The following section will show that (i) gas supply and infrastructure-related commitments by the wholesaler are distinct from each other, (ii) that Gazprom is dominant in the market of upstream gas supplies, (iii) that Gazprom did not leave its customer PGNiG any choice but to agree to the OA for the Yamal pipeline in the form advocated by Gazprom and, (iv) that this enabled Gazprom to foreclose competing supplies.

(1003) As will be shown below, Gazprom's behaviour of forcing PGNiG to assume supplementary infrastructure-related commitments fulfils the conditions under Article 102 d) TFEU.

15.9.2.1.1 Obligations under a gas supply agreement and infrastructure commitments are distinct from each other

(1004) Infrastructure-related commitments are distinct from a wholesaler's obligations under a gas supply contract. Under a gas supply agreement, the wholesaler is subject to certain obligations vis-à-vis the supplier, such as the payment of gas, but is also subject to purchase obligations in the form of take-or-pay obligations, mode of payment for the delivered gas, etc. The participation in infrastructure projects of the gas supplier or the management of existing gas infrastructures is neither naturally nor by way of commercial usage part of such gas supply contracts or in any other way commonly linked to gas supplies.

(1005) The distinction between gas supply and (infrastructure-related) transmission activities was already recognized by Gas Directive 2003/55[972]. Gas Directive

[971] The Commssion thus uses the notion Gazprom for both entitities.

[972] Directive 2003/55/EC, for full reference see footnote 569.

2009/73[973] distinguishes even more clearly between gas supply and gas network (transmission) activities. It includes strict rules on unbundling aimed at ensuring that gas supplies are to be kept separate from gas transmission in order to avoid inherent conflicts of interests and the risk of discrimination by not granting competitors of the supplier access to the network. The Commission's case practice also distinguishes between gas supply markets and infrastructure markets.[974]

(1006) As explained in section 13.2, Gazprom made gas supplies to PGNiG conditional on PGNiG agreeing to certain of Gazprom's requests as regards Yamal's owner Europol, in which Gazprom is a shareholder. In particular, Gazprom pushed for an OA under which Europol would have the competence to draw up development plans for the pipeline and carry out its eventual expansion whereas under Gas Directive 2009/73 this competence should have been conferred to the TSO Gaz-System. Pipeline development plans, pipeline expansions and investment decisions for the pipelines are therefore infrastructure-related activities which should be negotiated independently from supply issues.

15.9.2.1.2 Gazprom is dominant in the Polish market of upstream gas supplies

(1007) Gazprom is dominant as regards the product which it uses for leveraging its dominant position, as Gazprom has a dominant position in the Polish upstream wholesale gas supply market, see section 15.5.

15.9.2.1.3 Gazprom conditioned gas supplies to PGNiG upon the entry into force of the OA and upon certain other Europol-related issues.

Operatorship agreement

(1008) The OA was considered by Gazprom to form part of an overall package which also included the renegotiation of PGNiG's supply contract with Gazprom for gas supplies.

(1009) Gazprom e.g. stated vis à vis the Polish government that a '*necessary condition*' for gas supplies to Poland should include *'retentions of appropriate control over investments in EuRoPol GAZ SA*, see paragraph (664). In this context, Gazprom also stated that it had no intentions of sponsoring investments by the TSO Gaz-System, which Gazprom did not want to see entrusted with any managerial function in relation to the Yamal pipeline, paragraph (666).

(1010) Gazprom conditioned additional gas supplies to PGNiG upon the conclusion of an OA that would maintain Europol's (and hence Gazprom's) control over investments. This conditional link between gas supplies and the adoption of the OA in a form favourable to Gazprom's interest is also evident from Annex 35 of 29 October 2010 to the gas supply contract concerning increased supplies by Gazprom Export to PGNiG. Annex 35 to the gas supply contract was signed together with an agreement on the entry into force and termination of the Annex 35. According to that latter agreement, additional supplies to PGNiG were explicitly conditioned, inter alia, upon the entry into force of the OA between Europol and Gaz-System as agreed and signed on 25 October 2010. In addition, the contract for gas supplies would cease at the request of Gazprom, if the OA would be amended. Any changes in the functions of the TSO would therefore give Gazprom the right to stop gas supplies, see paragraph (663).

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973 Directive 2009/73/EC, for full reference see footnote 34.

974 See above section.

(1011) Gazprom had stated towards PGNiG that 'all' agreements between Gazprom, PGNiG and Europol, IGA and the new supply contract were closely related and if PGNiG would not fulfil its commitments, *all* agreements may change, see paragraph (665).

(1012) Throughout the entire negotiation period leading to the conclusion of the OA, Gazprom had expressed its will to only give very limited competence to Gaz-System, see paragraphs (658) to (662).

(1013) The conditioning resulted in the adoption of the OA on 25 October 2010 which provided for only a limited role of the TSO Gaz-System. This allowed Gazprom, through its blocking powers within Europol's statutory bodies, to hinder the development of, inter alia, physical and virtual reverse flows.

(1014) As a result of Gazprom's conditioning of gas supplies vis à vis PGNiG, the OA provided for far reaching powers over investments of Europol. In particular, it is not the TSO Gaz-System but Europol – the owner of the pipeline – which draws up the development plan for the Yamal pipeline and carries out expansions of the pipeline. The independent TSO Gaz-System only had the right of being consulted with respect to investments and was conferred mainly technical and some commercial functions.

(1015) Gaz-System is subject to a certification procedure under Gas Directive 2009/73 as the ISO for the Polish section of the Yamal-Europe pipeline[975]. In January 2015 the Commission received a notification from the Polish Energy Regulator of a draft decision for certification of Gaz-System as an ISO. On 19 March 2015 the Commission adopted its opinion on certification of Gaz-System as the operator of the Polish section of Yamal-Europe pipeline ('Certfication opinion'). The non-confidential version of the Certification opinion will be published on DG Energy's website.

(1016) In the Certification opinion the Commission noted that the mere fact that Europol is required to prepare a network development plan and that Europol has competence to prepare a development plan and carry out the expansion of the Yamal pipeline according to Article 2 point 3c of the OA of 2010, appears in contradiction with the Gas Directive 2009/73[976]. The Commission took the view that Europol should not have any prerogatives with regard to investments that go beyond its obligations laid down in the Gas Directive 2009/73 and that Gaz-System should be solely responsible for the development of the investment plan for the network. The Commission further noted that Gaz-System should be legally and in practice able to independently decide on investments on the Yamal pipeline.

Other Europol-related issues

(1017) Gazprom further conditioned additional gas supplies upon certain modifications in Europol's Statute in its favour. Through this conditioning Gazprom aimed at ensuring that (i) the Supervisory Board (SB) would gain increased rights with regard to investments at the expense of the Management Board (MB), and (ii) that a dispute

975 Gas Directive 2009/73 stipulates that gas supply activities should be separated from transmission operations. For the ISO model, Article 14, in particular paragraph 4, provides that the planning, construction and commissioning of new infrastructure belongs to the competence of the ISO. Article 14 explicitly states that the owner shall not be responsible for investment planning.

976 Article 9 of Gas Directive 2009/73 prohibits an undertaking performing supply functions from directly or indirectly exercising control over a transmission operator or vice versa. Control is to be understood as the possibility to exercise decisive influence within the other undertaking, which arises in particular from ownership or e.g. voting rights, see Commission Staff Working Paper, Interpretative Note on Directive 2009/73, point. 2.2.

with PGNiG about the decisive vote of the MB would be resolved in its favour and that the SB would be given more powers over investments. Both before and during the gas negotiations with PGNiG, Gazprom insisted that it should not have less influence within Europol's MB than PGNiG, although Gazprom had originally agreed to the decisive vote of the MB chairman in 1994, see paragraph (637).

(1018) In view of the dispute over decision-making in the MB and in light of the changes to the Polish Company Code of 2001, Gazprom and PGNiG created a Working Group in order to find a compromise and reflect it in the new statute of Europol. In that working group, Gazprom repeatedly pushed for increasing the powers of the SB over investments where it had a veto right. Gazprom also wanted to explicitly introduce the 'consensus' principle for the adoption of MB resolutions in the New Statute (paragraphs (670) - (674)). On several occasions, Gazprom stated that gas supplies should be settled together with the functioning of Europol. The CEO of Gazprom Export stated that '*all this is a package*', see paragraph (676).

(1019) It was by leveraging its dominant supply position that Gazprom attained its objectives. As section 13.2.2.2 describes in greater detail, Gazprom insisted on a package approach (i.e. making gas supplies dependant on solving the Europol-related issues) in order to settle the dispute regarding the decisive vote of the MB chairman (and to adapt the New Statute to the Polish law without providing for a decisive vote of the MB chairman) and to increase the investment powers of the SB, both as requested by and to the benefit of Gazprom.

15.9.2.1.4 PGNiG had no choice but to accept a 'package' that included gas supplies, the OA and Europol-related issues

(1020) PGNiG did not agree to the OA as advocated by Gazprom as is evidenced in section 13.2.1.2., which describes the negotiations about the OA. In view of its urgent need for gas supplies, PGNiG had no choice but to agree to Gazprom's position and to sign the OA of 25 October 2010. The OA only gave limited competence to Gaz-System as Gazprom had requested and instead conferred broad investment powers to Europol.

(1021) Gazprom and PGNiG also had different positions regarding voting rights in the MB of Europol. This is evidenced by PGNiG's insistence on keeping the original decisive vote of the MB chairman (appointed by PGNiG) whereas Gazprom was strongly advocating for unanimity voting in the MB. Gazprom also wanted to incease the powers of the SB, where Gazprom (and PGNiG) had a veto right over investments (see paragraph (633)), see as of paragraph (670) and in particular paragraph (673).

(1022) PGNiG commercially depended for gas supplies on Gazprom because domestic production or imports from other sources were insufficient to meet the country's demand. During the negotiations with Gazprom in 2009 and 2010, PGNiG needed gas particularly urgently because its Ukrainian supplier RUE (a subsidiary of Gazprom) had stopped deliveries in January 2009 which resulted in a 25% gap in PGNiG's gas imports. PGNiG's customers were at risk of not having gas in the winter months when the gas demand is highest, see paragraphs (648) seq.

(1023) Gazprom was fully aware of PGNiG's situation and could, via the negotiations about the gas supply agreement, achieve an OA in line with its interests and the changes in voting rights in Europol, which it had envisaged for many years.

15.9.2.1.5 Gazprom's behaviour is capable of restricting competition

(1024) The OA in the form as conditioned by Gazprom provided Europol – and not the TSO as would be required under Gas Directive 2009/73 - with important investment

powers over Yamal. These investment powers enabled Gazprom to use its veto rights in Europol to foreclose competition by blocking the necessary investments in Yamal that would be needed to enable additional gas supplies by competing suppliers to Poland (e.g. extension of entry points, reverse flows etc.).

(1025) In *Tetra Pak* the potential foreclosure of competition resulted from a dominant company acquiring control over another company which owned an asset (in that case an exclusive right) which made the entry of competitors difficult.[977] The situation in Poland is comparable. Through the OA – which grants Europol investment powers regarding the Yamal pipeline – Gazprom may, as a result of its veto rights in Europol, block investment decisions which would allow the diversification of supplies and hence the entry of competing supplies to Poland.

(1026) As paragraph (689) shows, gas supply demand in Poland is expected to continue increasing in the future. Alternative gas supplies into Poland to a large degree depend on the use of the Yamal pipeline, over which Gazprom – through Europol – has now control rights by which it can hinder or delay entry of competing gas supplies into the Polish market e.g. via reverse flows on Yamal from Germany.

(1027) This is not a mere theoretical possibility. Gazprom can be expected to use its rights in Europol to delay or hinder the entry of competing supplies. This is shown by the examples below in which Gazprom attempted to obstruct or delayed investments on Yamal.

The lack of inclusion of projects within the development plan

(1028) Article 2 point 3 c of the OA provides Europol with the competence to draw up development plans for the Yamal pipeline.[978] When Europol drew up such a plan after the entry into force of the OA on 25 October 2010, the plan did not include any investments except for the mere pipeline operation.

(1029) Europol stated that it was against any expansion plans for the Yamal pipeline. Gazprom appears to have been the driving force in Europol behind this negative attitude, as it had always insisted that final investment decisions should stay with Europol. Europol later explicitly made capacity extensions on Yamal subject to the corporate agreements of its shareholders, i.e. including of Gazprom, see paragraphs (694) et seq.

Attempt to obstruct the implementation of virtual reverse flows on Yamal

(1030) In 2011, Europol had to decide about the introduction of an allocation procedure for virtual reverse flows in Mallnow in order to import gas from Germany to Poland. Gazprom's representatives in Europol abstained from voting on the necessary technical adaptations needed for the metering which meant that reverse flow could not be implemented, see paragraphs (703) et seq. Ultimately, the TSO Gaz-System had to find other solutions to allow virtual reverse flows, as it was legally obliged to implement virtual reverse flows. It is however not relevant that Gazprom did in the end not succeed in foreclosing alternative supplies as established in *AstraZenecca*.[979] Therefore, as long as investment powers regarding the Yamal pipeline are with

977 Case T-51/89 *Tetra Pak Rausing SA* v *Commission* [1990] ECR II-309.

978 According to Article 14 (4) of Gas Directive 2009/73 the owner should not be involved in any investment planning.

979 Case T-321/05 *AstraZeneca*, cited above, paragraph 331, confirmed in Case C-457/10 P *AstraZeneca* v *Commission*, cited above, paragraphs 109 and 111.

Europol under the OA and not with the TSO Gaz-System, Gazprom's veto rights in Europol give it the possibility to block the respective investment decisions.

Actual delays for physical and virtual reverse flows

(1031) At least in two instances, Gazprom was able to delay the introduction of investment decisions on physical reverse and virtual reverse flow mechanisms. Gazprom thereby actually hindered supply diversification, at least for a limited time period.

(1032) **Virtual reverse flows**: In 2012/2013, Gazprom delayed the increase of capacity from Yamal through the exit point Wloclawek for a period of three months; see section 13.3.4. in particular (713) and (717). Gazprom's representatives in Europol insisted that the limited investment of EUR 2.5 million needed for the exit point expansion should be consulted with Europol's shareholders. Under the New Statute the matter was brought before the SB of Europol whose decision was delayed for Gazprom related reasons; see paragraph (714).

(1033) **Physical reverse flows**: In 2011, Gazprom's representative in Europol voted against the so-called Mallnow Agreement which would have set out the technical details for introducing physical reverse flows (PRF) from Germany into Poland. Negotiations had been ongoing between Wingas Transport GmbH and Europol since 2009, see paragraph (723). The two parties had already negotiated the respective contractual details, but the agreement did not materialise due to Gazprom's negative vote, see paragraph (727). While PRF on the Yamal pipeline has ultimately been realised since early 2015 (see footnote 76) after the German and the Polish transmission operators agreed on its introduction, see paragraph (734), the introduction of PRF could have occurred earlier, had the Gazprom voted differently in 2011, see section 13.3.5.

(1034) In 2012, Gazprom again delayed the process to expand the Mallnow metering station for reverse flows. While the costs for this project were limited and most likely would have resulted in revenue increases, Europol did not agree to finance the necessary investment.[980] [redacted] While the project was finally decided on in November 2012, Gaz-System had brought the matter forward to Europol already a year before, paragraph (730).

15.9.2.1.6 Preliminary conclusion on the exclusionary abuse (Poland)

(1035) Gazprom conditioned gas supplies to PGNiG upon the conclusion of the OA which conferred investment powers to Europol (where Gazprom had a veto right). Gazprom thereby at least potentially foreclosed access of competitors to the Yamal pipeline and infringed Article 102, in particular lit. d) TFEU. Likewise, Gazprom's conditioning of gas supplies for PGNiG with Europol-related issues was abusive.

15.9.2.2. Bulgaria – exploitative abuse

(1036) [redacted]

(1037) [redacted]

[980] According to Article 14 (5) of Gas Directive 2009/73, the owner finances investments decided by the TSO.

[redacted]

(1038) [redacted]

15.9.2.2.1. Obligations under a gas supply agreement and infrastructure commitments are distinct from each other

(1039) [redacted]

(1040) [redacted]

15.9.2.2.2. Gazprom is dominant in the market for upstream wholesale gas supplies

(1041) Gazprom is dominant in the upstream wholesale gas supply market of Bulgaria, see section 15.5.

15.9.2.2.3. Gazprom conditioned gas supplies upon BEH's participation in [redacted]

(1042) [redacted]

(1043) [redacted]

[981] See section 14.3 and in particular paragraph (766).

[redacted]

(1044) [redacted]

(1045) [redacted]

(1046) [redacted]

15.9.2.2.4. BEH had no choice but to accept its participation in [redacted]

(1047) [redacted]

(1048) [redacted]

982 See paragraphs (742) et seq.

[redacted]

15.9.2.2.5 Gazprom's imposed unfair trading conditions

(1049) As stated above, in order to determine whether a trading condition is unfair under Article 102 a) TFEU it has to be assessed whether the dominant company's behaviour was necessary and proportionate to attaining a legitimate objective, while balancing the interests of the dominant company and its contract partner, see section 15.9.1.2.

(1050) [redacted]

(1051) [redacted]

- [redacted]
- [redacted]
- [redacted]

(1052) [redacted]

- [redacted]
- [redacted]
- [redacted]

15.9.2.2.6 Preliminary conclusion on the exploitative abuse (Bulgaria)

(1053) [redacted]

[redacted]

16. SINGLE AND CONTINUOUS INFRINGEMENT

16.1. Principles

(1054) An abuse consisting of a series of acts by a dominant undertaking(s) may constitute a single and continuous infringement. The concept of a 'single infringement' for cases under Article 101 TFEU concerns a complex of practices adopted by various parties in pursuit of a 'single anti-competitive economic aim'.[984] The principles developed for the application of Article 101 TFEU will also be relevant for cases assessed under Article 102 TFEU, where the abuse consists of different practices, which may take place in different product or geographic markets.

(1055) An infringement of the competition rules may result not only from an isolated act but also from a series of acts or from a continuous conduct.[985] It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in abusive behaviour.

(1056) Such interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of the competition rules of the Treaty. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of the participation in the infringement considered as a whole.[986] As to the existence of such an 'overall plan', the Courts have established that the notion of a single infringement covers the situation in which undertakings participated in an infringement in which continuous conduct in pursuit of a single economic objective was intended to distort competition, and also individual infringements linked[987] to another by the same object (all the elements sharing the same purpose) and the same subjects (same undertakings who are aware that they are participating in the common object).[988] For the purpose of characterising various instances of conduct as a single and continuous infringement, it is necessary

983 See Case 27/76 *United Brands and United Brands Continental* v *Commission*, cited above, paragraph 248.

984 Joined Cases T-25/95 and others *Cement* [2000] ECR II-491, paragraph 3699.

985 Case T-6/89 *Polypropylene* [1991] ECR II-1623, paragraph 204 refers to a series of single efforts.

986 See Joint cases C-204/00 and others, *Aalborg Portland et al.* [2004] ECR I-123, paragraph 258, see also Case C-49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraphs 78-81, 83-85 and 203.

987 As to the links of different practices and their complementary inter-action, see Case T-101/05, *BASF* v *Commission* [2007] ECR II-4949, paragraphs 157-210.

988 Case T-53/03, *BPB plc* v *Commission*, [2008] ECR II-1333, paragraph 257; Case T-27/10, *AC Treuhand* v *Commission*, paragraph 238 with reference to other case-law.

to establish whether they complement each other and contribute to the realisation of the objectives of the overall plan.[989]

(1057) The fact that undertakings participate to different degrees in the anti-competitive behaviour does not exclude their responsibility for the infringement as a whole, even for acts committed by others, but which pursue the single economic objective and follow the overall plan.

16.2. Application of the principles to the case

(1058) Each of the abusive practices by Gazprom described in this Statement of Objections (territorial restrictions, excessive/unfair pricing and the imposition of unconnected supplementary obligations) would also constitute separate infringements of Article 102 TFEU and Article 54 of the EEA Agreement in their own right (see sections 15.7, 15.8, 15.9 in the legal assessment).

(1059) However, it would be artificial to split up such an abuse by treating it as consisting of separate infringements. In fact, the forms of conduct all seek to, or have the effect of, segmenting the market so that Gazprom can control output and maximise its profit through illegal means. The different abusive conducts are interlinked and serve the same purpose of protecting Gazprom's pricing policy to keep unfair prices in different national market by preventing intra-brand competition and inter-brand competition.

(1060) *Gazprom's practices followed a single economic aim*: Gazprom's aim to protect its differing (and excessive) price levels in the [redacted] by segmenting the markets is evidenced by several statements. As can be seen from section 8.1 of the Statement of Objections, Gazprom explained to [redacted]

(1061) *Gazprom's actions were based on an overall plan to prevent inter-brand and intra-brand competition*: In order to protect Gazprom's different prices in the national markets, Gazprom segmented markets along national borders and tried to prevent inter-brand competition.

(1062) It should be noted that Gazprom uses for [redacted] long-term contracts which are similar in nature and contain the similar contract conditions relevant for the abuse such as [redacted]

(1063) As to the *territorial restrictions*, section 8.2 of the Statement of Objections demonstrates that the inclusion of territorial restrictions was based on a comprehensive strategy, despite the fact that Gazprom's behaviour concerned eight different [redacted] since the conclusion of the contracts. With the exception of the contract for Poland (see paragraph (290)) and [redacted] (see paragraph (292)), these territorial restrictions have only been removed in 2011 and 2012, i.e. after the Commission's investigation.

[989] Case T-286/09 Intel Corp v Commission, paragraph 1562 seq., not yet reported,

(1064) As can be seen from section 8.2, these clauses are formulated in a similar, sometimes almost identical manner (for the Baltic territorial restrictions).[990]

(1065) *For its price formation*, Gazprom follows a similar price setting approach in supply contracts for , including in particular in the and Poland. While the formula has some national specificities, it is largely similar (see section 7.2.5 and Figure 5), and complemented with price revision and arbitration mechanisms.[991] The contracts in the are based on oil-indexation. Gazprom also treated requests by its CEE wholesalers to remove oil-indexation in the same manner, namely by refusing such requests. As stated before, and Polish wholesaler had demanded hub pricing in their contracts, see section 11.3. . This demonstrates that Gazprom indeed followed a consistent pricing policy for and beyond.

(1066) Gazprom's strategy to condition gas supplies upon infrastructure-related commitments of the wholesalers (and parent company) and the wholesaler in Poland had the aim of preventing supply diversification (see on the potential foreclosure of Gazprom's behaviour, section 12 to 14), thereby enabling Gazprom to maintain its price level resulting from its dominant position in these countries. For - The strategy also allowed Gazprom to gain benefits which it could not have attained if there had been functioning competition for gas supplies. The practices applied by Gazprom in Poland and are comparable.[993] They have a common strand, as they concern the same market and involve a similar behaviour by Gazprom. In both situations, Gazprom leverages its dominance in the upstream wholesale gas supply market in order to obtain infrastructural commitments by its customer. In both scenarios, Gazprom made use of the fact that the wholesaler were in need of gas supplies, as gas supplies had shortened (Poland) or existing contracts were coming to an end . In both cases, both Gazprom entitites acted together as gas supplier (Gazprom Export),

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993 For the criterion of complementarity see Case T-286/09 *Intel Corp* v *Commission*, paragraph 1529 seq., not yet reported, also Commission decision of 9.7.2014 AT. 39612 Perindopril (Servier), paragraph 2962, not yet published.

respectively infrastructure participant (OAO Gazprom as shareholder in Europol for the Polish Yamal pipeline control, respectively as shareholder in the joint venture [redacted]) to achieve the objectives of obtaining the desired infrastructure commitments of the wholesalers. In particular with regard to Poland, the control over the Yamal pipeline would also give Gazprom the possibility to obstruct investments for supply diversification in the form of the physical and virtual reverse flows, see paragraphs (1031) seq., which would make re-exports from other countries via physical or virtual reverse flow more difficult. Its conduct consequently complements Gazprom's general market segmentation strategy as described in the first part of the abuse.

(1067) This shows that in both cases, Gazprom followed the same strategy to make use of its customers' dependence on gas supplies in order to obtain unrelated and supplementary concessions.

(1068) The common overall strategy is further supported by the fact that in some instances OAO Gazprom directly participated in the abusive practices of Gazprom Export. As illustrated in the overview table in Figure 59 of this SO, Gazprom Export acted [redacted] For the conditioning of gas supplies with infrastructural commitments, OAO Gazprom was directly involved in the respective negotiations with the Polish and [redacted] wholesalers (and its parent company [redacted]).

(1069) In addition the CEO of Gazprom Export at the time was also a member of the management committee in OAO Gazprom, in which strategic issues are discussed.

(1070) Therefore, the Commission considers that there are objective reasons to legally qualify and treat the various conduct of Gazprom analysed in this SO as one single and continuous infringement of Article 102 TFEU and Article 54 of the EEA Agreement. In any event, and in the alternative, each of Gazprom's practices described in this SO constitutes also separate infringements of Article 102 TFEU and Article 54 of the EEA Agreement.

17. EFFECTS ON TRADE BETWEEN MEMBER STATES

17.1. Principles

(1071) Article 102 TFEU prohibits any abuse of dominant position within the internal market or in a substantial part of it insofar as it may affect trade between Member States.

(1072) In *Suiker Unie*, the Court established that for the purpose of determining whether a specific territory is large enough to amount to a substantial part of the internal market within the meaning of Article 102 TFEU '*the pattern and volume of production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.*'[994] Normally, the territory of a single entire Member State is sufficiently large in size to meet this condition.

[994] Joined cases 40-48, 50, 54-56, 111,113 and 114-73, *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission*, cited above, paragraph 371.

(1073) An abuse of a dominant position affects trade between Member States if it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States.[995]

(1074) First, '*trade between Member States*' must be affected. The concept of trade is not limited to traditional exchanges of goods and services across borders, but covers all cross-border economic activity. In addition, it also encompasses practices affecting the competitive structure of the internal market by eliminating or threatening to eliminate a competitor operating within the territory of the European Union.[996]

(1075) Second, the effect on trade between Member States must be '*appreciable*'. This is assessed primarily with reference to the position of an undertaking on a relevant product market.[997] The stronger the position of an undertaking, the more likely it is that the effect on trade between Member States of a practice will be appreciable.[998] However, the Court of Justice has underlined that '*Article 82 [now 102 TFEU] does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect.*'[999]

(1076) According to settled case-law, the notion of being capable of having appreciable effect implies that it must be foreseeable with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[1000] Where a dominant undertaking engages in abusive conduct in more than one Member State, such abuse is normally, by its very nature, capable of affecting trade between Member States.[1001]

(1077) EU law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner that might harm the attainment of the objectives of an internal market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market.[1002]

17.2. Application to the case

(1078) The abuse covers the territories of eight Member States and therefore a substantial part of the internal market within the meaning of Article 102 TFEU.

(1079) Since the gas supply contracts entered into by OAO Gazprom and Gazprom Export with CEE wholesalers raise artificial barriers to trade and inhibit the free flow of gas between the CEE countries and between the CEE countries and other EU Member States in order to protect Gazprom's unfair pricing policy, they must be regarded as having an effect on trade between Member States.

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995 See Joined Cases C-215/96 and C-216/96 *Bagnasco* v *BNP and others* [1999] ECR I-135, paragraph 47.

996 See Joined Cases 6 and 7/73 *Commercial Solvents* [1974] ECR 223, paragraphs 32-33 and Joined cases T-24/93 and others *Compagnie Maritime Belge* v *Commission* [1996] ECR II-1201, paragraph 203d; Cases C-215/96 and C-216/96 *Bagnasco* v *BNP* and others [1999] ECR I-135, paragraph 47.

997 Case 5/69 *Franz Völk* v *Établissment J. Vervaecke* [1969] ECR 295, paragraph 5/7.

998 Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 138.

999 Case 3222/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 104; see also Joined Cases *RTE and ITP* v. *Commission* ECR I-743, paragraphs 69-70.

1000 Case 5/69 *Franz Völk* v *Établissment J. Vervaecke* [1969] ECR 295, paragraph 5/7.

1001 See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ('Guidelines on the effect on trade concept'), OJ C 101 of 27.4.2004, page 81, paragraph 75.

1002 Case 22/78 *Hugin/Commissione* [1979] ECR 1869, paragraph 17; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 47; Case C-407/04 P *Dalmine/Commissione* [2007] ECR I-829, paragraph 89.

(1080) This also applies to Gazprom Export's strategy of imposing unconnected supplementary obligations allowing it to foreclose competition by making gas supply conditional on maintaining control of relevant infrastructure or by obtaining other infrastructure-related commitments. By implementing this strategy, Gazprom's behaviour is able to affect the possibilities of supply diversification via imports from Western Europe or via the creation of alternative supply infrastructures and thereby capable of influencing the competitive structure of the internal market.

(1081) Gazprom is dominant, often with very high market shares and sometimes a monopolist supplier, in all of the CEE countries.

(1082) In light of the above, the Commission has therefore reached the preliminary conclusion that Gazprom's conduct affects trade between EU Member States and between Contracting Parties to the EEA within the meaning of Article 102 TFEU and Article 54 of the EEA Agreement, respectively.

18. ADDRESSEE

18.1. Principles

(1083) The Commission considers that the addressees of this SO should be held liable for the anti-competitive behaviour described in this SO. EU competition rules apply to 'undertakings'. The term 'undertaking' is not defined in the TFEU. However, in *Shell International Chemical Company* v. *Commission*, the General Court held that '[…] *Article 85(1) of the EEC Treaty [now Article 101(1) of the TFEU] is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.*'[1003] The same principles apply for the concept of 'undertaking' in Article 102 TFEU.

(1084) The concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity or its precise legal form under national law.[1004] For the undertaking that is to be held accountable for infringing Article 102 TFEU, one or more legal entities are identified which should bear legal liability for the infringement. According to the case-law, '*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC [now Articles 101 and 102 of the TFEU] if the companies concerned do not determine independently their own conduct on the market.*'[1005] If a subsidiary does not determine its own conduct on the market independently, the company which

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1003 See Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311. See also Case T-352/94 *Mo Och Domsjö AB* v *Commission* [1998] ECR II-1989, paragraphs 87-96; Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 125; Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 83.

1004 Although an 'undertaking' within the meaning of Article 101(1) of the TFEU is not necessarily the same as a company having legal personality, it is necessary for the purposes of enforcing decisions to identify the legal entity to which the decision will be addressed. See PVC II [1999] ECR II-931, paragraph 978 and Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 59.

1005 Court of Justice in Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 132-133; Case 170/*83 Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11 and Court of First Instance in Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290.

directed its market strategy forms a single economic entity with that subsidiary and may be held liable for an infringement on the ground that it forms part of the same undertaking.[1006]

(1085) In order to determine whether a subsidiary forms an economic unit with its parent, the Commission needs to establish that the parent was able to exercise decisive influence over the subsidiary and that it actually exercised its influence.[1007] In its assessment of whether the conduct of a subsidiary can be imputed to its parent company, the Commission will in particular have regard to the economic, organisational and legal links between the two legal entities.[1008] The existence of an economic unit may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of an economic unit.[1009] Relevant factors include, for example, the representation of the parent company in the management bodies of its subsidiary.[1010] The decisive influence of a parent company does not necessarily have to be established on the basis of explicit instructions, but can be inferred from the totality of the legal and economic links with the parent company.[1011] Conversely, the existence of a certain autonomy of the subsidiary (or, as seen later, the joint venture) does not preclude the finding of a 'single economic unit'.[1012]

(1086) The Commission can generally presume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company, i.e. that a parent is able to decisively influence the commercial policy of such subsidiary, without having to assess whether the parent company has in fact exercised that power.[1013] However, the parent company and/or subsidiary can rebut this presumption by proving that the subsidiary '*decided independently on its own conduct on the market rather than*

1006 Joined Cases T-117/07 and 121/07 *Areva and Others and Alstom v Commission* [2011] ECR II-633, paragraph 85.

1007 Case T-399/09, *Holding Slovenske elektrarne d.o.o. (HSE)* v *Commission*, judgment of 13 December 2013, not yet reported, paragraph 29 with reference to T-314/01, *Avebe* v. *Commission*, cited above, paragraph 136; Case T-76/08 *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC, DuPont Performance Elastomers SA* v Commission, judgment of 2 February 2012, not yet reported, paragraph 60.

1008 Case C-90/09 P *General Quimica and Others* v *Commission* [2011] ECR I- 1, paragraph 37 and Case C-97/08 P *Akzo Nobel NV and Others* v *Commission* [2009] ECR I-8237, paragraph 58.

1009 Case T-299/09, *HSE* v *Commission*, cited above, paragraph 30.

1010 Case T-299/09, HSE v Commission, cited above, paragraph 38 with reference to Case T-344/06 Total v Commission, judgment of 27 September 2012, not yet reported, paragraph 73. The latter judgment makes the point that such link does not require that the representation of the parent company in the management bodies of the subsidiary is significant.

1011 Case T-76/08 *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC, DuPont Performance Elastomers SA* v *Commission*, cited above, paragraph 62.

1012 Case T-299/09, HSE v Commission, cited above, paragraph 54.

1013 Case T-566/08 *Total Raffinage Marketing* v *Commission*, judgment of 13 September 2013, not yet reported, paragraphs 496-497 and Case C-97/08 P *Akzo Nobel NV and Others* v *Commission* [2009] ECR I-8237, paragraphs 60-61. See also Joined Cases T-71/03 and Others *Tokai Carbon and Others* v *Commission* [2005] ECR II-10, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 80, upheld by the Court of Justice in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 27-29; Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 50; Joined Cases T-122/07 and others *Siemens AG Österreich and Others* v *Commission* [2011] ECR II-793, paragraph 130; Joined Cases T-117/07 and 121/07 *Areva and Others and Alstom* v *Commission* [2011] ECR II-633, paragraph 86; Case C-90/09 P *General Quimica and Others* v *Commission* [2011], judgment of 20 January 2011, not yet reported, paragraphs 37-40; Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* [2011], not yet reported, paragraphs 97-98.

carrying out the instructions given to it by its parent company and such that they fall outside the definition of an 'undertaking'.'.[1014]

(1087) In case of joint ventures, the respective parent companies can be considered liable for the behaviour of the joint venture where they have the ability to exercise decisive influence on the commercial policy of the joint venture and actually exercised this power.

(1088) The Commission may presume that a parent company in a joint venture exercises a decisive influence over its subsidiary where two companies are placed in a position analogous to that in which a single company owns the entire share capital of its subsidiary.[1015] This was found in particular to be the case where the parents each owned 50% of the joint venture[1016] or in a situation of 60% and 40% shareholdings.[1017] The Court stated in Fuji Electric Co. Ltd: '*it is generally the case that if a parent company holds a majority interest in the subsidiary's share capital, that can enable it actually to exercise a decisive influence on its subsidiary and in particular, on the subsidiary's market conduct.*'[1018] The ability to exercise decisive influence may also exist in a situation of minority shareholdings.[1019]

(1089) The exercise of decisive influence can be inferred from a number of factors such as the statutory provisions (and their implementation) in relation to the management of the company or the parent company's presence in the management board.[1020] It is not necessary that the parent company is involved in the day-to-day management of the subsidiary and in the commercial policy *stricto sensu*.[1021] Decisive influence can also be inferred e.g. where the parent company is also the supplier or customer of its subsidiary and has a very specific interest in managing the activities of the subsidiary.[1022]

(1090) Where a number of entities are held liable for the participation of one undertaking in the infringement of competition law, the Commission may consider them jointly and severally liable for that infringement.[1023]

1014 Case T-566/08 *Total Raffinage Marketing* v *Commission*, not yet reported, paragraph 496. Joined Cases T-71/03 and others *Tokai Carbon and Others* v *Commission* [2005] ECR II-10, paragraph 61.

1015 Case T-343/06, *Shell Petroleum NV a.o.* v *Commission*, paragraph 45, not yet reported, with reference to Case T-314/01 *Avebe* v *Commission*, paragraph 138.

1016 Case T -314/01 *Avebe* v *Commission*, cited above, paragraph 138 (50%/50% shareholding).

1017 Case T-343/06 *Shell Petroleum NV a.o.* v *Commission*, paragraph 145 in a situation of 60% and 40% shareholding.

1018 Case T-132/07 *Fuji Electric Co. Ltd* v *Commission* [2011] ECR II-4091, paragraph 182.

1019 Case T-132/07 *Fuji Electric Co. Ltd* v *Commission*, cited above, paragraph 184. In this regard, the Court's judgment in Fuji considered it relevant whether the parent company is present in the management bodies of the subisidiary

1020 See Case T-132/07 *Fuji Electric Co. Ltd* v *Commission*, cited above, paragraph 184: actual influence may be exercised even in case of minority shareholdings. The Court stresses that the extent of the parent company's involvement in the management of the subsidiary is of relevance. It is in particular relevant, whether management positions overlap, i.e. whether managers in the subsidiary also occupy management posts in the parent company, see Case T-132/07 *Fuji Electric Co. Ltd* v *Commission*, paragraph 199.

1021 Case T-299/09, *HSE* v *Commission*, cited above, paragraph 80.

1022 Case T-132/07 *Fuji Electric Co. Ltd* v. *Commission*, cited above, paragraph 184.

1023 Joined Cases 6/73 and 7/73 *Istituto Chemicoterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 41; Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraphs 33 and 34; *HFB Holding and Isoplus Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others* v *Commission* [2002] ECR II-1487, paragraphs 54, 524 and 525; Joined Cases T-71/03 and others *Tokai Carbon and Others* v *Commission* [2005] ECR II-10, paragraphs 60, 62; Case C-97/08 P *Akzo Nobel NV and Others* v *Commission*, [2009] ECR I-8237, paragraphs 57-62;

18.2. Application of the principles to this case

(1091) It is established on the basis of the facts described in this Statement of Objections that the legal entities Gazprom Export and OAO Gazprom have been directly involved in the infringement and/or bear liability for the infringement.

18.2.1. Direct liability of OAO Gazprom and Gazprom Export

18.2.1.1. First part of the abuse: territorial restrictions

Direct liability of OAO Gazprom for contracts with Baltic wholesalers

(1092) [redacted]

Direct liability of Gazprom Export for contracts with wholesalers in [redacted], the [redacted] Poland and [redacted]

(1093) Gazprom Export participated directly – for the territorial restrictions – in the infringements in [redacted], Poland and [redacted] Gazprom Export has been the contract partner of the respective national wholesalers.

(1094) Gazprom Export directly is liable for the territorial restriction contained in its [redacted]

(1095) Gazprom Export is directly liable for the territorial restriction contained in its [redacted]

(1096) Gazprom Export was the direct contract partner for [redacted]

(1097) Gazprom Export is directly liable for the territorial restriction contained in its contract with PGNiG. Gazprom Export was the direct contract partner, see section 8.2.1.7 (Poland).

(1098) Gazprom Export is directly liable for the territorial restriction contained in its [redacted]

(1099) As to other contractual provisions and measures which have the effect of preventing the export or resale of gas similar to the territorial restriction clauses, the direct liability is as follows:

(1100) Gazprom Export is directly liable for the equivalent measures in the supply contract [redacted]

Joined Cases T-117/07 and 121/07 *Areva and Others and Alstom* v *Commission* [2011] ECR II-633, paragraph 145.

(1101) Gazprom Export is directly liable for the [redacted]

(1102) Gazprom Export is directly likewise liable for refusing to change delivery points, in [redacted]

(1103) Gazprom Export is liable for blocking the re-direction of gas from [redacted]

Direct liability of Gazprom Export for contracts concluded by the intermediaries in [redacted]

(1104) [redacted]

(1105) Gazprom Export is directly liable for the territorial restrictions contained in:

– [redacted]

– [redacted] see paragraph (263).

– [redacted] see (264).

– [redacted] see paragraphs (181) et seq.

(1106) [redacted]

(1107) Gazprom Export's overall strategy was that gas should stay within national markets. Gazprom Export therefore had to ensure that in a situation in which the gas would be sold on to the national wholesaler, the respective territorial restriction would have to become part of the downstream contract between the intermediary and the wholesaler. This was understood by the intermediary. The Commission does not need to show evidence that Gazprom Export has explicitly instructed the intermediaries to introduce such territorial restrictions into their contracts with the national wholesalers.

(1108) It would be sufficient for the direct liability of Gazprom Export that Gazprom Export knew or at least must have known about the territorial restrictions.[1024] Gazprom Export not only knew about the territorial restrictions but actively created the supply chains and set up a contractual structure of largely identical upstream and

[1024] See, e.g., Joined Cases T-259/02 and others, *Raiffeisen Zentralbank Österreich and others v Commission*, [2006] ECR II-5169, paragraph 330.

downstream contracts which: i) contained largely the same contractual provisions, ii) foresaw the same quantities of gas to be sold under the contracts, iii) at the same delivery point and iv) which almost identically worded territorial restrictions, see paragraphs (160) - (166) for [redacted]

(1109) In none of these supply chains was the intermediary able to dispose of the gas according to its own commercial interests. The intermediary did not exercise a normal wholesale activity by selling the purchased gas to a variety of other natural gas traders, retailers or industrial customers. It simply delivered its gas to one specified contract partner only, namely the national wholesaler. The gas was off-taken at the exact same delivery point which was common for all contracts in the supply chain from Gazprom Export to the wholesaler. The facts show that [redacted] acted as mere vehicles. Their only role was to supply gas to the national wholesaler. All intermediaries depended entirely on Gazprom Export for gas supplies.

(1110) [redacted] see paragraph (191).

(1111) The evidence further shows that the contracts between Gazprom Export and [redacted]

(1112) [redacted]

(1113) [redacted]

(1114) [redacted]

[1025] The decision states that the only business of Panrusgaz is to purchase gas from Gazprom Export to MOL WMT, now EFT. Commission Decision 21 December 2005, COMP/M.3696 – *E.ON/MOL*, cited above, paragraph 10.

[redacted]

(1115) [redacted]

(1116) [redacted]

(1117) [redacted]

(1118) The Commission therefore concludes that it was Gazprom Export that set the conditions for gas supply, including the imposition of territorial restrictions, in the [redacted]

18.2.1.2. Second part of the abuse: pricing

Direct liability of OAO Gazprom for contracts with Baltic wholesalers

(1119) As already stated for the territorial restrictions, OAO Gazprom is the contract partner of the [redacted] wholesalers and is therefore directly liable for the contractual price provisions and hence for the pricing abuse in [redacted].

Direct liability of Gazprom Export (and OAO Gazprom) for contracts with wholesalers in Bulgaria and Poland

(1120) Gazprom Export is the contract partner of the Bulgarian wholesaler, Bulgargaz [redacted] and the Polish wholesaler and is therefore directly liable for for the contractual price provisions and hence for the pricing abuse in [redacted] Poland.

1026 [redacted]

(1121) [redacted]

Direct liability of Gazprom Export for contracts concluded by the intermediaries in Bulgaria

(1122) [redacted]

(1123) [redacted]

(1124) [redacted]

18.2.1.3. Third part of the abuse: conditioning of gas supplies on the assumption of supplementary obligations

(1125) Gazprom Export and OAO Gazprom are both directly liable for the imposition of unconnected supplementary obligations in Poland and [redacted]

(1126) As sections 13 and 14 of the Statement of Objections show, [redacted] Gazprom Export and OAO Gazprom were actively involved as gas supplier and shareholder in the negotiations which conditioned gas supplies on the acceptance by Gazprom's respective contractual partners of infrastructure-related commitments.

1027 [redacted]

18.2.2. Parental liability of OAO Gazprom and Gazprom Export

18.2.2.1. Parental liability of Gazprom Export for other entities

(1127) The Commission will below assess whether Gazprom Export was in a position to exercise a decisive influence on the respective subsidiaries' conduct during the time of the infringement. In this regard, the Commission will take into account factors such as the ownership and rights or contracts which conferred decisive influence on the composition, voting or decisions of the organs of the undertaking.

(1128) As regards the actual exercise of the decisive influence, the Commission will take into account, in line with the case law described above, the economic, organisational and legal links which tied the respective subsidiary to Gazprom Export.[1028]

Liability of Gazprom Export for Panrusgaz

Gazprom Export's ability to exercise decisive influence over Panrusgaz

(1129) The following elements demonstrate that Gazprom Export was able during the relevant period to exercise decisive influence over [redacted]: i) Gazprom Export's significant ownership and ii) Gazprom Export's veto rights under [redacted] statutes.

(1130) **Significant ownership by Gazprom Export**: Gazprom Export held a significant share of [redacted][1029], which under the above cited case law[1030] gives it the ability to exercise decisive influence.

(1131) While the shares of [redacted] cannot be attributed to Gazprom Export directly, it should nevertheless be noted that [redacted] is ultimately owned by Gazprombank, in which OAO Gazprom has a share of [redacted]. According to an i[redacted]

(1132) **Various blocking rights:** [redacted]

it. This does not require that the parent company possesses the *'sole'* control over the

1028 Case C-97/08, P *Akzo Nobel NV and Others* v *Commission*, cited above, paragraph 74.

1029 [redacted]

1030 See section 18.1 above with regard to the judgments in Case T-11/89 *Shell* v *Commission* and T-132/07 *Fuji Electric Co. Ltd* v *Commission*, Case T-314/01 *Avebe* v *Commission.*

1031 [redacted]

1032 [redacted]

1033 [redacted]

joint venture. The question is only whether Gazprom Export was able to exercise decisive influence. Decisions within [redacted] taken by the Shareholder's meeting, the Management Board and the General Director required Gazprom Export's consent.

(1133) [redacted]

(1134) [redacted]

(1135) [redacted]

1034 [redacted]

1035 [redacted]

1036 See Case -132/07 *Fuji Electric Co. Ltd* v *Commission*, cited above, paragraph 183: *'Nonetheless, a minority interest may enable a parent company actually to exercise a decisive influence on its subdiary's market conduct, if it is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary's market conduct.*'

1037 [redacted]

1038 [redacted]

joint venture. The question is only whether Gazprom Export was able to exercise decisive influence. Decisions within [redacted] taken by the Shareholder's meeting, the Management Board and the General Director required Gazprom Export's consent.

(1133) [redacted]

(1134) [redacted]

(1135) [redacted]

1034 [redacted]

1035 [redacted]

1036 See Case -132/07 *Fuji Electric Co. Ltd* v *Commission*, cited above, paragraph 183: *'Nonetheless, a minority interest may enable a parent company actually to exercise a decisive influence on its subdiary's market conduct, if it is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary's market conduct.*'

1037 [redacted]

1038 [redacted]

[redacted]

Gazprom Export's exercise of decisive influence

(1136) [redacted]

(1137) **Functions of the Gazprom board members within the Gazprom group**: In line with case law, the exercise of decisive influence can in particular be deducted if the parent company has put in place mechanisms which allow it to direct the market behaviour of its subsidiary. In this regard, personal overlaps in management boards are relevant[1039], as they ensure that the parent company receives the necessary information on the conduct of the subsidiary and is able, on that basis, to influence its subsidiary's conduct.

(1138) [redacted]

(1139) [redacted]

– Pavel Oderov, the head of the International Business Department within OAO.[1041]

– Mihkail Sereda,OAO Gazprom's Deputy Chairman of the Management Committee and Head of the Administration of the Management Committee, Gazprom. [1042]

1039 Case T-109/02 *Bollore SA and others* v *Commission* [2007] ECR II-947, paragraphs 135-140; Case T-175/05 *Akzo Nobel NV and others* v *Commission*, cited above, paragraph 106; Case T-85/06 *General Quimeca* v *Commission* [2008] ECR II-338, paragraph 73; Case T-24/05 A*lliance One International and others* v *Commission*, not yet reported, paragraphs 173-180.

1040 [redacted] Reply of 11 November 2013 to the Commission's request for information of 6 November 2013, IDs 6817-6819.

1041 See http://www.gazprom.com/about/management/dep-managers/oderov/, ID 8893. Mr. Oderov has been responsible in management positions since 2007 in Gazprom Export and since 2009 in OAO Gazprom.

1042 http://www.gazprom.com/about/management/directors/sereda/, ID 8894. Mr. Sereda held positions within Gazprom since 2001.

– Igor Lipskii, Deputy Head of Asset Management and Corporate Relations for OAO Gazprom since 2003.[1043]

(1140) [redacted]

(1141) [redacted]

(1142) [redacted] In the *Gas insulated switchgear case*, the Commission found the parents liable in a situation in which the JV was used as a mere vehicle through which the parents acted.[1046]

(1143) [redacted] In such a situation, as confirmed by the General Court in *Fuji*[1047], the parent has an interest in interfering with the joint venture's activities. [redacted]

(1144) [redacted]

(1145) [redacted]

1043 http://www.gazprom-mt.com/WhoWeAre/OurManagement/Pages/Profile.aspx?pID=25&iframe=true&width=440&height=550 , ID 8897. Mr. Lipskii had positions within OAO Gazprom since 2003.

1044 [redacted] from 2004 until today, Reply of 11 November 2013 to the Commission's request for information of 6 November 2013, IDs 6817-6819.

1045 [redacted], Reply of 11 November 2013 to the Commission's request for information of 6 November 2013, IDs 6817-6819.

1046 Commission Decision of 24 January 2007 in Case COMP/F/38.899 – *Gas Insulated Switchgear*, OJ C 5, 10.01.2008, paragraph 390, upheld by Case T-132/07 *Fuji*.

1047 Case T-132/07 *Fuji Electric Co. Ltd* v *Commission*, [2011] ECR II-4091, paragraph 184.

(1146) [redacted]

(see paragraph (201), 2nd indent).

Liability for [redacted]

Gazprom Export's ability to exercise decisive influence over [redacted]

(1147) [redacted]

(1148) [redacted]

(1149) [redacted]

1048 See above paragraph (1088), which refers to situations of 50% shareholdings and references to Case T-11/89 *Shell* v *Commission* and T-132/07 *Fuji Electric Co. Ltd* v *Commission*, Case T -314/01 Avebe v Commission, all cited above.

1049 DDI Holdings Limited was incorporated in 1999 in the UK (registration No 03735879). Sasho Dontchev has been director of DDI Holding Limited since 2004. See Overgas Holding's reply of 24 July 2013 to the Commission's request for information of 12 July 2013, ID 6090 (5/6); see http://companycheck.co.uk/company/03735879/DDI-HOLDINGS-LIMITED/group-structure, ID 7157; http://companycheck.co.uk/company/03735879/DDI-HOLDINGS-LIMITED/group-structure, ID 8918; see also http://companycheck.co.uk/company/03735879/DDI-HOLDINGS-LIMITED/directors-shareholders, ID 7156; http://companycheck.co.uk/company/03735879/DDI-HOLDINGS-LIMITED/directors-secretaries, ID 8919.

1050 DI DI Menidzhmant AD is a company incorporated in Bulgaria, see Annual Management Report for 2012 of DI DI Menidzhmant AD, web-site of the Bulgarian Commercial Register, file of DI DI Menidzhmant AD http://www.brra.bg/Default.ra, Unique Identification Code of DI DI Menidzhmant AD 'ЕИК':130677105, ID 7636 (4 and 9-10/33), see also Financial Statements and Annual Management Reports of DI DI Menidzhmant AD, for: 2007, ID 8920 (2-3, 16-17, 30/53); 2008, ID 8914 (11-12/50); 2009, ID 8915 (11-12, 36/61); 2010, ID 8916 (10-11/51); 2011, ID 8917 (14-15/55)

[redacted]

(1150) [redacted]

(1151) [redacted]

(1152) [redacted]

(1153) [redacted]

Gazprom Export's exercise of decisive influence

(1154) Gazprom Export also actually exercised its influence which can be seen from the following elements:

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and 2012 ID 7638 (13-14/51). See also http://companycheck.co.uk/company/03735879/DDI-HOLDINGS-LIMITED/group-structure, ID 7157.
http://companycheck.co.uk/company/03735879/DDI-HOLDINGS-LIMITED/group-structure, ID 8918.

1051 [redacted] web-site of the Bulgarian Commercial Register, file of Overgas Holding, http://www.brra.bg/Default ra, Unique Identification Code of Overgas Holding 'ЕИК': 128044092.

1052 See [redacted] to the Commission's request for information of 27 March 2013, ID 7307 (2/9).

1053 [redacted]

1054 Clause 39, 44(1), 45, 49 (2), 57 (1) of Overgas Inc.'s Articles of Association, ID 6092.

1055 Clause 49 (2), 57 (1) of Overgas Inc.'s Articles of Association, ID 6092; see also clause 3.5.2 (2) of the Shareholders' Agreement of 1 July 1995 regarding Overgas Inc., ID 6531.

– [redacted]

[redacted]

[redacted]

(1155) **Functions of Gazprom Board members within the Gazprom group**: The four Board members representing Gazprom in [redacted] also held positions within OAO Gazprom and Gazprom Export. A. Medvedev, who during the relevant period was chairman of [redacted] Board of Directors, was at the same time CEO of Gazprom Export and deputy chairman of OAO Gazprom's Management Committee.

(1156) The other three members of [redacted] board likewise occupied senior management positions within OAO Gazprom. In 2012 their positions within OAO Gazprom were: deputy chairman of OAO Gazprom's Management Committee and Head of Department for Finance and Economics; member of OAO Gazprom's Board of Directors and Head of Department for Pricing and Economic Expert Analysis; and Head of International Business Department of OAO Gazprom. One of the other four Board members was [redacted][1056]

(1157) [redacted]

(1158) [redacted]

(1159) [redacted]

(1160) [redacted]

(1161) **Other factual elements** demonstrate that Gazprom Export and OAO Gazprom exercised decisive influence within [redacted]

1056 [redacted] web-site of the Bulgarian Commercial Register, file of Overgas Inc. http://www.brra.bg/Default.ra, Unique Identification Code of Overgas Inc. 'ЕИК': 040845618.

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Liability for

(1162)

(1163)

(1164) The fact that Gazprom Export's ownership in was indirect does not matter for the finding of its ability to influence the company's conduct. The Court has held that specificities of the corporate structure are not relevant, as the decisive element is the '*effective functioning and actual organisation of the group'*. It therefore accepted parental liability also in a case, in which the group member to which the infringement was imputed did not hold the shares of the companies under its influence (here).[1062] It will be shown later in this section that despite not being a direct shareholder in , Gazprom Export was able to exercise decisive influence via Gazprom Germania.

(1165) **Blocking rights**: In the following it will be demonstrated that Gazprom Export was able to exercise decisive influence in and in its parent company through its voting rights in management bodies.

1057

1058

1059

1060 The shareholding in WIEH is held by WIBG which is a wholly-owned Wintershall subsidiary, see above paragraph (47).

1061 Cited above.

1062 Case C-407/09 *Knauf Gips KG* v *Commission [*2010] ECR I-6375, paragraphs 65 et seq.

(1166) [redacted]

(1167) [redacted]

(1168) [redacted]

(1169) [redacted]

(1170) [redacted]

(1171) There are also other elements demonstrating that Gazprom Export was able to exercise decisive influence in [redacted].

(1172) [redacted].

(1173) [redacted]

1063 [redacted]

1064 In a company limited by shares according to Swiss law, the *Verwaltungsrat* is the lead executive organ.

1065 [redacted]

1066 [redacted]

1067 [redacted]

[redacted]

Gazprom Export exercises decisive in [redacted]

(1174) The decisive influence of Gazprom Export in [redacted] is in particular demonstrated by

(1) a significant overlap of (senior) management personnel,

(2) Gazprom's group structure as well as

(3) Other elements

Personnel overlap

(1175) There were significant personnel overlaps between members of OAO Gazprom and Gazprom Export's management and the management of [redacted] and Gazprom Germania.

(1176) [redacted]

(1177) [redacted]

(1178) [redacted]

1068 [redacted]

1069 [redacted].

1070 [redacted].

1071 [redacted]

1072 [redacted]

1073 [redacted]

1074 http://www.gazprom-mt.com/WhoWeAre/OurManagement/Pages/Yuri%20Komarov.aspx, ID 8952

1075 http://www.gazprom.com/about/management/dep-managers/cygankov/, ID 8951

1076 [redacted]

[redacted]

Stratgey documents

(1179) [redacted]

(1180) [redacted]

(1181) [redacted]

(1182) [redacted]

(1183) [redacted]

1077 [redacted]

1078 [redacted]

1079 [redacted]

1080 [redacted]

1081 [redacted]

[redacted]

(1184) [redacted]

Other factual elements

(1185) [redacted]

(1186) [redacted]

(1187) [redacted].

(1188) [redacted]

1082 [redacted]

1083 [redacted]

1084 [redacted]

1085 [redacted]

1086 [redacted]

1087 [redacted]

Conclusion

(1189) In view of the decisive influence exercised by Gazprom Export, the Commission intends to hold Gazprom Export liable for the contracts concluded by [redacted]

18.2.2.2. Parental liability of OAO Gazprom for Gazprom Export

(1190) Gazprom Export is a wholly-owned subsidiary of OAO Gazprom. In line with the above mentioned case-law, the Commission presumes the exercise of decisive influence by OAO Gazprom over the commercial policy of Gazprom Export. The Commission therefore intends to hold OAO Gazprom, together with Gazprom Export, jointly and severally liable for the infringement in B[redacted] Poland [redacted].

18.2.3. Conclusion on liability

(1191) Given the above, the Commission finds that Gazprom Export is directly liable for the territorial restrictions, including equivalent measures ([redacted]Poland and [redacted]) and the unfair pricing in its contracts for which it is the direct contract partner ([redacted]). It is also – via direct participation in the infringements and via parental liability – liable for the territorial restrictions in contracts which intermediaries concluded in [redacted] with the respective national wholesalers (via the intermediaries [redacted]) as well as for unfair pricing in contracts which intermediaries concluded in [redacted]. It is also directly liable for the abuse in the form of conditioning gas supplies on infrastructural commitments in Poland and [redacted].

(1192) The Commission finds that OAO Gazprom is directly liable for the territorial restrictions and the unfair pricing in the contracts for which it is the direct contract partner ([redacted]). It is also liable for contracts concluded between Gazprom Export and [redacted] in which Gazprom Export explicitly acted 'on behalf' of OAO Gazprom (contract with [redacted]. It also directly participated in the abusive practices in [redacted]and Poland by conditioning gas supplies on infrastructure commitments.

(1193) OAO Gazprom is also – via parental liability – liable for any abusive practices attributed to Gazprom Export.

(1194) Details can be taken from the tables in Figure 58 and Figure 59 below.

19. ADDRESSEE OF THE STATEMENT OF OBJECTIONS

(1195) In view of the above, this Statement of Objections is addressed to Gazprom Export and OAO Gazprom.

20. DURATION OF THE INFRINGEMENT

(1196) The Commission considers 1 May 2004 as the starting date of the infringement in [redacted] except [redacted]. On 1 May 2004, the [redacted] Poland and [redacted] joined the European Union. Gazprom's supply contracts with wholesalers in all these countries included territorial restrictions on that date. [redacted]

[redacted]

(1197) At least as from 1 January 2009, Gazprom charged unfair prices in five CEE countries ([redacted] and Poland).

(1198) At least as from 26 August 2008 (Poland) and [redacted], Gazprom made gas supplies conditional on supplementary obligations to be assumed by its contractual partners.

(1199) The Commission considers that the infringement is still on-going. While most of the territorial restrictions were abolished by 2012, territorial restrictions continue to be included in supply contracts in [redacted]. Equivalent measures continue to be in place in [redacted] Poland and [redacted] The Commission also considers that Gazprom continues charging unfair prices in [redacted] ([redacted] Poland) and that the effects of the conditioning in Poland and [redacted] continue.

(1200) The tables below set forth the duration of the various abusive practices of the overall infringement for each CEE country. They also set forth the basis on which the Commission intends to hold Gazprom Export and OAO Gazprom liable (i.e. direct liability and/or parental liability)[1088].

[1088] The table does not include the equivalent measures for Poland and Hungary/Poland (change of metering station).

Figure 58: Duration and liability of Gazprom Export (direct liability and parental liability for subsidiaries) and liability of OAO Gazprom (parental liability for Gazprom Export)

Form of involvement and total duration of that involvement			Details of duration					
Legal entity 1 and form of involvement	Legal entity 2 and form of involvement	Duration of involvement	Member State	Total duration of overall infringement per MS		Form of abusive practice	Duration per type of abusive practice per MS	
				Start	End		Start	End
OOO Gazprom Export Direct participation and Parental liability for the entitities: [redacted]	**OAO Gazprom** Parental liability for behaviour of Gazprom Export	1 5 2004 – Ongoing	[redacted]					
			Poland	1 5 2004	Ongoing	Territorial restriction	1 5 2004	29 10 2010 for the supply contract with PGNiG of 25 9 1996
							24 12 2009	Ongoing for refusals to change delivery points (equivalent measure)
						Pricing	1 1 2009	Ongoing
						Conditioning of gas supplies	26 08 2009	Ongoing
			[redacted]					

Figure 59: Duration and liability of OAO Gazprom

Form of involvement and total duration of that involvement		Details of duration					
Legal entity and form of involvement	Duration of involvement	Member State	Total duration of overall infringement per MS		Form of abusive practice	Duration per type of abusive practice per MS	
			Start	End		Start	End
OAO Gazprom Direct participation	1 5 2004 – Ongoing	[redacted]					
		Poland	1 5 2004	Ongoing	Conditioning of gas supplies	26 8 2009	Ongoing

21. REMEDIES

21.1. Article 7(1) of Regulation no 1/2003

(1201) Where the Commission finds that there is an infringement of Article 102 TFEU and Article 54 of the EEA Agreement it may, by decision, require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation No 1/2003.[1089]

(1202) The Commission considers that the infringement is still on-going. It is therefore necessary for the Commission to require Gazprom Export and OAO Gazprom to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any abuse which might have the same or a similar object or effect.

(1203) A decision pursuant to Article 7(1) of Regulation (EC) No 1/2003 may include an order to 'do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty'.[1090] The requirement that a remedy has to be effective[1091] empowers the Commission to enjoin a dominant company to refrain from adopting any measures having an equivalent effect as the conduct identified as abusive.[1092] Finally, it is established case-law that the remedy must apply in relation to the infringement that has been established and be proportionate to the infringement identified.[1093]

(1204) The present section gives Gazprom an opportunity to comment on the remedies that the Commission envisages imposing by a decision enforcing Article 102 TFEU.

21.2. Territorial restrictions

(1205) Gazprom should remove all territorial restrictions such as export bans or destination clauses (including clauses which provide that the gas is for delivery for national consumers) in its existing contracts with CEE wholesalers and industrial customers and not introduce such restrictions in new contracts.

(1206) Gazprom should also remove clauses from contracts and/or cease practices which have an equivalent effect to territorial restrictions, including in particular expansion clauses, information obligations pertaining to exports and metering practices which require Gazprom's consent to exports. Gazprom shall not introduce such restrictions in the future.

(1207) Gazprom should offer its customers sufficient flexibility to change delivery points in supply contracts in order to enable the re-export of gas. This possibility should be introduced for new and existing contracts. Gas supply contracts should contain a detailed procedural framework to enable Gazprom's customers to change delivery points in a transparent and efficient manner. Under such framework, changes of delivery points should be granted by Gazprom except where duly justified and

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1089 Previously Article 3 of Council Regulation No 17 of 6 February 1962 (OJ 13, 21.2.1962, p.204/62) as last amended by Council Regulation (EC) No 1216/1999 (OJ L 148, 15.6.199, p.5).

1090 Joined Cases 6/73 and 7/73 *Commercial Solvents* [1974] ECR 223, paragraph 45; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 90.

1091 Joined Cases 6/73 and 7/73 *Commercial Solvents*, cited above, paragraph 46.

1092 See, for example, Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraphs 220-21; Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 198.

1093 Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 93.

documented objective reasons exist. Gazprom would be entitled to charge the customer with the actual and duly documented associated costs arising from the change of delivery point.

(1208) A potential alternative could be that Gazprom delivers the gas to certain stipulated EU border points, from which wholesalers could offtake the gas for their destination country or resale.

(1209) These remedies are effective as they will ensure that Gazprom is no longer able to partition markets along national borders by preventing the wholesalers from re-exports or by making such re-exports more difficult. They will enable wholesalers to sell gas purchased from Gazprom to other geographic markets and enable intra-brand competition. The remedies are proportionate to the infringement as they essentially amount to a cease and desist obligation.

21.3. Unfair pricing

(1210) Gazprom should abstain from charging its customers unfair prices.

(1211) To that end, Gazprom should offer its customers in all existing and future contracts market-based prices such as prices which are no higher than prices on TTF, possibly with a small mark-up or cost-based prices.

(1212) In addition, Gazprom should also adapt the conditions for the possibility of the buyer to demand a price revision. Gazprom should offer more frequent price revisions for both new and existing contracts and the grounds for initiating such revisions should be enlarged (in particular, it should be possible for customers to invoke the same grounds on several occasions). Gazprom should also adapt the procedural framework for such price revisions allowing for a resolution of price disputes within at most 6 months.

(1213) These remedies are effective to end Gazprom's unfair pricing. They are proportionate to the infringement as they will enable Gazprom to sell its gas at prices which remain significantly above its costs and at prices which are related to the market value of gas.

21.4. Gas supplies made conditional on infrastructural commitment by its customers

(1214) Gazprom should not make gas supplies conditional upon its customers making unconnected commitments in favour of Gazprom, in particular commitments related to infrastructure.

(1215) With regard to Poland, Gazprom should participate in the necessary contractual changes of the Yamal operatorship agreement between Europol and Gaz-System with a view that all investments regarding the Yamal pipeline will in the future be planned and decided solely by Yamal's TSO Gaz-System. The contractual changes shall also ensure that Gazprom will not have the right to influence the implementation of investment on the Yamal pipeline.

(1216) [redacted]

(1217) These remedies are effective, as they alleviate some of the negative effects for supply diversification which Gazprom achieved by making gas supplies conditional upon Gazprom's contractual partners assuming supplementary infrastructural commitments. They are also proportionate as they merely aim to undo the unjustified advantages that Gazprom obtained through its behaviour.

22. FINES

22.1. Article 23(2) of Regulation No 1/2003

(1218) Under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 102 TFEU and/or Article 54 of the EEA Agreement.[1094] The fine shall not exceed 10% of the undertaking's total turnover in the preceding business year.

(1219) In the present case, the Commission considers that the infringement has been committed intentionally. The infringement described above consists of territorial restrictions, unfair pricing and the conditioning of gas supplies upon unconnected supplementary obligations. With respect to this type of obvious infringement, parties cannot claim that they did not act deliberately.[1095] In addition, the facts referred to in section 8.4 establish that Gazprom was aware that its behaviour was unlawful with respect to territorial restrictions. Also for the unfair pricing, Gazprom was aware from the wholesalers' reactions and in particular from various arbitration proceedings that its prices were unfair, see section 11.3 and table in Figure 47. Also Gazprom could not be unaware that its conditioning of gas supplies with unconnected commitments vis à vis the Polish and [redacted] wholesalers was unlawful. In any event, Gazprom acted at least negligently.

(1220) Pursuant to Article 23(3) of Regulation No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in this Regulation. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. The Commission will reflect in the fines imposed any aggravating or mitigating circumstances. In setting the fine to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (hereafter, 'the Guidelines on fines').[1096]

22.2. Calculation of the fines

23. In applying the Guidelines on fines, the basic amount results from the addition of a variable amount and an additional amount, if applicable. The basic amount of the fine to be imposed on Gazprom is to be set by reference to the value of sales,[1097] that is, the value of the undertaking's sales of goods or services to which the infringement

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1094 Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area 'the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 101 and 102 TFEU] of the EC Treaty […] shall apply *mutatis mutandis.*' (OJ L 305, 30.11.1994, p.6).

1095 See, e.g., Case T-11/05 *Wieland-Werke AG* v *Commission*, judgment of 19 May 2010, ECR II-86, paragraph 140; Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917 paragraph 42; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411 paragraph 50.

1096 OJ C 210, 1.9.2006, p. 2.

1097 Point 12 of the Guidelines on fines.

directly or indirectly relates in the relevant geographic area within the EEA in the last full year of the infringement.

23.1.1.1. Relevant reference year

(1221) The Commission will normally take the sales made by the undertakings during the last full business year of their participation in the infringement.[1098] In this case, sales data for each year and hence for the full duration of the infringement for all CEE countries ([redacted]) are available until 2014 (see Figure 60) and hence the Commission may calculate the basic amount on the basis of Gazprom's actual sales during the relevant period.

(1222) An alternative option for the Commission is to use Gazprom's last year's sales. At this stage, the last full year of the infringement would be 2014 but the Commision reserves the option to also use any other year that it would deem representative for the infringement.

23.1.1.2. The value of sales

(1223) The abusive practices by Gazprom related to the supply of gas via its long-term contracts with wholesalers and industrial customers in [redacted]. Based on the information provided by CEE wholesalers, the Commission intends, for determining the basic amount of the fine, to use the value of Gazprom's sales under its relevant gas supply contracts in the relevant geographic area, as described in section 7 of this Statement of Objections. Only data for long-term contracts with an annual quantity of at least 0.5 bcm are available (except for the [redacted] hub-priced contracts), hence the value of sales does not fully reflect the scope of the infringement. The geographic area comprises [redacted] Poland and [redacted].

1098 Point 13 of the Guidelines on fines.

1099 The Commission used the sales in Hungary in 2006 ([redacted]) also for the years 2005 and 2004.

Figure 60: Gazprom's relevant value of sales, excluding export tax[1100] (in EUR million, estimates in *italics*[1101])

Year	[redacted]	Poland	[redacted]
May-Dec 2004		268.5	
2005		675.1	
2006		1006.0	
2007		926.2	
2008		1531.6	
2009		1391.1	
2010		1717.3	
2011		2147.4	
2012		2264.0	
2013		2111.6	
2014		1768.5	
Total		**15807.3**	

Source: Commission's calculations based on data from [redacted]

23.1.1.3. Determination of the basic amount of the fines

(1224) The basic amount consists of an amount of up to 30% of an undertaking's relevant sales in the EEA, depending on the degree of gravity of the infringement and multiplied by the period in years of the undertaking's participation in the infringement.[1102]

23.1.1.4. Gravity

(1225) The gravity of the infringement determines the percentage amount with respect to the value of sales taken into account in setting the basic amount. In assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, the market share of the undertaking concerned, the geographic scope of the infringement and/or whether or not the infringement has been implemented.

(1226) In the present case, Commission intends to consider, *inter alia*, the facts described in this Statement of Objections, and in particular:

(1) The fact that the abuse comprised several abusive practices which took place in parallel at least during part of the relevant period.

(2) The fact that the abusive practices concerned territorial restrictions, unfair pricing and requiring wholesalers to assume unconnected supplementary obligations for obtaining gas, which are, by their very nature, very harmful restrictions of competition. Such abuses have already been the subject of several Commission decisions and judgments of the EU courts and constitute a clear infringement of EU competition rules.

(3) The fact that Gazprom was aware of the illegality of the infringement.

1100 Export tax was 30% of sales during the duration of the infringement. Gazprom Databook 2010, ID 5798, sheet 'Taxes'.

1101 The estimates are based on extrapolations. [redacted]

1102 Points 19-26 of the Guidelines on fines.

(1227) The Commission may also take into account the high market share of Gazprom in the relevant countries concerned.

(1228) The Commission may also take into account the fact that Gazprom adopted certain measures to monitor and enforce the restrictions. As set forth in section 8.2.2., Gazprom for example put in place monitoring obligations on wholesalers in the [redacted] to inform Gazprom about gas exports and Gazprom threatened the wholesaler in [redacted] to set up its own wholesale business if the wholesaler would not abide by the territorial restrictions.

(1229) The Commission may also take into account the geographic scope of the infringement.

(1230) The Commission intends to also take into account the fact that the abusive practices did not all take place in parallel during the entire duration of the infringement.

23.1.1.5. Duration

(1231) In assessing the fine to be imposed, the Commission will also take into consideration the duration of the infringement, as described in section 20. As stated above, the infringement started on 1 May 2004 for all countries concerned except [redacted] for [redacted]. The Commission considers that the infringement is ongoing at least in part since territorial restrictions or equivalent measures continue to be in place in [redacted], Poland and [redacted], the unfair pricing practice is still on-going in the five countries concerned and the effects of the abusive conditioning in Poland and [redacted] are still on-going.

23.1.2. *Adjustments to the basic amount*

23.1.2.1. Aggravating factors

(1232) The Commission does not consider at this stage that there are any aggravating factors.

23.1.2.2. Mitigating factors

(1233) The Commission does not consider at this stage that there are any mitigating factors.

23.1.3. *Deterrence*

(1234) The Commission pays particular attention to ensuring that the fines act to a sufficient extent as a deterrent (paragraph 30 of the Fining Guidelines).

23.1.4. *Application of the 10% turnover limit*

(1235) The fine will not exceed the upper limit of 10% of the consolidated worldwide group turnover of Gazprom achieved in the last full business year preceding the adoption of the decision.

23.2. Periodic penalty payment under Article 24 of Regulation (EC) No 1/2003

(1236) Under Article 24(1) (a) of Regulation (EC) 1/2003, the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them to put an end to an infringement of Article 101 or Article 102 TFEU, in accordance with a decision taken pursuant to Article 7 of Regulation (EC) No 1/2003.

(1237) Should the present proceedings lead to the adoption of a decision pursuant to Article 7 of Regulation (EC) No 1/2003 and should the addressees of such decision not comply with the decision within a set timeframe, the Commission may impose periodic penalty payments in accordance with Article 24(1) (a) of Regulation (EC) No 1/2003.

24. CONCLUSION

(1238) The Commission therefore envisages issuing a decision, subject to granting the addressees of this Statement of Objections the opportunity to be heard pursuant to Article 27(1) of Regulation No 1/2003, on the matters to which the Commission has taken objection:

– finding that OAO Gazprom and OOO Gazprom Export have infringed Article 102 TFEU and Article 54 of the EEA Agreement, pursuant to Article 7 (1) of Regulation No 1/2003;

– requiring OAO Gazprom and OOO Gazprom Export to bring the infringement to an end, in so far as they have not already done so, and to refrain from any abuse which may have the same or a similar object or effect, pursuant to Article 7 (1) of Regulation No 1/2003;

– obliging OAO Gazprom and OOO Gazprom Export to remove all territorial restrictions in its existing contracts with CEE wholesalers, industrial customers and not to introduce restrictions in new contracts as well as to remove clauses which have an equivalent effect. In addition OAO Gazprom and OOO Gazprom Export should offer their customers sufficient flexibility to change delivery points in supply contracts. A potential alternative could be that OAO Gazprom and OOO Gazprom Export deliver the gas to certain stipulated EU border points, from which wholesalers could offtake the gas for their destination country or resale.

– obliging OAO Gazprom and OOO Gazprom Export to abstain from charging unfair prices and to offer their customers in all existing and future contracts market-based prices such as prices which are not higher than TTF hub prices with possibly a small mark-up or cost-based prices. OAO Gazprom and OOO Gazprom Export should further eliminate the effects of its unfair pricing policy by adapting the conditions for customers to ask for price revisions.

– obliging OAO Gazprom and OOO Gazprom Export with regard to Poland to participate in the necessary contractual changes of the Yamal operatorship agreement with a view that all investment decisions will be planned and decided in the future solely by the TSO Gaz-System.

– [redacted]

– Imposing fines on OAO Gazprom and OOO Gazprom Export pursuant to Article 23(2)(a) of Regulation No 1/2003.

Done at Brussels,

For the Commission

Margrethe VESTAGER
Member of the Commission