

PGNiG S.A. observations
on the commitments proposed by Gazprom
on the basis of
Article 9 of the Council Regulation (EC) No 1/2003
of 16th of December 2002
in Case AT.39816 — Upstream gas supplies in central and eastern
Europe

- (1) This letter, submitted on behalf of Polskie Górnictwo Naftowe i Gazownictwo S.A. is a response to the Communication from the Commission published in the Official Journal of the European Union (2017/C 81/09) on 16th of March 2017, pursuant to Article 27(4) of Council Regulation (EC) No 1/2003¹ in Case AT.39816 — Upstream gas supplies in central and eastern Europe concerning commitments proposed by Gazprom on the basis of Article 9 of the Council Regulation (EC) No 1/2003 of 16th of December 2002. PGNiG submits this letter within deadline stipulated in the Commission's letter of 28th of April 2017.
- (2) **[Business Secret]**

¹ Official Journal L 001, 04/01/2003, p. 0001-0025.

Table of contents

I. Definitions	5
II. Identification of the undertaking submitting observations to the commitments	9
III. Executive summary of PGNiG position	10
IV. Summary of relevant facts	13
IV.1. Unfair pricing of Gazprom	13
IV.2. Market segmentation: hindering natural gas supplies to Poland	14
IV.3. Tying commercial issues with infrastructure	15
V. Request for revision of the policy of the Commission towards Gazprom – a need for substantial fine for repeated infringements of EU Competition Law	16
V.1. Gazprom's consistent and intentional attitude to avoid acting in accordance with the rules of competition of the EU internal market – a need for deterrence and prevention of further abuses, which can be fully achieved only by an Article 7 decision	16
V.2. Legal gravity of the infringements of EU competition law by Gazprom	22
V.3. Gazprom has already expressly announced that it will not respect the commitment concerning the price revision clause	30
V.4. Gazprom awareness of the infringement of EU competition law	31
V.5. The stage of development of the EU internal market for gas requires that this case be concluded with Article 7 decision, imposing a fine	31
V.6. Gazprom has repeatedly infringed EU competition law by using destination clauses	32
V.7. Long-lasting damage to the market participants and to the related markets	32
V.8. The Commission is in possession of evidence necessary to the prove infringement and defend that decision in EU courts	34
V.9. Article 7 decision will address and solve competition problems identified by the Commission in CEE markets in a better way than Article 9 decision	34
V.10. Conclusions regarding the reasons for adopting an Article 7 decision	34
VI. Significant defects of the Commitments	36
VI.1. None of the proposed Commitments bring the infringements of Gazprom to an end	36
VI.2. The Commitments can be easily fulfilled without a real change of anticompetitive practice by Gazprom	38
VI.3. Commitments concerning removing the re-export or resale ban clauses are merely an already broken promise to respect EU competition law	39
VI.4. The Commitments are too narrow in their geographical scope to be effective	39
VI.5. The Commitments on removing market segmentation do not refer to specific problems of upstream market for supplies of natural gas to Poland caused by Gazprom	40
VI.6. Commitments concerning the change of delivery points (Kondratki/Kotlovka swap) do not provide any real benefits for the Baltic States and Poland	41
VI.7. The proposal of the price revision clause does not provide any protection against price exploitation	49

VI.8. The Commission accepted the lack of commitments regarding to unrelated concessions gained by Gazprom in connection with the Yamal Pipeline, without any substantial reasoning.....	50
VII. PGNiG proposal for effective commitments to be enforced on Gazprom	53
VII.1. Structural commitments addressing segmentation of the market.....	54
VII.1.1. Commitment to implement full ownership unbundling and third party access on NS1 and NS2.....	54
VII.1.2. Structural commitment – obligation to divest infrastructural assets in order to prevent Gazprom from exerting influence on gas trading on upstream markets for gas supplies in CEE	55
VII.2. Behavioural commitments concerning market segmentation	59
VII.2.1. Commitment to refrain from blocking the development of interconnectors between the CEE Countries and EU Member States and Energy Community countries.....	59
VII.2.2. Commitment to implement TPA on the Belorussian gas system in order to enable transmission of natural gas between the EU Member States via Belarus and Ukraine under transparent and non-discriminatory rules and preventing capacity hoarding.....	60
VII.2.3. Commitment to enable bidirectional flow of gas and application of Network Codes on the entry points to the CEE Countries from outside of EU	61
VII.2.4. Commitment to enable bidirectional flow of natural gas in Drozdowicze point.....	64
VII.2.5. Commitment to enable each of Gazprom customers in CEE with long-term contract to take-off gas on Gaspool / CEGH / NCG.....	65
VII.2.6. Commitment to abandon destination clauses should be expanded to all EU member states and to states neighbouring with CEE (Belarus, Ukraine, Turkey)	66
VII.2.7. Commitment not to retaliate for re-export of natural gas	67
VII.2.8. Commitment not to reserve transmission capacities for periods longer than 5 years in a row and to market those already booked via auctions	69
VII.3. Behavioural commitments concerning unfair pricing	73
VII.3.1. Commitment to provide extraordinary reversal of right to determine price formula in the contract.....	73
VII.3.2. Improvement of the Commitment concerning price revision clause	76
VII.4. Additional behavioural commitment addressing all competition concerns raised by the Commission with respect to Gazprom’s practices – increasing contract flexibility	79
VII.4.1. Gazprom commits to offer the CEE Customers a change of Annual Minimum Quantity level to 75% of Annual Contractual Quantity and to offer this level of AMQ as a maximal in future long-term contracts.....	79
VII.4.2. Gazprom commits to offer customers from the CEE Countries a possibility of adjusting ACQ each year within +/- 20% corridor	80
VII.5. Behavioural commitments concerning tying supplies with infrastructure	81
VII.5.1. Commitment to return [Business Secret] to EuRoPol in connection with the transmission fees dispute	81
VII.5.2. Commitment to amend the statute of EuRoPol to ensure its compliance with Polish law.....	82
VII.5.3. Implementation of the Certification Decision.....	83

VII.6. Observations concerning the duration of the Commitments.....	84
VII.7. Observations concerning the mechanism of revision of the Commitments.....	87
VII.8. Observations concerning the Monitoring Trustee mechanism.....	88
VII.8.1. Appointment of the Monitoring Trustee.....	88
VII.8.2. Enhancement of prevention against conflict of interests	88
VII.8.3. Adjustment of the competences of Monitoring Trustee to expanded scope of Commitments.....	89
VII.8.4. Access to non-confidential versions of reports of Monitoring Trustee by the customers of Gazprom in scope, in which Commitments are applicable to them	90
VIII. Application of the remedies / commitments presented in PGNiG's observations.....	92

I. Definitions

ACER – shall mean the Agency for the Cooperation of Energy Regulators.

ACQ – shall mean Annual Contractual Quantity.

AMQ – shall mean Annual Minimum Quantity.

BNetzA – shall mean the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway, national regulatory agency for Federal Republic of Germany.

CEE Countries – shall mean Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia.

CEE Customers – shall mean the Customers which are operating in one or more CEE Countries.

CEGH – shall mean a gas trading platform in virtual point in Austria, operated by Central European Gas Hub AG.

Certification Decision – shall mean the decision of the President of Energy Regulatory Office issued on 19 May 2015, pursuant to which OGP Gaz-System S.A. obtained a certificate of independence regarding operatorship of the Polish Section of the Yamal Pipeline.

Commitment Decision – shall mean the Commission's decision pursuant to art. 9 of the Council Regulation (EC) No 1/2003 in the case AT.39816 reflecting the commitments finally offered by Gazprom after market test(s).

Commitment Document – shall mean the letter of 14th of February 2017, submitted by Gazprom and Gazprom Export jointly to the Commission.

Commitments – shall mean the commitments proposed by Gazprom on the basis of art. 9 of the Council Regulation (EC) No 1/2003 in the Case AT.39816 – Upstream gas supplies in Central and Eastern Europe in the Commitment Document.

Commitment Decision Effective Date – shall mean the date when the Commitment Decision adopted by the Commission is notified to Gazprom.

Complaint – shall mean the complaint submitted by PGNiG on 10th of March 2017 pursuant to art. 7 of the Council Regulation (EC) No 1/2003 which relates to the practices of Public Joint Stock Company Gazprom and its subsidiaries.

Energy Union – shall mean Energy Union within the meaning of Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Economic Investment Bank a Framework Strategy for a Resilient Energy Union with a Forward Looking Climate Change Policy.

Energy Community – shall mean an international organization dealing with energy policy established between the European Union and Albania, Bosnia and Herzegovina, Kosovo, Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine.

Energy Community Countries – shall mean the countries which are members of the Energy Community.

ENTSO-G – shall mean the European Network of Transmission System Operators for Gas.

Erdgasspeicher Peissen GmbH – shall mean joint venture created by Gazprom Germania GmbH and VNG Gasspeicher GmbH, operator of UGS Katharina.

EuRoPol – shall mean System Gazociągów Tranzytowych EuRoPol Gaz S.A., joint-venture of Gazprom and PGNiG, owner of Yamal Pipeline section in Poland.

Gas Directive – shall mean Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Official Journal L 211, 14/08/2009, p. 0094-0138.

Gaspool – shall mean a gas trading platform in virtual point in Germany, operated by Gaspool Balancing Services GmbH.

Gascade – shall mean Gascade Gastransport GmbH, transmission system operator in Germany.

Gazprom – shall mean Public Joint Stock Company Gazprom and its subsidiaries.

Gazprom Export – shall mean Gazprom export LLC.

GTB – shall mean Open Joint Stock Company Gazprom Transgaz Belarus.

Hub Delivery Points – shall mean the virtual points of Gaspool, Central European Gas Hub or NetConnect Germany.

Intergovernmental Agreement – shall mean Intergovernmental Agreement between the Government of the Republic of Poland and the Government of the Russian Federation, signed on 25 August 1993 and amended afterwards with Additional Protocols.

Kondratki/Kotlovka swap – transaction based on change of the delivery point of gas supplied by Gazprom, on terms and conditions described in the Commitment Document

MDF Judgement – shall mean the judgement of the Court of 7th of June 1983 - SA Musique Diffusion Française and others v Commission of the European Communities, joined cases 100 to 103/80.

Microsoft Judgement – shall mean the judgement of the Court of 17th of September 2007 in case T-201/04.

NBP – shall mean National Balancing Point, gas trading platform in United Kingdom operated by Intercontinental Exchange, Inc.

NC BAL – shall mean the Commission Regulation (EU) No 312/2014 of 26th of March 2014 establishing a Network Code on Gas Balancing of Transmission Networks Text with EEA relevance, Official Journal L 91/ 27/03/2014, p. 15-35.

NC CAM – shall mean the Commission Regulation (EU) 2017/459 of 16th of March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013, Official Journal L72, 17/03/2017, p. 1-28.

NC TAR – shall mean the Commission Regulation (EU) 2017/460 of 16th of March 2017 establishing a network code on harmonised transmission tariff structures for gas Official Journal L 72, 17/3/2017, p. 29–56.

NC INT – shall mean the Commission Regulation (EU) 2015/703 of 30th of April 2015 establishing a network code on interoperability and data exchange rules, Official Journal L 113, 1/5/2015, p. 13-26.

Network Codes – shall mean NC BAL, NC CAM, NC TAR, NC INT and I to the Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13th of July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, jointly

NCG – shall mean a gas trading platform in virtual point in Germany, operated by NetConnect Germany GmbH & Co.KG.

NS1 – shall mean Nord Stream 1 Pipeline owned and operated by Nord Stream AG.

NS2 – shall mean the project of pipeline being implemented by Nord Stream 2 AG, which is solely owned by Gazprom.

Gaz-System – shall mean Operator Gazociągów Przesyłowych Gaz-System S.A., the company wholly owned by the Polish State Treasury, the operator of the Polish gas transmission system.

Opal Gastransport – shall mean the operator at 80% of the OPAL Pipeline, the company is co-owned by Gazprom and BASF.

Regulation 1/2003 – shall mean the Regulation of the Council (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, Official Journal L 001, 04/01/2003, p. 1-25,

Yamal Contract – shall mean the contract on the share-purchase of gas to the Republic of Poland concluded between PGNiG and Gazprom Export.

3rd Energy Package – shall mean the package of legislation, which consist of: Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Official Journal L 211, 14/08/2009, p. 55-93, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Official Journal L 211, 14/08/2009, p. 94-138, Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, Official Journal L 211, 14/08/2009, p. 1-14, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, Official Journal L 211, 14/08/2009, p. 15-35 and Regulation (EC) No 715/2009 of the European

Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, Official Journal L 211, 14/08/2009, p. 36-54.

PGNiG – shall mean Polskie Górnictwo Naftowe i Gazownictwo S.A.

Proceedings – shall mean the proceedings related to the Case AT.39816 — Upstream gas supplies in central and eastern Europe.

Rambus Decision – shall mean Commission Decision of 9 December 2009 in case COMP/38.636 – Rambus.

RUE – shall mean RosUkrEnergo AG.

Statement of Objections - the statement of objections issued by the Commission against Gazprom during the antitrust proceedings in case AT.39816.

S&P's Decision – shall mean Commission Decision of 15th of November 2011 in case COMP/39.592 – Standard & Poor's.

TFEU – shall mean Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012, P. 0047 – 0390.

TPA – shall mean third party access rule compliant with the relevant provisions regulating third party access under Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

TSO – shall mean a Transmission System Operator.

TTF – shall mean Title Transfer Facility, which is a virtual trading point for natural gas in the Netherlands.

UBC Decision – shall mean Commission Decision of 17 December 1975 in case 76/353/EEC.

UGS Katharina – shall mean Underground Gas Storage Katharina, the underground gas storage facility in Germany.

II. Identification of the undertaking submitting observations to the commitments

(1) Identification data:

Polskie Górnictwo Naftowe i Gazownictwo S.A. (Polish Oil and Gas Company SA)

Kasprzaka Street 25, Warsaw, Poland

State Registration No. (KRS) 0000059492, Sąd Rejonowy dla m. st. Warszawy

XIII Wydział Gospodarczy

Taxpayer Identification Number (NIP) 5250008028

National Official Business Register (REGON) 012216736

stock: PLN 5.778.314.857

<http://www.pgnig.pl/>

- (2) PGNiG is a public company, listed on the Index of the largest Polish companies (WIG 20 Index). The largest shareholder, holding 71.88% of shares of PGNiG (representing 70.4% of votes at the Shareholder's Meeting), is the Polish State Treasury. PGNiG and Gazprom are contractual parties to the Yamal Contract. The Yamal Contract was concluded on 25th of September 1996 and is to expire on 31st of December 2022. The supplies of natural gas under the Yamal Contract commenced on 1 April 2000.
- (3) According to the provisions of the Yamal Contract, PGNiG is obliged to purchase natural gas from Gazprom and Gazprom is obliged to deliver the quantities of natural gas that were stipulated in the Yamal Contract. **[Business Secret]**
- (4) The conclusion of the Yamal Contract followed the conclusion of the Intergovernmental Agreement.
- (5) On 10th of March 2017, PGNiG submitted a Complaint containing the facts that are relevant to the Proceedings. Below, we present a brief summary of Gazprom's actions, by which Gazprom abused its dominant position held by it on the upstream market for supplies of natural gas to Poland.
- (6) We also regrettably note that until the day of submitting these observations, Commission did not grant to PGNiG access to the statement of objections, as it derives from Article 6.1 of Regulation 773/2004². Such attitude of the Commission prevented PGNiG to present a full, in-depth analysis of the legal consequences deriving from the Commitment Decision.

² 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, Official Journal L 123, 27/4/2004, p. 18-24.

III. Executive summary of PGNiG position

- (7) For over a decade Gazprom has been abusing its dominant position against its customers in CEE Countries. Abuses of Gazprom has not only caused severe losses to its customers but also threatened energy security of the whole region. This danger is still present today, as the multiple infringements were not ceased and their effects impact competitive situations in CEE Countries' gas markets.
- (8) **Priority** in the Proceedings **should be** given to two aspects: **real and effective cessation of all infringements and forcing Gazprom to face the consequences of its actions.** Situation, in which Gazprom does not have to bear any burden in order to restore the competition on the CEE Countries' gas markets is unacceptable. It will not provide any protection against continuance of the infringements by Gazprom and committing new ones. Seeing that one can abuse its dominant position for over a decade and avoid any consequences will lead only to further increased disregard for the EU competition law and for the Commission as an antitrust enforcer.
- (9) **There are very strong, substantial arguments in favour of adoption in this case a firm infringement decision with fine and effective remedies.** Infringements committed by Gazprom were of serious nature and provided great losses to the market. Moreover, one of the practices is of identical nature as the one already questioned by the Commission over a decade ago and settled with Gazprom. The fact that Gazprom has removed destination clauses only from the contracts with its Western customers and left identical clauses in contracts with customers from CEE Countries shows that **Gazprom has in manifest disregard competition law of the EU.**
- (10) That disregard was shown explicitly by CEO of Gazprom, **Mrs Elena Burmistrova**, who recently **confirmed that Gazprom will not be accepting increasing role of prices based on gas hubs' indexes.** This statement was made despite the commitment to offer Gazprom's customers alleged "hub-based" price revision mechanism, that was submitted in writing to the Commission by Mrs Burmistrova herself. This statement perfectly pictures Gazprom's "willingness" to comply with commitments. In light of such attitude of Gazprom, PGNiG calls upon the Commission to return to the administrative path leading to the adoption infringement decision with remedies and imposition of fine.
- (11) Above mentioned statement (described further in the observations) comes in line with the **comprehensive scheme of Gazprom to secure its share in the EU gas markets not by the competition on merits** but on the combination of control over infrastructure and isolation of gas markets along the borders of the EU Member States. Gazprom's various actions or obstructions prevent cross-border trade among CEE Countries themselves as well as trade among them and their neighbours.
- (12) For all of the above mentioned reasons, the most adequate measure to cease the infringements is adoption of the decision based on Article 7 of the Regulation 1/2003. Such decision should contain not only a substantial fine in order to provide specific and general deterrence but also effective remedies, including:
- a. Divestment of assets that can be used by Gazprom to disturb or cease the supplies of natural gas to CEE Countries,

- b. obligation to cooperate on the development of interconnections between the CEE Countries and the EU Member States and Energy Community countries,
 - c. enabling gas trade among CEE Countries via Belarus and Ukraine,
 - d. enabling bidirectional flow of gas and application of Network Codes on the entry points to the CEE Countries from outside of the EU,
 - e. abandoning destination clauses in whole EU and in neighbouring countries,
 - f. obligation not to reserve transmission capacities for periods longer than 5 years in a row and to market those already booked via auctions,
 - g. providing customers affected by unfair pricing an extraordinary revision of price with reversed right to determine the price,
 - h. implementation of certification decision on the Yamal Pipeline,
 - i. removing the effects of abuses in EuRoPol (payment of transmission fees in accordance with the award of Moscow arbitration court, changes in the statute)
 - j. other obligations, aimed at cessation of the infringement in other CEE Countries.
- (13) Notwithstanding the arguments presented above, PGNiG recognises Commission's discretion in application of the instruments aimed at achievement of observance of the EU competition law. Therefore, since the Commission announced that there is a possibility of concluding Proceedings against Gazprom with a decision based on Article 9 of the Regulation 1/2003, PGNiG submits proposals within this framework.
- (14) After analysing **Commitments** proposed by Gazprom, PGNiG came to the conclusion that they **are by their very nature incapable of changing that situation and addressing any competition concerns** raised in the Statement of Objections. **Commitment concerning price revision clause provides even worse contractual situation** than present clause in contracts with customers. Commitments allegedly aiming at removing market segmentation are either already almost fulfilled (removal of destination clauses) or irrelevant for Polish market and other markets as well (ineffective swap mechanism with absurdly high costs). Finally, with respect to tying abuse, Gazprom offered no Commitments with – which is striking and surprising – Commission's consent to such situation.
- (15) It has to be underlined that even if those Commitments were improved in accordance with the observations of PGNiG and other participants of the market test, then they still would not be capable of restoring the competition on the market. Problem of those Commitment does not lie within the degree of their proportionality. **The Commitment does not met a fundamental criterion, laid down in Regulation 1/2003 – namely providing the cessation of all of infringements.** Such requirement derives from the wording of Article 9 and Article 7 of the Regulation 1/2003 read in conjunction and is a *conditio sine qua non* for adoption of the decision based on Article 9.
- (16) Taking into consideration the above, PGNiG has proposed wide range of possible commitments, as well as improvements of those already proposed. If the Commission is to adopt Commitment Decision, it is crucial for it to be **comprehensive and effective**. Due to less restrictive conditions regarding proportionality in cases that are

concluded with an Article 9 decision, PGNiG calls upon the Commission to adopt firmer approach towards Gazprom and demand truly effective concessions.

- (17) In respect to market segmentation, the Commitment Decision should contain comprehensive package of both structural and behavioural measures. Besides the obligations already mentioned in section (12) above, Gazprom should commit to implement full ownership unbundling and third party access rule on NS1 and NS2, allow its customers in CEE Countries to change delivery points of some part of their gas supply to German and Austrian gas hubs and provide them with increased flexibility of the contract (as enjoyed by customers from Western Europe). It should also commit to perform its contractual obligations to the customers without using measures aimed at restricting re-export and submit its actions in this respect to the scrutiny of Monitoring Trustee.
- (18) In respect to pricing abuse, PGNiG states that Commitment Decision should provide a comprehensive mechanism that is capable of:
 - a. cessation of infringement within less than a year since the adoption of the Commitment Decision,
 - b. removing the effects of the pricing abuse,
 - c. preventing prices of CEE Customers of Gazprom to diverge from market level in future in an effective way.
- (19) In order to achieve that, PGNiG submits its complex mechanism that is based on the extraordinary, one-time reversal of the right to determine price (from seller to the purchaser) and enhanced price revision clause. Mechanism allows to achieve desired effect while simultaneously providing safeguards for Gazprom against abusing this mechanism by its customers.
- (20) In respect to tying abuse, PGNiG submits proposals mentioned above, which aim at effective removal of the effects of abuse.
- (21) PGNiG proposes also adjustment of the competences of the Monitoring Trustee to the above mentioned commitments, as well as enhancement of guarantees of its independence.
- (22) Due to the wide range and diversified nature of proposed commitments, PGNiG submits also a detailed proposition on their timeframe. Due to the specificity of the gas markets, in particular its reliance on infrastructure, PGNiG proposes that the longest commitments should be expiring only after 16 years. Proposition regarding timeframe of the right to first revision of Commitment Decision is also given.
- (23) PGNiG believes that observations presented in this document will help the Commission to adopt an effective decision that will restore the competition on the markets for upstream supplies in Central and Eastern Europe.

IV. Summary of relevant facts

IV.1. Unfair pricing of Gazprom

- (24) Since November 2006 Gazprom has continued to charge unfair, exploitative prices on PGNiG.
- (25) In 2006, Gazprom forced PGNiG to accept the introduction of a drastically exploitative price formula into the Yamal Contract. Gazprom achieved it by threatening PGNiG to block the signing of an already agreed gas supply contract between PGNiG and RUE, a company controlled by Gazprom at that time. The absence of this contract would have resulted in a significant shortage of gas in PGNiG's portfolio as it was impossible for PGNiG to secure additional supplies from any other shipper at that time. Consequently, PGNiG accepted the Gazprom's ultimatum and agreed to the new, exploitative formula with effect from 1st of November 2006³. The contract with RUE and the amending annex no 26 to the Yamal Contract (introducing new formula) were signed on the same day (17th of November 2006).
- (26) In January 2009, RUE ceased supplies to PGNiG, due to the conflict between Russia and Ukraine over gas prices for Ukraine. Since RUE did not respond to letters calling it to restore supplies, PGNiG withheld payment for the supplies delivered by RUE in December 2008 in order to secure its potential claims towards RUE. However, even after the conflict between Russia and Ukraine had been settled, the supplies were not restored. Simultaneously, Gazprom prevented any other shipper from providing gas to PGNiG through the Yamal Pipeline or Ukraine. Faced with such situation, PGNiG was forced to conclude a short-term contract with Gazprom in summer 2009, **[Business Secret]**. Moreover, in course of the negotiations PGNiG had to release the whole payment to RUE for the supplies in December **[Business Secret]** and waive all the claims towards RUE for breach of contract. So not only PGNiG had to accept the excessive price formula for additional volumes but also to agree not to be compensated for a breach of contract by Gazprom subsidiary company.
- (27) It needs to be noted that during 2009 and 2010 PGNiG and Gazprom negotiated an increase of natural gas volumes within the Yamal Contract in order to secure supplies that would meet domestic demand in Poland. Gazprom expressed its consent to such an increase subject to other elements, including inter alia relinquishing of EuRoPol for the lump sum of **[Business Secret]** that was awarded to this company by an arbitration court in Moscow⁴. In late 2010, PGNiG and Gazprom finally signed an amending annex to the Yamal Contract, which:
- a. increased the annual contractual quantity of gas,
 - b. provided for a rebate for the gas purchased by PGNiG over the minimum annual quantity in years 2010-2014,
 - c. removed destination clause from the Yamal Contract,
 - d. left the price formula unchanged.

³ It needs to be noted that PGNiG had to pay additionally USD **[Business Secret]** in order to "compensate" Gazprom for refusing to accept the request for the revision of the price for over a year.

⁴ Said sum was awarded to satisfy damages suffered by EuRoPol from Gazprom when the latter refused to pay transmission fees in full amount (and instead paid only the non-arguable part of the fees).

- (28) In 2011 PGNiG requested for a contractual revision of the price formula. Initially, Gazprom has refused to accept the request, to which PGNiG responded by submitting a statement of claim to arbitration tribunal. Despite the submission of the claim, negotiations continued **[Business Secret]**. Gazprom was aware of that and submitted a settlement with formula that still did not provided market price for PGNiG⁵. Due to the fact that the ruling of the arbitration tribunal was expected to be delivered in May/June 2014 and PGNiG would have to endure two winter seasons with extremely excessive prices, PGNiG decided to accept Gazprom's offer. It has to be noted that Gazprom's offer to „settle” the case was made considering predictions that the arbitration tribunal would find in favour of PGNiG. Gazprom could then be obliged to provide a large compensation to PGNiG as well as to guarantee a change in the price formula that could be followed by potential claims from its other contractors.
- (29) In 2014 PGNiG requested for another contractual revision of the price formula. Once again Gazprom disagreed with the proposals made by PGNiG. Since the negotiations did not bring any result, in 2015, PGNiG submitted a notice of arbitration that was followed by a statement of claim to the arbitration tribunal in 2016.

IV.2. Market segmentation: hindering natural gas supplies to Poland

- (30) As it is known to the Commission, the Yamal Contract contained a so-called “destination clause”. **[Business Secret]**
- (31) In 2009 and 2010, after the gas supply contract between PGNiG and RUE had been breached by the latter, PGNiG approached various European companies, including **[Business Secret]** in order to sign a contract for additional supplies via Ukraine or the Yamal Pipeline. None of those companies was able to conclude a binding contract due to restrictions imposed by Gazprom.
- (32) On 4th of September 2014, without any prior warning, Gazprom has started to refuse to deliver quantities of gas, ordered by PGNiG (orders were made within the contractual range, in accordance with available capacities). Restrictions covered the delivery points Drozdowicze, Kondratki, Wysokoje and (from December) Tietierowka. Deliveries of gas nominated by PGNiG on a daily basis dropped **[Business Secret]** during the whole period of disruptions in supplies.
- (33) It has to be noted that the shipment to Slovakia, Austria and Hungary also dropped significantly, while on 26th of September 2014, the Minister of Energy of Russian Federation threatened EU countries, which supply Ukraine with natural gas bought from Gazprom might face interruptions in supplies. On the same day, the Hungarian pipeline operator ceased to provide reverse flow to Ukraine. On 1st of October 2014, Slovakia noted a decrease of 50% in supplies of gas⁶. The above mentioned actions by Gazprom were clearly intended to disturb re-export of natural gas to Ukraine.

⁵ The new price formula still resulted in excessive price (although some decrease was noted).

⁶ <https://www.osw.waw.pl/en/publikacje/analyses/2014-10-08/slovakia-and-hungary-gas-supplies-to-ukraine>

IV.3. Tying commercial issues with infrastructure

- (34) During the negotiations in 2009 and 2010, Gazprom insisted on tying the following commitments with the negotiations on the amount of gas supplied by itself:
 - a. **[Business Secret]**
- (35) By tying issues of the transfer of operator duties on the Yamal Pipeline to issues related to gas supplies, Gazprom aimed at influencing the process of certification of the operator of the Yamal Pipeline.
- (36) In face of the pressure exerted by Gazprom, PGNiG was forced to agree to the demands of Gazprom and negotiate all the above mentioned issues as a package.
- (37) The Commission is in possession of documents clearly showing that Gazprom still makes the security of its supplies to PGNiG conditional upon retaining control over the gas transport infrastructure in Poland – even though it is against the energy law of the European Union (inter alia, the Third Energy Package). **[Business Secret]** it clearly shows that Gazprom is still unwilling to comply with EU law.

V. Request for revision of the policy of the Commission towards Gazprom – a need for substantial fine for repeated infringements of EU Competition Law

- (38) The infringements of EU competition law described above and the Gazprom's attitude towards compliance with EU law in general, which is also exemplified by the nature of the Commitments proposed by Gazprom, require imposing severe fine on Gazprom and remedies on the basis of Article 7 of Regulation 1/2003. Therefore PGNiG requests the Commission reconsider its policy towards Gazprom for the reasons stated below.

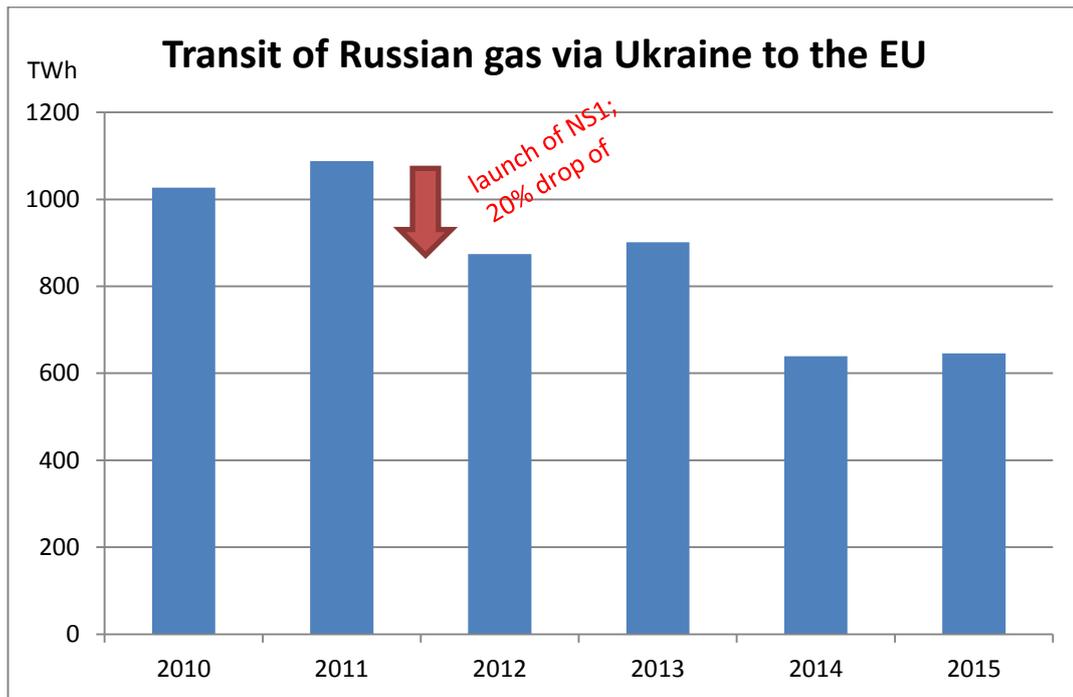
V.1. Gazprom's consistent and intentional attitude to avoid acting in accordance with the rules of competition of the EU internal market – a need for deterrence and prevention of further abuses, which can be fully achieved only by an Article 7 decision

- (39) First of all, it needs to be noted that Proceedings concerns three types of abuses: i) imposing territorial restrictions (breach of Article 102 (b) TFEU), ii) unfair pricing (breach of Article 102 (a) TFEU) and, iii) tying supplies with unrelated issues concerning infrastructure (breach of Article 102 (d) TFEU). These three aspects of Gazprom behaviour on the markets for upstream supplies of gas in CEE Countries form an overall scheme preventing the development of competitive gas markets in CEE Countries and maintaining Gazprom's abusive control over these markets. Gazprom implemented this plan in the first decade of 21st century and has been taking advantage of it until today. Introduction and enforcement of territorial restrictions allowed Gazprom to exploit its customers by imposing price formulas that have resulted in excessive prices. Prices dictated by Gazprom have not only led to direct losses of its contractors on the gas markets but were at least partially transferred on end customers, disturbing competition also on the relevant markets for goods the production of which requires that are produced with the direct or indirect utilisation of natural gas, such as production and trade of fertilizers, manufacturing and trade of petrochemical products, manufacturing and trade of glass, production and trade of electricity. Territorial restrictions allowed Gazprom to force PGNiG to consent to unrelated privileges connected infrastructure, which led to a further strengthening of Gazprom's position on the market for upstream supplies to Poland. As a result, Gazprom prevented the formation of a stable and competitive market. For the whole period of infringement, each element of the overall scheme has been strengthening the effects of the other ones. Although eventually, the clause prohibiting re-export was removed from the Yamal Contract, Gazprom has still continued to breach competition law by cutting down supplies to CEE Countries as well as Austria in order to prevent re-export of gas from EU Single Market to Ukraine.
- (40) When considering, which legal basis should be the ground for the Commission's final decision in the Proceedings, the Commission should take into account other activities of Gazprom, which aim at distorting the competition on the EU internal market, especially in CEE. Although those actions cannot be qualified as breaches of Article 102 TFEU, they show Gazprom's negative attitude towards respecting competition rules that are one of the fundamentals of the EU internal market. Therefore, the

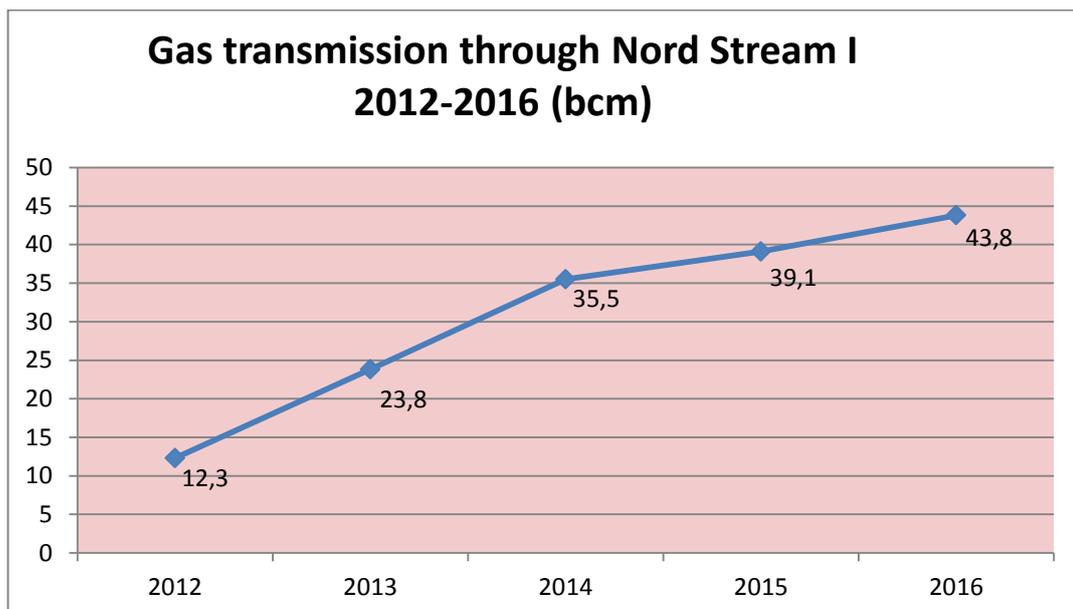
Commission cannot decide whether to pursue for Article 9 decision or Article 7 decision without assessing the complexity of circumstances in the case. The activities are inter alia:

Construction of NS1 and NS2

- (41) Regardless of the unsolved dispute as to whether this project was motivated politically or economically, it is a fact that NS1 allowed Gazprom to divert a significant volume of gas flows from Brotherhood Pipeline to Nord Stream, as it is illustrated on Graph 1.

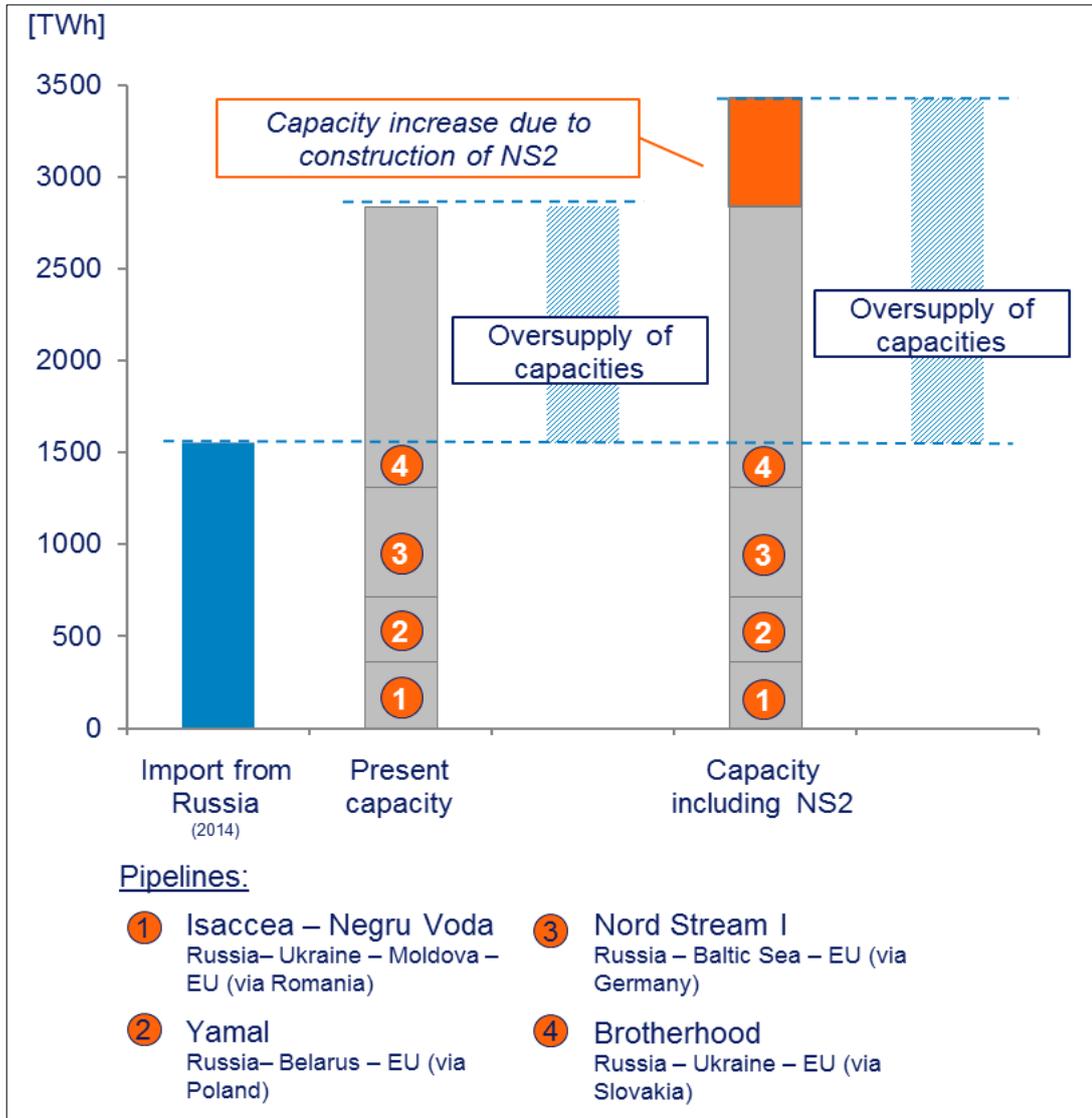


Graph 1. Source: own analysis of data available at: <https://transparency.entsog.eu>



Graph 2. Source: own analysis of data available at: <http://www.nord-stream.com>

- (42) Graphs 1 and 2 clearly illustrate that by constructing NS2 Gazprom aims at further decreasing the volumes of gas transmitted via Ukraine to its European customers. It should be stressed that presently, Gazprom uses not more than 55% of existing capacities from East, as it is shown on Graph 3.



Graph 3. Impact of NS2 construction on the supply of gas transmission capacities from the Russian Federation. Source: own estimates.

- (43) Decreased amounts of gas flowing through Ukraine will significantly reduce the amounts of gas transmitted via Poland and Slovakia. It will also have an impact, although not that significant, on the transmission of gas through the Czech Republic and Hungary. As a result of diverting of the gas flows to NS1 and NS2 CEE Countries risk to supplied only through interconnectors with their western neighbours via NS1 and NS2.
- (44) Diverting the transmission of gas to EU Member States to NS1 and NS2 will allow Gazprom to avoid all the requirements deriving from the 3rd Energy Package, which aim at providing undistorted competition on the gas markets (e.g. ownership unbundling, third party access). Since Ukraine, as a contracting party to the Energy Community, is introducing the 3rd Energy Package in its territory, then Gazprom would

have to be bound by those requirements on the transmission pipelines even before entering the EU territory.

- (45) Furthermore, diverting transmission to NS1 and NS2 gives Gazprom another incentive to raise the prices for CEE Countries. If Gazprom diverted gas supplies to those countries to NS1 and NS2 as well, the price of gas would need to cover costs of transport via Germany (in case of Poland and Czech Republic) or Germany and Czech Republic (in case of Slovakia) or Germany, Czech Republic and Austria (in case of Hungary). Additionally, such a practice would block significant capacities within Europe, preventing other suppliers from selling gas to CEE Countries.
- (46) Being in line within the above described schedule, Gazprom is unwilling to adjust the NS1 and NS2 legal framework to energy law of the EU, claiming that since those pipelines are not entirely located in the territories of EU Member States, EU law should not apply. Such an attitude does not constitute a breach of EU competition law in itself that would form grounds for action by DG Competition of the European Commission. However, the consideration of any of the ways to bring Gazprom in line with the EU Competition rules cannot leave aside the fact that Gazprom – when faced with a choice of acting in accordance with the rules of competition laid down in EU law or not – chooses the latter.

Opting for a special regime outside of the 3rd Energy Package for OPAL Pipeline

- (47) The above mentioned observation is also confirmed in case of the OPAL Pipeline. The Opal Pipeline is significant transmission infrastructure connected directly to NS1. It enables Gazprom to export gas from the Russian Federation to CEE Countries via Eastern Germany. The transmission capacity is allocated at three interconnection points: Greifswald (entry from Nord Stream to OPAL Pipeline at the Baltic Sea seaside, approx. capacity: 36,5 bcm/year), Gros Koris (exit from OPAL Pipeline to Gaspool area in Germany, approx. capacity: 4 bcm/year) and Brandov (exit from Germany to Czech Republic, approx. capacity: 32 bcm/year).
- (48) The OPAL Pipeline is operated by two TSOs: Opal Gastransport and Lubmin-Brandov Gastransport GmbH (operator at 20% of the pipeline, the company is owned by E.ON). The allocation rules discussed are related to Opal Gastransport co-ownership share.
- (49) The rules for the operation of the OPAL Pipeline were established in 2009 pursuant to an exemption decision of the European Commission issued according to Article 36 of the Gas Directive 2009/73/WE (transposed by BNetzA). The most significant requirement imposed on Gazprom was the maximum level of capacity which could be booked by such a dominant gas undertakings – i.e. 50% of the OPAL Pipeline capacity. As a result of the restriction Gazprom was enabled to book max. 16 bcm/year at Brandov IP (instead of 32 bcm/year). The mechanism was an appropriate measure which protected other market participants from abusing the dominant position by Gazprom.
- (50) The revision process was initiated in 2013 when German Regulatory Authority BNetzA signed a settlement agreement with Gazprom. The parties intended to remove the 50% limit imposed on Gazprom. However, the political situation related to Russian invasion on Eastern Ukraine in 2014 hampered the process. However, in

2016 the Settlement Agreement was resubmitted to the European Commission even though the situation hasn't changed since 2014.

- (51) The European Commission revised the exemption decision on 28th of October 2016 by issuing new rules where the 50% cap was not imposed on the dominant gas undertaking. According to new capacity allocation rules, 50% of OPAL Pipeline capacity is TPA exempted, which means that bookings can be made by Gazprom only. Further 50% of OPAL Pipeline capacity is offered at auctions where Gazprom is allowed to participate and place bids. Only 10% of the capacity offered at the auction is subject to mechanism which does not allow Gazprom to place bids above the medium price at the Gaspool market.
- (52) According to the above-mentioned mechanism 50% of Opal Pipeline capacity can be booked by Gazprom only, 40% capacity is available exclusively to Gazprom at the auction and 10% of the capacity is also available at the auction but subject to fulfilling specific requirements. Gazprom is allowed to fully book the capacity of the OPAL pipeline and double the transmission of Russian Gas through the OPAL pipeline to the CEE Region.
- (53) The European Commission decision was implemented in Germany by the Settlement Agreement signed between German Regulatory Authority BNetzA, Opal Gastransport, Gazprom and Gazprom Export on 30th of November 2016.
- (54) This situation raised serious concerns related to the security of gas supplies to CEE Countries. The situation where gas transported both from east and west actually comes from the same source (Russian Federation) and the same supplier (Gazprom) harms the position of CEE Countries and natural gas undertakings operating in that area. The major supplier (Gazprom) will be able to freely choose transmission routes and, consequently, influence the CEE Countries both economic and political.
- (55) In order to prevent Gazprom from monopolising gas supplies to the CEE Countries, actions against the European Commission before the European Court together with requests for the suspension of execution of the decision issued by the Commission were submitted by PGNiG Supply & Trading GmbH, the Government of the Republic of Poland, PGNiG S.A. and Naftohaz.
- (56) The major concerns raised in the actions were related to the status of the OPAL Pipeline (whether it can be subject to the exemption procedure under Article 36 of the Gas Directive), the European Commission's competence to revise the exemption decision issued in 2009, the negative impact on security of supplies to Poland and lack of positive impact on development of competition in the gas supply market.
- (57) The suspension of execution of the decision was requested in view of annual capacity allocation auction scheduled for 6th of March 2017. Such auctions for yearly products are organised once a year and enable TSOs to offer long-term capacity for the following 15 years. In case where Opal Gastransport offered long-term capacity, it would be booked by Gazprom until 2032. In order to prevent a maximum utilisation of the OPAL Pipeline, a request for the interim measure was submitted.
- (58) Concerns related to long-term capacity booking are justified by the experience with other long-term auctions organized in Germany. The Open Season auction was organized at the Eugal Pipeline (it is a pipeline planned to be constructed in order to

transport gas from Nord Stream 2). Following the capacity auction on 6th of March 2017, capacity was booked until 2039. The results of the auction confirm that long-term bookings would be made at the OPAL Pipeline if the interim measure was not applied.

- (59) On 15th of December 2016, a relevant action and request for applying the interim measure were also filed by PGNiG and PGNiG Supply & Trading with the German Court against the Settlement Agreement signed between BNetzA, Opal Gastransport, Gazprom and Gazprom Export.
- (60) On 23rd of December 2016, the President of the European Court agreed with the applicants and applied the interim measure defined as the suspension of the European Commission decision of 28th of October 2016. On 30th of December 2016, the German Court applied the interim measure and suspended the administrative agreement. These two decisions of the European and German Courts prevented Gazprom from booking yearly transmission capacities at OPAL Pipeline for the following 15 years.

Possibility of blocking Mallnow by gas flow to UGS Katharina

- (61) Another example of the scheme aimed at sustaining dependency of the Polish market for upstream supplies of gas is Gazprom's involvement in a project concerning the development of UGS Katharina and establishing the network code of Gascade.
- (62) UGS Katharina is a storage facility located in Central Germany. The UGS Katharina is operated by Erdgasspeicher Peissen GmbH (GAZPROM Germania GmbH and VNG Gasspeicher GmbH joint venture). It is an existing storage facility under further development; it is to be completed by 2024.
- (63) According to information published by Erdgasspeicher Peissen GmbH, by 2024 the UGS Katharina will offer storage capacity of approx. 600 million cubic meters and a withdrawal capacity of 24 million cubic meters per day. The storage facility will be connected to Jagal Pipeline, which is infrastructural extension of the Yamal Pipeline (import pipeline from the Russian Federation via Belarus and Poland to Germany).
- (64) According to information presented by Gascade, technical congestions on the German side will lead to a competition between UGS Katharina and Mallnow Interconnection Point (which connects Polish Section of the Yamal Pipeline operated by Gaz-System and Jagal Pipeline in Germany operated by Gascade). The competition mechanism means that due to technical limitations of the existing pipelines it is not possible to allocate the total amount of requested capacity at both points. In such a case, the priority might be given to allocation for UGS Katherina.
- (65) In Poland, Mallnow IP is considered as a crucial part of gas infrastructure which ensure security of gas supplies. It enables to transfer gas not only from Poland to Germany (basic direction), but also from Germany to Poland (virtual reverse active since 2011, physical reverse available since 2014). The reverse flow available at Mallnow means that in case of a significant gas supply disruption at the eastern border, gas can be transmitted from Germany to Poland.
- (66) The fact that Gazprom is able to exert influence on both Gascade and UGS Katharina operations, provides a strong incentive for Gazprom to restrict supplies to Poland, as it had happened in winter of 2014/2015. During that time access to emergency

supplies from Germany allowed PGNiG and other wholesalers on the Polish market to purchase lacking quantities in order to ensure supplies to final customers. When UGS Catharina construction is completed, Gazprom will be able to prevent such supplies to Poland – via its subsidiary in Germany – by ordering gas flow to UGS Catharina.

- (67) It needs to be noted that no intention to comply with EU competition legislation was observed in Gazprom's activity with respect to the Proceedings. The first set of commitments proposed by Gazprom in 2012 failed to address the European Commission's concerns⁷. PGNiG strongly believes that the most recent proposal by Gazprom, that is currently subject to the market test, does not in any way prevent Gazprom from continuing to breach the EU competition law.
- (68) The Commitments proposed by Gazprom in February 2017 are neither sufficient to prevent Gazprom from repeating the same type of infringements that it had committed in the past nor are they sufficient to bring the present, lasting infringements to an end. Presenting such a proposal to the Commission is yet another example of Gazprom's negative attitude and unwillingness to comply with EU competition law. In the absence of constructive attitude by Gazprom, which is a fundamental requirement for the possibility to adopt an Article 9 decision, it is clear that the only action which may enforce Gazprom's compliance with Article 102 TFEU is adoption of an Article 7 decision with remedies. Only by that measure a sufficient level of specific deterrence in case of Gazprom can be achieved. An obligation of paying high fine and altering its behaviour (in case of adopting remedies parallel to the fine), especially in the light of the investment projects in which Gazprom is engaged, constitutes a more effective means of ensuring compliance with the competition law than the Commitments, which can be easily complied with by Gazprom and which do not even bring the infringement to an end, as it will be proven below.

V.2. Legal gravity of the infringements of EU competition law by Gazprom

- (69) PGNiG would also like to draw the Commission's attention to the gravity of Gazprom's infringement as a factor supporting rather the imposition of a fine and refusal to accept the Commitments. As correctly observed by the Commission in the S&P's Decision, when assessing the proportionality of offered commitments, interests of third parties must also be taken into consideration. Such consideration must also be given in the case of Gazprom when a choice between commitments and a prohibition decision is to be made.
- (70) In this context, PGNiG wishes to comment on the decision-making practice of the Commission with respect to the abuse of a dominant position on the energy market. PGNiG is aware that a statistical analysis may lead to the conclusion that the Commission tends to choose commitment decisions with respect to alleged abuses of domination on such market. However, it is worth noting that none of such decisions was issued with respect to alleged excessive pricing. Furthermore, it should be borne

⁷ See Commissioner Verstager intervention: http://europa.eu/rapid/press-release_STATEMENT-15-4834_en.htm.

in mind that a prohibition decision was issued with respect to the energy market as well⁸.

- (71) In this context, it has to be underlined that even if the practices by Gazprom were to be assessed separately from each other, each one of them would be qualified at least as a serious infringement of EU competition law.

Gravity of unfair pricing

- (72) PGNiG is aware of the fact that unfair pricing was once assessed as moderate by the Commission⁹. However, it should be emphasized that the Commission stated that *the product* [the price of which was excessive] *is widely consumed and important to the consumer* – whereas in respect of the case at hand, the product the price of which is excessive is not consumable *per se* but is a source of energy, and as such it is indeed widely consumed and important, because in many cases it cannot be substituted in any way. Owing to its role in the economy, the abuse connected with such a good should be assessed as one of significant gravity.
- (73) Moreover, in the *Deutsche Telekom*¹⁰ decision, the Commission itself admitted that excessive pricing might be treated even as a very serious infringement. In the said case, excessive pricing of a dominant undertaking aimed primary at margin squeezing its competitors with collateral detrimental effects to consumers. PGNiG notes that in Gazprom's case, the practice is aimed primary at exploiting customers (and indirectly final customers, such as consumers). However, since it is combined with the practice of hindering cross-border trade, Gazprom's practice also affects its competitors, who were unable to enter the Polish gas market for substantial period of time (for this instance see Gazprom's practice of obstructing additional supplies to PGNiG in 2009 and 2010, described in sections (71)-(73) of the Complaint). Therefore, charging unfair, excessive prices by Gazprom in the case at hand meets the criteria to be regarded as at least serious type of infringement.
- (74) PGNiG draws the Commission's attention to the fact that the Commission previously imposed monetary fines on entities charging prices assessed as unfair, especially in the following decisions:
- a. the UBC Decision, in which a fine was imposed by the Commission on the addressee for charging excessive prices. It was stipulated in this decision that it was the first occasion on which such a pricing policy had been fully considered by the Commission as an abuse of a dominant position, and a provision had been included in the decision requiring United Brands Company for a specified period to inform the Commission of the prices it charged so that the Commission was able to ensure that they such prices were not abusive. It follows clearly from this approach that it is not sufficient that the infringing entity assures the Commission that the prices are no longer unfair (as is not even happening with respect to the case at hand – please see Section [...] below), but that a fine is required in order

⁸ Please refer to the Commission's Decision of 26th of October 2004 in case COMP/38662 – GDF/ENI and of 26th of October 2004 in case COMP/38662 – GDF/ENEL.

⁹ UBC Decision.

¹⁰ Commission Decision of 21st of May 2003 in cases COMP/C-1/37.451, 37.578, 37.579 - Deutsche Telekom AG.

to stigmatize the infringement committed by Gazprom and to deter prospective perpetrators¹¹;

- b. the decision issued with respect to General Motors Continental NV¹², whereby the addressee was found by the Commission to be charging unfair prices and imposed a monetary fine for such an infringement. It should be emphasized that while the decision was subsequently annulled by the Court, such annulment was not due to the fact that the imposition of unfair prices was deemed acceptable by the Court,¹³ but due to the fact that the entity which was punished very quickly reduced its charges to a level which was no longer unfair. This is obviously not happening in the case of Gazprom, which has been charging excessive prices for over 10 years; and
 - c. the decision issued against British Leyland¹⁴ whereby a fine was imposed on an entity charging unfair prices. This decision was subsequently upheld by the Court.¹⁵
- (75) PGNiG notes that the Commission addressed the cases of Rambus and Standard & Poor's by means of commitment decisions. However, significant differences between the antitrust Proceedings against Gazprom and decisions concerning Rambus and Standard & Poor's should be pointed out.
- (76) With respect to the Rambus Decision, PGNiG wishes to underline that the commitments proposed therein (please see Section (49) of said decision) were based on a new bundled license to be offered by Rambus, and the maximum royalty rates were provided in the commitments (notably as a percentage of a unit's selling price and below the then-current rates charged by Rambus). Therefore, as the Commission noted, such predictability and certainty had a clear value for business (please see Section (74) of Rambus Decision). What should, however, be noted in this context is also the fact that this ensured that the prices are fixed at a certain level which could have been assessed and checked by the Commission while discussing the offered commitments. This is not the case of Gazprom's Commitments, as elaborated in sections(121)-(124).
- (77) On the other hand, while one may claim that there is a similarity in terms of existence of substantial market barriers on the relevant market in the Rambus Decision (please see Section (73) of Rambus Decision) and in the present case, the barriers to entry as well as the nature of the relevant market are of such nature that the Commitments cannot in any way provide any incentive for a prospective new entrant to the market. With respect to the case at hand, because of the above-noted characteristics of the relevant market, the issue of the unfair pricing policy by Gazprom should be addressed by taking strong legal measures vis-à-vis Gazprom in order to guarantee

¹¹ The presented argumentation is in no way weakened by the fact that the Court subsequently partly annulled the UBC Decision since such annulment was the result of the fact that the Court did not consent to the assessment of the prices as unfair – please see para (267) of UBC Judgement.

¹² Please see the decision in case 75/75/EEC – Commission Decision of 19th of December 1974 relating to a proceedings under Article 86 of the EEC Treaty (IV/28.851 - General Motors Continental).

¹³ Please see the judgement of the Court of 13th of November 1975 - General Motors Continental NV v Commission of the European Communities - Case 26/75, ECR 1975 01367, para 12.

¹⁴ Commission Decision of 2nd of July 1984, British Leyland, O.J. [1984] L 207/11.

¹⁵ Judgement of the Court of 11th of November 1986 - British Leyland Public Limited Company v Commission of the European Communities, Case 226/84, ECR 1986 03263.

the compliance by Gazprom and all of its subsidiaries with European Union competition law.

- (78) With respect to S&P's Decision, PGNiG wishes to point out that the commitments proposed therein were based on the abolition of certain charges and fixing other charges at a certain level (please refer to Sections (45)-(46) of the S&P's Decision). Similarly to the Rambus Decision, it ensured that the prices are fixed at a certain level (or totally abolished), which could have been assessed and checked by the Commission easily, and again it should be stressed that it is not similar to the case of unfair pricing by Gazprom.

Gravity of the market segmentation

- (79) Abuse of dominance by segmenting the market is a practice equivalent to the market-sharing agreement between two or more undertakings as is often performed with the use of similar tools. It also produces the same effects. Therefore, both practices should be assessed by the Commission in a similar way. It needs to be noted that the Commission, in its *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*¹⁶, recognised and explicitly listed¹⁷ market-sharing as a practices that is, by its very nature, one of the most harmful restrictions of competition.
- (80) Such an assessment is also reflected in the Commission's decision and is generally recognized by the EU courts as well. Against this background, PGNiG again draws the Commission's attention to the UBC Decision and the UBC Judgement, whereby, along with excessive prices, contractual provisions applied by UBC prohibiting the resale of bananas while still green were examined by the Commission and the Court. Both assessments determined that the prohibition of resale was an abuse of a dominant position which affects trade between member states. Similarly, please note the opinion of the Commission and the Court in respect of the prohibition on cross-border trade in cars, which was assessed as "particularly serious"¹⁸, and another opinion of the Court¹⁹ that prohibitions on exports and imports is an effort to artificially maintain price differences between the markets of the various Member States. Thus, these should be classified as very serious infringements (as preventing the creation of the EU internal market). It also needs to be stressed that in all of the above mentioned cases, fines were imposed by the Commission.
- (81) In addition, it should be mentioned that the Commission already punished entities which hindered cross-border trade with fines. Please see for example the following decisions:
- a. issued with regard to barriers to the exports of cars²⁰ – where not only was it explicitly stated that the Commission consistently held that barriers to exports infringe the Community competition rules, but it was also taken into consideration that the addressee of the decision acted intentionally and was aware that the applied measures restricted competition. **Finally concluding**

¹⁶ Official Journal of the European Union, C 210 of 1st of September 2006.

¹⁷ See: point 23 of the Guidelines.

¹⁸ Please see the Judgment of the Court of 6th of July 2000 Volkswagen AG v Commission of the European Communities Case T-62/98, para 336.

¹⁹ MDF Judgement, para 107.

²⁰ Commission's decision of 5th of October 2005 relating to a proceedings pursuant to Article 81 of the EC Treaty, Cases F-2/36.623/36.820/37.275 – *SEP et autres / Peugeot SA*.

that the contested measure was a very serious infringement and that a fine had to be imposed, in order to punish this very serious violation and to provide a sufficient deterrent effect; and

- b. issued with respect to preventing parallel imports between Member States²¹ – whereby it was confirmed that restrictions having the objective of artificially partitioning the EU internal market and therefore jeopardizing a fundamental principle of the Treaty were classified **by their nature as very serious violations**.

(82) PGNiG is aware of the existence of the Commission's decisions in which only commitments were imposed on undertakings, which hindered the cross-border sale of electricity²². However, due to the following differences between the situation discussed in the above-mentioned decisions:

- a. significant differences with regard to the nature of the infringements in question and those considered in the case at hand, making the former significantly less grave, such as:
 - i. the fact that the entity hindering the cross-border sale of electricity (in respect of case 39767) was limiting its customers' freedom to choose whether to sell the purchased electricity in Bulgaria or to export it, and was not limiting its contractors in different countries from exporting the electricity with the aim to isolate a couple of national markets (as Gazprom does),
 - ii. the fact that the resale restrictions were implemented only in supply contracts with large industrial customers the primary line of business of which was not the further sale of electricity (as it is in case of Gazprom),

and

- b. the fact that the entities which offered commitments in such decisions did not commit such complex and long-lasting infringements as Gazprom did

– this should not be considered as a binding precedent.

Gravity of tying supplies with unrelated concessions concerning control over infrastructure

(83) Tying supplies with unrelated concessions connected with the control over infrastructure, aiming at preventing or delaying liberalization of the Polish gas market, must be classified as a very serious violation. This conclusion is strongly supported by the decision-making practice of the Commission and the Court in respect to tying, as correctly stated in the judgement of the Court concerning tying committed by Microsoft. As indicated by the Court in the Microsoft Judgement, tying practices had already clearly been declared unlawful by the courts of the European Union, notably in cases concerning Hilti²³ and Tetra Pak II²⁴. **Subsequently, it was upheld by the**

²¹ Commission's decision of 26th of May 2004 relating to a proceedings under Article 81 of the EC Treaty in case COMP/C-3/37.980 *Souris – Topps*, Section (175) and the case-law cited thereby.

²² The decision of the Commission of 10th of December 2015 in case AT.39767 and the Commission's decision of 17th of March 2010, in case COMP/39.386.

²³ See the judgements: in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, upheld in case C-53/92 P *Hilti v Commission* [1994] ECR I-667.

²⁴ See the judgements: in Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, upheld on appeal in Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951.

Court in Section (1351) of said judgement that the Commission's assessment of the infringement consisting of tying, i.e. classifying it as very serious, was correct. Importantly, the fine imposed on Microsoft for tying was of a very high value, which was determined with the account taken of the economic capacity of Microsoft in order to ensure a sufficient deterrence effect. A similar approach should be taken with regard to Gazprom, owing to the same factor also relevant in this case. The conclusion that imposing commitments is not effective when it comes to the cases concerning tying can be drawn from case concerning tying, committed by Microsoft, wherein commitments were offered by Microsoft and no fine was imposed, however later such commitments were not complied with by Microsoft.

- (84) Last but not least, taking into account the following observation provided by the Court in Section (1344) of the Microsoft Judgement: *First, as regards the gravity of the infringement, it must be borne in mind at the outset that the two abuses at issue form part of a leveraging infringement, consisting in Microsoft's use of its dominant position on the client PC operating systems market to extend that dominant position to two adjacent markets* – it should be repeated, as was stated in the Complaint, that forced acceptance by PGNiG of the influence of Gazprom on the operating activities on the Yamal Pipeline delayed the liberalization process of the Polish gas market as Gazprom was able to prevent and hinder the supplies of gas by other more competitive undertakings. The leveraging of the competitive position of Gazprom on the upstream market for the supply of gas on another market in respect of the present case was effected through the gaining by Gazprom of significant control over the transmission of gas through Poland (the market adjacent to the market of the upstream supply of gas), as well as gaining other significant benefits, such as waivers of various claims certain entities had towards Gazprom, which waivers were achieved at the expense of PGNiG.

Assessment of the infringements of Gazprom in their entirety

- (85) PGNiG wishes to conclude the above assessment by underlining the following observation of the Court²⁵: *in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, **the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs** and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community.*
- (86) The same principles should be applied when assessing the gravity of all of the infringements committed by Gazprom combined. Taking into account the complexity and interconnection of all of the infringements committed by Gazprom, as well as the fact that all of the infringements committed by Gazprom are aimed at hindering the development of competition of the market, which aim is clearly anti-competitive, all of Gazprom's infringements should be assessed as being of significant gravity.
- (87) PGNiG notes that the following effects of combining different infringements by Gazprom should especially be taken into account as aggravating circumstances:
- a. excessive prices connected with territorial restrictions allowed Gazprom, especially given its competitive position as a necessary supplier, to exploit its

²⁵ MDF Judgement, section 106.

contractors to a disproportionate extent and to realize ever greater profits based on such unfair pricing policy; and

- b. the tying of commercial issues with infrastructure-related commitments was even more effective through the application of territorial restrictions, which guaranteed that the position of Gazprom – as practically the sole supplier to PGNiG – was not threatened and therefore PGNiG was forced to agree to the concessions requested by Gazprom (not to mention that the merits of such concessions may *per se* constitute an infringement of Article 102 TFEU, being in fact the imposition of unfair trade conditions). Considering the nature of the relationship between PGNiG and Gazprom, which was additionally strengthened by territorial restrictions imposed by Gazprom, contractual tying was imposed by Gazprom in a much more effective way (as Gazprom was able to exert significant pressure on PGNiG in order to force PGNiG to accept such tying), and moreover the acceptance of the tying was detrimental to PGNiG.

- (88) When arguing that a comprehensive approach to all of the infringements by Gazprom should be adopted by the Commission and, based such an approach, a significant monetary fine should be imposed on Gazprom, PGNiG once again wishes to cite the landmark UBC Judgement, namely Sections (299)-(302) thereof in their entirety:

(299) UBC is an undertaking which, having engaged for a very long time in international and national trade, has special knowledge of anti-trust laws and has already experienced their severity.

(300) UBC, by setting up a commercial system combining the prohibition of the sale of bananas while still green, discriminatory prices, deliveries less than the amounts ordered, all of which was to end in strict partitioning of national markets, adopted measures which it knew or ought to have known contravened the prohibition set out in Article 86 of the Treaty .

(301) The Commission therefore had good reason to find that UBC's infringements were at the very least negligent.

(302) The amount of the fine imposed does not seem to be out of proportion to the gravity and duration of the infringements (and also to the size of the undertaking).

- (89) The resemblance between the cited case and the case at hand is striking. However, differences exist which should be pointed out as they constitute aggravating circumstances. Firstly, Gazprom has not yet experienced the severity of EU antitrust law since, up to the present day, the Commission has refrained from imposing monetary fines. Therefore, Gazprom was never sufficiently deterred from disobeying such law. Secondly, it cannot be claimed that Gazprom's infringements are "at the very least negligent", since the entire context of the case clearly suggests that Gazprom's actions form a complex scheme intentionally implemented and explicitly aimed at the exploitation of its contractors in a manner contravening the anti-trust regulations.
- (90) Consequently, PGNiG claims that the Commission should take into account all of the above-mentioned factors, including also the size of Gazprom, the extent of exploitation of its contractors which was achieved as a result of the infringements and, finally, the clearly anticompetitive effect exerted on the market of gas supply.

Such a market is of a very special nature, and therefore of vital importance for numerous end-users of supplied gas, being not only household users, but also industrial. As a result, the gas market is naturally connected with other markets. Therefore, the anticompetitive impact of Gazprom's activities on adjacent or connected markets may in fact be many times worse than the one which was undeniably achieved on the relevant market on which the infringements occurred. It was noted by the Court²⁶, however, that according to the established case-law, for the purpose of the application of Article 101(1) TFEU, there is no need to take account the actual effects of an agreement when the object thereof is prevention, restriction or distortion of competition within the common market and, consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.²⁷ Applying, *mutatis mutandis*, the same approach to the application of Article 102 TFEU, which in PGNiG's opinion is absolutely justified taking into account the duties of the Commission as discussed in Section (92) below, one must come to the conclusion that notwithstanding the evident anticompetitive effect of Gazprom's actions, even the sole and obviously anticompetitive object of such a behaviour would be sufficient to request that the Commission condemn it, through imposing financial fines.

Efficiency reasons do not justify limiting the action of the Commission to making the commitments binding

- (91) Thirdly, PGNiG is of the opinion that no efficiency reasons exist which would justify limiting the action of the Commission to making the commitments binding.
- (92) PGNiG wishes to draw the Commission's attention to the MDF judgement, whereby in Section (105) the Court observed correctly that: (...) *it must be remembered that the Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Articles 85 (1) or 86 of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.* PGNiG concurs with the assessment of the Court and submits that strong enforcement of the prohibition of abusing by Gazprom of its dominant position would ensure the realization of the above-described tasks of the Commission.
- (93) From the point of view of efficiency in dealing with the abuse, it should be noted that the Commission has, in PGNiG's opinion, already gathered a substantial amount of evidence which enables it to conduct a thorough analysis of the alleged infringement, and most of the work in this respect has already been done. Should, however, the Commission requires assistance in further analysis, PGNiG offers, its support in

²⁶ Please refer to the Commission's decision of 5th of October 2005 relating to a proceedings pursuant to Article 81 of the EC Treaty, Cases F-2/36.623/36.820/37.275 – *SEP et autres / Peugeot SA*, Section (130), and the case-law cited therein.

²⁷ And sometimes, as follows from the Commission Decision of 15th of June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Case COMP/A. 37.507/F3 – *AstraZeneca*, Section (914) and the case-law cited therein, factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of fine.

gathering additional information and conducting analysis that the Commission may deem necessary.

- (94) Last but not least, PGNiG notes that in the past Commission already rejected commitments offered by entities against which a prohibition decision was issued as a result of the proceedings – please refer to the decision of the Commission dated 15th of October 2014 in case AT.39523 and, especially, the decision of the Commission dated 22 June 2011 in case COMP/39.525, whereby the Commission deemed the commitments as not being an appropriate means to conclude the case.
- (95) **Taking into account all of the above-mentioned issues, it should be concluded that the Gazprom’s commitments relating to unfair prices should not be accepted and case AT.39816 with respect to such practice should be concluded with a decision under Article 7 of the Regulation 1/2003.**

V.3. Gazprom has already expressly announced that it will not respect the commitment concerning the price revision clause

- (96) According to the Press Release, “*Commission found that the **inability to refer to prices at competitive gas hubs** was one of the **key drivers of higher prices** in Central and Eastern Europe. **Gazprom’s commitments will allow** customers to make sure that the **price they will pay is competitive.**”*
- (97) Speaking at the Flame conference, Ms Elena Burmistrova, CEO of Gazprom Export, has stated that **Gazprom has no intention in moving increasingly towards hub indexation in future**²⁸. Responding to the question, whether Gazprom will move towards more hub pricing in the future, Ms Burmistrova “categorically” replied: “**We are not going to do this. At the moment everyone is fully satisfied**”.
- (98) In her speech, Ms Burmistrova has also questioned reliability of the gas hubs as pricing benchmarks. The exact wording was: “*I would say that **we still don’t feel that the hub prices are the most reliable instrument***”. The only exception to this remark was a reference to TTF market.
- (99) As PGNiG understood from the Commission’s communication on the “Benefits for the Polish gas market”²⁹, the commitment to introduce a new price revision clause was supposed to bring prices of natural gas paid by PGNiG in line with the prices that are shaped by the laws of supply and demand. In this respect, Gazprom is supposed to introduce a reference to “relevant generally accepted liquid hubs” into the price revision clause. PGNiG concurs with the approach of the Commission that “*under the current Gazprom supply contracts, the prices paid by the Polish customer could rise again and become excessively high in the future*” due to the existence of oil-related price formula. Moreover, PGNiG is currently in arbitration proceedings over the price paid under the Yamal Contract.
- (100) Against this background, Gazprom’s CEO comment that “everyone is fully satisfied” with their price formulas sounds like a bad joke. Moreover, despite officially committing to ensure that customers from CEE Countries can enjoy (after revision) formulas that shall result in prices being in line with the prices in gas hubs, the same

²⁸ <https://www.platts.com/latest-news/natural-gas/amsterdam/gazprom-sees-no-increase-in-hub-based-gas-pricing-26731877>

²⁹ http://europa.eu/rapid/press-release_MEMO-17-547_en.htm

person who on behalf of Gazprom Export signed the Commitment Document, declares that **Gazprom** – in a short term – **is not going to change its anticompetitive pricing policy**. There can hardly be a more manifest and explicit disregard for an undertaking's own commitment.

- (101) The above mentioned statements show that **Commitments will not be efficient in securing observance of EU competition law by Gazprom**.

V.4. Gazprom awareness of the infringement of EU competition law

- (102) At least in the respect to imposing destination clauses in the contracts with its customers, Gazprom was fully aware that its conduct is infringing not only Article 102 TFEU but also Article 101 TFEU. In 2003 and 2005 Gazprom was under the investigation of the Commission (DG Competition) for using such clauses in contracts with the customers in Western Europe (ENI³⁰, OMV³¹, E.On Ruhrgas³²).

V.5. The stage of development of the EU internal market for gas requires that this case be concluded with Article 7 decision, imposing a fine

- (103) In 2004, the Commission adopted two Article 7 decisions regarding contracts concluded by GDF (Gaz de France) with the Italian companies ENI and ENEL³³. In both cases the Commission confirmed that territorial restriction clauses in the gas sector restrict competition. Please refer especially to Sections 7.2.2 of both decisions, in which the Commission stresses that the gravity of the infringement should be assessed taking into account the nature of the relevant market. PGNiG further points out that the Commission decided that such Article 7 decisions did not provide for monetary fines. However, as it was indicated by the Commission, both decisions were issued at the very beginning of the liberalization of the gas market, being the first decisions concerning territorial restrictions on such a market, and the market participants were forced to adapt their behaviour to the new market structure.
- (104) However, the existence of an infringement was actually confirmed. Today, almost 13 years after from the issuance of both decisions, such reasoning cannot be applied. This was explicitly confirmed by the Commission itself³⁴ (and upheld by the Court³⁵) in 2009, when the Commission fined GDF Suez SA and E.ON Ruhrgas AG under Article 101 TFEU for the obligation not to sell gas transported over the MEGAL pipeline in each other's domestic markets.

³⁰ http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en.

³¹ http://europa.eu/rapid/press-release_IP-05-195_en.htm?locale=en.

³² http://europa.eu/rapid/press-release_IP-05-710_en.htm?locale=en

³³ Please refer to the Commission's Decision of 5th of March 2014 in case AT.39984 – *Romanian Power Exchange / OPCOM*.

³⁴ Please refer to the Commission's Decision of 8th of July 2009 in case COMP/39.401 — *E.ON/GDF*, especially Sections (323)-(325).

³⁵ Please refer to the judgement of the General Court of 29th of June 2012, *GDF Suez SA v European Commission*, case T-370/09, especially Section (392).

V.6. Gazprom has repeatedly infringed EU competition law by using destination clauses

- (105) As it was already mentioned above, the Commission has already investigated Gazprom for using destination clauses. This happened in 2003 and 2005. Those proceedings were concluded without imposing fines on Gazprom, as the company offered to remove those clauses from contracts with OMV and ENI.
- (106) A repeated anti-competitive behaviour, such as in this case, is a ground for adopting a decision prohibiting the infringement and imposing a severe fine. It can be clearly seen that Gazprom, having already avoided three fines, is not going to accept the fact of not being able to impose re-export and resale restrictions. It becomes even more obvious in the view of the wording of the commitment concerning abandoning destination clauses. By that commitment Gazprom commits not to use such clauses (and remove them from existing contracts) **only in CEE countries that were named in the statement of objections (Poland, Lithuania, Latvia, Estonia, Czech Republic, Hungary, Slovakia, Bulgaria)**. It means that Gazprom is still willing to use destination clauses in other EU countries, especially those that are directly connected to CEE countries via existing infrastructure (Germany, Austria, Greece). Accepting the present wording of the commitments would mean that the Commission is unwilling to take up any **real** action against Gazprom in order to protect the internal market against abuses of this company. It would also encourage other dominants to abuse their market position and then offer simply to cease the practice (even without any real intention to do so) in order to avoid a penalty, even when the company was previously under antitrust scrutiny.

V.7. Long-lasting damage to the market participants and to the related markets

- (107) PGNiG wishes to stress that the unfair pricing policy directly leads to significant losses being incurred by a contractor of the entity, which losses are mirrored by profits of the entity charging unfair prices. Moreover, as a natural consequence of the hindering of cross-border trade, Gazprom's contractors were forced to purchase more gas from Gazprom than they would have, had effective competition been ensured on the market; at the same time the free flow of gas would have ensured the lower price thereof. Through hindering cross-border trade Gazprom was also able to achieve other benefits. As mentioned in the Complaint, such as waivers of claims which could have been raised by the contractors. This way allowed Gazprom to effectively use gas blackmail.
- (108) In this context, it needs to be noted that for a long period of time Gazprom's contractors and (indirectly) their customers were suffering the damages. Unfair prices have been imposed by Gazprom on PGNiG solely at least since 2006 until the present time, i.e. for over 10 years. This effect was enhanced, as shown in the Complaint by hindering the cross-border trade of gas, not only through the utilisation of destination clauses, but also in other ways, as discussed in the Complaint.
- (109) PGNiG notes that the contractors of Gazprom suffered such losses; while it may be claimed that such contractors may seek damages in private enforcement, the following must be clearly stressed:

- a. seeking damages in private enforcement, which is not easy anyway, will be significantly harder, if not impossible, if the Commission fails to declare that Gazprom committed the alleged abuse. In such case, each and every contractor seeking damages would be forced to participate in lengthy and costly legal proceedings before the relevant court in order to prove the existence of the abuse (which proof would unarguably be easier should a prohibition decision be adopted by the Commission and the existence of an infringement be declared, and therefore the burden of proof is removed from the entity which has already incurred a loss due to Gazprom's anticompetitive behaviour). It may be presumed that courts will be reluctant to declare that there was an infringement should the Commission, which most likely has more qualified staff, better analytical tools, wider experience and better-quality evidence at its disposal than a single entity may produce during and for the purpose of private proceedings, refuse to declare the existence of such commitment; and
 - b. even if private enforcement resulted in granting damages to a contractor, that would only result in Gazprom sharing its profits gained through imposing unfair prices with a contractor which incurred losses, and therefore *per saldo* Gazprom would still benefit, or – in the worst-case scenario for Gazprom – it would neither incur a loss nor gain through the imposition of unfair prices.
- (110) That would result in the failure by the Commission to fulfil the tasks described in Section (92) above, as prospective perpetrators of similar infringements would not be in any way deterred from imposing unfair prices. In the worst-case scenario for such perpetrators, the only consequence would be the failure to realize a profit, as it is consumed by the damages to be paid; that would obviously create a strong incentive to impose unfairly high prices in order to try to achieve a profit. In this respect, the Commission has rightly stated in the UBC Decision that the amount of the fine should be considered not only in light of the total annual turnover of an entity and its annual turnover from the good subject to unfair pricing, but also in the light of high profits achieved by such an undertaking as a result of its pricing policy. PGNiG concurs with this observation.
- (111) PGNiG estimates that the difference between the market price of gas and the price imposed by Gazprom might reach **[Business Secret]** for the whole period of infringement (since 2006). In Poland, Gazprom has also forced PGNiG to consent to grant Gazprom unrelated commitments concerning control over infrastructure (the Yamal Pipeline) and **[Business Secret]**. It has to be noted that those numbers represent only the losses of PGNiG directly attributable to Gazprom on Polish market. As it was mentioned above, prices dictated by Gazprom have not only resulted in direct losses of its contractors but were at least partially transferred onto end customers, disturbing competition also on the relevant markets for goods that are produced with the usage of natural gas, including markets for production and trade of fertilizers, manufacturing and trade of petrochemical products, manufacturing and trade of glass, production and trade of electricity. Therefore it is reasonable to assume that overall detrimental effect on the competition in CEE and broadly – in whole EU (taking into account also losses of end customers operating on other product markets) could amount to billions of USD.

V.8. The Commission is in possession of evidence necessary to prove infringement and defend that decision in EU courts

(112) In PGNiG's opinion, the Commission is in possession of an overwhelming and sufficient amount of evidence of the infringements by Gazprom, collected throughout the past 6 years, that it can be reasonably expected that Gazprom will not be able to counter it in court and defend against the finding of infringement of Article 102 TFEU. The body of evidence³⁶ comprises of documents showing both actions of Gazprom, as well as their detrimental effects to domestic markets for gas trading (to both wholesalers and end customers, including households).

V.9. Article 7 decision will address and solve competition problems identified by the Commission in CEE markets in a better way than Article 9 decision

(113) The Commission's preference for adopting commitment decision is driven by the will to quickly fix market malfunctions identified during antitrust proceedings. As proven below, the Commitments submitted by Gazprom do not solve any market malfunctions identified by the Commission, do not prevent further abuses by Gazprom and importantly do not bring the infringements to an end, which is *condicio sine qua non* for the adoption of a commitment decision.

(114) PGNiG submits that if Gazprom is unwilling to provide any **real commitments and alter its anticompetitive behaviour**, it will be more beneficial to both the Commission and the market participants to adopt an infringement decision based on Article 7 with remedies aimed at restoring the competition in CEE markets, even if such decision was to be challenged in EU courts by Gazprom. A likely appeal against the decision to the General Court (and – in case the judgement is in favour of Commission's decision – to CJEU) might lead to postponing of implementation of the Commission's decision in terms of remedies. However, it needs to be noted that by continuing infringements after the decision of the Commission, Gazprom exposes itself to an extremely high risk of potential damages claims, in case it loses the case in EU courts. It is reasonable to predict that in such a situation, Gazprom will at least limit its anticompetitive practices in order to avoid follow-on claims and mitigate their potential financial impact, even if EU courts grant Gazprom interim measures before the final judgment is issued. **Therefore, even a challenged infringement decision might (at least partially) restore normal competition on the markets of upstream gas supplies for CEE Countries before it becomes final.**

V.10. Conclusions regarding the reasons for adopting an Article 7 decision

(115) In the light of the above mentioned arguments, PGNiG believes that an Article 7 decision can effectively compel Gazprom to cease the infringement and restore competition on the market for upstream gas supplies in CEE. Adopting such a decision is well grounded, taking into account the gravity and duration of the infringement as well as the evidence gathered by the Commission. Article 7 decision

³⁶ Referring to abuses on the market for upstream supplies to Poland. As PGNiG was not granted access to even non-confidential version of the Statement of Objections, we can assume that only in relation to the Polish market, where the evidence – collected during an inspection of PGNiG premises in September 2011 – was collected and is known to PGNiG.

will also fulfil the aims of general and specific deterrence, by ensuring their sufficient extent to prevent further infringement. In PGNiG's opinion, a decision adopting the Commitments would not be able to address the real problems of CEE Countries' gas markets, created by the abuses stemming from Gazprom's dominance. It would not bring the infringements of Gazprom to an end as required by Regulation 1/2003. It would also deter those customers of Gazprom, who suffered from abuses by the latter, from pursuing follow-on damages claims. Taken together, those factors would lead to the Commission failing to fulfil its role as a "Guardian of Treaties".

VI. Significant defects of the Commitments

(116) In PGNiG opinion, the Commitments are burdened with significant defects that make them incompatible with the provisions of Regulation 1/2003 (and by that – with the Treaties) and, consequently, the Commitments will be completely ineffective in terms of the aims officially pursued by the Commission in Proceedings. These defects will allow Gazprom to maintain its current attitude of non-compliance with EU competition law. The Commitments would fail to bringing Gazprom’s infringements to an end, while at the same time they could be easily fulfilled by Gazprom in formal terms.

VI.1. None of the proposed Commitments bring the infringements of Gazprom to an end³⁷

- (117) As it was already initially raised by PGNiG, the Commitments in their present version fail to bring the infringement to an end. As it stems from Article 9 (1) of Regulation 1/2003, commitments might be offered “*where the Commission intends to adopt a decision requiring that an infringement be brought to an end*”. This wording refers to the Article 7, which empowers the Commission – in cases of breach of competition law – to adopt the decision, imposing “*any behavioral or structural remedies, which are proportionate to the infringement committed and necessary to bring the infringement **effectively** to an end*”. Remedies can be either imposed directly by the Commission (Article 7 of the Regulation 1/2003) or proposed by the undertaking itself, under Article 9 of the Regulation 1/2003. Since the Regulation 1/2003 does not differentiate the requirements of those two legal tools in terms of their effectiveness, commitments offered by an undertaking suspected of anticompetitive behaviour have to guarantee that its practice is going to be changed and the questioned behaviour shall no longer take place. This is a *conditio sine qua non* for deciding that “*there are no longer grounds for action by the Commission*”.
- (118) The view presented above is strongly supported by the doctrine. According to T. Graf and D.R. Little: “[r]egulation 1/2003 does not simply state that the remedy must bring the infringement to an end, but it must bring the infringement >effectively< to an end. Accordingly, remedies need not merely mirror the infringements that they are intended to address. The inclusion of the word >effectively< in Article 23 of Regulation 1/2003 provides a legal basis for the Commission to impose requirements that not only put a stop to the infringement committed, but are apt to address the wider anticompetitive distortions caused by the infringement”³⁸. Such approach is also supported by the CJEU, which held that if anticompetitive effects persist beyond the cessation of the conduct which caused them, the Commission remains competent to take action to “eliminate or neutralize” such effects³⁹.
- (119) With utmost regret, PGNiG states that the Commitments have not not met that condition. Not only do the Commitments provide no significant change in Gazprom’s anticompetitive practices – in fact they **do not provide any change in the competitive situation on the market for upstream supply of natural gas to**

³⁷ PGNiG refrains from assessing the Commitments designed for the Bulgarian gas market.

³⁸ F.E. González-Díaz and R. Snelders (eds.), *EU Competition Law, Volume V, Abuse of Dominance Under Article 102 TFEU* (Clayes & Casteels, 2013), para 12.13.

³⁹ Judgment of the Court of 21st of February 1973 *Europemballage and Continental Can Company v Commission*, case 6/72 paras 24-25; Judgment of the Court of 4 March 1999 *Ufex and others v Commission*, case C-119/97 P, para 94.

Poland, which was distorted due to a long period of Gazprom's various infringement of competition law.

- (120) Firstly, it is difficult to understand why the Commission decided to abandon any form of the commitments referring to enforcing unrelated commitments by Gazprom on the infrastructure (the Yamal Pipeline) by tying them with supplies negotiations. As it will be explained in detail in sections (159)-(170), there is no legal ground preventing the Commission from demanding commitments from Gazprom. Even if there were legal grounds for such an approach (or legal obstacles preventing from adopting any remedies/commitments), then it would constitute a ground for imposing a fine on Gazprom under an Article 7 decision for actions that cannot be attributed directly to the Russian Federation and its organs **[Business Secret]**. Therefore, should the Commitments in their present form be accepted, the Commission will allow Gazprom to make further profits from the continuous breach of EU competition law and by doing so the Commission will fail to fulfil its obligations as the "Guardian of Treaties".
- (121) In terms of the objections concerning excessive pricing applied by Gazprom to its CEE Customers, the **Commitment to introduce or improve the price revision clause is by its very nature incapable of bringing infringement to an end**. The main assumption of the proposed mechanism is to give a Gazprom's customer **only a possibility** of avoiding price exploitation by Gazprom, making it conditional on Gazprom acceptance of the price revision offer (to which Gazprom has absolutely no incentive under the proposed Commitment) or on an action of third party (ruling of the arbitration tribunal). Moreover, in some (if not all) cases (this is certainly the case of PGNiG) **the Commitment is actually aimed at exacerbating the situation of the customer**. Therefore, accepting this Commitment can even be described as taking a step backwards by both Gazprom and the Commission (as it has initially accepted such a proposal) in developing the undisturbed competition on the upstream supplies markets for CEE.
- (122) **[Business Secret]** The present wording of the revision clause proposed by Gazprom contains no such mechanism. It means that, by accepting offer of introducing such clause in its contract, a customer of Gazprom has to give its consent to be exploited by Gazprom in the period between submitting a reasoned request for a price revision and the actual revision, as such a revision refers to prices paid after the day of the agreement or the tribunal's award.
- (123) On the other hand, Gazprom will have absolutely no incentive to accept a request to revise a price in the course of negotiations. Moreover, it will have an incentive to prolong the negotiations as long as possible, forcing its customer to file a claim before the arbitration tribunal and await the ruling, which takes even up to 4 years, according to PGNiG best knowledge. The proposed Commitment provides therefore a mechanism that is already routinely used in its relations with counterparties seeking a price adjustment of long-term contracts – the prolongation of negotiations in order to check whether the customer will endure the financial pressure resulting from excessive price and then propose a decrease of the price that is significantly smaller than would be achievable in the arbitration proceedings. Even if such strategy of Gazprom fails (the customer endures the pressure), under the Commitment Gazprom will be entitled to keep profits from excessive pricing, gained in the period between the submission of request for the price revision and the actual revision (most likely –

after the award of the tribunal). As it was indicated, this period might be very long, up to 4 years (4 winter seasons). Therefore, the customer is exposed to an additional risk of changing market circumstances as time passes. In the end, the circumstances invoked by the customer might not be relevant on the day, on which the award of the tribunal is given. This may lead to the situation, in which the customer will suffer from price exploitation by Gazprom and will have to incur additional costs of arbitration with a serious risk that – due to factors beyond its control – it will lose.

- (124) Such a mechanism creates barriers for customers preventing them from exercising the price revision clause and gives absolutely no incentive for Gazprom to comply with EU competition law in terms of pricing policy. It does not bring the infringement to an end. It even **exacerbates** the contractual position of some of the contractors of Gazprom, including PGNiG. Therefore, if this Commitment were to be made binding on Gazprom, and Gazprom were to send an offer of implementing that kind of price revision clause into the Yamal Contract, **PGNiG would refuse to accept such an offer**. We are also convinced, that every other contractor of Gazprom that enjoys the price revision clause with retroactive effect on request will to refuse to accept such an offer as well.

VI.2. The Commitments can be easily fulfilled without a real change of anticompetitive practice by Gazprom

- (125) As it was already proven by PGNiG, the Commitments will not bring the infringement to an end, as required by Regulation 1/2003. Importantly, they are ineffective in providing a barrier for further abuses by Gazprom. The deterrence effect of potential breach of the Commitments does not exist either, as Gazprom will be able to continue infringements of the EU competition law, identified by the Commission while being formally in line with the Commitments.
- (126) The Commitment concerning charging unfair prices requires Gazprom to make an offer to either implement a price revision clause into existing contracts or offer such a clause in new contracts. It does not require any change of pricing policy or actual change of formulas that are currently contained in contracts with customers in CEE. Therefore Gazprom is still going to be able to charge unfair, excessive prices on customers in CEE Countries, including PGNiG, without breaching the Commitment.
- (127) Also the Commitments concerning market segmentation⁴⁰ provide only actions requiring the submission of an offer to change the contracts by:
- a. removing the destination clauses from existing contracts in CEE Countries,
 - b. ceasing to from offer contracts including such clauses in the future to the customers in the CEE Countries,
 - c. providing a possibility for certain customers in CEE Countries to off-take gas in additional delivery points to Baltic states (Kotlovka) and/or Bulgaria (Negru Voda).
- (128) Notwithstanding PGNiG's critical opinion of the nature and effectiveness of the above mentioned Commitments, it has to be noted that Gazprom is still in a position to

⁴⁰ Again, PGNiG is not assessing part of the Commitment that refers to Bulgarian market.

hamper the trade not only between the Member States of the EU within CEE region but also between the CEE Countries and other EU Member States (i.e. with Germany or Netherlands, with their most liquid markets in EU). In order to achieve that goal it can restrict volumes delivered to CEE as it did in the 2014/2015 winter season). In this context, PGNiG would like to draw the Commission's attention once again to the facts presented in sections (32)-(33). The strong influence of Gazprom on the infrastructure in Western Europe (via combination of shareholders rights and supply contracts with other shareholders), which is crucial for supplying CEE Countries in case of disruptions or cessation of supplies from the east, will present a strong incentive for Gazprom to continue the abuse, as exercising its rights and influence on that infrastructure is not covered by the Commitments.

- (129) Since there are no Commitments that refer to tying infrastructure with supplies and obtaining unrelated commitments from PGNiG on the Yamal Pipeline, it is certain that Gazprom's abuses are going to be continued on that field.
- (130) All of the above mentioned factors prove that **an Article 9 decision basing on the Commitments will not constitute even a minor burden for Gazprom that would be capable of preventing current abuses and committing new ones, due to Gazprom's dominant position on the markets for upstream supplies in CEE Countries.**

VI.3. Commitments concerning removing the re-export or resale ban clauses are merely an already broken promise to respect EU competition law

- (131) As it was pointed out in section (105)-(106), Gazprom was already charged with breaching EU competition law by using the destination clauses in contracts with customers from EU, thrice. Despite full awareness that the destination clauses included in other contracts in the western and eastern part of the European Union constitute a breach of EU competition law of the same nature and gravity and cannot be objectively justified, Gazprom did not remove them from its contracts with CEE Customers.
- (132) Therefore, accepting a Commitment to remove those clauses from existing contracts with CEE Customers amounts to the same action that was undertaken over 10 years ago. In PGNiG's view, the extent of effective impact on competition in EU internal market will be the same – namely none. Understanding that the Commission is not in a position to firmly enforce the competition law in CEE Countries, Gazprom will continue to infringe it.

VI.4. The Commitments are too narrow in their geographical scope to be effective

- (133) The CEE Countries are highly dependent on supplies of natural gas from outside of this region. There are two main directions of supplies: East and West. For natural reasons, Gazprom controls the eastern routes of supplies to the CEE Countries. However, it also aims at controlling or at least maintaining strong influence of Western routes of supplies to CEE.

- (134) As it was mentioned earlier, expansion of NS1 and NS2, together with the control over German underground storages Catherina, and its influence on Gascade provides Gazprom with a possibility of blocking supplies to Poland and other CEE Countries without hampering the supplies to the western part of the EU.
- (135) A situation in which Gazprom controls – or is going to gain control over –the routes of supplies to CEE Countries from both East and West should be taken into account by the Commission in applying the Article 9 in the Proceedings. This would allow Gazprom to use its dominant position to effectively cut off the supplies to CEE Countries in order to continue to impose excessive prices or prevent re-exporting gas or other unfair contractual conditions. Moreover, by reversing the flow of gas from East-West to West-East direction and by changing delivery points for customers in CEE Countries to those located on their western borders, Gazprom will compete for transmission capacities to CEE Countries with companies from Western Europe. Since Gazprom is a significant supplier for companies like E.ON., OMV, ENI and others, and those companies cooperate closely also on infrastructural projects (like NS1 and NS2), such situation creates incentive for anticompetitive agreements between those entities and for unilateral actions of Gazprom aimed at restricting competition in CEE Countries.
- (136) PGNiG believes that above mentioned arguments are grounds for expanding the geographical scope of the Commitments. In order to achieve minimum degree of effectiveness required by the Regulation 1/2003, the Commitments should cover the whole territory of EU. In some cases, in order to achieve the legitimate goal of protecting competition in CEE, it is also reasonable and proportionate to expand the geographical scope of the Commitments outside of the EU, to countries that are connected with EU via the existing infrastructure, namely the Energy Community Member Countries.

VI.5. The Commitments on removing market segmentation do not refer to specific problems of upstream market for supplies of natural gas to Poland caused by Gazprom

- (137) As was raised by PGNiG, the current version of the Commitments does not address any of the problems of the Polish gas market arising from abuses by Gazprom. It is known by the Commission that the destination clause was removed from the Yamal Contract (and Intergovernmental Agreement) in 2010, when Amending Annex no 35 was signed. PGNiG reminds, that although Gazprom was perfectly aware of the illegality of such clause, it nevertheless demanded concessions for removal of this clause. Since 2010 there was no attempt to reintroduce such clause to the Yamal Contract. Therefore, the Commitment is already fulfilled.
- (138) The Commitment to remove such clauses from contracts with other CEE Customers (as well as the ban on implementing them in new contracts with customers in this region) are not going to affect in any way the situation on the Polish market, since there are no significant interconnections between the Polish and other CEE Countries

markets⁴¹. Gas trade, based on the physical and firm flow of gas between these EU Member States will be possible upon the completion of the following projects:

- a. Poland-Ukraine interconnector,
- b. Poland-Czech Interconnection,
- c. Poland-Slovakia Interconnection,
- d. Poland-Lithuania Interconnection,
- e. Baltic-connector between Finland and Estonia,
- f. Enhancement of Estonia-Latvia interconnection,
- g. Greece-Bulgaria Interconnector,
- h. Slovenian-Hungarian interconnector.

(139) However, the listed projects are not going to be completed before 2020-2022. Over the next couple of years any trade between CEE Countries will actually be possible only via Gaspool, Central European Gas Hub or NetConnect Germany.

(140) Therefore, the removal of the destination clauses does not have any potential of affecting competitive situation on the Polish market in the nearest future. Taking this into consideration, this Commitment fails to meet the necessary criterion of effective end of Gazprom's infringement of Article 102 TFEU on the Polish market.

VI.6. Commitments concerning the change of delivery points (Kondratki/Kotlovka swap) do not provide any real benefits for the Baltic States and Poland

(141) With respect to the Commitment to change the delivery point, PGNiG would like to stress that the proposed mechanism, the so called "service fee" and the structure of gas supplies to Baltic States, make the Kondratki/Kotlovka swap economically ineffective for a supplier like PGNiG and inefficient in terms of removing competition disruptions in Poland. First of all, the Kondratki/Kotlovka swap provides – via Gazprom – "competition" between gas provided by Gazprom itself. It has to be noted that:

- a. Gazprom has full knowledge of the prices paid by its contractors on all of the markets concerned (Poland, Lithuania, Latvia, Estonia);
- b. According to the present version of the Commitment, Gazprom has to be notified of the will of performing the swap (and has to give its consent) at least 6 months before the commencement of supplies to the new delivery point;
- c. Gazprom profits from additional margin (so called "service fee") for providing such a possibility.

(142) Due to the above mentioned factors Gazprom will be able – and incentivized – to hinder any attempts by PGNiG (or other customers) to actually deliver any quantities of gas to the Baltic States. Knowing (well in advance) the prices of gas for its customers on every market concerned, as well as the characteristics of the product

⁴¹ The only existing interconnection (Stork) between Poland and Czech Republic has the capacity of 0.5 bcm per year.

(quantity, off-take profile throughout the year, etc.⁴²), Gazprom might be able to assess to which client(s) PGNiG (or other contractor) is planning to supply gas (especially if a previous supplier will signal its will to lower its orders by a corresponding quantity). It will then be able to approach such a client in order to propose a better price itself and take-over the client either before the commencement of supplies or after the contract with PGNiG (or other contractor) is terminated.

- (143) Another factor that has to be taken into account is the increased risk arising from the structure of the markets of Baltic States. There is no liquid trading point for gas (like TTF or Gaspool) available for those markets, where PGNiG (or other contractor) could sell its gas at the market price in case of any problems with off-take by the customer. Without a liquid market, selling gas (especially if the quantity is significant) on a short notice is hampered or even impossible. In such case, PGNiG (or other contractor) faces increased risk of paying contractual penalties resulting from the take-or-pay clause in the contract with Gazprom.
- (144) Moreover, the fact that potential supplier to the Baltic States has to order at least 100 mcm of gas per year constitutes yet another deterring factor. Such quantity of gas amounts to⁴³:
- a. 3,5% of Lithuania's annual consumption,
 - b. 10,5% of Latvia's annual consumption,
 - c. 20% of Estonia's annual consumption,
 - d. 6% of annual industry consumption in all Baltic States,
- (145) Data presented above shows that, in order to enter Baltic gas markets, a new entrant would have to either enter into a contract with domestic shipper or be able to win – before entering the market – a significant number of final customers. For that reason the Kondratki/Kotlovka swap provides a significant risk of entry, which is even aggravated by the “service fee”.
- (146) Regarding the “service fee”, it needs to be noted that the Commission and Gazprom has failed to provide any form of argumentation supporting the fixing of the “service fee” on the level of EUR 8 per 1.000 cubic meters. This failure prevents the customers of Gazprom (like PGNiG) from being able to point out factors that should not be taken into account in calculations and resulted in an excessively high price for the swap operation.
- (147) Excessiveness of the “service fee” can be demonstrated by a simple comparison of prices for customers in Poland, Lithuania, Latvia and Estonia. The following diagrams show gas prices for domestic consumers in Poland, Lithuania, Latvia and Estonia depending on the amount of consumption. The first part represents prices for clients whose consuming between 5.55 MWh and 55.55 MWh (20 GJ and 200 GJ) and spreads between particular countries. The second part illustrates analogical data for clients consuming over 55.55 MWh (200 GJ).⁴⁴

⁴² Such data, under the commitments and contracts should be provided to Gazprom in order to perform the swap.

⁴³ Data on the basis of: <https://www.iea.org/qtf/>

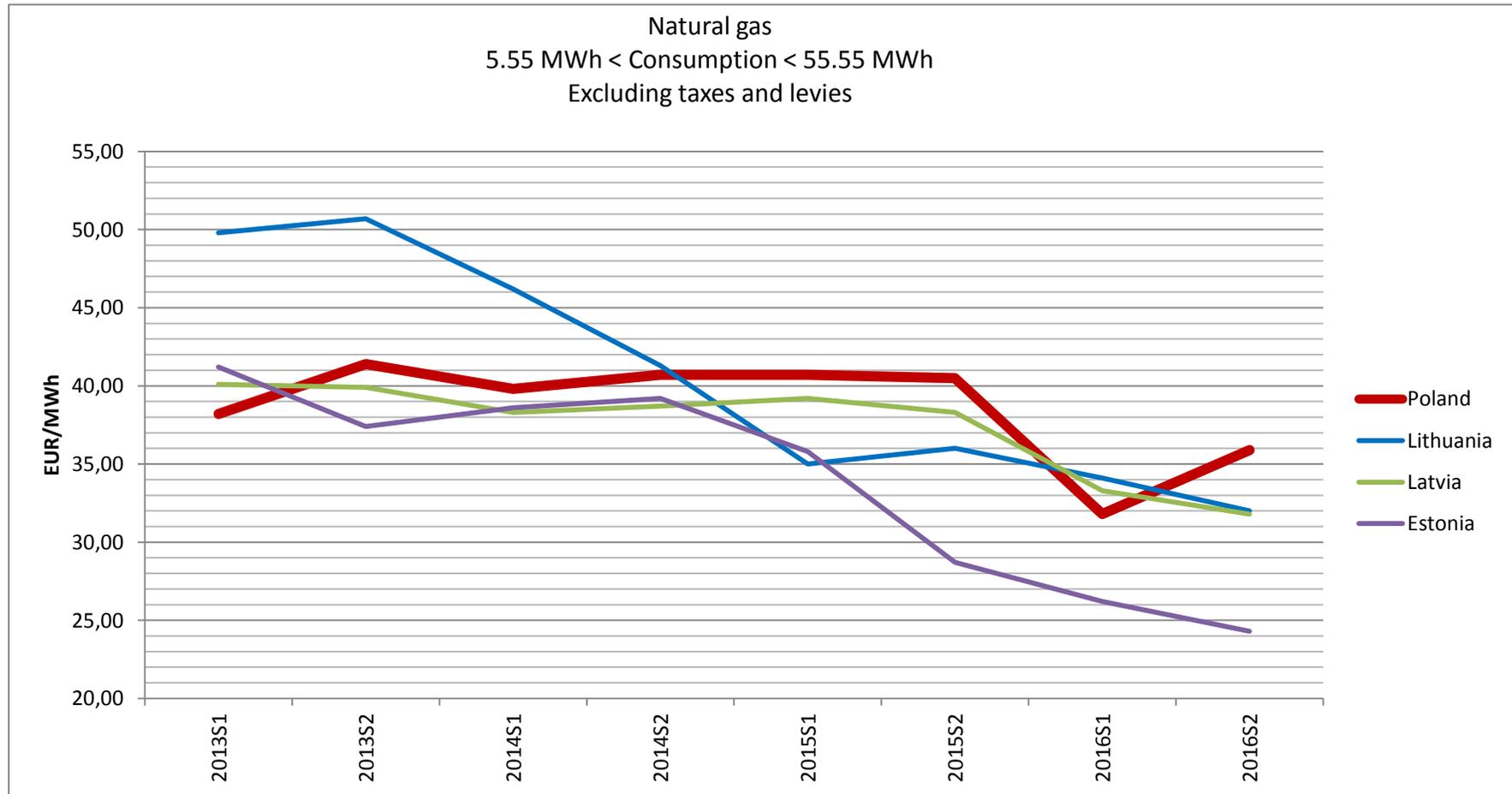
⁴⁴ Source: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nrg_pc_202&lang=en

GEO/TIME	2013S1	2013S2	2014S1	2014S2	2015S1	2015S2	2016S1	2016S2
Estonia	41.20	37.40	38.60	39.20	35.80	28.70	26.20	24.30
Latvia	40.10	39.90	38.30	38.70	39.20	38.30	33.30	31.80
Lithuania	49.80	50.70	46.20	41.30	35.00	36.00	34.10	32.00
Poland	38.20	41.40	39.80	40.70	40.70	40.50	31.80	35.90

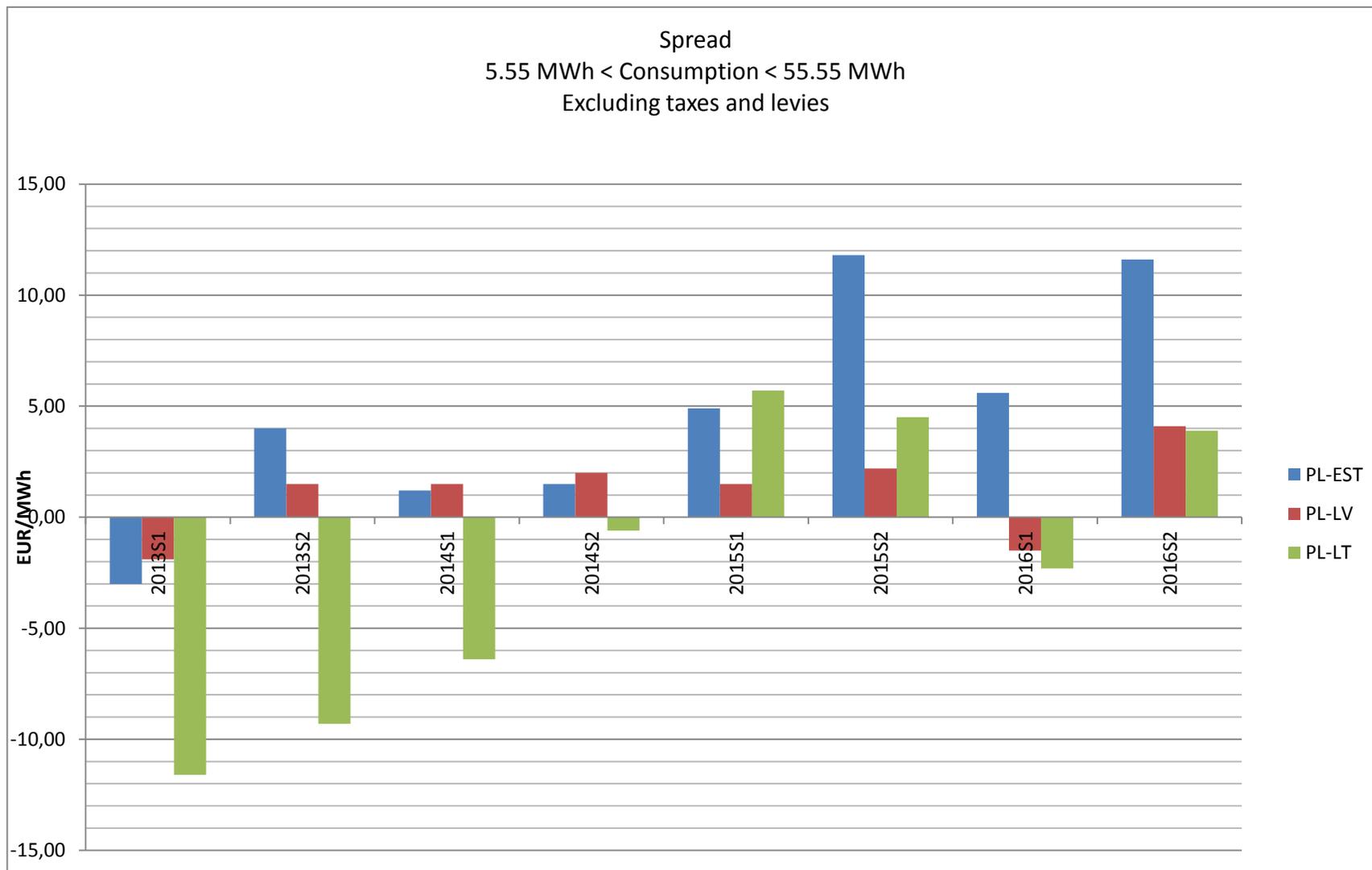
Table 1. Product: Natural gas || Consumption: from 5.55 MWh to 55.55 MWh || Unit: megawatt-hour || Tax: Excluding taxes and levies || Currency: Euro

GEO/TIME	2013S1	2013S2	2014S1	2014S2	2015S1	2015S2	2016S1	2016S2
Estonia	39.8	34.1	36.8	36.2	35.4	26.3	24.3	21.5
Latvia	39.9	39.6	38.1	37.9	39.1	38.3	33.3	31.8
Lithuania	44.6	41.5	38	33.8	35	36	34.1	32
Poland	37	40.1	39	39	40	38.8	29.5	30.8

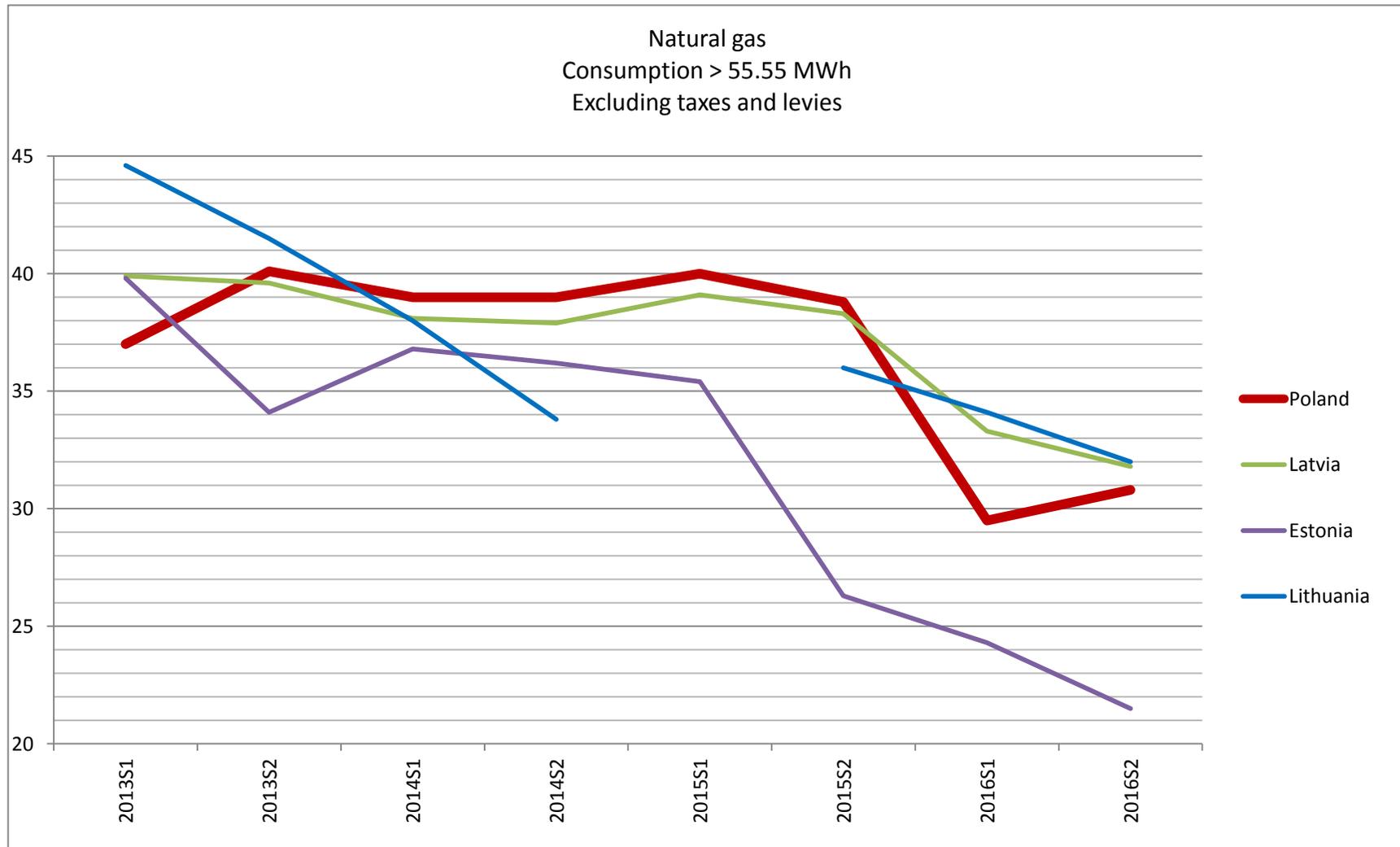
Table 2. Product: Natural gas || Consumption: from 5.55 MWh to 55.55 MWh || Unit: megawatt-hour || Tax: Excluding taxes and levies || Currency: Euro



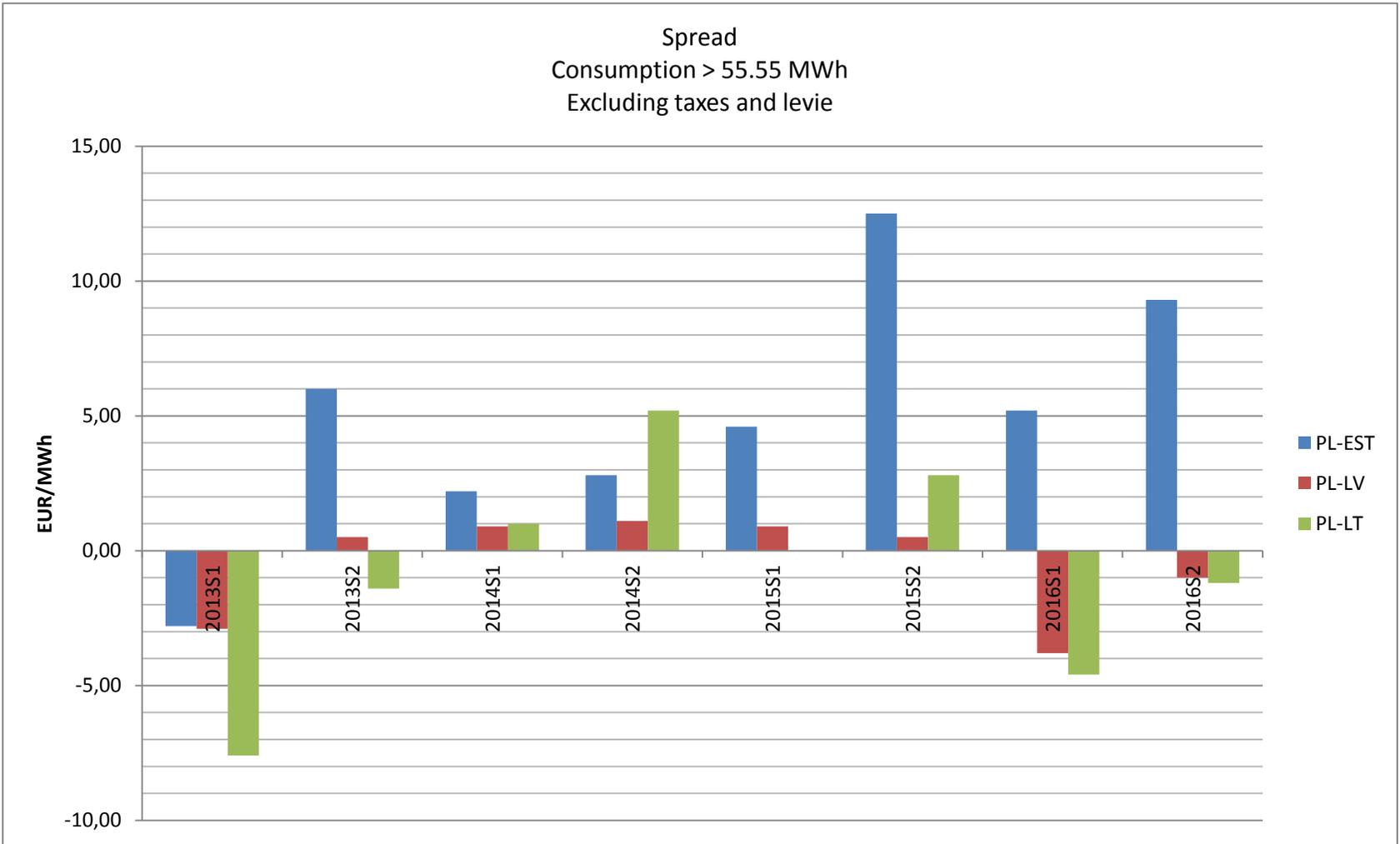
Graph 4. Comparison of gas prices in Poland and Baltic states (for customers using 5.55-55.5 MWh/y)



Graph 5. Comparison of gas prices spreads' in Poland and Baltic states (for customers using 5.55-55.55 MWh/y)



Graph 6 Comparison of gas prices in Poland and Baltic states (for customers using over 55.55 MWh/y)



Graph 7 Comparison of gas prices spreads' in Poland and Baltic States (for customers using over 55.55 MWh/y)

- (148) Another argument proving the excessiveness of service fee for the Kondratki/Kotlovka swap is the fact that, according to the best knowledge of PGNiG, natural gas would not actually be transmitted from Kondratki to Kotlovka, but would enter territory of Belarus via pipeline parallel to the Yamal Pipeline⁴⁵ and go directly to Kotlovka. Distance from the place where the Yamal Pipeline and pipeline to Kotlovka separate is respectively⁴⁶:
- a. To Kotlovka – approx. 150 km;
 - b. To Kondratki – approx.. 300 km.
- (149) Since in case of the Kotlovka delivery point the distance is shorter, the cost of transmission of 1000 cubic meters of gas **should actually be lower**. This would rather constitute a ground for granting a rebate to the customer than a ground for demanding additional payments. This is supported by the fact that Gazprom gives its customers a certain flexibility with respect to off-take in supply contracts, so it takes into account that certain quantities of gas will not be transmitted via pipelines and that capacity reserved for the purpose of this transmission will not be used. Moreover, in this context it has to be noted that the owner of the Belorussian section of the Yamal Pipeline is GTB – Gazprom’s 100% subsidiary, so the actual costs of swap stay within the Gazprom corporate group anyway.
- (150) Finally, if one compares the service fee for transmission between Kondratki and Mallnow (i.e. 0.58 EUR/MWh which is equal of 6 EUR per 1000 cubic meters GOST⁴⁷) with the prices of transmission via Belorussian transmission system that is two times cheaper⁴⁸ and the distances: Kondratki-Mallnow (684 km) and Kondratki-Kotlovka⁴⁹ (600 km) then it is even more striking that “service fee” level is drastically excessive.
- (151) Considering all the arguments presented above, it has to be concluded that no objective explanation exists that would allow to charge such amount of the “service fee”.
- (152) **The combination of the factors presented above constitutes a significant barrier to entry on to the Baltic States gas markets for Gazprom’s customers on the basis of the Kondratki/Kotlovka swap as proposed in the current version of the Commitment.** The conditions, under which the said swap can be performed, are deterrent for the customers of Gazprom (like PGNiG) and do not incentivize Gazprom to comply with competition law. On the contrary, they incentivize Gazprom to obstruct attempts of its customers to enter the Baltic States gas markets. The mechanism of the Kondratki/Kotlovka swap and the characteristics of the Baltic States’ gas markets also constitute risk-aggravating factors influencing the price that customers of Gazprom will have to calculate. Finally, even if such customers succeed in their market entry attempt(s), Gazprom will additionally benefit from such a fact anyway, as the level of service fee is unjustifiably high and does not relate in any way to the real

⁴⁵ According to the best knowledge of PGNiG, the Yamal Pipeline is isolated from Belarussian gas system (there is no physical connection between the pipeline and gas system).

⁴⁶ Estimates based on the maps.

⁴⁷ According to the tariffs given by EuRoPol. The tariff price has been converted to the EUR currency on exchange rate provided by the National Bank of Poland on 19th of April 2017 (4.2404 PLN per EUR).

⁴⁸ Comparison on the basis of data in IHS ENERGY: Regional power, gas, coal, and renewables/ Nord Stream 2/ September 2016

⁴⁹ Assuming that gas would physically flow from Kondratki to Kotlovka.

costs of performing the swap. In the end, final customers will not benefit from increased competition as customers of Gazprom will not be able to fully compete in one of the most important aspects of supplies – the price.

- (153) **Therefore, the proposed Commitment is completely inefficient in terms of bringing the infringement effectively to an end, inter alia with respect to the Baltic States' markets. It doesn't provide any substantial improvement on the market for upstream gas supplies to Poland either.**

VI.7. The proposal of the price revision clause does not provide any protection against price exploitation

- (154) As it was already pointed out in sections (121)-(123), the proposed price revision clause does not provide a retroactive effect of submitting a request for price revision.
- (155) PGNiG would like to draw the Commission's attention to the possibility that Gazprom proposed the Commitment, which deliberately does not refer to the question of retroactivity of the price revision request in order to address this issue after the end of the market test, as a mean of acting in a "spirit of compromise". PGNiG asks the Commission not to treat that probable step – if it is made – as a concession but rather as a fixing of a fundamental defect in the price revision clause. Such effect should be a standard, due to the factors described in sections (121)-(123) . PGNiG regrettably notes that the Commission failed to recognize the importance of this element despite having access to, inter alia., documents concerning negotiations between PGNiG and Gazprom in 2006, where the issue of the retroactivity was fundamental to the progress of the negotiations.
- (156) However, the lack of retroactive effect of the price revision request is not the only flaw of this clause as proposed by Gazprom. Firstly, the proposed price revision clause still includes a substantial number of imprecise terms, that can be interpreted in a different manner by Gazprom and its customers in the course of negotiations and arbitration proceedings. For instance, it is not clear what the scope of "European gas market" is or what the criteria of "general acceptance" of liquid gas hubs of continental Europe are. It is also unclear how "having due regard to all characteristics of natural gas supplied under the Contract" should be put in practice. Secondly, market prices based on indexes of liquid hubs in the EU (including UK hub) are presently the basic, objective and reliable criteria for the determination of the price level for European customers. However, according to the Gazprom's Commitments wording, market prices in gas hubs are only one of the criteria (and certainly not the most important). Thirdly, according to Gazprom's proposal, the revised contract price will be determined inter alia by reference to the average weighted import prices in only three countries (Germany, France, Italy). It means that customers of Gazprom are deprived of reference to other significant gas markets of Western EU (e.g. the United Kingdom, the Netherlands or Belgium), which might be relevant in case of certain customers or in certain market circumstances.
- (157) In addition, the Commitment in the present form provides a general sample of the price revision clause, which might not be suitable for each and every specific contract. Its general wording combined with the fact that it does not refer to all aspects covered by price revision clauses in different contracts (e.g. like in the Yamal Contract)

provide an incentive to Gazprom to attempt to change such clauses in a way that will not be directly contravening the Commitments but will exacerbate the position of its customers. The negative effect may also result from the fact that authentic languages of the contracts of customers from CEE Countries are usually their national languages and most probably Russian. Since the wording is of crucial importance in such matters, the Commitments should ensure that there will be no conflicts relating to the translation and language interpretation of such clauses.

VI.8. The Commission accepted the lack of commitments regarding to unrelated concessions gained by Gazprom in connection with the Yamal Pipeline, without any substantial reasoning

- (158) One of the Commission's concerns investigated in the Proceedings is that Gazprom leveraged its dominant market position on the gas supply market to obtain advantages relating to access to or control of gas infrastructure. With respect to this allegation, Gazprom offered a commitment concerning Bulgaria. Despite the fact that this allegation also concerns Poland, the offered commitment does not cover Poland and the Yamal Pipeline. As stated by the European Commission in a press release related to Poland (the "Press Release"): "*As regards Yamal Pipeline, the Commission's investigation has shown that the situation cannot be changed by this antitrust procedure due to the impact of an intergovernmental agreement between Poland and Russia*". PGNiG cannot agree to such approach.
- (159) First of all, this statement has not been supported with any substantial legal argumentation. Therefore, the argumentation presented below is provided without knowledge of real grounds behind the Commission's reasoning", as PGNiG is still deprived of access to the Statement of Objections, despite several requests, as well as access to the Commission's reasoning concerning the lack of commitments in this respect.
- (160) Moreover, the Commission's and Gazprom's approach is inherently incoherent. Gazprom offered not to claim USD 70 million from BEH⁵⁰. According to the best knowledge of PGNiG, such a claim could be linked to the intergovernmental agreement between Russian Federation and Bulgaria. Therefore, it is absolutely unclear why Gazprom cannot provide any commitments resolving competition concerns arising from its anticompetitive conduct in Poland, while it can do the same thing with respect to Bulgaria.
- (161) PGNiG is of the opinion that the Intergovernmental Agreement does not exempt Gazprom from the obligation to comply with EU competition law, including with Article 102 TFEU, and also does not preclude the Commission from enforcing the EU competition law.
- (162) Specifically, there are no EU regulations that would exclude the application of EU competition law to undertakings which operate in the areas or sectors to which intergovernmental agreements relate. This argument is corroborated by the commitment proposed with respect to South Stream, where, in antitrust proceedings, the Commission has not intervened with respect to an intergovernmental agreement

⁵⁰ Bulgarian Energy Holding EAD.

(its intervention has been effected under separate proceedings) and the commitment exclusively concerns a civil-law contract between private parties entered into, as stated in the Intergovernmental Agreement.

- (163) In this context, it needs to be noted, that article 351 TFEU, applies to at Member States, not undertakings, should certainly not be considered as an exemption from applying EU competition law. This view is supported by the CJEU⁵¹, which stated that Article 351 TFEU (then Article 234 of the EC Treaty) is not intended to confer rights on individuals. Therefore, Gazprom may not, in its defence in Proceedings, refer to Article 351 TFEU, since it has not been granted any rights under this provision. On the contrary, based on Article 3.1 (b) TFEU, the European Union has exclusive competence with respect to the establishment of competition rules necessary for the functioning of the internal market, which, inter alia, includes the territory of the Republic of Poland⁵². Therefore, the Commission has fully-fledged competence to regulate civil-law relationships in order to bring them into line with EU competition law.
- (164) The Intergovernmental Agreement is a document which should be interpreted as a declaration which only expresses the political will of both signatories⁵³, i.e. the Government of the Republic of Poland and the Government of the Russian Federation, regarding the transit and supply of gas to the Republic of Poland. As such, it may not be deemed as a source of rights and obligations which would be binding on the signatories to this agreement.
- (165) In addition, since the Intergovernmental Agreement has only been signed and not ratified, it also does not constitute a source of universally binding law of the Republic of Poland⁵⁴ which would be binding on private undertakings such as PGNiG or Gazprom. Irrespectively, the Intergovernmental Agreement includes a range of political declarations concerning the support for the Yamal Pipeline project and gas supplies to Poland, while it does not include any provisions which could be directly applied or enforced by any undertakings. Gazprom has not achieved any advantages under the Intergovernmental Agreement, nor are any civil law obligations imposed on Gazprom thereunder. On the contrary, all of the advantages that Gazprom has achieved or obligations that have been imposed on Gazprom resulted from civil-law contracts between the relevant parties. This statement can also be implied from the Intergovernmental Agreement, e.g. under Article 3, which states that “*The detailed volumes, terms and dates of delivery of natural gas will be determined in relevant contracts between business entities of the Parties, provided that the capacity of the system of transmission pipelines, including its technical status, is taken into consideration*”. Moreover, there are no provisions of the Intergovernmental Agreement, which would directly or indirectly legally influence the Yamal Contract (including the amendment process of the Yamal Contract). Similarly, no provisions of the Yamal Contract influence the Intergovernmental Agreement or require its modification. Therefore, Intergovernmental Agreement and the Yamal Contract cannot be regarded as interdependent.

⁵¹ Please see the judgements of the Court in cases: T-2/99 T.Port v. Council of the European Union, ECR 2001 II-02093 para 83 and T-3/99 Banatrading GmbH v. Council of the European Union, 2001 II-02123, para 78.

⁵² Article 52 (1) and (2) of the Treaty of the European Union in connection with Article 355 of the Treaty.

⁵³ Please see the example expressions: ‘The Parties, wishing to create conditions (...), support the establishment (...); ‘The Parties will foster (...) amendments to the Articles of Association of EuRoPol (...).’

⁵⁴ Pursuant to the Polish Constitution, aside from the Constitution itself, statutes and regulations, only ratified international agreements constitute sources of universally binding law of the Republic of Poland.

- (166) Nevertheless, even if it could be stated that the Intergovernmental Agreement granted Gazprom certain rights, including those related to access to or control of gas infrastructure, the Intergovernmental Agreement does not regulate the matter of how Gazprom should exercise such rights, including the rights of a shareholder of EuRoPol. Moreover, since the agreement relates to the territory of the Republic of Poland (i.e. a part of the internal market), Gazprom should not use such rights in a way that is incompatible with the EU competition law, including Article 102 TFEU. If it does so, such incompatibility should be examined and penalized by the European Commission in the same manner as it would be examined and penalized in case of any other undertaking infringing the EU competition law (in case of the infringement of Article 102 TFEU – as well as any other undertaking infringing its dominant position on the internal market in so far as it may affect trade between Member States).
- (167) An intergovernmental agreement, especially being a declaration, not a source, of rights and obligations, may not preclude undertakings from applying the EU competition law to their actions which have an effect on the internal market. There is no EU regulation that would exempt the application of EU competition law towards undertakings conducting operations on the internal market and/or towards undertakings whose actions would have an effect on the internal market.
- (168) The Commission has expressed concerns not about the international agreements, but about the fact that Gazprom leveraged its dominant market position on the gas supply market to obtain advantages relating to access to or control of gas infrastructure. As we have indicated in the Complaint, in its negotiations with PGNiG, Gazprom has been tying issues of a purely commercial nature with infrastructure-related commitments described in particular in section 75 of the Complaint. Since PGNiG was (and is) dependent on supplies of gas by Gazprom, Gazprom refused to supply additional quantities, making such additional supplies conditional on certain concessions and commitments, as described in section 75 of the Complaint. Such refusal of supply and taking advantage of its leverage constitutes an infringement of Article 102 TFEU by Gazprom. As mentioned in the Complaint, there is a substantial likelihood that Gazprom could commit similar infringements in the future.
- (169) The Proceedings conducted by the Commission should therefore ensure that by way of the implementation of the commitments, such infringement would be brought to an end, specifically by preventing Gazprom from benefiting from the advantages it has achieved through its infringement of Article 102 TFEU. We strongly believe that there are no legal obstacles under EU law that would prevent the Commission from intervening in this respect.
- (170) However, if it is not possible to make a commitment in this scope, this argues in favour of issuing an infringement decision. Pursuant to Article 9 of the Regulation 1/2003, the Commission may impose a commitment on the undertaking concerned if the undertaking concerned offers a commitment to meet the concerns expressed to it by the Commission. In the present case, no commitment has been offered that would meet the concerns expressed by the Commission regarding the Yamal Pipeline.

VII. PGNiG proposal for effective commitments to be enforced on Gazprom

- (171) For the reasons stated above, PGNiG believes that the proper way to conclude Proceedings is adoption of an Article 7 decision. Nevertheless, understanding the Commission's willingness to adopt Article 9 decision, PGNiG is providing substantial proposals on the scope, nature and detailed mechanisms of the commitments that could provide a **real restoration of the normal competition on the markets for upstream supplies of gas to the CEE Countries**. In addition, PGNiG notes that the submitted propositions may also be used as remedies if the Commission were to adopt Article 7 decision.
- (172) The proposals of PGNiG aim not only at improving the Commitments that are subject to the market test but also at the adoption of additional commitments. Adopting some of the propositions would mean abandoning others as they are incapable of being jointly implemented. Therefore, after presenting all our propositions, PGNiG will also provide a "package" of the commitments, which in our opinion will lead to an effective addressing Commission's concerns.
- (173) Before presenting detailed Commitments, PGNiG emphasises, that the circumstances of the case require the adoption of far-reaching and strong commitments. PGNiG notes that the Commission is bound by the principle of proportionality and that the commitments "*must not exceed what is appropriate and necessary to attain objective sought, namely re-establishment of compliance with the rules infringed*"⁵⁵. However, the gravity of the infringement – both in legal and economic terms – as well as Gazprom's actions that fall outside the scope of the Proceedings, require providing complex and firm measures in order to restore the competition. Against this background, PGNiG wishes to invoke the decisions in ENI, RWE and E.On. cases, where the Commission, faced with significant barriers of entry to gas markets, enforced far-reaching commitment decisions with structural commitments. In the context of Gazprom's case it has to be noted that Gazprom practices are of even greater gravity than the cases mentioned above, due to the existence of parallel exclusionary practices (aimed at competitors) and exploitative practices (aimed at customers, including consumers), while in said cases only exclusionary practices raised the Commission's concerns.
- (174) Furthermore, PGNiG would like to concur with the observations of the Energy Community Secretariat⁵⁶, concerning the expansion of the geographical scope of the Commitments. In addition to legal arguments already presented in the mentioned document, PGNiG draws the Commission's attention to the fact that Energy Community countries are linked to the CEE Countries with direct infrastructure that is often controlled or influenced by Gazprom. Consequently, it has to be noted that an Article 9 decision, as a tool that requires explicit consent of the undertaking concerned to the adoption thereof, can be used to provide measures, which geographic scope is wider than the EU only.

⁵⁵ Judgment of the Court of First Instance of 28 February 2002 in case T-395/94 *Atlantic Container Line and others vs Commission*, ECR 2002 II-00875 para 410.

⁵⁶ https://www.energy-community.org/portal/page/portal/ENC_HOME/NEWS/News_Details?p_new_id=14523.

VII.1. Structural commitments addressing segmentation of the market

VII.1.1. Commitment to implement full ownership unbundling and third party access on NS1 and NS2

- (175) In order to address charges raised by the Commission against Gazprom in their complexity, PGNiG propose that the Commission use a tools that have been designed to develop and foster competition on the EU internal energy market, namely the third party access rule and the full ownership unbundling⁵⁷. The legislative process that resulted in adoption of 3rd Energy Package provided those effective instruments that can be used within the framework of an Article 9 decision. Those two elements have already proved to be efficient in providing enhanced possibilities for competition between gas suppliers in the EU.
- (176) As it was already mentioned, Gazprom controls the infrastructure necessary for imports of gas to CEE Countries, as well as the infrastructure that allows to bypass now partially and after the construction of NS2 – fully – the CEE Countries. If not remedied, such situation will provide a powerful incentive for Gazprom to continue its policy of market segmentation and will even strengthen its effects, as Gazprom will be able to provide supplies to Western Europe without any disruptions, while supplies for CEE Countries will not be equally certain. This will allow Gazprom to pursue its unfair pricing policy, regardless of any changes to the pricing mechanisms in contracts with its customer, as supply cessation/restriction blackmail will still be in place.
- (177) Introducing TPA and full ownership unbundling with respect to NS1 and NS2 can be an effective means of preventing Gazprom from infringing the EU law in the CEE Countries. By effectively granting TPA to the above mentioned infrastructure, equal conditions for all gas companies interested in transporting gas to the EU will be created. The current status of NS1 and NS2 stems from the with situation where a dominant supplier (Gazprom) is additionally granted with exclusive utilisation of that transmission infrastructure. This is contrary to EU rules, which base on equal access to transmission services for all interested market users. Fair relation between TSO, who offers transmission services and network users, being able to book capacity in a non-discriminatory way, creates the appropriate framework for competitive market. In addition, it should be emphasized that the operation of NS1 and NS2 directly influence the pipelines, which are directly connected (OPAL Pipeline and projected EUGAL Pipeline) due to the fact that only NS1 and NS2 users are interested in booking transmission capacities and those on-shore pipelines. However, it has to be noted that without full ownership unbundling, TPA might not be implemented effectively. For this reason precisely, in the commitment decisions, the Commission pursue for the divestment of infrastructural part of businesses of gas undertakings. Allowing Gazprom to keep ownership of the NS1 and NS2 may lead to a situation, which is similar to the one of EuRoPol – namely to incentivizing Gazprom to obstruct implementation and performance of the TPA rules or obstructing pro-competitive investments. Therefore, it has to be also noted that only an ownership unbundling

⁵⁷ Model of the unbundling compliant with the relevant provisions regulating the full ownership unbundling under Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

model should be enforced in respect of NS1 and NS2, as older unbundling models – ISO⁵⁸ and ITO⁵⁹ - have not provided full effectiveness.

- (178) Unbundling of the ownership of infrastructure and gas trading activity can be achieved by means of divesting shares or by assignation of certain assets to a special purpose vehicle company, which would then be sold to the external buyer that has no relations with Gazprom. Gazprom should also be prohibited from regaining any shares in or influence on this infrastructure within at least 16 years from the divestment under the Commitment Decision. In order to guarantee that TPA will be observed by the buyer, Gazprom should undertake to implement necessary changes before the divestment and provide contractual safeguards in order to ensure the application of the TPA over at least 10 years after the effective date of divestment.
- (179) The exceptional circumstances of the case, described in sections (173) above, provide a special justification for the application of such far-reaching measures. Such a commitment would remove Gazprom's incentive to arbitrary divert supplies to NS1 and NS2. In conjunction with the commitment to divestment of shares in EuRoPol it will remove this incentive permanently and provide an economic incentive to use most efficient route in economic terms to transmit gas to the Member States of EU.
- (180) Furthermore, the proposed commitment provides a resolution to the dispute concerning applicability the of 3rd Energy Package to NS1 and NS2. In this context, PGNiG notes that such dispute takes place even within the Commission itself⁶⁰. Also in this respect and Article 9 decision would benefit the EU internal market development.

VII.1.2. Structural commitment – obligation to divest infrastructural assets in order to prevent Gazprom from exerting influence on gas trading on upstream markets for gas supplies in CEE

- (181) As it was pointed out in section (41)-(66), by gaining influence on the natural gas transmission infrastructure Gazprom obtains tools to disturb or prevent normal competition from emerging on CEE markets. In the past Gazprom infringed the competition law in CEE Countries as a result of its dominant position and inability of other suppliers to compete against it. Moreover, the infringements were aimed at preventing the competition from emerging. Gazprom has been enforcing its claims to control EuRoPol, by making gas supplies conditional upon PGNiG's consent to those claims. Influence exerted on EuRoPol and Gascade enabled Gazprom to gain and use opportunities to delay the implementation of virtual and physical reverse flow on the Yamal Pipeline. PGNiG notes that similar practices of Gazprom could have been observed in Slovakia (implementation of virtual reverse on Brotherhood Pipeline) and Bulgaria (construction of South Stream, which is under scrutiny in Proceedings).
- (182) It can be noted, that Gazprom – without any respect for EU competition or energy law – is aiming at monopolizing not only gas trading in Central and Eastern Europe (namely: Germany, Austria, Poland, Czech Republic, Slovakia, Hungary, Lithuania, Latvia, Estonia and Bulgaria as well as countries of former Yugoslavia) but also the

⁵⁸ Independent system operator.

⁵⁹ Independent transmission operator.

⁶⁰ <http://www.politico.eu/pro/commission-internal-documents-on-nord-stream-2/>

routes through which gas is imported to EU as well as the infrastructure crucial for the establishment of an internal, liquid European gas market. In light of Gazprom's disrespect for competition rules, such actions constitute serious threat to the energy goals of the European Union.

- (183) Therefore, PGNiG proposes a solution that will not only bring certain infringement of Gazprom effectively to an end but will also prevent Gazprom from hindering cross-border trade and free flow of gas between the Member States of EU. **Gazprom should commit to divest all of its infrastructural assets that allow it to – directly or indirectly – exercise influence on gas infrastructure in Member States of EU. This commitment should concern all shares held by Gazprom in:**
- a. EuRoPol Gaz S.A.,
 - b. WIGA Transport Beteiligungs-GmbH & Co. KG,
 - c. Erdgasspeicher Peissen GmbH.
- (184) Gazprom should effectively divest the above mentioned assets within a maximum period of 2 years from the Commitment Decision Effective Date. Buyer (or buyers) of those assets should be approved by the Commission before the transaction, in order to ensure that the commitment is effectively fulfilled (i.e. that the buyer is not dependent on Gazprom in any way). This would also be in line with Article 9 of Gas Directive.
- (185) This commitment will effectively bring the market segmentation enforced by Gazprom to an end and will prevent Gazprom from further abuses. Gazprom will not be able to create barriers for entry to CEE Countries by influencing its contractual partners and using its rights as shareholder. The undertakings operating the pipelines on territories of Poland (EuRoPol) or Germany (Gascade) will be incentivized not to hinder free flow of gas to Poland (i.e. by blocking necessary investments). On the contrary, they will be incentivized to foster competition between various routes of supplies to Poland. **This will bring Polish customers, including PGNiG, a real benefit of competition between potential suppliers.** Since the risk of disruptions of supplies through the western route (Mallnow) will be minimalized, Polish customers will also benefit from more favourable terms of supplies, including the price.
- (186) The proposed commitment will also impact Gazprom's pricing policy. Being unable to segment the market and prevent cross-border competition by influencing undertakings operating the pipelines (Gascade) or being responsible for grid development (EuRoPol), Gazprom will have to offer to its customers in CEE Countries prices on the market level instead of excessively high prices as presently. Customers will be able to contract gas from different suppliers, who will pose a real competition to Gazprom.
- (187) The proposed commitment will meet the criterion of proportionality. It aims at preserving a legitimate goal – undisturbed competition and fostering internal gas market in the EU. It is in accordance with the principles of EU energy law providing separation of gas transmission and gas trading. It is also necessary for the achievement of the above mentioned goals, as it removes inherent incentive (influence over infrastructure) to combine of those two types of activities to abuse a dominant position.

- (188) This view on proportionality is supported by the Commission approach in the resolution of antitrust cases in gas sector. Importantly, in cases of ENI⁶¹, GdF Suez⁶² and RWE⁶³ the Commission questioned certain practices of those undertaking that had similar effects to practices of Gazprom in the this case.
- (189) In case of ENI, the management and operation of its natural gas transmission pipelines has allegedly entailed:
- a. a refusal to grant access to capacity available on the transport network (**capacity hoarding**);
 - b. an offer of capacity in a less useful manner (**capacity degradation**); and
 - c. a strategic limitation of investment (**strategic underinvestment**) in its international transmission pipeline system.
- (190) RWE's conduct based on five practices, which raised the Commission's concerns:
- a. practices concerning capacity management (refusal to supply);
 - b. wrong indication of available capacity;
 - c. inefficient capacity allocation mechanism;
 - d. elevated tariffs for network access;
 - e. asymmetric cost elements disadvantaging competitors.
- (191) GDF Suez practice comprised of:
- a. long-term foreclosure of access to gas import capacity by reservations accounted for a very substantial part of total firm import capacity in each of the balancing zones of the gas network;
 - b. explicit and implicit refusal to provide other shippers with capacities;
 - c. strategic underinvestment in additional capacity at the Montoir de Bretagne LNG terminal and by that limiting supply of import capacity to France.
- (192) All of the above mentioned practices aimed at foreclosing certain parts of EU internal market, which were covering a part of or whole Member State. In Gazprom's case, a dominant undertaking aimed at – and successfully achieved – the foreclosure of **eight** member states.
- (193) In Poland, Gazprom forced unrelated concessions concerning the control over the Yamal Pipeline, including control over investments. PGNiG draws the Commission's attention to the fact that virtual reverse flow on the Yamal Pipeline was introduced after long period of PGNiG's requests for such a service. The same situation repeated when the physical reverse flow of gas was to be introduced. In both cases Gazprom was not interested in providing such services by EuRoPol, regardless of the market demand and economic efficiency of those projects, including higher revenues for EuRoPol and Gascade (in both undertakings Gazprom holds a significant number of shares).

⁶¹ Commission Decision of 29 September 2010 in case COMP/39.315

⁶² Commission Decision of 3 December 2009 in case COMP/39.316

⁶³ Commission Decision of 18 March 2009 in case COMP/39.402

- (194) Control over the infrastructure combined with contractual provisions led to foreclosure of the Polish gas market for upstream supplies. During crisis in 2009 (caused by Gazprom itself) Gazprom already used such tools to effectively prevent PGNiG from obtaining additional supplies. In winter 2014/2015 by non-performance of the contractual obligation to provide nominated quantities of gas delivered to Poland, it aimed at cessation of export of gas to Ukraine. This step resulted in rapid and significant increase of the costs of gas supplies from Germany to Poland. If at that time Gazprom had the possibility to order deliveries to Catherina Underground Storage, it could have effectively limit or even block supplies to Poland also through Mallnow. There is no doubt that if Gazprom have such possibility in future, it will use it regardless of its impacts on the competition on the EU internal market.
- (195) With regard to NS1 and NS2 it has to be underlined that the construction of those pipelines provides significant overcapacity on gas routes from Russia. It allows Gazprom (enjoying statutory monopoly over the export of gas via pipelines according to the Russian Federation's legislation) to allocate gas flows to Western Europe in arbitrary manner and bypass CEE Countries like Poland, Czech Republic, Ukraine or Slovakia. In combination with the possibility to limit or even block supplies via Mallnow, this will pose a substantial threat to the security of gas supply to Poland. Such situation will incentivize Gazprom to abuse its dominant position against PGNiG. Furthermore, it needs to be noted that none of the Commitments proposed by Gazprom provides effective protection against such practice.
- (196) The proposed commitment will also allow to embrace the aims of European Energy Union. On 25th of February 2015 the Commission published the Energy Union package, including among others a framework strategy for the Energy Union. The objective of the energy union is to ensure greater energy security, sustainability and competitiveness in the energy sector. The framework strategy for the Energy Union sets five dimensions for the achievement of the above mentioned objectives. Energy security, solidarity and trust as well as a fully integrated European energy markets are crucial dimensions for the accomplishment of Energy Union's objectives. Any distortion of these dimensions will hinder the project. Energy security and solidarity play an essential role in ensuring immunity to external energy shocks and dependency on particular suppliers and routes. As Commission stated in a framework strategy for the Energy Union, Member States TSOs, the energy industry and all other stakeholders have to work closely together to ensure a high-level of energy security for European citizens and companies. A high-level of energy security requires more transparency and more solidarity between Member States. It should be born in mind that the spirit of solidarity in energy matters is explicitly mentioned in the Treaty and is at the heart of the Energy Union. Additionally, fulfilling the objectives of Energy Union requires the development of gas transmission system and connections between Member States.
- (197) Gazprom's actions scrutinized under the Proceedings are contrary to the above mentioned objectives of the Energy Union. Therefore, it is necessary to remove incentives encouraging Gazprom's for anticompetitive actions by providing divestment of its infrastructural assets.
- (198) On the above mentioned grounds, PGNiG believes that, regardless of whether the European Commission decides to use Article 7 or 9, such measure should be

imposed on Gazprom (as a remedy or commitment). Otherwise, the Commission will adopt a decision that will not be effective in providing either a substantial change in the market situation and real protection against further infringements of competition law against CEE Countries energy undertakings, industrial customers and consumers of gas in households.

VII.2. Behavioural commitments concerning market segmentation

VII.2.1. Commitment to refrain from blocking the development of interconnectors between the CEE Countries and EU Member States and Energy Community countries

- (199) The first proposal refers to the development of the infrastructure in the CEE Countries. As identified in ENTSOG's *Ten-Year Network Development Plan 2017*⁶⁴, countries of the region are still vulnerable to the disruptions of their main source of natural gas supply. Therefore, development of the interconnectors between CEE Countries and other EU Member (as well as neighbouring Energy Community countries) is of crucial importance to ensure proper functioning of the EU internal market.
- (200) As already mentioned, Gazprom has influence on the significant infrastructure in western part of EU being at the same time the main supplier for CEE Countries. Therefore, it has the capacity and incentives to block or delay the implementation of the investments aiming at reducing dependence of the region on the supplies from East. For this instance, it has to be noted that despite the demand, the introduction of virtual reverse flow on the Yamal Pipeline was deliberately delayed by Gazprom (by means of blocking the decision process). According to the best knowledge of PGNiG, the same approach was exercised by Gascade (on which Gazprom can exert influence), when the physical reverse was implemented. Therefore, it is to be expected that such practices by Gazprom are going to be repeated, unless the Commission introduces an effective measure ensuring Gazprom's cooperation.
- (201) Two structural remedies (or commitments) addressing this issue have already been discussed in chapter VII.1. above. The commitment proposed hereby is of behavioural nature and might be used if the Commission deems structural remedies (commitments) to be less adequate in this case.
- (202) Under the proposed Commitment, Gazprom would have to commit itself to refrain from blocking or delaying infrastructural projects realized by the CEE Countries (or undertakings based or operating therein). To that end, Gazprom should give its consents to the execution of those projects, if by any means they are necessary (e.g. the implementation of bidirectional flow of gas in Drozdowicze) within a fixed period of time from the request of a relevant undertaking. Should there be any doubts concerning any issues (for instance, environmental), Gazprom should be obliged to refer the case to the Commission for the assessment whether such doubts are reasoned.

⁶⁴ https://www.entsog.eu/public/uploads/files/publications/TYNDP/2017/entsog_tyndp_2017_main_170428_web_xs.pdf, p. 141-142, 151.

VII.2.2. Commitment to implement TPA on the Belorussian gas system in order to enable transmission of natural gas between the EU Member States via Belarus and Ukraine under transparent and non-discriminatory rules and preventing capacity hoarding

- (203) As it was presented in sections (81)-(87) of the Complaint, Gazprom fully controls GTB, an exclusive operator of transmission system in Belarus, holding 100% of its shares. It should be stressed that Belorussian gas system provides possibility of gas supplies not only from the Russian Federation to Belarus and further west (Poland, Lithuania) but could also allow gas trade among Lithuania (and Latvia and Estonia through Lithuania), Poland and Ukraine. However, due to the fact that GTB is controlled by Gazprom, the possibility of trading gas in other configuration than Russia-EU is only theoretical.
- (204) The Commission has correctly identified Gazprom's practice of isolating gas markets along national borders. In response to that, Gazprom has provided a Commitments to abandon territorial restriction clauses and a possibility to change delivery points for certain volumes of gas. However, as it has already been proven above, those Commitments are in no way capable of providing any change to the situation of CEE Countries, in particular in the Baltic states. Therefore, PGNiG has identified a possibility for another commitment by Gazprom that can bring a substantial change and remove existing barriers for gas trading within CEE Countries.
- (205) Gazprom should be committed to provide a transparent and non-discriminatory TPA on the infrastructure in Belarus, which is under its sole control. In conjunction with implementation of bidirectional flow of gas and Network Codes as described in chapter VII.2.3 below, such commitment would provide a real possibility for natural gas trading among Poland, Baltic states, Slovakia and Hungary (via gas systems of Ukraine and Belarus). In this scenario, these would be the laws of demand and supply that would determine the volumes traded among CEE Countries. Gazprom's ability to prevent the trade among those countries would be limited, as GTB's decision on the access to infrastructure would be based on the existence of free capacities only.
- (206) Such commitment should be accompanied by the commitment preventing Gazprom from capacity hoarding. In this respect, GTB should introduce "use it or lose it" rule. Moreover, Gazprom should not book capacities in a manner that would prevent trade between the EU Member States. To this end, the commitment described in chapter VII.2.8. can be applied accordingly. Also, the Monitoring Trustee functions should be expanded accordingly, allowing it to revise changes in the documents governing the transmission of gas before their implementation and issue non-binding opinions as to, whether they fulfil requirements arising from the Commitment Decision.
- (207) The proposed commitment effectively addresses the practice of market segmentation in CEE Countries and provides substantial barrier to the continuance of this practice by Gazprom. It is also proportionate, as it does not require Gazprom to provide and obey other rules than those, which are in place within the territory of the EU, where Gazprom already operates.

VII.2.3. Commitment to enable bidirectional flow of gas and application of Network Codes on the entry points to the CEE Countries from outside of EU

- (208) In order to provide a strong and effective measure dealing with market segmentation and establishing undistorted competition in a firm manner, PGNiG propose that Gazprom should be committed to implement bidirectional flow of gas and apply Network Codes on the interconnection points to the CEE Countries and their neighbouring countries of Energy Community (Ukraine and Belarus). Below, PGNiG present an exhaustive list of the entry points that should be covered by this commitment:
- a. Kotlovka,
 - b. Kondratki,
 - c. Wysokoje,
 - d. Tietierowka,
 - e. Drozdowicze,
 - f. Velke Kapuszany,
 - g. Beregovo,
 - h. Mediesu Aurit,
 - i. Issacea.
- (209) With respect to the entry points listed above, Gazprom should commit itself to submit offers to the respective TSO's relating to amendments of changing documents governing the management of those points so that both aims can be implemented effectively. In addition, it should submit offers to its customers with a view of changing its historical long-term contracts, should their provisions pose obstacles to the mentioned aims. If any action, aiming at implementation of those aims, is taken by the respective TSO, Gazprom should be bound to give its consent without any delay.
- (210) Bidirectional flow is an instrument recognized in SoS Regulation⁶⁵, as a measure designed to guarantee the security of gas supplies of the EU Member States. It allows to provide emergency supplies to a given EU Member State through one interconnection point in the event of any disruptions of supplies on other interconnection points. Ensuring the security of supplies decreases the level of risk associated with the economic activity involving gas trading with and within a given EU Member State and creates an incentive to entry by the new market players. Knowing that it is possible to sell natural gas to customers within given country and from such a country to another gives gas undertakings a flexibility of deliveries (wider range of potential customers). Such possibility is especially crucial to the states, where own gas production is low and in which most of domestic demand is covered by long-term historic contracts with Gazprom. In case where prices in a neighbouring country are higher than in a given EU Member State, it would be beneficial for an undertaking to sell gas purchased from Gazprom to this neighbouring country and – if necessary – purchase additional quantities on competitive markets in the Western Europe at

⁶⁵ Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20th of October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC

competitive market price. This would allow to benefit not only the said undertaking, but also its customers (gas could be sold to them gas at lower prices) as well as other wholesalers operating on the western markets.

(211) The EU has also developed tools designed to unify various aspects of infrastructure functioning, in order to undisturbed competition on merits for access to given infrastructure. Those tools are encompassed in:

- a. NC CAM - the implementation of auction mechanisms at cross-border IPs was crucial for the development of flexible gas trade between market zones within UE. It was a great market-based factor which enabled all interested shippers to book transmission capacity and transport gas between countries. It would be beneficial if the standardized auction process, including auction algorithms, auction calendar and products with pre-defined duration time, were implemented at the borders between Member States and the Energy Community Countries in accordance with the requirements defined in NC CAM.

It is important to emphasize that the new NC CAM, which is applied since 6th of April 2017, provides a new market-based Open Season procedure dedicated to development of new transmission capacities at interconnection points. In our view, it would be beneficial to implement the incremental capacity process also at the interconnection points between CEE countries and Energy Community members in order to facilitate the development of cross-border points fully in line with market needs.

According to Article 2 (1) of the new NC CAM, the regulation may apply to entry points from and exit points to third countries, subject to decision of the relevant national regulatory authority. The implementation of the NC CAM at all cross-border points between CEE Countries and Energy Community Members would result have a positive impact on cross-border trade in the region and provide more transparency and availability of transmission capacity for network users.

- b. NC TAR – the introduction of fair pricing mechanism in relation to transmission services in the region is an essential issue in terms of non-discriminatory treatment of all market participants active in the CEE Countries. The entry into force of NC TAR on 6th of April 2017 is a milestone for market integration within the EU. It provides a set of common rules for tariff setting and obliges National Regulatory Authorities to compare the tariff methodology applied in the given Member State with the capacity-weighted distance methodology defined as a benchmark for other methods.

The scope of the NC TAR applicability to points between Member State and third country is strictly related to the applicability of the NC CAM. In case where the National Regulatory Authorities does not issue a decision on the application of the NC CAM at such a point, the NC TAR provisions relate to 1) reserve prices, 2) pricing of bundled capacity and capacity and virtual interconnection points, 3) clearing price and payable price, 4) consultation on discounts, multipliers and seasonal factors and 5) incremental capacity provisions shall not apply to entry point from/exit point into third countries.

The development of liquid regional gas markets in the CEE Countries would be additionally facilitated in case of broader application of NC TAR at the borders with Energy Community Countries.

- c. NC BAL – the network code on gas balancing of transmission network is a significant tool which enables TSO's to balance the gas portfolio of network users in an appropriate manner. In addition, it is significant document which defines the nomination process at all points, including cross-border interconnection points.

In order to guarantee a sufficient operation of the balancing system, it is important to ensure that whole market zone is covered by the mechanisms defined in the regulation. It means that all NC BAL provisions shall apply to cross-border interconnection points between Member States and Energy Community Members

It is important to emphasize that according to Article 2(1) NC BAL, this regulation shall apply to balancing zones within the borders of the Union.

- d. NC INT – regulates significant, technical issues related to interconnection agreements between neighbouring TSO's, gas quality and odourisation parameters of gas in transmission systems, a common set of units and data exchange mechanisms.

According to Article 1(2) NC INT, the regulation may apply to entry points from and exit points to third countries, subject to the decision of the national authorities.

In PGNiG view, it is important to apply the NC INT at the borders with Energy Community Countries in order to facilitate market integration in the region. Significant cost effectiveness would be provided to all market participants if Energy Community Members developed IT and gas quality solutions which are fully in line with EU standards.

- e. CMP⁶⁶ - this document provides significant anti-hoarding mechanisms, which prevent network users from blocking capacity at interconnection points. It defines mechanisms which oblige TSOs to offer capacity which is not utilized by a given network user to other market participants. It also defines the mechanism which enables the network user to surrender of contracted capacity by means of reallocation to other network user.

Congestion management procedure may apply to entry points from and exit points to third countries, subject to the decision of the relevant National Regulatory Authority. In PGNiG opinion, the development of such mechanisms at the borders between CEE countries and Energy Community Members would be crucial for the utilisation of capacity which is not used by the dominant supplier.

(212) From the commercial point of view, the application of Network Codes allows to introduce transparent and non-discriminatory rules on each of cross-border connections. It provides equal competitive ground for every undertaking, harmonizing the EU internal market. The present state of affairs with different rules applying on

⁶⁶ Annex I to the Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13th of July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, Official Journal L 211 of 14th of September 2009, p. 36-54.

interconnection points listed in section (208) provides a significant barrier for cross-border trade, hindering sustainable development of the internal gas market in the EU. Removing those differences will not only provide a possibility for the competition but will also enhance energy security of the CEE Countries.

- (213) By the implementation of both elements mentioned above, trade among all CEE Countries via territories of Ukraine and Belarus will be made possible (in conjunction with the commitment discussed in chapter VII.2.2.). Such trade will not be dependent on Gazprom in the same manner as in the case of swaps offered by Gazprom. It will give undertakings from CEE Countries better opportunities, which they would be enjoying, if Gazprom did not act contrary to the competition rules.
- (214) With reference to the above it has to be noted that limiting the possibility of reexporting gas from given EU Member State to another state by preventing bidirectional flow of gas on the interconnection points hampers the competition in a part of internal market (in such a Member State). This conclusion applies not only to trade between the EU Member States but also to trade between a Member State and its neighbouring countries not belonging to the EU. The proposed commitment address this concern in its complexity. Not only it restores or establishes the possibility of cross-border trade but also provides equal rules, tested in practice, for every market participant.

VII.2.4. Commitment to enable bidirectional flow of natural gas in Drozdowicze point

- (215) Taking into consideration the arguments presented in chapter VI.2.2. above, in the event the implementation of the commitment described there would be impossible, in order to foster prevention of market for upstream supplies of natural gas in Poland from further market segmentation, it is necessary for Gazprom to cease its resistance to allowing bidirectional flow of natural gas in Drozdowicze point.
- (216) Currently, TSOs of Poland (Gaz-System) and Ukraine (Ukrtransgaz) are planning to conclude inter-operator agreement providing for a possibility of bidirectional flow of gas in Drozdowicze and Hermanowice point by means of virtual reverse. Under the agreement, transmission of gas will take place through single virtual point – Grid Connection Point GAZ-SYSTEM/ UKRTRANSGAZ.
- (217) In order to effectively conclude this agreement and establish an inter-operator balancing account, certain changes that need to be introduced to:
- a. transmission agreements concluded between Gazprom Export and TSO's,
 - b. the Yamal Contract concluded between Gazprom Export and PGNiG.
- (218) The changes to the above mentioned agreements should stay in accordance with NC BAL. Gazprom Export has so far denied its consent to those changes, preventing the implementation of bidirectional flow of gas.
- (219) **[Business Secret].**
- (220) Gazprom should be committed to agree to any amendments of documents or contracts governing flow of gas through Drozdowicze point. Where action by Gazprom is required with respect to a given contract (i.e. the Yamal Contract),

Gazprom should be obliged to submit an offer reflecting all necessary changes required to achieve the goal stipulated in the commitment. Since Ukraine, as a contracting party to the Energy Community, is bound to implement 3rd Energy Package in its territory, the proposed commitment is in line with EU obligations arising from the membership in this international organization.

- (221) Enabling bidirectional flow in Drozdowicze would allow to address competition concerns with respect to isolating the Polish market. Bidirectional flow through Drozdowicze would allow to trade natural gas among Poland, Slovakia, Hungary and Romania via the Ukrainian gas system. This proposal provides more efficient and practical solutions than expanding swap-like operations. It gives the opportunity to perform cross-border trade not only to Gazprom customers but to every undertaking on the market, without Gazprom acting as intermediary and being informed in advance of every activity of its customers from CEE Countries. Moreover, following the implementation of such a commitment, undertakings other than customers of Gazprom would benefit from trade among those states.
- (222) In its Statement of Objections, the Commission identified non-contractual measures, by which Gazprom restricts competition in CEE Countries. With respect to the Bulgarian market, Gazprom has proposed a commitment pursuant to which working interconnections with other states could be established. Therefore, such a measure can be deemed as proportionate and effective in attaining a legitimate aim. On those grounds, PGNiG submits that the presented commitment should be applied at least to the Polish market for upstream gas supplies, by enabling bidirectional flow in the Drozdowicze point.

VII.2.5. Commitment to enable each of Gazprom customers in CEE with long-term contract to take-off gas on Gaspool / CEGH / NCG.

- (223) As it was explained in section (138) due to the insufficient capacities available between CEE Countries, undertakings originating from there face significant obstacles in trading among them. The only actual possibility for those undertakings is to trade on the liquid hubs of Germany and Austria, since those countries are connected by infrastructure to all of CEE Countries. Therefore PGNiG proposes hereby an additional commitment, which can be based on the mechanism already proposed by Gazprom (swap transactions to Baltic States and Bulgaria).
- (224) By this commitment Gazprom would be obliged to provide its customers, whose contracts stipulate delivery points in CEE Countries (or at their borders), with a possibility to change Original Delivery Points⁶⁷ to Hub Delivery Points for part or all of the contractual quantity supplied under the contract. Right to such request could be exercised by the customer within 3 months before the commencement of deliveries to given Hub Delivery Point. The minimal volume of the swap should be 50 mcm, and the minimal period for deliveries to Hub Delivery Point should be 3 months.
- (225) For providing that swap-like operation Gazprom could either charge the customer with the service fee amounting to the costs of transmission to and entry to the given Hub Delivery Point or allow the customer to arrange the transmission by himself (if there

⁶⁷ As defined in the Commitment Document.

would be such technical possibility). In case where Gazprom would be in possession of the unused capacities that would allow to transmit quantity of gas requested by the customer and customer would not be able to book enough capacity by himself, Gazprom should be under obligation to make those capacities available to the customer. Under this Commitment, Gazprom could refuse to change delivery point only in circumstances described in section (12)(i) of the Commitments Document.

- (226) In order to prevent Gazprom from charging excessive service fee's (like in case of already proposed swap-like operations), methodology of setting service fees should be presented by Gazprom to the Commission and be subject of another market test. It should be corresponding to the transmission costs and be revised only if the transmission costs actually increased. Another safeguard could be an obligation to present Monitoring Trustee any plan to rise the service fee in advance, in order to allow Trustee to verify the level of increase.
- (227) Proposed commitment, in the opposition to the one proposed by Gazprom, allows to actually trade between the CEE Countries. In conjunction with commitments proposed in chapters VII.2.1.-VII.2.3., it would provide a possibility for Gazprom's customers from CEE Countries to choose from competing routes for gas transmission. This would not only foster competition in the internal market of EU but also effectively prevent to further segment markets along national borders.

VII.2.6. Commitment to abandon destination clauses should be expanded to all EU member states and to states neighbouring with CEE (Belarus, Ukraine, Turkey)

- (228) The Commitment to abandon destination clauses in its current version will have no impact on the competitive situation in CEE markets. Due to already mentioned limited capacity of interconnectors between the countries of the region, cross-border trading of gas between the countries of the region will be impossible in the nearest future.
- (229) However, as it is already known to the Commission, Gazprom had been **preventing suppliers from outside CEE Countries to sell gas to CEE Customers** (i.e. PGNiG in 2009 and 2010). Furthermore, Gazprom had already been under investigation for using such clauses in countries of Western Europe (Germany, Austria, Italy) and although it committed to abandon such clauses with customers from those countries, it did not remove it from other contracts until years later (in PGNiG case – in 2010, so over 5 years since last settlement with the Commission in E.On. case).
- (230) For infrastructural reasons, the CEE Countries can be supplied through western routes from Germany, Austria, Italy, Slovenia. However, the undertakings operating on the markets in these countries originate also from other member states of EU.
- (231) Taking into account the circumstances presented above, it is reasonable to demand that Gazprom removes destination clauses, as well as other contractual measures aiming at restricting cross-border trade, **from every contract under which gas is delivered to any delivery point located in the EU and that Gazprom do not propose to introduce such clauses in any such contract.** This will guarantee that every customer of Gazprom in the EU will be able to freely resale its gas to CEE countries, without fearing Gazprom's retaliation. Gazprom will be deprived of the tool

to further abuse its dominant position in CEE markets and will have to refrain from the application of contractual measures aimed at hindering cross-border trade within and into the region.

- (232) Moreover, Gazprom should commit not to use such clauses in contracts concluded with customers off-taking gas in countries not belonging to EU, which are neighbouring with CEE Countries, namely: Turkey, Belarus and Ukraine. Since undertakings from these countries have the possibility to sale gas to the CEE Countries with the existing infrastructure, Gazprom should not be allowed to prevent them from doing so by binding them through contractual terms. Undertakings from those countries may contribute to fostering the competition in the markets for upstream supplies of natural gas in CEE.
- (233) The expansion of the geographic scope of the commitment not to use destination clauses is necessary and proportionate to achieve a legitimate goal –undisturbed competition on merits in the CEE Countries. Only such a scope of the commitment can be effective in bringing a change to the competition in CEE and preventing Gazprom from using its dominant position to further hinder the market functioning. What's more, such a commitment meets also the requirement of being proportionate to achieve legitimate aim. It needs to be noted, that restricting the freedom of undertakings to freely use their assets (in this case – natural gas, whose ownership is transferred to them at a certain point) is in line with competition law only subject to meeting certain criteria. A resale ban or territorial restriction is usually a reason for at least launching the investigation by the competition authority as it might amount **even to an anticompetitive agreement, which constitutes an infringement of Article 101 TFEU**. It is even more damaging to the competition on the market when such clause is imposed by the dominant undertaking. Of course, a destination clause or resale ban in the contract not always amounts to a breach of the competition law. In certain cases, especially in the selective distribution agreements it might have positive effects on the competition (by fostering inter-brand competition). However, in this case the purpose of destination clauses and resale bans is not to achieve a legitimate goal. Natural gas is a homogeneous product and there is no ground to organize a selective distribution system for it.
- (234) For the same reasons, PGNiG submits that the possibility of applying destination clauses, stipulated in contracts already concluded at auctions organized by Gazprom, is not backed by any solid legal reasoning. Therefore, such clauses contained also in those contracts should be declared null and void.
- (235) Therefore, since there is no objective justification for the inclusion of such clauses in gas supply contracts and taking into account Gazprom's unwillingness to fully comply with competition law, PGNiG proposes to expand its geographical scope to cover all EU Member States as well as Belarus, Ukraine and Turkey.

VII.2.7. Commitment not to retaliate for re-export of natural gas

- (236) As it is known to the Commission, Gazprom applies a policy of retaliation aimed at those undertakings, which that do not comply with its abusive actions. This can be clearly seen in the actions of Gazprom vis-à-vis Belarus (see sections (81)-(87) of Complaint) and Ukraine in 2009. Gazprom is not refraining from such actions against

the EU Member States either. In winter 2014/2015 it reduced its supplies to Poland, Germany Slovakia, Austria and Hungary in order to prevent undertakings from those countries from supplying Ukraine (see section 57 of Complaint).

- (237) It needs to be noted that at least one of the above mentioned abuses was committed during the Proceedings (restrictions in supplies in winter 2014/2015). Therefore, it is clear for PGNiG – and accordingly should be accordingly clear for the Commission – that Gazprom is willing to use its market power to restrict cross-border trade (not only within EU, but also that of EU Member States with third states), regardless of the existing regulations on competition.
- (238) Taking this into account, the Commission should enforce instruments that would allow to effectively control Gazprom's actions. Since in Statement of Objections the Commission has issued a charge of using also measures – other than contractual ones – aiming at hindering cross-border trade, then it is possible for the Commission to address also that kind of abuse in its decision.
- (239) PGNiG proposes that Gazprom be committed to refrain from any activity consisting in:
- a. restricting contractual rights of its customers,
 - b. non-performance or improper performance of Gazprom's obligation under the contract, in particular:
 - i. threatening or actually restricting or cutting off supplies to any customer,
 - ii. demanding additional, non-proportional measures securing the performance of the contract,
 - iii. withholding any payments due to the customer,
- and/or
- c. hindering the performance of any contract of purchase of natural gas concluded by the customer with any undertaking other than Gazprom, in particular by applying the measures described in (b) above to the undertaking contracting with customer.
- (240) Above mentioned list should not be exhaustive as there are various ways (depending mainly on the contractual and factual situation of Gazprom' customer) for Gazprom to retaliate for performing cross-border supplies within the CEE and on the borders of the EU. In such case, general obligation with a list of the severe forms of retaliation is a proportionate measure. However, if the Commission finds such broad terms impossible to reconcile with the principle of proportionality, then it will be possible to identify practices that Gazprom implemented in the past and create exhaustive list in order to limit possibilities of Gazprom further abuses. Within this approach, at least the practices mentioned in section (239) (b) should be covered by such a list.
- (241) In case any customer of Gazprom becomes aware of Gazprom's action(s) of aimed at retaliation for re-export of gas (whatever the form of such action(s) may be), it should have a right to inform the Monitoring Trustee in writing. The Monitoring Trustee would then be obliged to react – within 5 working days – and send Gazprom the complaint from its customer together with the demand to provide an explanation of Gazprom's action supported – if necessary – with documents, fixing a timeframe (no longer than 3 weeks) for the reply. Gazprom should be burdened with providing an objective

justification of its actions and support it with necessary documents. Upon receiving Gazprom's response, the response should be forwarded to the complainant in order to provide him with a possibility to comment on Gazprom's response. At the same time, the Monitoring Trustee should start preparing its opinion with respect to Gazprom's compliance with its commitment. The opinion should indicate whether Gazprom has violated its commitment (remedy). After receiving response from the complainant and taking its opinion into account the Monitoring Trustee should send the opinion together with documents gathered in the case to the Commission, which could then make a decision with regard to the grounds for initiating of administrative proceedings for non-compliance with the commitment (or remedy) by Gazprom.

- (242) In order not to restrict Gazprom's contractual rights by the proposed commitment, any action taken on the basis of explicit provisions of the contract (e.g. demand to additionally secure the contract, due to the customer's financial situation) should be deemed as objectively justified, unless the customer is able to present substantial evidence that the reason for performing a contractual right was illusory.
- (243) The proposed commitment would substantially reduce Gazprom's ability to repeatedly abuse its dominant position to the detriment of its customers from CEE Countries in future. Furthermore, it would provide Gazprom's customers with an effective safeguard against anticompetitive actions.

VII.2.8. Commitment not to reserve transmission capacities for periods longer than 5 years in a row and to market those already booked via auctions

- (244) As explained earlier, Gazprom – holding by the laws of the Russian Federation, a statutory monopoly over the export of gas via gas pipelines – presently uses three alternative transit routes to transport natural gas from the Russian Federation to Central Europe: the Yamal Pipeline, the Brotherhood Pipeline and NS1⁶⁸.
- (245) In brief, the tool enabling Gazprom to segment the market with the use of infrastructure relies on (i) increasing the actual capacities of NS1 by boosting its current utilisation (ii) and providing additional capacities by commencing NS2 project (see sections (41)-(46)) and (iii) the access to the onshore gas transporting routes connected to those offshore gas pipelines, including OPAL and projected EUGAL gas pipelines, as well as further access to national transmission systems of individual Member States.
- (246) Gazprom is in a position to use NS1 in order to bypass two other alternative routes which allow natural gas delivered by Gazprom to enter the EU⁶⁹. Consequently, Gazprom may develop this practice of shifting all deliveries into CEE Countries from the two alternative routes to Nord Stream and its connected infrastructure, to such an extent that it will deliver natural gas to Slovakia through Germany and the Czech Republic or, similarly, utilise the western-southern route to effectuate its deliveries to Poland, bypassing the transit infrastructure erected in Poland and in Ukraine. That would generate exorbitant costs and only increase resource dependency.

⁶⁸ Gas pipeline to Negru Voda was not taken into account due to lack of substitutability of this route with three others.

⁶⁹ This possibility can be enhanced if Gazprom finalizes construction of NS2.

- (247) Such a practice would come into existence only if Gazprom is allowed to use interconnecting infrastructure without necessary oversight from the competition law enforcement.
- (248) Such a conduct poses a threat to the continuity of gas supplies both in terms of mere availability of the commodity but also in terms of quality of infrastructure; it may result in a shortage of natural gas on CEE Countries markets as well as lead to a deterioration of operability of alternative route. Both come to the detriment of energy security as much as the practice puts at peril the situation of end users of natural gas.
- (249) All stakeholders may be forced to procure gas in limited quantities, at significantly higher prices and with the exclusive use of those sections of infrastructure, which Gazprom chose to utilize. Due to its technological nature, such infrastructure also enables to transmit gas for the purpose of trans-border gas trade.
- (250) **Such situation provides an oversupply of transmission capacities and incentivizes Gazprom to segment market geographically anew.**

Long-term capacity reservations as an abuse complimentary to Territorial Restriction Clauses and corresponding with previously questioned practices

- (251) The practice of long-term capacity bookings leads to the perpetuation of dominance on the downstream markets by Gazprom. Consequently, it only strengthens its market power and capacity to apply monopolistic practices.
- (252) This abuse is in its nature similar to a capacities-related abuse referred to in the case law. The Commission has investigated cases on long-term capacity booking: COMP/39.316 – Gaz de France and COMP/39.317 – E.ON Gas. In its decisions the Commission has found **long-term capacity reservations restrictive of competition** and accepted commitments *inter alia* to release booked capacities.
- (253) In the context of the above mentioned decisions, PGNiG draws the Commission's attention to similar practices by Gazprom investigated in Proceedings, namely the obstruction to the PGNiG's attempts to obtain additional supplies during the crisis in 2009 and 2010. In that situation Gazprom has used its control over infrastructure to prevent other suppliers from providing gas to PGNiG.
- (254) Here, the main concern is not entirely connected with a barrier to entry created for a new entrant but with a more complex process of market foreclosure: (i) the strengthening of a dominant position into a monopoly on the downstream market for gas supply, (ii) cascading it into further market tiers and leveraging the dominant position, (iii) segmenting markets.
- (255) It can be correctly recapitulated as a practice which engrosses "*keeping capacity for its own downstream supply business, especially on bottlenecks [comp. Greiswald entry – PGNiG] (...) in a manner that prevented competitors gaining access*"⁷⁰.

Actions attributable entirely to Gazprom despite NC CAM, no state compulsion

- (256) The access to inland gas transporting routes (interconnecting entry / exit points) within the European Union is regulated by NC CAM.

⁷⁰ EU Competition Law and Energy Markets, Ch. Jones (ed.), Claeys&Casteels 2016, p. 344, para. 3.538

- (257) NC CAM is neither a comprehensive nor exhaustive piece of legislation. It regulates the way capacities at entry / exit points are marketed, whereas the conduct of bidders (and certain infringements) are subject to other regulations whose concern is fair and undistorted competition and market integrity. Furthermore, NC CAM is without prejudice to the observance and enforcement of competition law.
- (258) As a rule, NC CAM, which regulates the conducting of capacity auctions at interconnecting points (entry / exit), does not impose any obligation on a shipper to bid at auctions for capacities. In terms of frequency of auctions and availability of capacities (their proportions at set intervals) it may at best confer rights on shippers and obligations on network operators. Shippers, including Gazprom, retain a broad extent of discretion as to engage in an auction and if so, which capacities and for how long could be purchased.
- (259) Consequently, Gazprom acts at auctions on its own accord. Therefore, even if Gazprom's action does not violate the provisions of NC CAM, it may demonstrate – and it does constitute (see above) – a breach of Article 102 TFEU. **Such a conduct may not be shielded from the application of competition law for its mere compliance with NC CAM or any specific sector regulation. NC CAM does not eliminate any willful exercise of competitive conduct by Gazprom.** Hence Article 102 TFEU is applicable to its conduct, as “[Articles 101 and 102 TFEU] *apply (...) to anti-competitive conduct engaged in by undertakings on their own initiative.*” (joined cases C-359/95P and C-379/95P – Commission and France v Ladbroke Racing).
- (260) This is undisputable in the view of settled case law⁷¹: “[sector – PGNiG] *regulation did not in any way deny the (...) [dominant undertaking – PGNiG] the possibility of adjusting its retail prices for end-user access services or, therefore, of engaging in autonomous conduct that is subject to Article 82 EC [now: 102 TFEU – PGNiG], since the competition rules laid down by the EC Treaty supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the (...) markets.*”

Reasonable scope of infrastructure-related commitments

- (261) In order to reduce the negative effects of its conduct and restore competition Gazprom should undertake to:
- a. Cease and desist **the booking of annual capacities for a period exceeding five years** on any entry / exit points on the EU external border and within the EU, both interruptible and firm capacities:
 - i. Even if the operator offers yearly standard capacity product for a period of over five upcoming years (comp. Article 11 (3) NC CAM) Gazprom should never bid for annual capacities stretching over a period of more than five gas years,
 - ii. Gazprom should immediately advise the Monitoring Trustee of any annual capacities it has already booked on any entry / exit points on the EU external border and within the EU,

⁷¹ C-280/08 P - Deutsche Telekom v Commission, para. 92

- iii. Should any of those annual capacity reservation stretch over a period of more than five years, Gazprom should request the operator to **cancel the reservation** against proper compensation and cost reimbursement; operators should be deemed cleared to do so under such exceptional circumstances provided they charge Gazprom for the cancellation and offer the capacities at auctions, in a procedure similar to new capacities,
 - iv. Should the cancellation of the reservation not be possible, Gazprom should **release the capacities** so as to bring its reservations in line with the established limits,
- b. Cease and desist to bid more than **70% of capacities available at a given auction at entry / exit points** on the EU external border and within the EU,
- i. At no auction should Gazprom bid more than 70% of capacities available for purchase at such an auction,
 - ii. So as to avoid stranded costs on the part of the operator, in first three consecutive years this restriction may not apply to the fourth annual auction of quarterly capacities (Article 12 (3) (d) NC CAM) and further auctions of capacities available in the last quarter of a gas year if the operator presents a valid economic justification for such an exemption to its relevant energy market regulator and the Monitoring Trustee,
 - iii. The restriction on capacity bookings through auctions should respectively apply to **overnominations** and any other means that would effectively allow Gazprom to utilise more than 70% of the gas pipeline, save for the last quarter if the operator notices the need for and successfully justifies the application of the exemption.

Proportionality of an infrastructure-related commitment

- (262) The principle of proportionality requires that the adopted measure must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued; the recourse applied should not be excessively onerous meaning it should not produce disproportionate result⁷².
- (263) The Commitments in their current shape fail to fulfil the proportionality test as they do not allow to remove the competition concerns. They need to be extended in a manner suggested above so as to serve their purpose.
- (264) The proposal of PGNiG is intended to remove the questionable practice of using capacities in order to petrify market structures and attain a forbidden objective of market segmentation.
- (265) The CEE Countries have been put so far in a particularly vulnerable position by anticompetitive conduct of Gazprom. Not only has this caused harm to competition and consumers but also crystallized itself in critical questions of security of supply of natural gas.
- (266) The commitment to maintain balanced flow of natural gas allows to prevent disruptive shifts of deliveries between alternative routes, which would be likely to cause a gas

⁷² The judgement of the Court of 11th of July 1989 *Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau*, case 265/87.

crisis, give more room for unfair pricing and market segmentation. This cannot be achieved by less far-reaching measures. In order to safeguard a necessary degree of transparency Gazprom should start to observe REMIT and publish insider information so as it is unable to use any alleged infrastructure shortage in order to deviate from the measure adopted.

- (267) The commitments to limit capacity reservations and release long-term capacities remove the concern of petrification of anti-competitive structures. Similar commitments have been used in order to remove concerns on a smaller scale (see E.ON Gas and Gas de France cases); they have not been contended for their excessive onerousness. This will allow, especially on intra-EU entry/exit points, third-party shippers to reinforce their foothold on the relevant downstream markets in the CEE Countries.
- (268) The commitments also allow to protect the interests of third parties by allowing infrastructure operators to request an exception in first three years so that they could adjust their tariffs accordingly if that is deemed necessary.
- (269) Beyond any doubt, this remedy is proportionate to the objective.

VII.3. Behavioural commitments concerning unfair pricing

VII.3.1. Commitment to provide extraordinary reversal of right to determine price formula in the contract

- (270) As it was already pointed out by PGNiG, the proposed Commitment to change price revision clause does not meet the fundamental criterion contained in Article 7 and 9 of Regulation 1/2003, namely effective cessation of the infringement. Therefore, PGNiG provides a proposal of the commitment that could be offered by Gazprom to meet that criterion and effectively interrupt practice identified by the Commission in the Statement of Objections as excessive pricing.
- (271) Proposed solution provides customers of Gazprom with a possibility to introduce – within fixed period of time from adoption of the Article 9 decision – the price formula in their long-term contracts that would reflect market standard and be based on proper benchmark.
- (272) According to PGNiG's proposition, Gazprom would have to commit itself to send an offer ("**Offer**"), described below, to its certain customers in CEE Countries ("**Eligible Customers**").
- (273) Eligible Customer would be an undertaking that in the period covered by the Proceedings (namely from 1st of May 2004) concluded or had existing (concluded before 1st of May 2004) long-term contracts (each contract, which duration exceeds 4 years), with at least one of contractual delivery point located in CEE Countries. The fact that contract with Eligible Customer expires before the price revision is completed or is amended in any manner, does not entitle Gazprom to withdraw the Offer or to fail to comply with the obligation to provide it to the Eligible Customer
- (274) The Offer should be send by Gazprom within 6 (six) weeks from Commitment Decision Effective Date.
- (275) Gazprom offer should contain the following elements:

- a. **Opening of renegotiation of the price.** Gazprom gives Eligible Customer a possibility to open price negotiations concerning contractual price formula, which provides price paid by Eligible Customer. Price renegotiations are opened by submitting reasoned price revision request, delivered to Gazprom no later than within 6 weeks from receipt of the Offer.
- b. **Requirements for reasoned price request (“Request”).** In order to be valid, Request should contain the following elements:
 - i. Period covered by the requested revision,
 - ii. The fact whether there would be one relevant price formula for whole period of revision or several relevant price formula,
 - iii. Benchmark(s) for the price that Eligible Customer is regarding as relevant for the periods covered by the revision,
 - iv. Description of the economic circumstances that Eligible Customer deems relevant to be taken into account in the price revision, including, but not limited to:
 - differences between contract price paid in period covered by the requested revision and the prices on European gas markets understood as liquid gas hubs located in EU (including but not limited to: TTF, NCG, CEGH, Gaspool, NBP), average weighted import prices on borders of France, Italy, Germany, United Kingdom;
 - liberalization of the gas markets in the EU, including but not limited to introduction of new legislation of the EU and of Member States;
- c. **Period that might be covered by the revision.** Offer should allow Eligible Customer to ask for the retroactive revision of the price since the commencement of the pricing infringement (in PGNiG case – from 1st of November 2006) until the day of request and onwards. Eligible Customer may freely choose whether to ask only for revision of the past prices, revision for the future or both.
- d. **Duration of the negotiations.** Negotiation over the revision of price formula should last at least 180 days since the day after the delivery of Request, unless both parties agree otherwise. Parties cannot – by means of non-disclosure agreement or in any other way – exclude each other right to refer to the information obtained during the negotiations in the arbitration proceedings initiated as a result of the Offer.
- e. **“Revision Offer”.** If parties do not reach agreement within 180 days, Eligible Customer is entitled to submit an offer revising price formula within period indicated in Request or shorter. Revision offer should be submitted within 4 weeks after the day, on which period for negotiations stipulated in the decision elapsed, unless other arrangement was agreed by both parties. Revision Offer has to fulfil the following conditions:
 - i. Price revision covering the period before the day of the submission of Revision Offer should be based on the price revision clause(s), according to its (their) wording in the given period, interpreted in accordance with the following principles:

- The right of the purchaser to obtain a positive margin,
 - Possibility to market purchased gas in any case on the markets indicated as benchmark markets in the price revision clause.
- ii. Price revision for the period after the day of submitting Revision Offer should be based on the criteria laid down in the Methodology of the price revision indicated in section (288),
 - iii. Price formula(s) cannot be based on the benchmarks that were not indicated as relevant benchmarks in Request,
 - iv. If Eligible Customer presents several relevant formulas, exact period covered by each formula has to be specified. Periods in Revision Offer should not be different than those indicated in Request and/or discussed during negotiations, unless Eligible Customer provides objective justification for such approach,
 - v. Eligible Customer has to indicate whether the payments by Gazprom should be deduced from the payments made by the Eligible Customer under the contract or should be made without any connection to the payments under the contract.
- f. **Acceptance and entry in force of Revision Offer.** Gazprom is obliged to accept the Revision Offer (rejection constitutes a direct breach of the Commitment Decision) within 2 weeks since its receipt. If the Revision Offer sets price formula for future, this formula shall be applied to price for natural gas delivery in full second month after the month, in which Revision Offer was accepted.
 - g. **Payment of the lump sum resulting from the retroactivity of the revision.** If Eligible Customer demanded retroactive revision of price formula(s), Gazprom is obliged to pay 50% of the lump sum resulting from revision within 15 weeks from the day of the acceptance of the Revision Offer. The payment of remaining 50% of lump sum might be withheld by Gazprom, provided that it uses its right to arbitration. Otherwise, Gazprom is obliged to divide the remaining 50% of lump sum into equal monthly instalments, which number is equal to the number of remaining months of duration of long-term contract with the Eligible Customer. If such contracts expires before payment of remaining 50% is due, then number of the equal monthly instalments is fixed at 48 (reflecting 4-years period).
 - h. **Right to arbitration.** From the day of the receipt of the Revision Offer, Gazprom is entitled to refer the revision to arbitration tribunal, in accordance with the contract with given Eligible Customer. The right to refer the revision expires if Gazprom does not notify Eligible Customer of using its right to arbitration within 4 weeks from the day of receipt of the Revision Offer.
 - i. **Rights of Gazprom under arbitration proceedings.** In the arbitration proceedings Gazprom is entitled to be awarded with the revision of the price formula(s) stipulated in Revision Offer. If this happens and the lump sum resulting from revising formula(s) is awarded to Gazprom,
 - j. **Obligation of Gazprom to respect and exercise arbitration tribunal award within the period deriving thereof.** Gazprom should be bound to exercise

arbitration tribunal award within the time frame fixed by the arbitration tribunal. Non-performance of the award (e.g. payment only of the part of the lump sum, refusal to pay or conditioning payment on acceptance by customer of any other obligations) should be considered as a violation of the Commitment Decision.

- (276) Above described commitment aims at achieving the necessary element of the commitment, namely effective cessation of infringement.. Retroactive revision of price for Eligible Customers allows them to gain a market price, which they should have been enjoying for a long time.
- (277) At the same time, proposed commitment does not require the Commission to declare that certain price level is actually a “market level”. In this aspect, PGNiG concurs with the statement of Commissioner Vestager that “[t]he last thing we [DG COMP] should be doing is to set ourselves up as a regulator, deciding on the right price”⁷³. In the proposed solution it is left for market players (or in a pinch, for a commercial arbitration tribunal) to establish the market price.
- (278) Moreover, such measure does not amount to a plea of infringement by Gazprom and to the payment of damages. By offering price revision voluntarily, Gazprom does not admit to having committed a breach of EU Competition. It has to be noted that in one of previous cases⁷⁴, in order to bring another alleged infringement to an end, dominant undertaking has offered a one-time payment to its customers and such commitment was accepted and made binding by the Commission, while it was clear that it did not amount to a damage payment. Solution proposed by PGNiG also does not amount to damages payment, as it does not cover interest on capital (due to long-lasting practice) and *lucrum cessans*. It has to be noted that only combination of both of those elements and loss suffered (*damnum emergens*) would amount to full damage.
- (279) Proposed solution also meets the criterion of proportionality. It aims at achieving legitimate goal – providing market prices by the dominant undertaking. It is necessary to effectively cease the infringement, as the implementation price revision clause (even if improved according to proposals below) is – by its nature – incapable of providing a substantial change to the situation of Gazprom’s customers and therefore does not fully address the concerns of the Commission. It also provides a swift effect on the competition, as the price can be changed within couple of months since the Commitment Decision Effective Date.

VII.3.2. Improvement of the Commitment concerning price revision clause

- (280) As PGNiG pointed out in section (121), price revision clause in version proposed by Gazprom provides worse conditions for customers like PGNiG, despite the increasing frequency of revision and shorter term for negotiations before referring case to the arbitration. Therefore, PGNiG provides the following proposals in order to make the price revision clause effective.

⁷³ https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en

⁷⁴ Commission Decision of 18th of December 2013 in joint cases: COMP/AT.39678/Deutsche Bahn I and COMP/AT.39731/Deutsche Bahn II.

- (281) Firstly, in all versions of the price revision clauses used in the current contracts with the CEE Customers, Gazprom should provide for a retroactive effect of the price revision request, namely the new price – agreed in the course of negotiations or awarded by the arbitration tribunal – must be effective from the day on which a party to the contract has received request for revision onwards. This is an absolute minimum for the Commitment to be considered. A retroactive revision is a standard in long-term contracts concluded not only with Gazprom but also with other suppliers. The fact that Gazprom did not include this element in its Commitment shows that Gazprom is not intending to respect the market rules of competition and that it will try – also by means of an Article 9 decision – to deteriorate the situation of its customers. Therefore, if the Commission is to further negotiate the Commitments with Gazprom after the market test, ensuring the retroactive effect of the revision request should be regarded not as a concession of Gazprom but as a *sine qua non* condition of further negotiations with Gazprom.
- (282) Secondly, the price revision clause should reflect the fact that prices in the gas hubs in Europe constitute the main criteria for the assessment benchmark price on “*European gas markets*”. Furthermore, it should be explicitly stated that such a price is a presumption for both requesting the price revision and as the benchmark price to used fix new price (or price formula). Simultaneously, the average weighted price should be either removed from the price revision clause or – if not removed – considered at best as a supplementary source used to verify whether the contract price is in line with the benchmark price on “*European gas markets*”.
- (283) The reason for such construction of the price revision clause is the fact that prices in liquid gas hubs reflect the market price, determined by the demand and supply. At the same time it has to be noted that average weighted import prices – even on the liquid and competitive markets in Germany, France and Italy – might be influenced by historical, long-term contracts, where prices are questioned by the customers. In this context PGNiG draws the Commission’s attention to the various negotiations and arbitrations concerning price revision. The fact that such a number of Gazprom’s customers regularly demands price revision clearly demonstrates that average weighted border prices, in which long-term contracts prices represents a significant percentage (and might determine the actual border price), should not be taken into account as a factor determining the benchmark price.
- (284) Against this background, PGNiG would like to refer to the fact that “European gas markets” should also cover liquid gas hubs not only in “continental” Europe. PGNiG opts that the NBP in United Kingdom should also be taken into account. NBP is the largest and most liquid of European hubs, what is more it is physically connected to Continental Europe through the Interconnector and BBL pipelines. United Kingdom and NBP are also one of the most important destinations of LNG deliveries to Europe. Therefore, there is no substantial ground for excluding NBP from the list of benchmarks.
- (285) Thirdly, the term “*European gas markets*” should be specified. PGNiG proposes that there should be certain criteria of assessment whether a national market of given country is covered by the term “*European gas markets*”. The following factors can be taken into account:

- a. level of liquidity (for instance a yearly churn ratio of the main hub on a given market at a level above 4),
 - b. level of domestic consumption (countries with domestic consumption below an ACQ of a given contract should not be taken into account),
 - c. level of diversification of imports.
- (286) To further specify the term, it is possible to name the markets covered by the term “*European gas markets*” on the day of providing the offer. Alternatively, this term can be defined, as comprising the following gas markets of north-western Europe: United Kingdom, France, Belgium, Netherlands, Germany.
- (287) Lastly, it is not clear how the “*due regard to all characteristics of the natural gas supplied under the Contract (such as but not limited to quantity, quality, continuity and flexibility)*” should be ensured. In particular, it should be specified whether certain factor might be taken as elements justifying a price increase, a price decrease or both (depending on the circumstances of a given contract).
- (288) Therefore, in line with the observations submitted in the report prepared by Microeconomix, PGNiG proposes that the price revision clause should also provide an **indicative methodology** on how the clause should be applied. For this purpose, the following elements should be included:
- a. **Primary character of gas hubs prices.** Gas prices in gas hubs should be treated as a primary element for both triggering the price revision and adjusting the price.
 - b. **Criteria for verification of “relevance” of gas hubs.** Relevance of gas hubs for the price revision can be verified using two factors:
 - i. **By their geographical location.** The clause should refer to gas hubs located in north-western Europe, including the following countries: United Kingdom, Netherlands, Belgium, Germany.
 - ii. **By their attributes.** The clause should refer to gas hubs, whose yearly churn ratio of the main hub on a given market is at a level above 4.
 - c. **Secondary and supplementary character of average weighted import prices.** Average weighted import prices should be regarded only as supplementary factor in determining both trigger and adjustment of the contractual price. In order for an average weighted import price for a given country to be regarded as relevant, the following conditions must be met:
 - i. if in the course of the negotiations or arbitration proceedings between a customer and Gazprom, there are on-going price revisions in a given country, in particular relating to contracts between Gazprom and its customers in this country, it should not be regarded as a relevant country;
 - ii. none of the CEE Countries mentioned in the Statement of Objections can be regarded as relevant until the Commitment Decision is in force.
 - d. **The characteristics of long-term contract should be recognized as follows:**
 - i. The geographic location of the delivery point should be a factor implicating reduction of the price, due to the lower transmission costs;

- ii. A Longer term of the contract should be a factor favouring the application of the price formula that is more suitable for purchaser;
- iii. Price under the long-term contract should allow customer to:
 - Obtain a positive margin,
 - In any case – to market the gas purchased from Gazprom on the European gas markets (defined as above).

(289) All of the above mentioned improvements should be implemented into the price revision clause in order to make it effective, thus depriving Gazprom of any incentive to abuse its dominant position during the renegotiations of the price. This solution meets the criterion of proportionality as it does not favour any party to the contract, but simply removes ambiguities that can be used to the detriment of the party requesting the price revision.

VII.4. Additional behavioural commitment addressing all competition concerns raised by the Commission with respect to Gazprom’s practices – increasing contract flexibility

(290) PGNiG also proposes that an additional behavioural commitment be introduced in order to address all of the competition concerns in respect to Gazprom’s practices. This commitment – if implemented – would allow Gazprom’s customers to lower ordered quantities of natural gas, in case the contract price would diverge from the market level (before the price is revised in the course of negotiation or arbitration). This would allow Gazprom’s customer to purchase natural gas from another, more competitive supplier and reduce the impact of non-market price on the financial situation of the customer, making him more resilient to Gazprom’s non-market pricing policy. Furthermore, it would give the customer possibility of enduring pressure on tying unrelated issues to the contractual negotiations. Lastly, increased flexibility in long-term legacy contracts would also prevent further market segmentation and would enable enhanced competition and utilisation of interconnectors built also with EU financial support. Since Gazprom’s long-term contract very often aim at satisfying a substantial part of domestic demand, increasing their flexibility would also hamper Gazprom’s attempt to isolate markets by non-contractual means.

(291) For the above mentioned reasons, PGNiG proposes, as an alternative, the implementation of one of the following two flexibility mechanisms into long-term contracts of Gazprom with CEE Countries’ customers.

VII.4.1. Gazprom commits to offer the CEE Customers a change of Annual Minimum Quantity level to 75% of Annual Contractual Quantity and to offer this level of AMQ as a maximal in future long-term contracts

(292) By this commitment, Gazprom should offer its customers in CEE Countries, with whom it has concluded long-term contracts (for the period longer than 4 years) a modification of existing AMQ clauses. By such a modification, the AMQ level would

be non-higher than 75% of ACQ. Modification of no other provision of the contract would be allowed..

- (293) Gazprom would also be obliged to offer this (or lower) level to customers operating in CEE Countries, with whom it had signed long-term contracts that existed during the Proceedings in any contract concluded with those customers during the period of applicability of the Commitment Decision being in place.
- (294) As it was indicated, such a modification will allow to decrease the dependency of undertakings from CEE Countries on Gazprom's supplies. It will foster the competition in EU gas markets as those undertakings will be able to take advantage of competitive supplies. As a result, Gazprom will be under greater pressure to provide market-level prices and other contractual terms for customers from CEE Countries. It needs to be noted that Gazprom tends to react to such pressure by adopting more market approach⁷⁵. In addition, it should be stressed that in many legacy long-term contracts in western part of the EU have been decreased and flexibility at a level of 75% is available since at least 2012⁷⁶.
- (295) This proposal meets all the criteria to be applied in this case. In this context PGNiG draws the Commission's attention to a similar solution that was adopted in the Commission's decision concerning practices of *Distrigaz*⁷⁷. Notwithstanding the differences in the circumstances that led to the adoption of the mentioned decision and the present case, it should be borne in mind that decreasing dependency of the customers (either by limiting the maximum duration of the contract or by lowering the level of the obligatory off-take) is a legitimate way to foster competition on the market affected by the infringements.
- (296) As it was explained above, the proposed commitment allows to address all three concerns of the Commission, expressed as charges raised against Gazprom in the Statement of Objections. It is also proportionate as it does not require Gazprom to provide special conditions for the CEE Countries – it rather aligns Gazprom's practices in Western Europe and in CEE Countries.

VII.4.2. Gazprom commits to offer customers from the CEE Countries a possibility of adjusting ACQ each year within +/- 20% corridor

- (297) As an alternative proposal addressing the same concern and achieving a similar effect, PGNiG proposes that Gazprom commit to offer customers from CEE Countries a possibility of adjusting ACQ before the start of each of the contractual years within +/- 20% ACQ corridor. Under that proposal a customer would have contractual right to modify ACQ each year (in advance, before the beginning of a contractual year) by increasing or decreasing ACQ by 20%. At the same time the increase or decrease would be based on the same ACQ in order to avoid transforming gas purchase contract into a framework contract with obligation to supply. The base ACQ would be:
- a. For contracts already existing on the Commitment Decision Effective Date – ACQ applicable on this date;

⁷⁵ To this example see the effect of the opening of FSRU in Klaipeda on prices in Lithuanian market.

⁷⁶ Note the decrease of the level of AMQ in contract between ENI and Gazprom, where the said level was lowered from 85% to 75%.

⁷⁷ Commission Decision of 11th of October 2007 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/B-1/37966)

- b. For contracts concluded after the Commitment Decision Effective Date – ACQ agreed by the parties in the course of contractual .
- (298) To the best knowledge of PGNiG, the above described mechanism is present in the upstream market for supplies in the EU in some of the contracts. PGNiG submits that all the arguments invoked in sections (294)-(297) above are accordingly applicable to the proposed solution.

VII.5. Behavioural commitments concerning tying supplies with infrastructure

- (299) In order to address concerns of the Commission, regarding tying supplies and infrastructure, PGNiG proposes several measures that are capable of preventing further similar abuses of dominant position by Gazprom and deprive Gazprom of the benefits it has gained due to the abuses in the past.

VII.5.1. Commitment to return [Business Secret] to EuRoPol in connection with the transmission fees dispute

- (300) As indicated in section (34), in 2010 Gazprom forced PGNiG (acting as shareholder of EuRoPol) to accept the relinquishment by EuRoPol of a lump sum of **[Business Secret]**, owed by Gazprom pursuant to a final and enforceable ruling of arbitration court. Gazprom used commercial blackmail that was a result of the crisis caused by Gazprom itself.
- (301) By opening the Proceedings and issuing the Statement of Objections, the Commission has declared that the case at hand involved a sufficient degree of the EU interests to be pursued. Those interests were identified among others as cessation of infringements committed against Polish companies relating to tying control over infrastructure with providing supplies in accordance with the obligations of Gazprom and its subsidiaries.
- (302) It has to be noted that allowing a dominant company to keep the benefits that it had gained due to the abuses of its market position is against the competition policy pursued by the Commission. It was confirmed in one of the CJEU judgements⁷⁸, where the Court explicitly stated: *“If anti-competitive practices effects continue after the practices, which caused them have cease, the Commission thus remains competent under Articles 2, 3 (g) and 86 of the [EC - PGNiG] Treaty to act with a view to eliminating or neutralizing them”*. Therefore, the Commission – even if it intends to adopt an Article 9 decision – should not accept a situation, in which Gazprom offers no commitment addressing its behaviour involving anti-competitive tying.
- (303) Considering the above, it has to be repeated that the settlement of [2010] was not based on normal commercial background. EuRoPol (PGNiG indirectly) had to resign from its claims in order to secure supplies to Poland. By that, Gazprom gained undue benefit and is holding it until today. Therefore, PGNiG submits that – as a measure of cessation of infringement – Gazprom should be ordered (under an Article 7 decision) or commit itself (under an Article 9 decision) to pay discussed lump sum to EuRoPol.

⁷⁸ Judgment of the Court of 4 March 1999 *Ufex and others v Commission*, case C-119/97 P, para 94.

- (304) In order to prevent Gazprom from “redirecting” the returned lump sum back to Gazprom, the remedy or commitment should be supplemented with an obligation imposed on Gazprom to refrain from paying this sum (in whole or partially) as a dividend for this company. This measure should include obligation to vote in accordance with the commitment at the Board of Members, Supervisory Board and General Assembly of Shareholders of EuRoPol.

VII.5.2. Commitment to amend the statute of EuRoPol to ensure its compliance with Polish law

- (305) As discussed in section (159)-(169)(34), PGNiG strongly disagrees with the statement of the Commission that in view of existing Intergovernmental Agreement no remedy or commitment can be proposed against the charge of anti-competitive tying of gas supplies with concessions regarding control over infrastructure. PGNiG presented solid legal reasoning showing that the Commission can require a commitment from Gazprom regarding its abuses of anticompetitive tying.
- (306) The reasoning is further supported by the already mentioned power of the Commission to “neutralize” anticompetitive effects of the abuse, even after the cessation of infringement⁷⁹. The Commission, in its capacity of the “Guardian of Treaties”, cannot waive its obligations, when the situation requires it to act.
- (307) Further to that, PGNiG draws the Commission’s attention to the still lasting effect of the abusive tying by Gazprom, namely the deadlock in EuRoPol decision-making processes. By applying commercial blackmail during the supply crisis, which was caused by Gazprom itself, Gazprom enforced introduction of *de facto* unanimity of voting procedures to the Statute of EuRoPol. Requirement of unanimity is applicable in all bodies of EuRoPol – Management Board, Supervisory Board and General Assembly of Shareholders. It affects virtually all aspects of the company’s management, leaving only a narrow scope of matters to be decided by one Member of the Board.
- (308) By the said changes Gazprom deprived PGNiG of the rights it had enjoyed under the previous version of the statute, in particular the right of deciding vote by the Chairman of the Management Board in case of equal number of votes “for” and “against”. This led to a deadlock in EuRoPol, that was also detrimental to the competition (delayed implementation of virtual and physical reverse flow of gas on the Yamal Pipeline). Moreover, the requirements of unanimity of votes with respect to virtually all matters of the company’s management, as well as delegating competences of Management Board to the Supervisory Board and to the General Assembly of Shareholders, are contradictory to the nature of the joint-stock company under the Polish Code of Commercial Companies.
- (309) For the above mentioned reasons, PGNiG expects that Gazprom commit either to offer to amend the statute or give its consent to changes submit by PGNiG. Those changes should include:

⁷⁹ Judgment of the Court of 21st of February 1973 *Europemballage and Continental Can Company v Commission*, case 6/72; Judgment of the Court of 4 March 1999 *Ufex and others v Commission*, case C-119/97 P.

- a. Appointing the Members of the Management Board by an absolute majority of votes in General Assembly of Shareholders,
 - b. Removing the cross-representation requirement for the Members of the Management Board,
 - c. Removing the *quorum* requirement on the General Assembly.
- (310) Referring to the previously proposed commitments, especially the one discussed in chapter VII.1.2., PGNiG submits that this measure should be treated as a complementary one. It should be in place until EuRoPol is effectively divested by Gazprom. However, if for any reason the Commission chooses not to adopt the divestment remedy or commitment in relation to EuRoPol, this measure should be implemented in order to provide an effective barrier to Gazprom anti-competitive practices. In such a case, only the implementation of this commitment would effectively cease the infringement and ensure the fulfilment of the necessary condition, as stipulated in Article 9 of the Regulation 1/2003 in respect of the concern expressed in the Statement of Objections.

VII.5.3. Implementation of the Certification Decision

- (311) As it is well known to the Commission, Gazprom is unwilling to give its consent to proper implementation of the Certification Decision, including transferring to Gaz-System the daily operation of the gas pressure pumps and metering stations with staff and IT systems. By obstructing this decision, it prevents the fulfilment of the requirements deriving from EU law, which was underlined by the Commission itself during the consultation proceedings of the Certification Decision.
- (312) Under Article 26 (1) TFEU, the Commission is obliged to adopt measures with the aim of establishing or ensuring the functioning of the internal market. As a “Guardian of Treaties”, it is the Commission’s role to monitor the observance of EU law by all the entities within the EU (not only Member States, but also undertakings operating within the EU). Furthermore, it has to be noted that Article 4 (3) TEU⁸⁰ requires the Commission to assist Member States in carrying out tasks which flow from the Treaties.
- (313) In the view of above, it should be remembered that during the certification proceedings of Gaz-System as an independent system operator the Commission was fully aware that the construction and governance of the Yamal Pipeline was underpinned by Intergovernmental Agreement. At no point the commitments arising from the Intergovernmental Agreement were considered by the Commission as a problem when the certification decision was issued or an obstacle to a proper implementation thereof.
- (314) Therefore, PGNiG expects that the Commission will act in accordance with its role as EU Institution enforcing the EU law to the full extent. An Article 9 decision should be used in order to bring Gazprom in compliance with the Certification Decision. Gazprom should commit to give its consent to the **full implementation** of this decision. Taking into consideration the arguments presented in sections (159)-(169),

⁸⁰ Treaty on the European Union.

the existence of Intergovernmental Agreement should not be treated as a justification for disrespecting the EU law by Gazprom.

- (315) This commitment is proportionate, since it simply requires Gazprom to obey the EU law, which Gazprom should be doing even without the adoption of an Article 9 decision. It also deprives Gazprom of the benefits of its tying abuse and therefore, addresses competition concern raised in the Statement of Objections.

VII.6. Observations concerning the duration of the Commitments

- (316) Taking into account the circumstances of the case, as well as Gazprom's actions that fall outside of the scope of the Proceedings, PGNiG believes the duration of the Commitments proposed by Gazprom, namely 8 consecutive years from the Commitment Decision Effective Date is insufficient to rightly and effectively address the concerns raised by the Commission.

- (317) IN PGNiG opinion, the assessment of proper duration of the commitments in this case should be based on the following factors:

- a. Effective deadlines for the completion of interconnectors between the CEE Countries,
- b. Effective deadlines for the completion of projects increasing diversification of supplies to CEE Countries,
- c. The duration and nature of Gazprom's practices,
- d. The dynamics of the gas sector regulation and its implementation in EU,

- (318) PGNiG proposed various types of specific remedies/commitments. Propositions of their duration are listed below:

- a. Commitment to implement full ownership unbundling and third party access on NS1 and NS2 (described in chapter VII.1.1.) – within 2 years from the Commitment Decision Effective Date,
- b. Commitment to divest certain assets (described in chapter VI.1.2.) – within 2 years from the Commitment Decision Effective Date,

PGNiG is of the opinion that the measures described in chapters VII.1.1. and VI.1.2 can be taken within 2 years from the adoption of the decision. Such a deadline provides a proper balance between the need for swift implementation of measures restoring and preserving competition and the necessary time to prepare and close transaction(s).

- c. Commitment to cooperate on the development of interconnections between the CEE Countries and the EU Member States and Energy Community countries (described in chapter VII.2.1.) – within 16 years from the Commitment Decision Effective Date,

Establishing a fully liquid internal gas market that is resistant to supply disruptions and developing new infrastructure are crucial. However, in some cases Gazprom's consent is needed for further investment process. Therefore, the commitment discussed should be in place for a period of time corresponding to

the length of the development process of natural gas infrastructure. 16 years from the Commitment Decision Effective Date is therefore adequate. The long term of this commitment is justified by the length of investment processes.

- d. Commitment to enable gas trade with Baltic states via Belarus and Ukraine (described in chapter VII.2.2) – within 2 years from the Commitment Decision Effective Date,
- e. Commitment to enable bidirectional flow of gas and application of Network Codes on the entry points to the CEE Countries from outside of the EU (described in chapter VII.2.3.) – within 2 years from the Commitment Decision Effective Date,

In order to ensure a swift implementation of undisturbed trade between the CEE Countries, a short period should be provided, in which Gazprom will have to adjust its contracts and rules governing the transmission of natural gas. In PGNiG's opinion, 2 years from the adoption of the decision is an adequate period for the completion of these tasks.

- f. Commitment to enable bidirectional flow of natural gas in Drozdowicze point (described in chapter VII.2.4.) – within 6 months from the Commitment Decision Effective Date,

This commitment requires Gazprom to amend contracts with third parties and agree to certain changes in acts governing the management of infrastructure. Such a timeframe is set in order to provide Gazprom with sufficient time for any necessary actions. However, according to the best knowledge of PGNiG, it is possible to prepare such offers and express necessary consents in less than 6 months. Therefore, a period of 6 months is more than adequate.

- g. Commitment to enable each of Gazprom's customers with long-term contract in CEE Countries to take-off gas on Gaspool / CEGH / NCG (described in chapter VII.2.5.) – for 16 years from the Commitment Decision Effective Date,

Gaspool, CEGH and NCG are commonly recognized gas hubs for CEE Countries.

Allowing Gazprom customers to take-off gas in those points would enhance even more its liquidity and affect the pricing. A positive impact on trade will also result directly from increased security of gas supplies supported by market-based instruments.

According to the best knowledge of PGNiG, most of Gazprom's long-term contracts with CEE Customers end within 16 years from the Commitment Decision Effective Date. Therefore, the commitment discussed needs to be complied with during that period of time. However, in case of concluding a new long-term contract or extending an existing one, the commitment needs to be in force for its whole term.

- h. Commitment not to use destination clauses and similar measures in EU and neighbouring countries (described in chapter VII.2.6.) – for 16 years from the Commitment Decision Effective Date,
- i. Commitment not to retaliate for re-export of natural gas (described in chapter VII.2.7.) – for 16 years from the Commitment Decision Effective Date,

The commitments concerning the re-export of gas should be in place for a maximum period provided in these observations. In view of the long history of Gazprom's abuses in this respect, such a period is justified.

- j. Commitment not to reserve transmission capacities for periods longer than 5 years in row and to market those already booked via auctions (described in chapter VII.2.8.) – for 16 years from the Commitment Decision Effective Date,

Long-term booking of transmission capacities by Gazprom represents a threat to new entrants and to the development of competition. It can produce similar effects to destination clauses. Therefore the limitation on bookings should be applicable in accordance with a timeframe provided for the destination clauses commitment.

- k. Commitment to submit an offer with an extraordinary price revision (described in chapter VII.3.1.) – within 6 weeks from the Commitment Decision Effective Date,

Excessive pricing in some of the CEE Countries was one of the Commission's main competition concerns. Measure addressing such issue may be implemented immediately. The measure addressing this issue may be implemented immediately. Offering a solution to customers does not require months. Therefore, the commitment discussed should be complied with within 6 weeks from the Commitment Decision Effective Date.

- l. Application of the enhanced price revision clause with customers from CEE Countries (described in chapter VII.3.2.) – for 16 years from the Commitment Decision Effective Date,

Although the extraordinary price revision mentioned above may be implemented almost immediately, the nature of long-term contracts justifies the application of the enhanced price revision clause for 16 years from the Commitment Decision Effective Date.

In the course of the internal gas market development, economic circumstances in the European gas market may change significantly and, therefore, the price formula may not reflect market standards. As a result, the enhanced price revision clause shall be applicable for the whole period necessary for the formation of a fully liquid gas market that will be resistant to supply disruptions.

- m. Commitment to offer AMQ on 75% of ACQ or possibility of adjusting ACQ each year within +/- 20% corridor (described in chapter VII.4.1. and VII.4.2.) – for 16 years from the Commitment Decision Effective Date,

The development of the internal gas market also requires more flexibility in terms of gas supply contracting. In this period, economic circumstances may change and, therefore, a new approach will be desirable. For those reasons, the commitment to offer a cap on AMQ on 75% of ACQ or possibility of adjusting ACQ each year within +/- 20% corridor shall be complied with for 16 years from the Commitment Decision Effective Date.

- n. Commitment to pay the lump sum to EuRoPol (described in chapter VII.5.1.) – within 1 year from the Commitment Decision Effective Date,

This commitment should be fulfilled within 1 year from the adoption of the decision, unless Gazprom and EuRoPol agree an extension of the deadline.

- o. Commitment to amend the statute of EuRoPol in order to ensure its compliance with Polish law (described in chapter VII.5.2.) – within 6 weeks from the Commitment Decision Effective Date,

Changing the statute of EuRoPol requires from Gazprom only a consent to submit a proper motion to registry court. Therefore, the commitment could be fulfilled within a short period from the adoption of the decision.

- p. Commitment concerning implementation of certification decision on the Yamal Pipeline (described in chapter VII.5.3.) – within 6 weeks from the Commitment Decision Effective Date,

Since Gazprom is aware of the certification proceedings, it is sufficient to provide it with a short period to comply with the commitment.

VII.7. Observations concerning the mechanism of revision of the Commitments

- (319) According to the Commitments, Gazprom is entitled to request that the Commission to review the Commitments where it might expect that Gazprom is no longer a dominant market player in any or all CEE Countries. Such request cannot be submitted earlier than 2 years after the Commitment Decision Effective Date.
- (320) In addition to this right, Gazprom is entitled to request at any time, a review of the Commitment Decision if the criteria laid down in Article 9 (2) (a) of Regulation 1/2003 are met.
- (321) PGNiG submits that the mechanism of revision proposed by Gazprom should be revised, so that Gazprom would be entitled to a first request for review after the lapse of a 5-year-period commencing on the Commitment Decision Effective Date. The reasons for applying 5-year stand-still period are the following:
 - a. Duration of Gazprom's infringements – the infringements lasted significantly longer than 2 years, therefore observance of the competition rules by Gazprom should be verified in the long term,
 - b. Establishing firm market mechanisms in CEE Countries upstream markets for gas supplies – vulnerability of the CEE Countries markets to Gazprom's actions requires long-term, stable rules; the possibility of reverting changes introduced by the Commitments (if they have been improved) after only 2 years is striking. In this context PGNiG notes that only 4 years after the initial decision of BNetzA regarding the possibility of utilising the OPAL Pipeline Gazprom has applied for the revision of this decision. In addition, taking into consideration the interview referred to in section (97), PGNiG predicts that Gazprom will apply for a revision of the Commitment Decision (regardless of its actual scope) as soon as possible.
- (322) It worth noting that in two airline cases, where commitment decisions were adopted⁸¹, the Commission has already set up 5 years stand-still period for the revision to

⁸¹ Decision of the Commission of 12th of May 2015 in case AT.39964 – Air France/KLM/Alitalia/Delta; Decision of the Commission of 14th of July 2010 in case COMP/39.596 - British Airways/American Airlines/Iberia Airlines.

provide a safeguard for the preservation of the commitment's pro-competitive effects on the markets.

- (323) It has to be noted that 5-year stand-still period with respect to the Commitment Decision does not preclude Gazprom's rights under Article 9 (2) (a) of Regulation 1/2003. Therefore revision at Gazprom's request should be possible only after 5 years of applicability of the Commitment Decision.

VII.8. Observations concerning the Monitoring Trustee mechanism

- (324) With regard to the Monitoring Trustee mechanism, PGNiG would like to propose certain amendments to the mechanism itself in order to guarantee full independence and effectiveness of the Monitoring Trustee.

VII.8.1. Appointment of the Monitoring Trustee

- (325) PGNiG submits that in order to guarantee the highest standard of both knowledge of the gas market and compliance with the sector regulation, the Monitoring Trustee should be composed of – except for the Trustee appointed by Gazprom – representatives appointed by ACER and ENTSOG. It is justified by the complexity of the Commitments and their impact on the European gas markets. The mentioned organizations play a key role in gas sector. For instance, ACER coordinates developments of the regulation for the European energy markets, whereas ENTSOG is responsible for providing a consistent view of the European gas infrastructure and signal potential gaps in future investments. Therefore, the participation of representatives appointed by ACER and ENTSOG in the Monitoring Trustee guarantees an effective and reliable fulfilment of the Commitments.

VII.8.2. Enhancement of prevention against conflict of interests

- (326) PGNiG considers that the provisions, which guarantee the independence of the Monitoring Trustee are too vague and could be interpreted in a way that can lead to situation in which Monitoring Trustee can be compromised.
- (327) Firstly, PGNiG proposes that Commitments should contain explicit statement that the Monitoring Trustee is independent of:
- a. Gazprom and its direct or indirect subsidiaries, as well as any companies in which Gazprom holds any shares,
 - b. Customers of Gazprom and its direct or indirect subsidiaries, as well as any companies in which Gazprom's customers holds any shares,
 - c. Partners in the framework of JVs in which Gazprom and its direct or indirect subsidiaries hold any shares,
 - d. Companies, institutions and bodies which provide financing for Gazprom's infrastructure projects (i.e. NS2).

The amendments indicated above aim at eliminating possible violations of the independence of the Monitoring Trustee.

- (328) Secondly, PGNiG proposes that the Monitoring Trustee mechanism should provide for an annual review of the independence status of the Monitoring Trustee, according to the ACER procedure dedicated to that purpose. PGNiG submits that in order to ensure an effective and reliable fulfilment of the Commitments by Gazprom, the Monitoring Trustee mechanism must be subjected to regular examination for potential conflict of interests.

VII.8.3. Adjustment of the competences of Monitoring Trustee to expanded scope of Commitments

- (329) In order to achieve the effective supervision of the compliance of Gazprom with the commitments discussed in these observations and due to the large number of new proposals for commitments, PGNiG presents hereby also proposals of adjustment of the Monitoring Trustee competences.
- (330) In respect to the structural commitments (ownership unbundling and divestment of certain assets, discussed in chapters VII.1.1. and VII.1.2. respectively) PGNiG proposes mechanisms similar to those already used in previous cases, where structural measures were applied. Detailed proposal is included in the appendix.
- (331) Monitoring Trustee would also be responsible for supervising the introduction of TPA rules (chapter VII.1.1.). Gazprom would have to present Monitoring Trustee drafts of the documents implementing TPA rules on NS and NS2 and obtain non-binding recommendation of the Monitoring Trustee on necessary changes in the documents (if needed). If Gazprom would not follow the recommendation of Monitoring Trustee, the latter would be obliged to present a report to the Commission, in which it would be giving its preliminary opinion on the compliance of Gazprom with the Commitment Decision. Moreover, Gazprom should also submit reports on the performance of TPA each six months.
- (332) Mechanism analogical to the one discussed in the section above could be used for the commitment enabling to trade via Belarus (chapter VII.2.2.). Additionally, Gazprom should be obliged to submit to Monitoring Trustee reports on the availability of the Belorussian gas system to the customers from outside Belarus each year for at least 6 consecutive years after the Commitment Decision Effective Date.
- (333) In respect to the commitment concerning introduction of the Network Codes and bidirectional flow of the gas on the entry points to the CEE Countries Gazprom should submit to the Monitoring Trustee detailed report within 6 months from the Commitment Decision Effective Date, presenting the necessary actions of Gazprom (consents, submitting proposals if necessary) in regard to this commitment and their timeframe. Said timeframe should allow to incorporate Network Codes and bidirectional flow of gas within period set out in the Commitment Decision. Monitoring Trustee should then verify, if Gazprom acts in accordance with the timeframe set out in this report.
- (334) In case of the introduction of bidirectional flow on Drozdowicze point (chapter VII.2.4.), due to the short period of implementation Gazprom should present a report to the Monitoring Trustee concerning completion of the Gazprom's obligation within 2 weeks from the date set out in the Commitment Decision.

- (335) In respect to the enabling off-take on Gaspool, NCG or CEGH (chapter VII.2.5.), Gazprom should be committed to provide Monitoring Trustee a report once per each calendar year on the performance of this commitment, including information concerning number of clients, volumes and duration of the changes in delivery points, as well as the service fee charged in those transactions. Mechanisms analogical to those proposed in the Commitment Document (regarding swap-like operation) should also be used to monitor the effectiveness of this commitment.
- (336) Monitoring of the implementation of the commitment concerning destination clauses (chapter VII.2.6.) does not require changes.
- (337) Role of the Monitoring Trustee with regard to the commitment concerning retaliation for re-export of natural gas was already described in sections (241)-(242).
- (338) In respect to the commitment concerning limitation in reservation of transmission capacities (chapter VII.2.8.), Monitoring Trustee should supervise process of cancellation of the long-term bookings. Gazprom should provide a detailed report, containing timeframe during, which it is going to complete its obligation. In case any changes to the time schedule, Gazprom should inform Monitoring Trustee and provide a new deadline (staying within the timeframe set out in the decision). After completing obligation to dispose all long-term capacity booking, Gazprom should report to the Monitoring Trustee each year the data on the capacity bookings and their duration.
- (339) In case of the pricing commitments, Gazprom should be delivering drafts of the offers regarding both extraordinary price review (chapter VII.3.1.) and price review clause (chapter VII.3.2.) to the Monitoring Trustee. If the Monitoring Trustee would come to the conclusion that offers contain elements, which:
- a. are unrelated to the commitment,
 - b. may produce negative impact on the effectiveness of the commitment,
 - c. may produce effect contrary to the commitment aim,
- it can issue a non-binding recommendation to Gazprom. In case Gazprom acts against this recommendation, Monitoring Trustee has to notify the Commission.
- (340) The same mechanism can be applied to commitment concerning flexibility (chapter VII.4.).
- (341) With regard to the commitments concerning EuRoPol, PGNiG proposes that Monitoring Trustee should be delivered a report of Gazprom from the completion of the commitments.

VII.8.4. Access to non-confidential versions of reports of Monitoring Trustee by the customers of Gazprom in scope, in which Commitments are applicable to them

- (342) PGNiG proposes that the Commitments should provide a right of access to non-confidential versions of the Monitoring Trustee's reports in order to guarantee an effective implementation of the Commitments. The undertakings concerned will be

able to provide their relevant observations and comments to the performance of Gazprom with respect to its compliance with the Commitment Decision.

- (343) PGNiG stresses that the right of access to non-confidential versions of reports of Monitoring Trustee would respect the right to be heard and the right of defence, which the affected customers of Gazprom are entitled to.
- (344) The discussed provision is necessary, due to the fact that the mentioned rights are based on fundamental principles of the EU legal *acquis*.

VIII. Application of the remedies/commitments presented in PGNiG's observations

- (345) As already indicated, the measures of restoring of the competition in CEE Countries proposed by PGNiG can be used as remedies or as a commitments, depending on which basis (Article 7 or Article 9), which the Commission will eventually adopt when taking its decision. Noting significant differences in the nature of those two decisions, PGNiG submits two propositions of “packages” containing measures that could be applied with each of the decisions adopted by the Commission.
- (346) In case the Commission intends to adopt an Article 7 decision, including a fine, PGNiG propose to enhance it with the following remedies:
- a. Obligation to divest assets,
 - b. Obligation to cooperate on the development of interconnections between the CEE Countries and the EU Member States and Energy Community countries,
 - c. Obligation to enable gas trade with Baltic states via Belarus and Ukraine,
 - d. Obligation to enable bidirectional flow of gas and application of Network Codes on the entry points to the CEE Countries from outside of the EU,
 - e. Obligation to abandon destination clauses in whole EU and in neighbouring countries ,
 - f. Obligation not to reserve transmission capacities for periods longer than 5 consecutive years and to market those already booked via auctions,
 - g. Obligation to provide customers affected by unfair pricing with the option of an extraordinary revision of price with reversed right to determine the price,
 - h. Obligation to return **[Business Secret]** to EuRoPol ,
 - i. Obligation to implement the Certification Decision on the Yamal Pipeline,
 - j. Obligation to amend the statue of EuRoPol to ensure its compliance with Polish law,
 - k. Other necessary obligations, aimed at cessation of the infringement in other CEE Countries.
- (347) PGNiG states once again that adoption of an Article 7 decision with the above presented remedies constitutes an adequate and effective way of combating Gazprom's infringements.
- (348) In case the Commission intends to adopt a decision under Article 9, PGNiG submits that the Commission should negotiate with Gazprom the introduction of all of the commitments proposed and discussed in this document. PGNiG is aware that implementing all the commitments in one decision might not be possible because of Gazprom's refusal to accept such an extent thereof. However, PGNiG believes that presenting a wide range of possible measures with a view to restore competition in CEE Countries will lead to a better and more effective decision than the one basing on the present version of the Commitments.