



EUROPEAN COMMISSION
Competition

***CASE AT.40497 - POLISH GAS
PRICES***

ANTITRUST PROCEDURE
Council Regulation (EC) 1/2003 and
Commission Regulation (EC) 773/2004

Article 7(2) Regulation (EC) 773/2004

Date: 17/04/2019

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EUROPEAN COMMISSION

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PUBLIC VERSION

**POLSKIE GÓRNICITWO NAFTOWE
I GAZOWNICTWO S.A.
KASPRZAKA STREET 25
01-224 WARSAW
POLAND**

Subject: Case AT.40497 - Polish gas prices
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Madam/Sir,

- (1) I am writing to you in connection with your complaint of 9 March 2017 lodged with the European Commission (the "Commission") against Public Joint Stock Company Gazprom and its subsidiaries and Gazprom Export LLC ("Gazprom"). I also refer in this context to the Commission's letter of 23 January 2018 (received by you on 25 January 2018) informing you of the Commission's intention to reject the complaint, your reply of 2 March 2018 to this letter, your letter to the Hearing Officer of 5 September 2018, the Commission's reply letter of 25 September 2018 and your subsequent letter of 24 January 2019. The Commission also refers to your application pursuant to article 263 TFEU of 15 October 2018 for the annulment of Commission Decision C(2018) 3106 final of 24 May 2018.
- (2) The Commission has examined the different elements you have submitted, in particular those contained in your letter of 2 March 2018. However, this examination has not led to a different assessment of your complaint. For the reasons set out below, the Commission does not intend to conduct a further investigation into your allegations and it has decided, pursuant to Article 7(2) of Regulation 773/2004¹, to reject your complaint.

¹ 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, 27.04.2004, pages 18-24.

1. FACTS

- (3) The Commission summarises below the procedure, before it outlines the contents of Polskie Górnictwo Naftowe i Gazownictwo S.A. (“PGNiG”)’s complaint of 9 March 2017, the Statement of Objections of 22 April 2015, Gazprom’s initially proposed commitments, PGNiG’s written observations on these initial commitments of 14 February 2017 and Gazprom’s final improved commitments 15 March 2018.

1.1 Procedure

- (4) On 9 March 2017, PGNiG filed a complaint (the "Complaint") against Gazprom pursuant to Article 5 of 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 (“Regulation 773/2004”).² The Commission registered the Complaint under case number AT.40497 - Polish Gas prices.
- (5) The Commission published shortly afterwards on 16 March 2017 a communication pursuant to Article 27 (4) of Regulation (EC) No 1/2003 in case AT.39816 (Upstream gas supplies in Central and Eastern Europe) in the Official Journal of the European Union concerning the commitments proposed by Gazprom in case AT.39816 (‘the Market Test’).
- (6) The Commission invited PGNiG by letter of 31 March 2017 to submit written observations ("Written Observations") in the Market Test. PGNiG requested and was granted an extension of the deadline until 19 May 2017.
- (7) A non-confidential version of PGNiG’s complaint was forwarded to Gazprom on 6 April 2017. Gazprom submitted comments on PGNiG’s complaint on 15 May 2017.
- (8) PGNiG submitted Written Observations on Gazprom’s draft commitments on 19 May 2017. An economic study of Microeconomix, prepared at the request of PGNiG, was also submitted in reply to the Commission’s Market Test Notice.
- (9) On 23 January 2018, pursuant to Article 7(1) of Regulation 773/2004 the Commission informed PGNiG of its intention to reject the Complaint (the “pre-rejection letter”) The Commission attached to this letter also a non-confidential version of the Statement of Objections addressed to Gazprom on 22 April 2015. Furthermore, the Commission attached a non-confidential version of Gazprom’s comments of 15 May 2017 on PGNiG’s complaint to its pre-rejection letter.
- (10) The Commission also offered to PGNiG a meeting. PGNiG replied by email of 24 January 2018 that it will for time constraints not be able to attend the proposed meeting with the Commission’s services and "*intends to utilize its prerogative to provide its response*" to the pre-rejection letter.
- (11) PGNiG requested by letter of 15 February 2018 an extension of the deadline to reply to the Commission’s pre-rejection letter. The Commission granted the requested extension of the deadline by email of 19 February 2018.

² OJ L 123, 27.4.2004, p. 18.

- (12) By letter of 2 March 2018, PGNiG submitted written comments on the Commission's pre-rejection letter. PGNiG also requested by its letter further access to certain paragraphs of the SO and to have access to all further undisclosed documents on which the Commission had based itself for its provisional assessment of PGNiG's complaint.
- (13) Gazprom submitted on 15 March 2018 an improved proposal for commitments in case AT.39816 ("the Commitments").
- (14) On 24 May 2018, the Commission adopted a decision making binding the commitments. The Commission published a non-confidential version of this decision on 17 July 2018.
- (15) PGNiG sent on 5 September 2018 a letter to the Hearing Officer by which it requested like in its letter of 2 March 2018 access to further access to parts of the SO and specified for the first time documents or types of documents on which PGNiG believes the Commission based its provisional assessment of PGNiG's complaint.
- (16) The Hearing Officer referred all of PGNiG's requests by email of 17 September for response to DG Competition. DG Competition responded by letter of 25 September 2018 to PGNiG's various requests.
- (17) PGNiG filed on 15 October 2018 an appeal against the Commission's commitment decision of 24 May 2018.

1.2. The Complaint

- (18) PGNiG alleges in its Complaint that Gazprom has a dominant position on the market of upstream gas supply to, inter *alia*, Poland and committed a number of abuses of this dominant position. In essence, PGNiG contends that:
 - Gazprom engages as of at least the beginning of the year 2006 until the present in an **unfair pricing policy**, the effect of which was that PGNiG had to pay excessive prices for the supply of gas.³
 - PGNiG alleges that Gazprom forced it in late 2006 to accept the introduction of a new detrimental price formula into the Yamal contract, which became effective retroactively as of [...]. PGNiG maintains that Gazprom made the signing of a gas supply contract with RosUkrEnergo ("RUE"), a subsidiary of Gazprom, contingent on PGNiG's agreement to the new price formula. PGNiG points out that it was dependent on RUE's gas supplies, because it had no alternative source for the additional gas it needed.⁴
 - PGNiG mentions that, as a result of the dispute between Russia and Ukraine in 2009, RUE did not comply with its obligation to supply gas under the gas supply contract with PGNiG. PGNiG claims it was, in view of insufficient gas supplies, forced to agree with Gazprom on a short-

³ Complaint, recitals 23 to 66.

⁴ Complaint, recitals 29 to 36.

term contract in summer 2009. Gazprom allegedly made the signing of this contract contingent on PGNiG waiving all claims for a breach of contract against RUE and releasing to RUE the payment PGNiG withheld as compensation for the breach.⁵

- PGNiG maintains that in 2011 it had to accept Gazprom's proposal for the settlement of the dispute of PGNiG's price revision request of 2011. PGNiG claims that Gazprom's price proposal was above market prices and mentions that it only accepted the settlement in order to avoid having to pay excessive gas prices during lengthy arbitration proceedings. PGNiG adds in this context that its price revision request of 2014 is the subject matter of pending arbitration proceedings.⁶
- PGNiG alleges that, from 4 September 2014 until 6 March 2015, Gazprom infringed **contractual supply obligations** without prior warning by reducing gas supplies on average by about 20%. The gas volumes supplied were, according to PGNiG, below the contractually agreed volumes, because Gazprom decided to supply first Russian gas storages before the winter season. PGNiG claims, that as a consequence of Gazprom's contractual breach, it had to incur high transmission fees on the Western border for potential alternative gas shipments from Germany.⁷
- PGNiG mentions that the Yamal contract included **destination clauses** until October 2010 and that it did not manage to find an alternative gas supplier willing to supply gas via Ukraine to Poland during Gazprom's reduction of gas supplies in 2009 and 2010. PGNiG alleges that destination clauses in the gas supply contracts of alternative suppliers (who were also Gazprom customers) or a requirement for Gazprom's approval for cross border sales were the reason for PGNiG's failure to find alternative gas supply sources.⁸ PGNiG suspects, without being able to provide documentary evidence for this suspicion, that the gas supply contracts of Gazprom customers outside the CEE might still include destination clauses or similar restrictions.⁹
- PGNiG alleges that Gazprom insisted that additional gas supplies required an amendment of the Intergovernmental Agreement and therefore the Russian Federation should also be involved in the negotiations. PGNiG mentions that the Russian Federation insisted in this context that System Gazociągów Tranzytowych EuRoPol Gaz S.A. ("EuRoPol"), a joint venture of PGNiG and Gazprom Export, waived a claim of [...] (which Gazprom should have paid to EuRoPol following the verdict of an arbitration tribunal). Furthermore, PGNiG stated that the additional gas supplies were also conditional on PGNiG agreeing to changes in the statutes of EuRoPol that granted a veto right to Gazprom, on a waiver by PGNiG of any claims against RUE and on conditions

⁵ Complaint, recitals 37 to 45.

⁶ Complaint, recitals 46 to 54.

⁷ Complaint, recitals 55 to 66.

⁸ Complaint, recitals 67 to 73.

⁹ Complaint, recital 73.

of the agreement between EuRoPol and OGP Gaz-System S.A. that only allowed for the transfer of limited task to the latter. PGNiG is of the view that these **infrastructure related conditions** demanded for the supply of additional gas volumes were also imposed in retaliation for the Polish opposition against the construction of the Nord Stream 1 Pipeline.¹⁰

- PGNiG is of the view that Gazprom's abused its dominant market position on the **Belarus market** and that this has the effect of restricting competition on parts of the EU market. PGNiG alleges that Gazprom abused its dominant position on the Belarus market by forcing in the period 2004 to 2011 Belarus to transfer full control over Beltransgaz to Gazprom. PGNiG mentioned that Belarus accepted price decreases in consideration of the transfer of shares in the infrastructure company. PGNiG notes that the pipelines of Beltransgaz would allow gas to be transported from Lithuania and Ukraine to Poland via Belarus.¹¹

- (19) In terms of evidence, PGNiG submitted with its Complaint only two press articles, but did not provide to the Commission any other new evidence. PGNiG refers in the Complaint in a general manner to its replies to the Commission's requests for information in case AT.39816.¹²

1.3. Statement of Objections in case AT.39816

- (20) The Commission provisionally found in its Statement of Objections of 22 April 2015 that Gazprom would be dominant in eight EU Member States (*Bulgaria, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia*) for the upstream wholesale supply of gas and may have infringed Article 102 TFEU by abusing its dominant position. The Commission's preliminary view was that Gazprom was hindering competition in the upstream gas supply markets in CEE. In particular, the Commission's preliminary view was that Gazprom was abusing its dominant position in these markets by pursuing an overall strategy to partition CEE gas markets with the aim of maintaining an unfair pricing policy in several of those Member States. Gazprom may also have abused its dominant market position by making the supply of gas dependent on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure.

1.3.1 *Gazprom might have hindered cross-border gas sales*

- (21) Gazprom included a number of clauses in its long-term supply agreements with wholesalers that may have constituted territorial restrictions and that may have prevented the export of gas in eight EU Member States.
- (22) In Poland, the gas supply contract with PGNiG included territorial restrictions in the form of a destination clause and measures that may have had an equivalent effect to an export ban. In terms of measures having an equivalent effect to an export ban, the Commission preliminarily found that Gazprom Export isolated the Polish gas market

¹⁰ Complaint, recitals 74 to 80.

¹¹ Complaint, recitals 81 to 87.

¹² Complaint, recitals 126 to 127.

and prevented the import of gas into Poland by refusing to change gas delivery points. Such a change of delivery points would have allowed other gas wholesalers to redirect gas to Poland. As a result of Gazprom's conduct, PGNiG's attempts to procure gas from other wholesalers at times of a severe shortage of gas supply failed and the Polish gas market remained isolated from the neighbouring gas markets. Furthermore, the Commission preliminarily found that Gazprom may have prevented the re-routing of natural gas from Hungary to the Ukrainian/Polish border by refusing to change gas metering stations.

- (23) The Commission preliminarily concluded that Gazprom's strategy of segmenting the internal market along national borders in the markets concerned may have been implemented either through explicit territorial restrictions or by other means having an equivalent effect. The Commission provisionally held that this constituted an abuse of a dominant position within the meaning of Article 102 TFEU. The Commission noted in this context that the territorial restrictions and the equivalent measures had a restrictive object and were abusive under Article 102 TFEU. The Commission also provisionally found them to be capable of having restrictive effects and noted provisionally for some of the territorial restrictions that they can also be qualified as abusive unfair trading conditions under Article 102 a) TFEU.

1.3.2 Gazprom's alleged unfair pricing policy

- (24) The Commission's investigation also concerned the prices that Gazprom's customers paid for their gas with regard to five CEE countries (*Bulgaria, Estonia, Latvia, Lithuania and Poland*). The Commission assessed the prices in those countries against Gazprom's costs, as well as compared with competitive Western European gas price benchmarks. The former comparison was carried out for the period 2009-2013, while the latter was carried out for the period 2009-2014.
- (25) The Commission's preliminary conclusion was that Gazprom had charged unfair prices in five CEE countries (*Bulgaria, Estonia, Latvia, Lithuania and Poland*) at least from 1 January 2009 until 31 December 2014 by charging prices that were considered excessive compared with Gazprom's costs, as well as compared with competitive Western European gas price benchmarks. The Commission considered on a preliminary basis that the different price formulae based on oil price indexation may have contributed to the unfairness of certain prices.

1.3.3 Concerns on gas transport infrastructure

- (26) The Commission also had concerns that Gazprom leveraged its market dominance in Bulgaria and Poland by making gas supplies conditional upon obtaining certain infrastructure-related commitments from wholesalers.
- (27) In Bulgaria, the Commission's preliminary view was that Gazprom made wholesale gas supplies conditional upon the participation of the incumbent Bulgarian gas wholesaler in a large-scale infrastructure project of Gazprom (the South Stream pipeline project) despite its high costs and an uncertain economic outlook.
- (28) In Poland, the Commission's preliminary view was that Gazprom made gas supplies to PGNiG conditional upon the conclusion of the Operatorship Agreement, which conferred investment powers to EuRoPol (where Gazprom had a veto right). The Commission provisionally held that Gazprom thereby at least potentially foreclosed access of competitors to the Yamal pipeline and infringed Article 102, in particular lit. d) TFEU.

Likewise, the Commission preliminarily noted that Gazprom's conditioning of gas supplies for PGNiG with Europol-related issues was abusive.

1.4 The Market Tested Commitments

(29) As mentioned before, Gazprom offered commitments on 14 February 2017, which were subject to a market test (“market tested commitments”). The market tested commitments addressed the three main competition concerns set out in the Statement of Objections. Gazprom proposed a duration of eight years for its proposed commitments.

1.4.1 Enabling the free flow of gas in Central and Eastern Europe

(30) Gazprom committed to remove all contractual barriers to the free flow of gas in Central and Eastern European gas markets. In addition, Gazprom committed to take active steps to enable their better integration:

- *Remove market segmentation* - Gazprom proposed to remove all direct and indirect contractual restrictions that prevented its customers from re-selling gas or make it economically less attractive for customers to resell gas. This means that in addition to removing restrictions on gas re-sale (e.g., export bans, destination clauses), Gazprom proposed to remove all clauses which reduce its customers' business incentives to re-sell gas.
- *Facilitate market interconnections with Bulgaria* – The provisions in Gazprom's contracts on the monitoring and metering of gas in Bulgaria isolated the Bulgarian gas market from the neighbouring EU gas markets. Gazprom proposed to make changes to the relevant contracts in order to put the Bulgarian operator of the gas transmission infrastructure in control of the cross-border flows of gas and facilitate interconnection agreements between Bulgaria and its EU neighbours, in particular with Greece.
- *Create opportunities for more gas flows to the Baltic States and Bulgaria* – As Bulgaria and the Baltic States still lack access to interconnections with their EU neighbours, Gazprom proposed to give the relevant customers in Hungary, Poland and Slovakia the possibility to ask for delivery of all or part of their contracted gas to entry points into the Baltic States and Bulgaria. This would allow customers to seek new business opportunities in the Baltic States and Bulgaria, even before the connecting gas infrastructure becomes available. Gazprom would be allowed to charge a fixed and transparent service fee, in line with what it would typically charge for such services in the market.

1.4.2 Ensuring competitive gas prices in Central and Eastern Europe

(31) Gazprom proposed to introduce a number of important changes to its contractual price revision clauses to ensure competitive gas prices in the Bulgarian, Estonian, Latvian, Lithuanian and Polish gas markets:

- *Gas prices linked to competitive benchmarks*: Gazprom proposed to introduce competitive benchmarks, including Western European hub prices, into its price review clauses in contracts with customers in the five Member States. The price review clauses would enable customers to request changes to their gas price. The commitments would give the customers a contractual right to trigger a price review when the prices they pay diverge from competitive price benchmarks. This would ensure competitive gas prices in these regions in the future.

- *More frequent and efficient price reviews:* Gazprom would increase the frequency and speed of price revisions. For those contracts, for instance in the Baltic States, where price revision clauses do not currently exist, Gazprom proposed to introduce clauses reflecting above elements.

1.4.3 Removing demands obtained through its dominant market position

- (32) The Statement of Objections raised concerns in relation to the South Stream project in Bulgaria and the Yamal pipeline in Poland.
- *As regards South Stream,* Gazprom proposed to commit not to seek any damages from its Bulgarian partners following the termination of the South Stream project.
 - *As regards the Yamal Pipeline,* the Commission's investigation has shown that the situation cannot be changed by the antitrust procedure due to the impact of an intergovernmental agreement between Poland and Russia.

1.5 PGNiG's Written Observations in the Market Test

- (33) With regard to the market tested commitments, PGNiG took issue in particular with the following elements¹³:
- PGNiG noted that Gazprom allegedly abused its dominant position in the CEE countries concerned for more than a decade and never stopped infringing competition law. Accordingly, PGNiG deemed it a priority that case AT.39816 that Gazprom fully ceases its infringing conduct. PGNiG took the view that it would be necessary to adopt a decision imposing a substantial fine on Gazprom as well as effective remedies.
 - PGNiG expressed the view that Gazprom's commitments would be ineffective. PGNiG took of the view that the Commission could not accept the market tested commitments, because they would not bring to an end the objections set out in the Statement of Objections;
 - PGNiG alleged that compliance with the market tested commitments would not even require Gazprom to stop its infringements. With respect to specific market tested commitments, PGNiG notes the following:
 - the commitment addressing Gazprom's unfair pricing policy would "*not require any change of pricing policy or actual change of formulas that are currently contained in the contracts with customers in the CEE.*"¹⁴
 - the commitment concerning market segmentation would only require from Gazprom an offer to its customers to amend their contracts;¹⁵ and
 - the commitments would not address Gazprom's alleged abusive conduct against PGNiG consisting of the tying of commercial issues with infrastructure related commitments concerning the Yamal Pipeline.¹⁶

¹³ See the summary in PGNiG's written observations, recitals 7 to 23.

¹⁴ PGNiG's written observations, recital 126.

¹⁵ PGNiG's written observations, recital 127.

1.6 PGNiG's Written Comments

- (34) PGNiG replied by letter of 2 March 2018 with written comments to the Commission's pre-rejection letter ("Written Comments"). PGNiG alleged in its letter in particular that its procedural rights in case AT.39816 (Upstream gas supplies in Central and Eastern Europe) had been infringed by the Commission. PGNiG objected to the adoption of a commitment decision against Gazprom, criticised the lack of adequacy of the commitments concerning pricing and territorial restrictions and alleged a lack of legal reasoning concerning the abandonment of the objection concerning the Yamal pipeline.
- (35) PGNiG also disagreed with the Commission's position on the supply restrictions in winter 2014/2015 and noted that all of Gazprom's supply restrictions since 2004 were motivated by Gazprom's aim to obtain economic objectives either in Belarus, Ukraine or EU Member States. PGNiG noted with respect to the allegedly abusive transfer of ownership in the Belarusian gas network that it would be the task of the Commission to further investigate the alleged abuse in Belarus and not PGNiG's obligation to submit relevant evidence. PGNiG concluded by requesting the Commission to reconsider its position and adopt a prohibition decision against Gazprom.

1.7. Final Commitments after the Market Test

- (36) Taking into account PGNiG's and other replies to the Market Test, Gazprom significantly improved its market tested commitments by submitting a revised proposal on 15 March 2018 ("Commitments"). The improvements related to the commitments dealing with change of delivery points and price revisions. On 24 May 2018, the Commission adopted a decision making binding the Commitments.
- (37) The main improvements, as compared to the market tested commitments are summarised below.

1.7.1 Improvements of the commitment dealing with the changes of gas delivery points

- (38) First, Gazprom committed to offer to its customers concerned the change of delivery points on a bi-directional basis (and not only to entry points in the Baltics and Bulgaria as foreseen in the market tested commitments). This allows gas to be shifted in both directions between, on the one hand, the Baltic States and Bulgaria and, on the other hand, a number of delivery points in the other parts of CEE. Such a bi-directional mechanism will anticipate the existence of gas connecting infrastructure before it is physically put in place. The minimum conditions and the service fee charged for bi-directional gas swaps are the same irrespective of the direction of the gas swapped.
- (39) Second, Gazprom committed to make available the change of delivery point mechanism also to customers in the Baltic States who had a gas supply contract with Gazprom at the time the Statement of Objections has been adopted.
- (40) Third, as requested among others by PGNiG, Gazprom reduced the minimum requirements applicable to the change of delivery point mechanism as set out in the

¹⁶ PGNiG's written observations, recital 129.

market tested commitments. The minimum volume of gas to be shifted was reduced from 100 to 50 million cubic meters per year and the lead-time was shortened from 6 months to 4 months.

- (41) Fourth, Gazprom committed to add two new delivery points in the Baltic States, Izborsk and Varska, and one delivery point in Poland, Wysokoje. The added new delivery point will make more gas volumes eligible for a change of delivery points.
- (42) Fifth, the exceptions allowing Gazprom to refuse a change of delivery point have been limited to a lack of transmission capacity. In this context, Gazprom also committed to provide the Monitoring Trustee with all necessary confidential information (*e.g.*, with regard to capacity availability and bookings) to allow for a full and effective monitoring of the Commitments.
- (43) Sixth, Gazprom committed to remain liable for non-delivery of gas to a new delivery points except, in line with the terms of the long-term gas supply contracts, for instances of *force majeure* and/or maintenance work carried out by the relevant Transmission System Operators.
- (44) Seventh, for some of the change of delivery pairs, Gazprom reduced the service fee that it is allowed to charge to its customers.

1.7.2 Improvement of the commitment dealing with pricing

- (45) First, Gazprom committed to extend the scope of the price revision clause by offering the price review clause also to new customers and by covering contracts with a total duration of at least 3 years (instead of 4 years).
- (46) Second, Gazprom specified what is meant by "*generally accepted liquid hubs in continental Europe*" by listing two examples of liquid hubs: the TTF gas hub in the Netherlands and the NCG gas hub in Germany (these two hubs were used as benchmarks in the Statement of Objections to assess whether Gazprom's prices were excessive). This improvement addresses a comment of PGNiG, which proposed to set out the criteria pursuant to which a gas hub would be considered as liquid.
- (47) Third, Gazprom made clear that only "*competitive Continental Western European gas markets*" should be taken into account when reviewing prices. This clarification aims at ensuring that the substantive guidance is sufficiently precise to prevent prices from becoming excessive. This modification takes into account PGNiG's suggestion to further specify the relevant price benchmarks.
- (48) Fourth, as suggested in the market test by PGNiG, Gazprom clarified its commitment by including a clause providing for the retroactive application of the new price as of the date of the notification of the price revision request. Gazprom also specified that the parties will be allowed to trigger a price revision immediately after the introduction of the new price review clause in their contracts.
- (49) Fifth, Gazprom specified that the arbitrators shall also be guided by the substantive guidance spelled out in the commitment text and that the place of arbitration should be within the EU

2. ASSESSMENT

2.1 Considerations for the Assessment of Complaints

(50) The Commission notes that it is entitled to set priorities in complaint matters as set out in points 41 to 45 of the Notice on the handling of complaints¹⁷, including with regard to the investigation of individual aspects of an alleged infringement.

2.1.1. *Complaints relating to concerns addressed by commitments*

(51) Subject to the requirement that it gives reasons for such a decision, the Commission may decide that it is not appropriate to investigate or to continue to investigate a complaint alleging practices contrary to Articles 101 and 102 TFEU where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest.¹⁸ To the extent that matters raised in a complaint relate to preliminary concerns that could be adequately addressed by commitments made binding pursuant to Article 9 of Regulation 1/2003¹⁹, the Commission may hence reject the complaint.

(52) Article 9 of Regulation 1/2003 provides that where an undertaking offers commitments to address the concerns expressed to it by the Commission, the Commission may by decision make those commitments binding on the undertaking. Such a decision shall conclude that "*there are no longer grounds for action by the Commission.*" Whereas the Commission is required to consider attentively all the matters of fact and of law which the complainant brings to its attention, Article 7 of Regulation 1/2003 does not give a complainant the right to require the Commission to take a final decision as to the existence or non-existence of an alleged infringement.²⁰

2.1.2. *Complaints relating to concerns not addressed by commitments*

(53) When a complaint does not relate to concerns that will be addressed by commitments, the Commission takes various factors into account to decide whether there are sufficient grounds for acting. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. The Commission may also take into account whether the complainant would have other efficient means to seek redress.

(54) In accordance with Article 7(1) of Regulation 773/2004, the Commission can consider that there are insufficient grounds for acting on a complaint on the basis of the

¹⁷ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, pp. 25-27.

¹⁸ Case T- 110/95 *International Express Carriers Conference v Commission (IECC) v Commission*, paragraph 57, upheld by the Court of Justice in Case C-449/98 P *International Express Carriers Conference v Commission* [2001] ECR I-03875, paragraphs 48-51. Similarly, Case T-1 93/02 *Laurent Piau v Commission*, paragraph 96, upheld by the Court of Justice in Case C171/05 P *Laurent Piau v Commission*.

¹⁹ Cf. in this regard, Case T-76/14, *Morningstar*, at para. 56.

²⁰ Case C-367/10 P *EMC Development AB v Commission* [2011] ECR-I 46, paragraphs 73 and 74; cf. also Case C-441/07 P, *Alrosa*, at para. 40.

information in the Commission's possession. Moreover, the Commission may consider whether the complaint concerns on-going conduct or conduct that lies mainly in the past.

2.2. Appropriateness of Adopting a Commitment Decision for Case AT.39816

- (55) PGNiG lodged an application on 15 October 2018 against the Commission's commitment decision. PGNiG's application coincides to a large extent with the subject matter of its complaint. It also touches upon the issue of handling of PGNiG's complaint. The Commission emphasises, in view of the substantive overlap between the pending Court proceedings and the pending complaint case, that all findings made in this decision of PGNiG's complaint are without prejudice for the Commission's defence before the Union courts. Furthermore, the Commission wishes to stress that all the alleged irregularities in the handling of the complaint are irrelevant for the judicial review of the Commission's commitment decision and the Commission will take a position on these alleged irregularities below.

PGNiG's Views on the Adoption of a Commitment Decision for Case AT.39816

- (56) PGNiG is of the view that only a decision based on Article 7 of Regulation 1/2003 including a final finding as to the existence or non-existence of an alleged infringement would be adequate in case AT.39816. PGNiG noted that Gazprom had allegedly pursued its strategy of dominating and dividing the CEE gas markets for more than a decade and had increased gas prices in CEE countries in the period between 2004 and 2008 because of the CEE countries' accession to the European Union. PGNiG mentioned also that Gazprom's anticompetitive conduct would be facilitated by infrastructure projects such as the construction of the Nord Stream 1 pipeline and the Underground Gas Storage Katharina. The construction of the Nord Stream 2 pipeline would be motivated by similar considerations. PGNiG admitted that these projects would not be "*a direct breach of competition rules*", but would nevertheless facilitate Gazprom's long-lasting abusive conduct on the upstream gas supply markets.²¹ PGNiG essentially maintains the view set out in its complaint of 9 March 2017 and its written observations in the market test, namely that only the imposition of a severe fine on Gazprom and remedies on the basis of Article 7 of Regulation 1/2003 would be an adequate remedy for Gazprom's abusive conduct.²²

The Commission's Test for the Adequacy of the Commitments

- (57) The Commission emphasises in this context the broad margin of discretion it enjoys when deciding on making proposed commitments binding. Furthermore, the Commission refers to the comprehensive and forward-looking character of commitments. The Commission recalls that it is in the Commission's discretion to decide whether or not it is appropriate to accept commitments offered by parties under investigation. The Commission decision to accept commitments is in view of its broad discretion in general based on their ability to quickly and adequately address the competition concerns. When assessing the commitments offered, the Commission

²¹ Letter of PGNiG of 2/03/2018, recital 34 to 36.

²² Written observations of PGNiG, recital 38.

must verify in light of the principle of proportionality whether the commitments would be sufficient to address the identified competition concerns.²³

- (58) In the context of Article 9 of Regulation No 1/2003, the principle of proportionality obliges the Commission to ensure that the commitments in question address its competition concerns, as communicated to the undertaking concerned, and, second, that the undertakings concerned have not offered less onerous commitments that would also address those concerns adequately.²⁴
- (59) The Commission maintains its view about the adequacy of the forward looking commitments addressing the concerns and their ability of facilitating the free flow of gas within CEE. These commitments allow for a timely remedy of all the preliminary concerns identified by the Commission in the final decision and put in place a market-based pricing mechanism that can prevent that gas prices become unfair again in the future. The Commission would like to recall in this context that also in its preliminary objections, as set out in the Statement of Objections, related solely to Gazprom's conduct on the market for the upstream supply of gas within the eight investigated CEE Member States and did not relate to Gazprom's broader business and infrastructure operations within the European Union or its business conduct outside of the European Union.
- (60) The Commission continues therefore to be of the view that it is exercising its discretion by accepting commitments that do address adequately the Commission's concerns as identified in the final decision and ensure that there is no longer ground for action by the Commission. In this context, it should also be taken into account that Article 9 (2) b) of Regulation 1/2003 provides the Commission with an effective instrument to ensure that Gazprom fully respects the Commitments as made binding by a decision of the Commission.

2.3. Adequacy of the Commitments declared binding

- (61) The Commission had on the basis of above described criteria and on the basis of the market tested commitments preliminarily and on the basis of further considerations set out below (cf. below paragraph (94)) concluded that the Complaint should be rejected. The Commission set out in detail its reasons in its pre rejection letter of 23 January 2018. PGNiG addressed again by its letter of 2 March 2018, by which it replied to the pre-rejection letter of 23 January 2018, several commitments as well as matters which are not addressed by commitments. The Commission addresses in this section first PGNiG comments on the commitments, before it deals with PGNiG's further points of complaint in the subsequent section.

²³ Case C-441/07 P *Commission v Alrosa*, C-441/07 P, ECLI:EU:C:2010:377, paragraph 61.

²⁴ Case C-441/07 P *Commission v Alrosa*, C-441/07 P, ECLI:EU:C:2010:377, paragraph 41.

2.3.1 *The Pricing Commitment*

PGNiG's Submissions

- i. Polish gas prices as of 2015
- (62) [...].
- ii. Effectiveness of price revision clauses
- (63) Furthermore, PGNiG stated with regard to price revision clauses that such clauses could only ensure fair prices if a commodity supplier could not influence supply levels and if customers could use an alternative supply source. Otherwise, a threat of a supply interruption could prevent customers from exercising their rights as provided for in a price revision clause. Furthermore, the uncertainties associated with arbitration proceedings and their duration would make exercising the rights under a price revision clause unattractive, especially since there would be no guarantee that Gazprom would respect an arbitration award. Furthermore, PGNiG also notes that the commitments would not provide for a compensation mechanism for past excessive prices, although the Commission's antitrust practice would not rule out such a mechanism.²⁵
- (64) Finally, PGNiG notes the long-term gas supply contracts did not prevent CEE customers from invoking benchmark prices (be it weighted border prices or prices in liquid gas hubs) in price revision proceedings and therefore denies that a price revision clause referring to benchmark prices would improve the situation of customers. PGNiG therefore concludes that the pricing commitment would be inadequate as regards the Polish gas market.²⁶

The Commission's Assessment

- i. Polish gas prices as of 2015
- (65) [...].²⁷
- (66) [...].²⁸ [...].
- ii. [...]
 - [...]
- (67) [...].²⁹

²⁵ Letter of PGNiG of 2/03/2018, recitals 44 to 47.

²⁶ Letter of PGNiG of 2/03/2018, recitals 48 to 52.

²⁷ [...].

²⁸ [...].

²⁹ [...].

- (68) Customers have without an explicit reference to such prices no contractual claim to enforce that the price revision will be based on publicly available, transparent and competitive Continental Western European gas price benchmarks including in particular TTF and NCG and the average weighted border prices in Germany, France and Italy.³⁰ Such a reference ensures not only for the future that gas prices will remain at a competitive price level, but also significantly facilitates the price revision and improves the predictability of the outcome of a price revision proceedings.
- (69) The Commission is also contrary to PGNiG of the view the potentially long duration of arbitration proceedings does not make price revision proceedings ineffective as such, because the revised contract price shall retroactively apply as of date of the price revision request. The commitments clarify that the revised prices “will apply retroactively from the date of the request for a price review.”³¹ As price revisions under the commitments can also be requested at least every 2 years (including immediately after the introduction of the new clause in the contracts and an extraordinary price review once every 5 years), the Commission concludes that the price revision clause provided for in the commitments is adequate to address the Commission’s preliminary concern that the prices under the long-term could deviate significantly from the prices provided for by competitive gas price benchmarks.
- PGNiG's partially ineffective price revision clause
- (70) [...].
- (71) [...].
- (72) [...].³²
- Price revisions are an enforceable contractual remedy
- (73) PGNiG's view that the mere threat of a dominant gas supplier with supply interruption would make price revision clauses ineffective does not seem to hold any longer for the Polish market, which by now is well connected with the neighbouring German market and could alternatively source gas from there, if Gazprom would unilaterally reduce gas supplies to Poland.
- (74) For the sake of completeness, the Commission would like to add that it does not have any indications that Gazprom might not comply with an arbitration award revising gas prices in favour of a CEE gas customer and notes that, in principle, such awards are enforceable.

³⁰ [...].

³¹ Cf. paragraph 19 of the Commitments

³² The Commission notes that PGNiG's reference to recitals 975 to 979 of the SO is misleading. The SO only mentioned that the "*new risk [that the oil-indexed formulae in the CEE countries lead to prices which no longer capture the economic value of gas] is not mitigated by the fact that most of CEE contracts contain a price revision clause (and all of them an arbitration clause)*". These recitals have to be interpreted in the light of the specific price revision clauses provided for in the CEE contracts, which were ineffective at preventing unfair prices. These recitals do not support the conclusion that price revision clauses would as such be an ineffective tool to prevent unfair pricing.

- Commitments are forward looking

(75) The Commission notes that commitments are, by their very nature, forward looking and therefore cannot remedy alleged excessive pricing in the past. The adoption of a commitment decision, however, does not prevent PGNiG from enforcing before the competent national courts or (as far as contractually foreseen) arbitration tribunals potential damage claims against Gazprom's for its past conduct.

2.3.2. *The Commitment on Territorial Restrictions*

PGNiG's Submissions

- (76) In its complaint of 9 March 2017, PGNiG had alleged that Gazprom hindered cross-border gas sales by including until October 2010 destination clauses in the Yamal contract and that similar clauses in the gas supply contracts of Gazprom's other gas customers outside CEE had frustrated PGNiG's efforts to find an alternative gas supplier during the gas crisis in 2009. PGNiG admitted to not have evidence on the use of destination clauses in Gazprom's gas supply contracts outside of CEE.
- (77) In its written observations of 19 May 2017 on the market tested commitments, PGNiG stated that Gazprom's commitment to remove abuses resulting from Gazprom's market segmentation policy³³ would be ineffective for the Polish market, because the destination clause in the Yamal Contract was already removed in 2010.³⁴
- (78) PGNiG alleged that the Commission would believe that cross-border gas trades were only distorted by contractual restrictions. PGNiG notes that the lack of interconnections between Poland and the other CEE countries would remain a trading obstacle for the free flow of gas and would prevent gas trading between Czechia, Hungary and Poland. PGNiG mentioned that Gazprom would prevent the development of bi-directional flows in Drozdowicze (interconnection between Poland and Ukraine), which would, if implemented, allow Polish gas traders to sell gas to Slovakia and Hungary via Ukraine.
- (79) PGNiG remains of the view that the gas swap to the Baltic States will not have a real impact on competition in those markets. PGNiG therefore repeats its position that the commitment concerning territorial restrictions would not be adequate to address the competition concern set out in the Statement of Objections.³⁵
- (80) PGNiG argued in relation to the commitment concerning the change of delivery points that it would be ineffective, because Gazprom could remove a business case for its CEE customers for any swap-like operations by itself supplying gas to Baltic

³³ Cf. paragraph 38 et seq. of the Commitment Decision.

³⁴ Written observations of PGNiG, recital 137.

³⁵ Letter of PGNiG of 2/03/2018, recitals 53 to 57.

customers. Furthermore, PGNiG stated that the minimum annual order requirement and the overall level of the service fee would be too high.³⁶

The Commission's Assessment

(81) The Commission recalls that the commitments dealing with market segmentation can be categorised as follows: (i) general commitment; (ii) change of delivery point commitment; and (iii) Bulgarian gas metering commitment. Given that PGNiG's complaint relates to the Polish gas market, the Commission will only respond as regards the adequacy of the (i) general commitment and (ii) change of delivery point commitment. At the same time, the Commission would like to stress the importance of (iii) the Bulgarian gas metering commitment for removing the Commission's competition concern and opening the Bulgarian gas market to competition.

i. General market segmentation commitment

(82) It should be noted that the general market segmentation commitment provides for legal certainty by clarifying that any territorial restriction clauses, resale restriction clauses or similar contractual forms of market segmentation as further set out in Annex 1 to the commitments cannot prevent wholesalers from re-selling gas outside their countries. As a consequence, all CEE customers can export and import gas to/from other EU gas markets.³⁷

(83) The Commission notes with respect to PGNiG's unsubstantiated allegation³⁸ that destination clauses or similar restrictive practices may still be used outside CEE countries that the case file does not support this unsubstantiated allegation.³⁹ With regard to CEE contracts, the general commitment ensures that any potential remaining territorial restrictions will be removed from CEE gas contracts. Gazprom's compliance with this commitment has been and continues to be carefully monitored by the trustee.

ii. Change of delivery point commitment

(84) The Commission agrees with PGNiG that the improvement of gas transport infrastructure is essential for the free flow of gas between all CEE Member States concerned, but also notes that the further improvement of the European gas network is a task primarily entrusted to the relevant Transmission System Operators in the CEE countries concerned (and not to Gazprom). In the course of its investigation, the

³⁶ EUR 8.00 per 1000 cubic meters of natural gas. In case of Russian gas, this translates into around EUR 0.76 per MWh.

³⁷ The Commission notes that the destination clause contained in the PGNiG-Gazprom gas supply contract of 1996 (Clause 17.3) mirrored Article 8 of the 1993 Intergovernmental agreement between Poland and Russia. The destination clause was deleted from the gas supply contract on 29 October 2010 following the deletion of the mirroring clause in the 1993 Intergovernmental Agreement.

³⁸ The burden of proof for this allegation is on PGNiG; cf C-56/12 P *EFIM*, ECLI:EU:C:2013:575, paras. 71-72; T-198/98 *Micro Leader*, ECLI:EU:T:1999:341, para. 57; T-712/14 *CEAHR*, ECLI:EU:T:2017:748, para. 39.

³⁹ See in this respect recital 47 of the Notice on Complaint Handling, which provides that a “*complaint [...] [that] does not sufficiently substantiate the allegation put forward [...] may be rejected on that ground.*”.

Commission has noted that the gas connecting infrastructure has significantly improved in parts of CEE, especially in Czechia, Hungary, Poland and Slovakia. Those Member States can source pipeline gas from neighbouring Western European markets (and from each other) and are no longer dependent on Gazprom as their sole gas supplier. However, both Bulgaria and the Baltic States still lack sufficient pipeline connecting infrastructure with the rest of CEE. Therefore, Gazprom remains the sole supplier of pipeline gas on those markets in addition to liquefied natural gas (LNG) in the Baltic States.

- Bidirectional gas swaps

- (85) The change of delivery point mechanism aims to overcome the remaining infrastructure isolation of the Baltics and Bulgaria by obliging Gazprom to provide swap like operations between, on the one hand, the Baltics and Bulgaria and, on the other hand, a number of delivery points in the rest of CEE. Following the market test feedback, such swaps are possible in both directions meaning that gas from the Baltics and Bulgaria can also be swapped into other CEE countries.
- (86) The mechanism, once implemented, would allow PGNiG to send gas directly to Lithuania (via interconnector point Kotlovka), to Latvia (via interconnector point Izborsk), or to Estonia (via interconnector point Varska). In the opposite direction, gas could be requested by Baltic wholesalers to be delivered at two interconnection points in Poland (in Wysokoje or in Kondratki).
- (87) The change of delivery point commitment therefore offers Polish and Baltic wholesalers the opportunity to seek new business opportunities in new gas markets well before the connecting infrastructure is put in place by the respective TSOs (GIPL interconnector linking Poland and Lithuania is expected in early 2020).
- (88) It needs to be noted that the scope of the commitment goes beyond Poland and the Baltics and also covers other delivery points in CEE. The Commission's overall assessment of the mechanism's effectiveness therefore includes the assessment of the delivery point mechanism also for other CEE countries.

- Minimum annual order requirements/service fees

- (89) In order to make the mechanism fully effective and given the size of the markets covered by the mechanism, the Commission notes that the minimum annual order requirement in the final version of Gazprom's commitments has, in response to comments in the market test (including PGNiG's comments), been reduced from 100 mcm to 50 mcm. The Commission is of the view that this reduced amount makes the swap mechanism, whilst preventing its use for disproportionately small volumes, more attractive and ensures that the minimum order requirement does not become a significant obstacle for CEE customers to make use of gas swaps.
- (90) The Commission also notes that in line with commercial practice in competitive markets Gazprom is entitled to charge a service fee, the level of which has been reduced in the final version of the commitments. With regard to the service fee, the Commission considers that the level applicable with respect to the swap between Poland and the Baltics allows customers to take advantage of business opportunities in the Baltics, given that that the fee represents less than [...] % of PGNiG's gas price (in terms of gas prices in 2017). The Commission also notes that the service fee

applicable to the swaps between Poland and the Baltics is the lowest of all the service fees included in the Commitments.

- (91) The Commission is therefore of the view that the change of delivery points mechanism foreseen in the Commitments would contribute to the free flow of gas in the European Union.
- Increase of the free flow of gas in CEE
- (92) It is the Commission's position that the effectiveness of the commitment concerning the change of delivery points is not compromised because Gazprom might also decide to compete for a customer in the Baltic States. The purpose of this commitment is to allow Gazprom's customers in Poland and Slovakia to re-direct gas to the Baltic States and thereby to compete with Gazprom for customers in these markets. Gazprom therefore commits for a positive action to overcome the isolation of the Baltic gas markets from the rest of CEE gas markets and to allow for the free flow of gas. It is not the purpose of this commitment to reduce competition in the Baltic markets by preventing Gazprom from competing on merit with alternative gas suppliers from CEE countries for Baltic customers. The purpose is to allow for competition also between different (re-)sellers of Russian gas.
- (93) Apart from the fact that Poland is no longer isolated because of the possibility of gas flows from Germany and Czechia, an additional contribution could come from the commitment concerning the change of delivery points. The Commission notes regarding gas imports into Poland that the commitment contributes to avoiding for the future the difficulties resulting from shortages of gas supply as experienced by PGNiG in the past. Alternative CEE gas suppliers would no longer be prevented from exporting gas to Polish customers.

2.4 Matters not Covered by the Commitments

2.4.1 *The Objection concerning the Yamal Pipeline*

PGNiG's Submissions

- i. The certification decision of the Polish Energy Regulator
- (94) PGNiG claimed in its Written Comments, before addressing the Commitments and Gazprom's conduct, that the Commission misinterpreted the Polish Energy Regulator's decision. PGNiG noted that this decision dealt only with the certification of Gaz-System as a transmission system operator of the Yamal pipeline and did not deal with Gazprom's delaying conduct before the adoption of investment decisions for the Yamal pipeline.
- ii. Imposition of infrastructure-related commitments
- (95) In its Complaint, PGNiG alleges that it approached Gazprom during the gas crisis in 2009/2010 and asked for an increase the gas volumes agreed upon under the Yamal contract. Gazprom allegedly responded that the contractual amendment would only be possible if the underlying 1993 Intergovernmental Agreement between Poland and

Russia was changed accordingly. The intergovernmental negotiations started on 7 May 2009.⁴⁰

- (96) PGNiG states that as a result of the intergovernmental negotiations, Gazprom agreed to sign a short-term contract covering the missing gas quantities but made the additional supply conditional on PGNiG waiving any potential claims against RUE for the breach of the RUE contract. At the same time, [...].⁴¹ PGNiG also alleges that Gazprom insisted on changes of EuRoPol's statutes providing Gazprom with a veto-right and insisted on including conditions to the agreement between EuRoPol and OGP Gaz-System ('Gaz-System'), the TSO of the Polish section of the Yamal pipeline.
- (97) PGNiG acknowledges that the negotiations were conducted at an intergovernmental level since the issues relating to EuRoPol had to be included in the Intergovernmental Agreement. PGNiG alleges that the insistence of the Russian Federation on tying of infrastructure and commercial issues was an act of retaliation against the Republic of Poland for the latter's opposition to the Nord Stream 1 project.⁴²
- (98) PGNiG takes in its written observations on the Market Test the view that the intergovernmental agreement would not exempt Gazprom from the application of Article 102 TFEU.⁴³ PGNiG proposes that the intergovernmental agreement should be interpreted as a "*declaration which only expresses the political will of both signatories*"⁴⁴ and notes that the agreement had only been signed (and not ratified) and would, therefore, not be binding under Polish law.⁴⁵

The Commission's Assessment

i. Certification decision issued by the Polish Energy Regulator

- (99) The preliminary competition concern set out in the Statement of Objections was limited to investment powers for the Polish section of the Yamal pipeline. The Commission was concerned that Gazprom has made gas supplies to PGNiG contingent on the transfer of investment powers to the pipeline owner EuRoPol (instead of Gaz-System, the TSO legally responsible for infrastructure development and investment plans). The preliminary concern was that this could have delayed the introduction of reverse flows on the Yamal pipeline and thereby foreclose access of competitors to the Yamal pipeline.

- Relevant findings of the Polish regulator

⁴⁰ *Ibid*, recital 40.

⁴¹ *Ibid*. recitals 41-45.

⁴² Complaint, recital 79.

⁴³ PGNiG's written observations, recitals 161 to 163.

⁴⁴ PGNiG's written observations, recitals 164.

⁴⁵ PGNiG's written observations, recitals 165.

- (100) These concerns have not been confirmed. Following the adoption of the Statement of Objections, the Polish Energy Regulator issued its decision certifying Gaz-System as the Yamal's pipeline independent TSO.⁴⁶ In its decision, the Polish Energy Regulator, having conducted a thorough and detailed analysis of the relations between the owner of the pipeline, EuRoPol, and its operator, Gaz-System, concluded that Gaz-System is in full control of all the investment planning on the Polish section of the Yamal pipeline and that its investment plans would override any (conflicting) plans of EuRoPol. The Polish Energy Regulator noted that while EuRoPol maintains some investment rights over the pipeline, these investments plans are subordinate to the investment plans of Gaz-System and are largely limited to the infrastructure maintenance works.⁴⁷ Furthermore, the Polish Energy Regulator concluded that any corporate disputes or attempts to block such investments undertaken by the shareholders of the pipeline owner, EuRoPol, would have no impact on such investments.⁴⁸
- (101) With regard to the investment aimed at diversification of gas supplies and the free flow of gas across Poland's borders, the Polish Energy Regulator provided numerous explicit examples where such investments had been implemented, e.g. the introduction of virtual and physical flows at the interconnection point Mallnow. The Polish Energy Regulator also noted that the cooperation between EuRoPol and Gaz-System with regard to the investment planning and its implementation works without problems and the development of the Polish section of the Yamal pipeline corresponds with the market needs.⁴⁹
- The Commission's overall conclusion
- (102) With a view to the detailed findings in the certification decision the initial potential foreclosure concerns explained before could not be upheld. In light of the detailed analysis and the findings contained in the Polish Energy Regulator's decision (in particular as explained in the preceding recitals), the Commission concludes that its preliminary concern has not been confirmed and hence there was no need to seek a commitment from Gazprom in this regard.

⁴⁶ The Gaz-System certification decision dated 19 May 2015.

⁴⁷ The Gaz-System certification decision dated 19 May 2015, p. 108-120 (Biuletyn Branzowy URE – Paliwa Gazowe) Nr 25/2015 (813) 19 maja 2015 r.

⁴⁸ *Ibid.* p. 50-51.

⁴⁹ *Ibid.* p. 118-119.

ii. Imposition of infrastructure-related commitments

(103) The construction of the Yamal pipeline followed the signing of the 1993 Intergovernmental Agreement between Poland and Russia ('the 1993 IGA'). EuRoPol, which was established by the 1993 IGA, owns the Polish section of the Yamal pipeline. According to Article 2 of the 1993 IGA, EuRoPol is owned by Gazprom and PGNiG in equal proportions⁵⁰ and all corporate decisions are to be reached based on a consensus. The parity of rights of PGNiG and Gazprom in EuRoPol is further repeated in Article 2 of the First 2010 Protocol which explicitly refers to the 1993 IGA.

- State compulsion defence could not be excluded

(104) On the basis of the evidence available to the Commission, it could not be excluded that Gazprom's conduct was either required by the national legal framework⁵¹ or unilaterally imposed upon it by the Russian authorities through the exercise of irresistible pressures⁵² with the consequence that the eventual restriction of competition at stake may not be attributable, as Art. 102 TFEU provisions requires, to the autonomous conduct of the undertaking in question⁵³.

(105) The Russian Federation and Poland have set by the 1993 IGA (and subsequent four Protocols signed in 1995, 2003 and two in 2010 in connection with the Intergovernmental Agreement) a comprehensive set of rules and safeguards for the construction and operation of the Yamal pipeline.

(106) The construction of the Yamal pipeline followed the signing of the 1993 Intergovernmental Agreement between Poland and Russia ('the 1993 IGA'). EuRoPol, which was established by the 1993 IGA, owns the Polish section of the Yamal pipeline. According to Article 2 of the 1993 IGA, EuRoPol is owned by Gazprom and PGNiG in equal proportions⁵⁴ and all corporate decisions are to be reached based on a consensus. The parity of rights of PGNiG and Gazprom in EuRoPol is further repeated in Article 2 of the First 2010 Protocol which explicitly refers to the 1993 IGA. The 1993 IGA has also laid ground for the signing of the gas supply contract between PGNiG and Gazprom (Article 10 of the 1993 IGA). The driving role of the governments of Poland and Russia is also confirmed by the Complaint. PGNiG states that it was the Russian State (not Gazprom or EuRoPol) that insisted on tying gas supplies with a number of infrastructure-related commitments.⁵⁵ Furthermore, PGNiG

⁵⁰ The 1993 IGA states that EuRoPol gas is to be 50% owned by PGNiG and 50% owned by Gazprom. The Commission notes that currently 4% of shares are owned by Gas Trading and PGNiG and Gazprom own 48% each.

⁵¹ Cf. GC, T-66/99, *Minoan Lines SA v Commission*, paragraph 176; .

⁵² Cf. GC, T-66/99, *Minoan Lines SA v Commission*, paragraph 179.

⁵³ Cf. GC, T-66/99, *Minoan Lines SA v Commission*, paragraph 176;

⁵⁴ The 1993 IGA states that EuRoPol gas is to be 50% owned by PGNiG and 50% owned by Gazprom. The Commission notes that currently 4% of shares are owned by Gas Trading and PGNiG and Gazprom own 48% each.

⁵⁵ Complaint, recital 75.

states that EuRoPol issues had to be negotiated between Poland and Russia and the agreement had to be reached on an intergovernmental level.⁵⁶ [...].⁵⁷

- (107) While PGNiG alleges that the IGA had not been ratified in Poland, it should be noted that it cannot be excluded on the basis of the evidence available to the Commission that the obligations stemming from the IGA are binding on Gazprom under the Russian legal order or that Gazprom's conduct in any event was imposed on it by the Russian authorities through the exercise of irresistible pressures. Hence, it cannot be excluded that Gazprom's relevant conduct has been determined by the Russian legal framework and that Gazprom could successfully claim to have acted under State compulsion. PGNiG has also not submitted to the Commission evidence that Gazprom's relevant conduct was not determined by the IGA.
- (108) With regard to PGNiG's claim that the Russian Federation insisted that EuRoPol waives a claim for the lump sum of [...] against Gazprom or RUE, the Commission's view is that the insistence (if any) may not be attributable to Gazprom. PGNiG has itself acknowledged that the insistence came from the Russian State (not Gazprom) vis-à-vis Poland in the context of a comprehensive set of rules provided for in intergovernmental agreements.⁵⁸ On this basis, the evidence available to the Commission was held to be not sufficient to conclusively to establish that Gazprom was not acting under State compulsion.

- Relevant findings of the Polish regulator

- (109) With regard to PGNiG's claim that the Russian Federation insisted on changes to EuRoPol's statutes that would enable Gazprom to block investments that Gazprom would deem contrary to its own interests, such allegation is contradicted by the Polish Energy Regulator's certification decision (see above recitals (99)-(102)). The certification decision confirmed that the TSO Gaz-System (and not the pipeline owner EuRoPol) is responsible for infrastructure development and investment plans.

With regard to PGNiG's claim that Gazprom insisted on a particular shape of the operatorship agreement to give itself control over the investment decisions, the Commission's view is that, in addition to the arguments listed under paras (99)-(102) above, it could not be excluded that the EuRoPol-Gaz-System operatorship agreement was largely determined by intergovernmental agreements binding the economic operators.

⁵⁶ Complaint, recital 78.

⁵⁷ PGNiG's written observations. recital 37.

⁵⁸ See for instance the detailed provisions of the 1993 IGA dealing with the ownership of the pipeline (Article 2), technical specifications of the pipeline (Article 3), operation of the pipeline (Article 4), safeguards for the transit of gas through the territory of Poland (Article 5), the support given by the governments to the construction and operation of the Yamal pipeline (Article 6), supplementary gas transit and gas supply contracts to be signed in order to implement the 1993 IGA (Article 10).

- The Commission's overall conclusion

(110) On the basis of the above, the Commission concludes that it cannot be excluded that Gazprom's conduct was required by Russian law or imposed upon it by the Russian authorities through the exercise of irresistible pressures. Hence, the relevant conduct may not be attributable to Gazprom, because Art. 102 TFEU requires autonomous conduct of the undertaking concerned. Furthermore, the Commission notes that it can also not be excluded that the EuRoPol-Gaz-System operatorship agreement was largely determined by IGAs binding the economic operators.

2.4.2. Supply Restrictions in the Winter Season 2014/2015

PGNiG's Submissions

- (111) PGNiG mentioned in its reply letter of 2 March 2018 its regrets that the Statement of Objections did not address Gazprom's gas supply restrictions in the winter season 2014/2015, although these supply restrictions became publicly known before the end of the period on which the Statement of Objections was based, *i.e.*, before the end of 2014.
- (112) PGNiG noted in this context that also Austrian, Slovakian and Hungarian customers were affected by Gazprom's alleged abusive unilateral gas supply restrictions. PGNiG pointed in this context to the broader political background of Gazprom's gas supply restrictions in the past and therefore disagrees with the Commission's assessment that the relevant conduct relates only to the past. PGNiG requests that Gazprom is "*effectively discouraged from imposing territorial restrictions in any form*" until a "*sufficient level of transmission infrastructure developments is reached in CEE, allowing those EU Member States to sustain even total shutdown of gas deliveries from Gazprom.*"⁵⁹ PGNiG concluded by noting that the Commitments would not address the issue of Gazprom's future supply restrictions.⁶⁰

The Commission's Assessment

- (113) The Commission notes that PGNiG's further written comments in its reply letter of 2 March 2018 do not change its assessment. The Commission notes in this context at the outset that the improved interconnection of the Polish gas market with the German market⁶¹ reduces significantly the risk that supply disruptions as described by PGNiG would affect Poland again in the future.
- (114) The Commission also notes that it does not have in its case file any evidence that would allow the conclusion that Gazprom abusively restricted on a temporary basis gas supplies in winter 2014/2015 to prevent the re-export of gas to Ukraine. Hence, the

⁵⁹ Letter of PGNiG of 2/03/2018, recital 79.

⁶⁰ Letter of PGNiG of 2/03/2018, recital 68 to 80.

⁶¹ Cf. in this context the press releases of Gascade (<https://www.gascade.de/en/press/press-releases/press-release/news/reverse-flow-towards-poland-starts-in-april/>) and Gaz-System (<http://en.gaz-system.pl/press-centre/news/information-for-the-media/arttykul/201595/>).

Commission continues to not see any basis for launching an investigation into Gazprom's alleged abusive conduct in winter 2014/2015.

- (115) The Commission continues to regard the dispute, which only lasted for several months, as one of a contractual nature. The circumstance that gas supply restrictions in winter 2014/2015 might also have affected other Member States than Poland is by itself insufficient to conclusively establish an infringement
- (116) In view of above, the Commission continues to be of the view that the dispute resolution mechanism agreed upon in the gas supply contract between Gazprom and PGNiG provides an alternative and well suited means of redress for this matter.

The Commission also repeats its view that the above described alleged conduct, in any case, lies completely in the past and that there are, in spite of PGNiG's references to other gas supply restrictions, no clear indications that it presently affects competition (cf. paragraph 44 of the Notice on complaints).

2.4.3. The transfer of the Belarusian gas transmission system

PGNiG's Submissions

- (117) In its complaint of 9 March 2017, PGNiG alleged that Gazprom abused its dominant position on the Belarus gas market and notes that this abuse would impact the gas market in the European Union. PGNiG essentially alleged that Gazprom forced Belarus to transfer (in the period 2004 to 2011) full ownership in Beltransgaz, the Belarusian gas network operator, in consideration of gas supplies at a decreased price.

PGNiG emphasised with respect to the transfer of ownership in the Belarusian gas transmission network that it would be the Commission's task to investigate the matter and PGNiG's role would be limited to pointing to Gazprom's potential abusive conduct. PGNiG believes that the Commission should, in spite of limited enforcement powers outside the European Union, investigate the matter as gas supplies via the Belarusian gas transmission system would be relevant for gas supplies to Lithuania, Poland and Germany.⁶²

The Commission's Assessment

- (118) The Commission notes that it did attentively consider PGNiG's allegations relating to Gazprom's allegedly abusive conduct in Belarus, but still does not intend to carry out an in-depth investigation of the matter, because the Commission does not have on its files any element that could justify an investigation of the matter.⁶³
- (119) The Commission notes in this context again that the impact of the relevant conduct on the single market remains unclear. The evidence available does not conclusively allow the Commission to establish an infringement. Furthermore, an in-depth investigation into this matter would require considerable resources, because the Commission would

⁶² Letter of PGNiG of 2/03/2018, recital 81 to 90.

⁶³ See also case C-56/12 P *EFIM*, ECLI:EU:C:2013:575, paras. 71-72; T-198/98 *Micro Leader*, ECLI:EU:T:1999:341, para. 57; T-712/14 *CEAHR*, ECLI:EU:T:2017:748, para. 39.

have to obtain evidence from outside the territory of the European Union, where it has only limited enforcement powers. This would be disproportionate in view of the limited likelihood of establishing the existence of an infringement.

In conclusion, taking into account the low likelihood of finding and being able to prove an infringement, there are not sufficient grounds to further investigate this issue.

2.4.4 PGNiG's Alleged Infringement of its Procedural Rights

- (120) PGNiG alleged in its letter of 2 March 2018 that the Commission infringed its procedural rights as a complainant. PGNiG also claimed that the Commission infringed Article 8 of Regulation 773/2004, because it provided PGNiG only with "*a document (the Statement of Objections) which is partially incomplete or illegible.*"⁶⁴
- (121) By letter of 24 January 2019, PGNiG noted that the Commission had not reacted to its reply letter of 2 March 2018 and mentioned that it may bring an action against the Commission, if the Commission continues to fail to act in line with its obligations under Article 7 (2) of Regulation 773/2004.
- (122) The Commission has already addressed PGNiG's statements concerning the disclosure of further parts of the Statement of Objections and further documents mentioned in PGNiG's letter to the Hearing Officer of 5 September 2018. Therefore, the sections below focus on those points which have not already been addressed in the Commission's letter to PGNiG of 25 September 2018.

PGNiG's Submissions

- (123) PGNiG claims that its right to be heard and its right to sound administration have been infringed by the Commission. PGNiG takes the view that it enjoys "*a legitimate expectation to be treated as a complainant in case AT.39816*" and that the Commission infringes PGNiG's right to be heard, if it does not take a view on the question whether PGNiG, in spite of the very late submission of its complaint, enjoys the participation rights of a complainant.⁶⁵
- (124) PGNiG also alleges that this infringement had been aggravated by the circumstance that the Commission had not reacted on the complaint, despite numerous reminders of PGNiG, for a period of almost 11 months, although the Commission would be obliged to decide on a complaint within a period of 4 months.⁶⁶
- (125) PGNiG notes that it has not been provided with a copy of the non-confidential version of the Statement of Objections and an opportunity to make its views known as provided for in Article 6 (1) of Regulation 773/2004 before it received the Commission's pre-rejection letter of 23 January 2018. Instead, PGNiG received the non-confidential version of the Statement of Objections as an annex to the pre-rejection letter of 23 January 2018. PGNiG therefore considers that the Commission

⁶⁴ Letter of PGNiG of 2/03/2018, recital 20 to 23.

⁶⁵ Cf. letter of PGNiG of 2/03/2018, recital 11, 16 and 17.

⁶⁶ Cf. letter of PGNiG of 2/03/2018, recital 18 and 19.

did not comply with the requirements of sound administration as it did not comply with the requirements of Article 6 (1) of Regulation 773/2004.⁶⁷

- (126) PGNiG claims that the Commission based its pre-rejection letter on documents not made available to PGNiG. PGNiG also maintains that the copy of the non-confidential version of the Statement of Objections would be partially incomplete and illegible. PGNiG requested in its reply to the pre-rejection letter (for the first time) that additional paragraphs of the Statement of Objections would be disclosed to it as it is of the view that certain redactions would be unjustified. PGNiG also maintains that the lack of a concise summary for each redacted part infringed its rights pursuant to Article 8 of Regulation 773/2004 as did the unjustified confidentiality treatment of certain parts of the Statement of Objections. PGNiG claims that the Commission thereby infringed its right to be heard and its right to access to the file.
- (127) PGNiG also requested from the Commission the disclosure of further (unspecified) documents on which the Commission based its provisional assessment of PGNiG's complaint. PGNiG further elaborated by letter to the Hearing Officer of 5 September 2018 on the types of documents it believes it is entitled to review as a complainant. The Commission replied by letter of 25 September 2018 to PGNiG's letter to the Hearing Officer and explained that it did not base its provisional assessment on any of the documents mentioned by PGNiG in its letter of 5 September 2018.

The Commission's Assessment

i. PGNiG's close association with the proceedings

- (128) The Commission notes that it did not infringe PGNiG's procedural rights as a complainant by not taking a view on the question whether PGNiG enjoys the full participation rights of a complainant.
- (129) PGNiG as a complainant has, in spite of the very late submission of its complaint, been closely associated with the proceedings in line with Article 27 (1) of Regulation 1/2003. PGNiG was associated with the proceedings as of the inspection at its premises in September 2011⁶⁸ and as an addressee of several requests for information.⁶⁹ Furthermore, the Commission met with PGNiG before the submission of its complaint.⁷⁰
- (130) PGNiG submitted its complaint only shortly before the publication of the Market Test Notice. Therefore, the Commission ensured PGNiG's participation in the procedure in particular by providing it with an opportunity to fully participate in the market testing of Gazprom's draft commitments. The Commission invited PGNiG by letter of 31 March 2017 to provide written observations on the draft commitments within the framework of the market test. The Commission extended for PGNiG the deadline to

⁶⁷ Cf. letter of PGNiG of 2/03/2018, recital 20 to 22.

⁶⁸ Cf. Statement of Objections, paragraph 8.

⁶⁹ Cf. Statement of Objections, paragraph 9, 15, 19 and 21.

⁷⁰ Meeting with PGNiG on 26 April 2016.

submit written comments by letter of 20 April 2017. PGNiG subsequently submitted detailed written observations⁷¹ and an economic study.⁷²

- (131) Furthermore, the Commission heard PGNiG again when it provided PGNiG with an opportunity to make its views known on the Commission's assessment of PGNiG's complaint and the underlying Statement of Objections,⁷³ when it addressed to PGNiG the pre-rejection letter of 23 January 2018. The Commission notes in this context that it was, for reasons of procedural efficiency, entitled to provide PGNiG at the same time with an opportunity to comment on the Statement of Objections and on the Commission's pre-rejection letter of 23 January 2018. In particular in cases like case AT.39816, in which the Commission has decided to market test draft commitments, it is not mandatory to provide a complainant with a separate opportunity to comment in writing on the Statement of Objections, because the choice for the market testing of commitments implies that the Commission is considering to conclude the case with a decision holding "*that there are no longer grounds for action*" and without a definitive finding on the provisional objections set out in an earlier Statement of Objections.
- (132) The Commission notes also that it is not true that it did not react for a period of almost 11 months to PGNiG's various letters. The Commission closely associated PGNiG in the proceedings by involving PGNiG in the market testing of the draft commitments, which was taking place in that period. The Commission also replied to several letters of PGNiG in that period. The Commission explained for instance by letter of 24 August 2018 to PGNiG that the period of 4 months mentioned in the Notice on complaint handling is only "*an indicative time-frame*" and "*does not constitute a binding statutory term.*"⁷⁴ The Commission informed PGNiG on this occasion also about the next procedural steps, *i.e.* the assessment of the written observations submitted by PGNiG and other market participants. The Commission concluded therefore in its letter that it had "*undertaken significant efforts to ensure that PGNiG has a meaningful chance to present its views at the current stage of the procedure.*"
- (133) The Commission also notes in this context that it never takes a separate decision on the admissibility of a complaint and that its formulations can hardly have impaired PGNiG's rights as a complainant as PGNiG itself admitted that "*the Commission acted as if it had recognised PGNiG as the complainant in AT.39816 case.*"⁷⁵
- (134) Hence, the Commission concludes that it provided PGNiG in spite of the very late submission of its complaint shortly before the publication of the market test notice with several opportunities to fully exercise its right to be heard and its right to obtain a

⁷¹ PGNiG published a non-confidential version of the written observations in the internet: http://pgnig.pl/documents/10184/1749782/20170519_PGNiG_observations_FINAL_public_version.pdf/27baab84-af99-45b2-bbce-b896ae2ea790.

⁷² Cf. the "Economic report on Gazprom's commitments concerning CEE gas markets destined to the European Commission" of 4/05/2017 prepared by Microeconomix on behalf of PGNiG.

⁷³ See Article 6(1) of Regulation 773/2004.

⁷⁴ Recital 61 of the Notice on complaint handling.

⁷⁵ Letter of PGNiG of 2/03/2018, recital 15.

non-confidential version of the Statement of Objections. The Commission has not infringed PGNiG's right to be heard and to a sound administration.

ii. No infringement of PGNiG's rights under Article 8 of Regulation 773/2004

- (135) The Commission did not infringe Article 8 of Regulation 773/2004. The Commission did not base its assessment of PGNiG's complaint on documents which were not either public or made available to PGNiG together with the pre-rejection letter.
- (136) The Commission assessed PGNiG's comments on the draft commitments on the basis of the Statement of Objections, a non-confidential version of which was made available to PGNiG with the pre-rejection letter of 23 January 2018. On this basis, the Commission was in a position to assess whether Gazprom's commitments as market tested met the preliminary objections set out in the Statement of Objections. PGNiG's further points of complaint, in particular its observations on supply restrictions in the winter season 2014/2015 and the allegedly forced privatisation of the Belarusian gas transmission system were not part of the investigation in case AT.39816 and, therefore, could be assessed without the use of documents from the Commission's case file. The Commission notes in this context that PGNiG only indicated by its letter to the Hearing Officer of 5 September 2018 the types of documents it believed it needed for the reply to the pre-rejection letter. The Commission replied by letter of 25 September 2018 to PGNiG's letter and explained in great detail that it did not use any document not disclosed to PGNiG or publicly available.
- (137) The Commission denies that the non-confidential version of the Statement of Objections, which was made available to PGNiG, would be "*partly incomplete or illegible*" as alleged by PGNiG.⁷⁶ In this context it should be noted that PGNiG justified by letter of 15 February 2018 its request for an extension of the deadline to reply to the pre-rejection letter of 23 January 2018 by referring to "*the complexity of the case as well as the necessity to carry out an in-depth analysis of the statement of objections.*" The Commission granted the extension of the deadline and was never informed by PGNiG, that the non-confidential version of the Statement of Objections would be incomplete or for other reasons incomprehensible. Furthermore, the Commission explained in great detail in its letter of 25 September 2018 the reasons for not disclosing the requested further parts of the Statement of Objections. It provided PGNiG with a list confirming for each of the requested paragraphs that they contained either business secrets or other confidential information.
- (138) The Commission notes in this context also that it prepared the non-confidential version of the Statement of Objections in a diligent manner. It engaged in several rounds of intense discussions with Gazprom on its confidentiality claims and made to PGNiG a non-confidential version of the Statement of Objections available that allowed it to fully review the Commission's preliminary objections relating to the Polish gas markets.
- (139) The Commission emphasises that it has also not infringed PGNiG's rights as a complainant by not providing it with a concise summary of the redacted information of the non-confidential version of the Statement of Objections. Article 16 (3) of

⁷⁶ Letter of PGNiG of 2/03/2018, recital 23

Regulation 773/2004 provides that the Commission "may" request from an addressee of a Statement of Objections that it "*provides a concise description of each piece of deleted information*", but the provision does not oblige the Commission to do this on every occasion. In fact, in most antitrust cases the Commission has in the interest of an efficient procedure not requested such a concise description of deleted information, as experience as shown that a generic concise description does often not provide meaningful additional information. As concerns the non-confidential version of the Statement of Objections disclosed to PGNiG, the Commission therefore concluded that PGNiG's claim that it was deprived of its "*right to receive bases for the issuance of the Rejection Letter (its right of access to files)*"⁷⁷ by the lack of a concise description for each piece of deleted information is unjustified.

iii. PGNiG's objections against the confidentiality treatment

- (140) With regard to PGNiG's alleged right "*to access files*"⁷⁸ the Commission notes that Paragraph 30 of the Notice on Access to File provides "*that complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the file as established for parties.*" Accordingly, PGNiG's right to access documents is limited to "*request access to documents on which the Commission based its provisional assessment*" of PGNiG's complaint in its pre-rejection letter.⁷⁹
- (141) The Commission also recalls that complainants "*do not have a right of access to business secrets or other confidential information which the Commission has obtained in the course of its investigation.*"⁸⁰ With regard to PGNiG's objections against the Commission's confidentiality treatment, the Commission upholds its view that the relevant parts of the Statement of Objections qualify either as business secret or confidential information of Gazprom to which PGNiG as a complainant has no right of access. The Commission notes in this context that it disclosed to PGNiG all relevant sections concerning Gazprom's conduct in Poland.

3. CONCLUSION

- (142) In view of the above considerations, the Commission concludes that it closely associated PGNiG with the procedure. The Commission provided PGNiG with several opportunities to make its views known.
- (143) The Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the complaint pursuant to Article 7(2) of

⁷⁷ Letter of PGNiG of 2/03/2018, recital 24.

⁷⁸ Letter of PGNiG of 2/03/2018, recital 26 and 27.

⁷⁹ Point 31 of the Notice on Access to File.

⁸⁰ Point 32 of the Notice on Access to File.

Regulation 773/2004 and closes the file with respect to the alleged breach of Article 102 TFEU.⁸¹

4. PROCEDURE

4.1 Possibility to challenge this Decision

(144) In accordance with Article 263 TFEU, an action may be brought before the General Court of the European Union against this Decision, insofar as it rejects your complaint based on Article 102 TFEU against Gazprom.

4.2 Confidentiality

(145) The Commission reserves the right to send a copy of this Decision, or parts thereof, to Gazprom. Moreover, the Commission may decide to make this Decision public on its website, or a summary thereof.⁸² If required for the protection of legitimate interests of the complainant, the published version of the Decision will not identify the complainant.

(146) Therefore, if you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform Mr [...] (e-mail: [...]). Please identify clearly the information in question and indicate why you consider it should be treated as confidential. After the expiry of the deadline, the Commission may decide to send this Decision to Gazprom and/or publish it on its website.

For the Commission

*Margrethe VESTAGER
Member of the Commission*

⁸¹ 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, 27.04.2004, pages 18-24.

⁸² See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.