



EUROPEAN COMMISSION

Brussels, XXX
[...] (2011) XXX draft

COMMISSION DECISION

of XXX

on the exemption of an Underground Gas Storage Facility in Dambořice, Czech Republic, from the internal market rules on third party access

ONLY THE CZECH TEXT IS AUTHENTIC

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THE EUROPEAN COMMISSION,

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

Having regard to Directive 2009/73/EC¹, and in particular Articles 33 and 36 thereof,

Whereas:

(1) Procedure

1. On 26 October 2010, the Ministry of Industry and Trade of the Czech Republic ("Ministry" or "notifying authority") adopted Decision No. 15439/2009 ("the notified decision") granting Globula, a joint stock company with headquarters in Uprkova 807/6, 69501 Hodonin, a temporary exemption from the obligation to provide (negotiated) third party access to a planned Underground Gas Storage ("UGS") facility at Dambořice in accordance with § 67 paragraph 7 of Act No. 458/2000 Coll. for 90% of the capacity and for 15 years starting from the effective date of the authorization of use.
2. This decision was notified to the European Commission by letter dated 11 February 2011 and received by the registry of the European Commission on 18 February 2011.
3. On 15 April 2011, the Commission asked the Ministry for additional information. The Ministry responded on 29 April 2011.
4. On 3 May 2011, the Commission published a note (Ref. Ares(2011)479310 - 03/05/2011) drawing the attention of the public to the notified decision and inviting the public to submit comments within two weeks. No such comments were received.
5. On 11 May 2011, the Commission services and the Ministry held a phone conference to discuss the case.
6. On 13 May 2011, the Commission asked the Ministry a second time for additional information. The Ministry responded on 20 May 2011.

¹ OJ L 211 of 14.8.2009, p.94.

(2) Description of the project and the market

Dambořice

7. The planned Dambořice UGS facility will be located in the Czech Republic, in the South Moravia Region, cadastral area of Dambořice, Uhřice u Kyjova and Žarošice, and will consist of three separate geological structures. It will cost CZK 11.4 billion (i.e. approx. EUR 460 Mio).
8. The UGS facility at Dambořice will offer:
 - a storage capacity of 580 million m³;
 - a maximum daily withdrawal capacity of 17.0 million m³;
 - a maximum daily injection capacity of 7.5 million m³.
9. The UGS facility will be connected to the transmission system operated by NET4GAS, s.r.o. through a DN 700 PN 77 ultra-high pressure gas pipeline at the gauging station in Brumovice.
10. Construction works are planned from 2011 to 2016 and the facility is expected to enter into service in 2016.
11. The UGS facility will be owned by GLOBULA a.s., a joint stock company with its registered office at Úprkova 807/6, 695 01 Hodonín, Company Registration Number: 28506065, Tax Identification Number: CZ 28506065. GLOBULA a.s. is a 100% daughter company of MND Gas Storage, a.s.²

Storage Market

12. The market for gas storage in the Czech Republic has a total storage capacity of approximately 2 500 million m³.³ The storage market is highly concentrated.
 - (a) *Ownership*³
13. RWE Gas Storage s.r.o owns approximately 92% (2 321 million m³) of the total storage capacity in the Czech Republic. This capacity is spread across six UGS facilities (Lobodice, Tvrdonice, Stramberk, Dolni Dunajovice and Haje). The total capacity owned by RWE Gas Storage s.r.o. in the Czech Republic⁴ amounts to:
 - a storage capacity of 2 321 million m³;
 - a maximum daily withdrawal capacity of 35.7 million m³

² Moravske naftove doly (MND) is a formerly state-owned company which used to be responsible for extracting gas in the Czech Republic. The company was privatized and is today privately owned by Mr. Komarek.

³ The below information on ownership of gas storage facilities in the Czech market is derived from the National Energy Report of the Czech Republic of July 2010, pages 34 and following, as well as from the notified Decision.

⁴ In addition to this capacity in the Czech Republic, RWE Gas Storage s.r.o also leases additional storage capacity in Lab (Slovakia) and since 1994 in Rehden (Germany).

- a maximum daily injection capacity of 26.3 million m³
14. MND Gas Storage a.s. owns approximately 8 % (180 million m³) of the total storage capacity in the Czech Republic at the Uhřice UGS facility. The UGS facility at Uhřice has the following capacity:
- a storage capacity of 180 million m³;
 - a maximum daily withdrawal capacity of 6.0 million m³;
 - a maximum daily injection capacity of 2.4 million m³;
15. Slovenský plynárenský priemysel a.s. (SPP) owns a smaller UGS facility at Dolní Bojanovice.⁵ The UGS facility is operated by MND Gas Storage a.s..
- (b) Use⁶
16. RWE Gas Storage s.r.o rent 95% of the total capacity of their UGS facilities in the Czech Republic to the vertically related company RWE Transgas s.a. and 5% to small scale traders.
17. MND Gas Storage a.s. rent the UGS facility at Uhřice under a long term contract to RWE Transgas a.s.
18. Slovenský plynárenský priemysel a.s. (SPP) use the capacity of the storage facility at Dolní Bojanovice.⁷

Upstream Gas Supply Market

19. The Czech Republic's inland consumption of natural gas is about 8 bcm per year. This consumption in the Czech market has been varying over the last years. The decrease in gas consumption in 2009 was mainly due to the economic crisis.

Table 1 Annual gas consumption Czech Republic 2007-2010 (bcm/y)

2007	8.653
2008	8.685
2009	8.161
2010	8.979

Source: *Balancing Centre, Energy Regulatory Office*

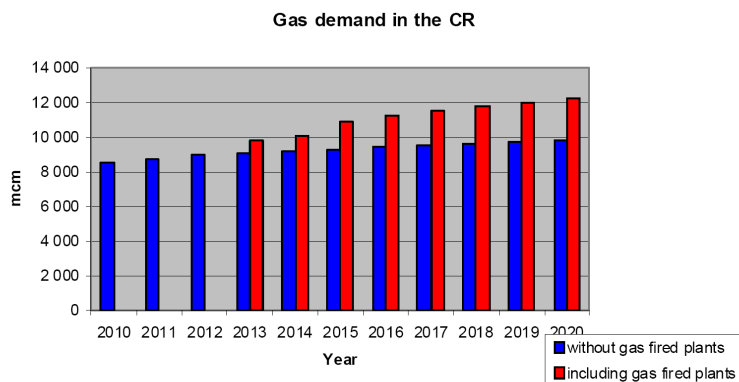
20. Gas consumption increased again in 2010 and is expected to increase up to 10.8 bcm in 2016.

⁵ No data are available on the capacity of this UGS facility.

⁶ The below information on use of gas storage facilities in the Czech market is derived from the National Energy Report of the Czech Republic of July 2010, pages 34 and following, as well as from the notified Decision.

⁷ No data are available on the capacity of this UGS facility.

Chart 7 Natural gas demand expected in the Czech Republic between 2010 and 2020



Source: National Energy Report Czech Republic 2010

21. In 2009, natural gas was imported from Russia, Norway and Germany. Contractually, 5 099 million m³ of gas were imported from Russia, 3 000 million m³ from Norway and 571 million m³ from Germany. Most of the gas supplied from Norway and from Germany was of Russian origin. Imports were supplemented by indigenous production which however amounted to 113 million m³ in 2009, only.⁸
22. According to the data of 2009, Gazprom supplies almost 60 % of the gas consumed in the Czech Republic. Taking imports of Russian gas via Germany into consideration, as well, Gazprom Export's market share in contractual and physical gas deliveries to the Czech Republic reaches approximately 65%.

Wholesale Gas Trade Market

23. In 2009, RWE Transgas a.s. was the most important importer of gas with a market share of 87.66 %. The second largest importer was VEMEX s.r.o., a company controlled by AOA Gazprom, with a market share of 8.54%. All remaining importers together held less than five percent market share.

Table 2 Shares held by wholesale gas traders in the Czech Republic

	2009 [%]
RWE	87.66
VEMEX	8.54
Others	3.8

Source: Balancing Centre, Energy Regulatory Office

Retail Gas Market

24. In 2009, there were a total of 105 retail gas traders in the Czech Republic. The retail market still remained highly concentrated with the largest two companies holding more than 75% market share.

Table 3 Shares held by gas retail traders in the Czech Republic

⁸ Energy Report of the Czech Republic of July 2010, page 34.

	2008 [%]	2009 [%]	Difference [%]
RWE	72.75	64.88	-7.87
PP	12.69	13.28	0.59
E.ON	4.10	3.70	-0.40
VEMEX	8.72	8.54	-0.18
Others	1.74	9.60	7.86

Source: Balancing Centre, Energy Regulatory Office

(3) Applicable National Rules for Storage Facilities

25. According to Article 33 of Directive 2009/73/EC, Member States may chose between negotiated and regulated Third Party Access for gas storage facilities.
26. In the case of *negotiated* access, Member States or, where Member States have so provided, the regulatory authorities shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage facilities and line pack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The parties shall be obliged to negotiate access to storage, line pack and other ancillary services in good faith. Contracts for access to storage, line pack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings. Storage system operators and natural gas undertakings must publish their main commercial conditions for the use of storage, linepack and other ancillary services on an annual basis.
27. If Member States chose the system of *regulated* access, the regulatory authorities must regulate the tariffs for capacity and must take measures to give natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right to access to storage, linepack and other ancillary services, on the basis of published tariffs and/or other terms and obligations for use of that storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services.
28. The Czech Republic opted for the more flexible system of *negotiated* Third Party Access. This means that tariffs for storage are not regulated, but the owner of a storage facility is obliged to negotiate access in good faith and the storage system operator must publish the main commercial conditions for the use of storage, linepack and other ancillary services on an annual basis.
29. These minimum requirements for negotiated Third Party Access are set out in Public Notice no. 365/2009 of the Energy Regulatory Office (hereafter "ERO") which introduces a transparent system of storage capacity allocations by means of multi-round electronic auctions. Under the terms of Public Notice no. 365/2009, storage capacity availability, including some other information, is posted on the operators' websites and sold in multi round electronic auctions. Operators may sell firm capacity in monthly or in annual intervals.

30. In the year the electronic auction system was introduced in 2009, only RWE Gas Storage s.r.o. offered storage capacity. MND started auctions in 2011. These auctions produced the following results:

Table 4 Auction Results Gas Storage 2009-2011

Date	Seller	Operating Volume sold (mil.m3)
5.2.2009	RWE	3.315
2.6.2009	RWE	3.315
12.1.2010	RWE	45
3.2.2010	RWE	5
5.3.2010	RWE	4.611
21.9.2010	RWE	0
7.12.2010	RWE	0
3.2.2011	MND	0
15.2.2011	RWE	50
17.2.2011	RWE	75
16.2.2011	RWE	104.6
21.3.2011	RWE	43.176
21.3.2011	MND	75

Source: Ministry for Industry and Trade

31. When *new* storage capacity is put into operation, the operator must offer bidders capacity in line with section 21 (1) of Public Notice no. 365/2009 of the Energy Regulatory Office which stipulates that a storage system operator planning the development of new storage capacity must offer at least 10% of the capacity using the normal electronic auctions according to Section 17 and 18 of the Public Notice no. 365/2009. This means that these 10% are auctioned in multi electronic rounds for one month or one year firm capacity. The operator may however offer up to 90% of the planned new storage capacity under a special procedure set out in subsections (2) to (8) of section 21 of the notice. This special regime for new capacity deviates from the normal system which allows operators to auction capacity only on a short term (monthly or annual) basis. The special regime of section 21 allows operators to auction up to 90% of the new capacity for as long as 15 storage years.⁹
32. Section 21 of Public Notice no. 365/2009 sets out certain minimum transparency requirements for auctions of new capacity. The terms and conditions of such auctions shall include the following:
- a) The minimum price per unit of storage capacity and the method for the calculation of the price for the other storage years throughout storage capacity booking;
 - b) The minimum quantity, expressed in per cent, which must be booked in the auction for the operator not to cancel the auction;

⁹ Section 21 (3) of Public Notice no. 365/2009.

- c) The date and time of the auction;
- d) The required method of secured electronic communication, including an alternative method of communication should electronic communication fail on the part of bidders;
- e) The way of paying a financial deposit;
- f) A model of gas storage agreement; this agreement shall be executed with the bidders for whom storage capacity has been booked;
- g) The minimum and maximum duration of storage capacity booking;
- h) The total storage capacity offered in the first year of gas storage and in the following years if the new storage capacity, or the parameters thereof, are increased gradually;
- i) A model of the request form for the first access to the operator's information system.

(4) The notified decision

- 33. The notified decision No. 15439/2009 combines a construction permission (section I) with an exemption from third party access for 15 years (section II) under the following conditions:
- 34. "II. GLOBULA a.s., with its registered office at Úprkova 807/6, 695 01 Hodonín, Company Registration Number: 28506065, Tax Identification Number: CZ 28506065, represented by member of the board of directors Ing. Ladislav Šmýd, Birth Identification Number 730330/4261, with residence at Vracov, Lesní 1666, Postcode 696 42, is granted temporary derogation from the duty to afford third parties access to this underground storage facility (hereafter "temporary derogation") according to s. 67 (7) of Act No. 458/2000 Sb., in the wording effective on the date of lodging the application, for the entirety of the storage capacity for a period of 15 years commencing on the date on which a permit for its use and operation comes into effect, this according to the following conditions:
 - (a) In accordance with the legislation in force at that time and within a time limit of one year from the date on which the storage facility enters into permanent operation and following the granting of a gas storage licence, GLOBULA a.s. shall offer 10% of the achieved storage capacity of the Dambořice underground storage facility to potential customers by means of a multi-round electronic auction. The terms and conditions of this auction must be reasonable, non-discriminatory and transparent;
 - (b) For the duration of the temporary derogation under II, GLOBULA a.s. shall not enter into any contract on the storage of gas in the Dambořice underground gas storage facility with RWE Transgas, a.s., unless RWE Transgas, a.s. wins storage capacity as part of a multi-round electronic auction;
 - (c) The temporary derogation referred to in II will not be revoked according to Section 67(12) of Act No. 458/2000 Sb., in the wording valid on the date of

lodging the application (according to the requirement of the European Commission).

(5) Assessment of the conditions for an exemption

General

35. As by the date of the present decision, Article 22 of Directive 2003/55/EC has been replaced by Article 36 of Directive 2009/73/EC. Article 36 therefore applies for the assessment of the notified decision irrespectively of the fact that the Czech legislator failed to transpose the provisions of Directive 2009/73/EC into national law and that Decision No. 15439/2009 was notified to the Commission in February 2011.
36. According to Article 36 of Directive 2009/73/EC ("the Directive"), major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) of the Directive under the following conditions:
- (a) the investment must enhance competition in gas supply and enhance security of supply;
 - (b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;
 - (c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
 - (d) charges must be levied on users of that infrastructure; and
 - (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.
37. Such an exemption may cover all or part of the capacity of the new infrastructure. In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.
38. Before granting an exemption, the regulatory authority shall decide upon the rules and mechanisms for management and allocation of capacity. The rules shall require that all potential users of the infrastructure are invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure, including for own use, takes place. The regulatory authority shall require congestion management rules to include the obligation to offer unused capacity on the market, and shall require users of the infrastructure to be entitled to trade their contracted capacities on the secondary market. In its assessment of the criteria referred to in points (a), (b) and (e) of paragraph 1, the regulatory authority shall take into account the results of that capacity allocation procedure.

39. As set out in Article 36 of the Directive, any exemption decision must be duly reasoned so that the Commission is able to reach a well-founded decision. In particular, the information contained in the decision (or information attached to it) shall contain:
- (a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted or refused the exemption including the financial information justifying the need for an exemption;
 - (b) the analysis undertaken of the effect on competition and the effective functioning of the internal market in natural gas resulting from the grant of the exemption;
 - (c) the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;
 - (d) in case the exemption relates to an interconnector, the result of the consultation with the regulatory authorities concerned; and
 - (e) the contribution of the infrastructure to the diversification of gas supply.

Application of Article 36 to Dambořice

40. The planned new underground gas storage facility at Dambořice qualifies as a major gas facility within the meaning of Article 36 of Directive 2009/73/EC.

Conditions for an Exemption according to Article 36

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

(aa) Enhancement of competition

41. Investment in infrastructure is likely to entail positive effects on competition through increased capacity. If - in the absence of the exemption - the project did not go ahead nor had a smaller scale, an exemption triggering the investment would usually generate positive effects on competition. However, the grant of an exemption counteracts this effect to some extent in the cases where access to the exempted infrastructure is restricted which is in turn likely to restrict competition, in particular if the capacity is held by players with a significant degree of market power. The decisive question is whether on balance the project will enhance competition.
42. Exemption requests by dominant undertakings in markets served by the new infrastructure are likely to have the greatest potential for harming competition and therefore require particularly careful scrutiny. However, also exemption requests introduced by non-dominant undertakings may in certain circumstances have a negative effect on competition. This may be the case, in particular, where the undertakings requesting the exemption – individually or collectively – have a significant degree of market power or where the exemption might favour the market position of third parties that are either dominant or have a significant degree of market power. This could be the case, for example, where the exemption is requested

by a company that has no supply interests, but capacity in the exempted infrastructure is or could be contracted on a long term basis by dominant suppliers.¹⁰

Storage Market

43. In the case at hand, the creation of a new storage facility will increase storage capacity within the Czech market and therefore has the potential to increase competition between companies offering storage. The storage market is dominated by RWE Gas Storage s.r.o., which is by far the largest storage operator. MND Gas Storage s.r.o., the parent company of Globula a.s., owns and operates one gas storage facility in the Czech Republic but its market share of 8% is small. Including the capacity of the planned Dambořice storage, the market share of MND Gas Storage s.r.o. would remain below 25% which does not yet as such raise competition concerns.

Wholesale Gas Trade Market and Upstream Gas Supply Market

44. However, if the storage capacity of Dambořice is booked by an undertaking which is dominant on a related gas market, the project might still have a negative effect on competition. Currently there are two undertakings which have a dominant position on related gas markets, namely RWE and Gazprom.
45. RWE Transgas s.a., accounting for more than 65% of the downstream wholesale gas trade market¹¹, has a dominant position on this market. The condition currently imposed in the notified decision prevents RWE Transgas a.s from buying capacity at Dambořice, but does not expand that prohibition to affiliated undertakings.
46. Gazprom and companies controlled by it hold a dominant position on the upstream gas supply market of the Czech Republic (see above, paragraphs 21 and 22).
47. Preferential access to storage capacity by a dominant upstream supplier could have negative effects on competition in gas supply. Storage enables downstream wholesale companies to counterbalance the market power of a dominant producer or upstream wholesale traders. Given the seasonality of demand for natural gas, the market power of producers increases during high-demand periods (normally during winter). Higher demand results in higher utilisation of pipelines thus making capacity scarcer or not available at all. Since production is often not flexible also gas becomes scarcer. In such a situation, producers gain market power towards their customers and can increase prices. If storage capacity is available to customers, they can hold stocks for periods of high demand (and scarce supply) and exert countervailing buyer power.¹²

¹⁰ Commission Staff Working Paper on exemption of new infrastructures of 6.5.2009, SEC(2009)642 final, paragraph 34.

¹¹ See paragraph 23.

¹² See, for instance, *Laure Durand-Viel*, Strategic Storage and Market Power in the Natural Gas Markets, 2010 showing that storage can be used strategically by a buyer to force sellers to lower their price in future peak periods.

48. The strong market position of Gazprom Export in the wholesale supply market of the Czech Republic could therefore be strengthened if Gazprom Export obtained privileged access to the capacity of the UGS facility at Dambořice for up to 15 years.
49. In the administrative proceedings, it has not been verified in an Open Season which companies are potentially interested in acquiring storage capacity at the UGS facility of Dambořice. Project promoters are, however, expected to test market demand for a planned new infrastructure in an open and transparent way before asking for an exemption. The absence of any such transparent and non discriminatory market test in the present case is problematic.¹³
50. The notifying authority provided two justifications why it exempted the UGS facility despite the fact that Globula a.s. did not test market demand in advance of requesting the exemption.
51. On the one hand, it is argued that Globula a.s. was not subject to section 21 of Public Notice no. 365/2009 of the Energy Regulatory Office on Gas Market Rules which stipulates that *"storage system operators shall book new storage capacity for annual firm storage capacity according to the principle of multi-round on-line auctions"*. A "storage system operator" is defined in Public Notice no. 4587/2009 as "licensee", that is a company already holding a license to operate a UGS facility. In short, section 21 applies to holders of storage licenses, not to newcomers. As Globula a.s. did not yet dispose of such a license at the time the exemption was granted, Globula a.s. was not obliged to organise an electronic auction. Globula a.s. would even have faced *"a risk of major sanctions from the State Energy Inspection and potential legal action from the participants in the auction"*¹⁴. To obtain a storage license, Globula a.s. would have to *"document the ownership title to or right of use of the energy facility"*.¹⁵
52. On the other hand, the notifying authority agreed that preceding auctions at existing storage sites had demonstrated that there was anyhow no market demand for additional gas storage at the UGS facility of Dambořice. Dealers of natural gas today would prefer to purchase cheap gas on spot markets above buying capacity to store gas in underground gas storage facilities. An electronic auction of RWE Gas Storage, s.r.o. in September 2010 was unsuccessful. RWE Gas Storage, s.r.o. then offered interested parties 135 million m³ of storage capacity for one year in an electronic auction but no bidder came forward.¹⁶ In response to the Commission's first request for information, the Ministry specified that one auction at the very end of 2010 and another one at the beginning of 2011 also failed to attract bids.
53. Neither of these reasons, however, appears convincing.
54. First, if section 21 (2) of Public Notice no. 356/2009 in conjunction with Public Notice no. 4587/2009 were indeed to be interpreted as suggested, then this legislation

¹³ See the Commission Staff Working Paper on exemption of new infrastructures of 6.5.2009, SEC(2009)642 final, paragraph 28.3 and paragraph 34.

¹⁴ Response of the Ministry to the Second Request for Information at Q3.

¹⁵ *Ibid.*, at Q3.

¹⁶ Notified Decision No. 15439/2009, section II.a.

would discriminate against newcomers to the Czech storage market.¹⁷ The Energy Regulatory Office interprets its own Notice no. 356/2009 differently, as the notifying authority acknowledges. ERO considers that Globula a.s. must test market demand for the new capacity by means of an electronic auction.¹⁸

55. There is also no apparent reason why Globula a.s. should have been unable to test market demand by procedures other than an electronic auction according to section 21 (2) of Public Notice no. 365/2009. Open Seasons are non discriminatory transparent procedures to test market demand in a non binding way while section 21 of Public Notice no. 365/2009 foresees a specific procedure for auctioning firm capacity.¹⁹ As to legitimate expectations of third parties participating in such Open Seasons, such expectations can be protected by means of appropriate disclaimers as to the purpose of the Open Season.
56. Second, the mother company of Globula a.s., MND Gas Storage a.s., already disposes of a storage license and could have organized the electronic auction (before setting up Globula a.s. or thereafter acting on its behalf). This approach was after all also possible when Net4Gas tested market demand for the capacity of the planned new Gazelle pipeline in an Open Season on behalf of its daughter company Brawa.²⁰
57. Third, the absence of market demand for storage capacity during September 2010 to February 2011 is no reason to assume that there will be no demand for long term storage capacity up to 15 years. Spot markets can change from one year to another and demand for firm storage capacity in the Czech Republic may well be larger than assumed in the notified decision. After all, the five auctions after February 2011 were all successful (see table 4, paragraph 30). Large suppliers such as Gazprom or Norwegian companies may also see value in booking capacity for long term strategic reasons which are different from a short term profit maximising strategy of traders on spot markets.
58. In conclusion, it is likely that the UGS facility of Dambořice will enhance competition in the storage market. To prevent potential negative effects in the vertically related wholesale trade market, the condition currently imposed in the notified decision should be expanded to all undertakings affiliated to RWE Transgas a.s. As regards the upstream supply market for gas in the Czech Republic, it was not sufficiently demonstrated in the notified decision that the exemption cannot strengthen the dominant position of Gazprom Export and its affiliated undertakings.

¹⁷ Before taking an investment decision to acquire a piece of land and to construct a new storage facility, incumbents (i.e. license holders) could test market demand while newcomers could not. Such an obstruction of new entry can hardly have been the intention of ERO and would be problematic in view of the EU internal market *acquis* and the competition *acquis*.

¹⁸ Response of the Ministry to the First Request for Information at Q8 ("During the administrative proceedings, the Energy Regulatory Office has argued, in particular, that Globula a.s., as the operator of an underground gas storage facility planning to build new capacity, failed to hold an electronic auction for the new capacity in accordance with Decree No 365/2009 on gas market rules, as amended.")

¹⁹ See the Commission Staff Working Paper on exemption of new infrastructures of 6.5.2009, SEC(2009)642 final, paragraph 28.3.

²⁰ See Commission Decision of 19.5.2011, *Gazelle*, C (2011) 3424 at paragraph 52 with further references to the submissions of the Czech regulatory authority ERO.

59. However, for the reasons set out below under paragraph 69 and following, it can eventually be left open whether the UGS facility of Dambořice will enhance or rather reduce competition in the relevant markets concerned.

(ab) Enhancement of Security of Supply

60. Any additional storage facility has, in principle, the potential to increase Europe's security of supply with natural gas in case of emergencies.
61. Whether the UGS facility at Dambořice is needed to satisfy the Czech Republic's N-1 infrastructure standard according to Article 6 of Regulation (EU) No 994/2010²¹, can be accurately determined based on the Risk Assessment, Preventive Action Plan and Emergency Plan of the Czech Republic according to Articles 4 and 9 of this Regulation. In the absence of such assessment and plans, the proposed additional storage capacity must be assessed on the basis of the information provided by the Ministry and other publicly available sources of information available to the Commission.
62. From the notified decision it appears that the daily withdrawal capacity at the UGS facility of Dambořice was initially conceived to close a gap of 17 million m³ a day which existed during the 2009 supply crisis. In 2009, the Brotherhood pipeline which transports natural gas from the Russian Federation via the Ukraine on to the Slovak Republic and to the Czech Republic was disrupted and supply was provided from Germany via reverse flows from the border point of Waidhaus, as well as through withdrawing natural gas stored in the existing UGS facilities of RWE and MND.²²
63. The Ministry however clarified in response to the second request for information that the existing storage capacities owned by RWE are already being increased to close a good part of the 17 million m³ gap.²³ While demand for natural gas in the Czech Republic may increase, in particular if new gas-fired power plants are built²⁴, the Ministry expects that overall demand for gas and gas storage will de facto grow only slowly over the coming years. This is because the price for local brown coal is lower than the price of imported natural gas and will remain so as long as the system of free allocation of allowances for carbon dioxide production remains in force in the Czech

²¹ Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010, OJ L 295 12.11.2010, p.1.

²² Notified Decision No. 15439/2009, section I.a. "Of particular importance is the proposed parameter of the maximum daily capacity of this underground gas storage facility of 17 million m³ a day. The gas crisis which struck in January 2009 as a result of the complete suspension of transmission of Russian natural gas across Ukraine, a considerable part of Europe, demonstrated the key significance of underground gas storage facilities and in particular their maximum daily capacity parameter for the security and reliability of gas supply in such critical situations. At the time in question the maximum daily capacity of domestic storage facilities stood at 43 million m³, whereas the daily consumption of the Czech Republic was somewhere between 50 and 60 million m³ given the low temperatures. Moreover, the construction of gas power production plants are planned in the Czech Republic within the foreseeable future, which will increase the consumption of gas quite considerably.

²³ RWE Gas Storage is currently expanding their existing capacities and this expansion will add another 6.5 million m³ of withdrawal capacity per day; see response of the Ministry to the Second Request for Information at Q2.

²⁴ Response of the Ministry to the Second Request for Information at Q1. RWE is currently in the process of enhancing the daily withdrawal capacity at Tranovice by an additional 4 million m³ per day and the withdrawal capacity at Tvrdonice by an additional 2.4 million m³ per day.

Republic. This system will be phased out in two steps, namely in 2020 (for electricity producers) and 2027 (for heat producers).

64. If this latter information is correct, then the value added by the UGS facility at Dambořice for the security of supply may remain limited in the short term.
65. Moreover, the need for additional storage may also have to be reassessed in the medium and longer term, because once the planned new Gazelle pipeline is operational in 2016, capacities for additional gas imports will be freed up on the existing Czech pipeline system between Lanzhot and Waidhaus as well as between Lanzhot and Hora Sv. Katariny which will further increase the ability of the system to transport gas in the reverse direction either from the Baumgarten hub or from Germany via Waidhaus to the Czech Republic.²⁵ Moreover, the new Gazelle pipeline will dispose of emergency exit take off points as well as a physical reverse flow capacity from Germany to the Czech market. Reverse flow capacities on the existing pipeline system between Lanzhot and Waidhaus as well as between Lanzhot and Hora Sv. Katariny are also being increased.
66. The need for additional storage to secure supply with natural gas may therefore be less pronounced than assumed in the notified decision.
67. However, for the reasons set out below in paragraph 69 and following, it can be left open how far the additional capacity at the planned UGS facility of Dambořice will in practice increase the security of supply of the Czech Republic.

(b) Exemption must be required in view of the risks involved in the investment - Article 36 (1) (b) of Directive 2009/73/EC

68. The decisive reason why the Commission cannot endorse the notified exemption for the UGS facility at Dambořice is related to the alleged risks of the project.

Exemption must be necessary to cover risks of investment

69. Generally speaking, exemptions are designed to allow for investments where the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted. If the investment in infrastructure for gas or electricity is a sunk cost, two main risks determine the assessment: the risk of non-use of the investment and the risk of a change in costs and/or revenues in the future.²⁶
70. As regards the risk of non-use, the need to secure upstream supply from capacity users can be relevant in particular for LNG terminals and gas pipelines whereby evidence that the upstream suppliers may require from infrastructure developers long-term transportation and transmission contracts to conclude supply contracts needs to be taken into account.²⁷ This reasoning can in principle also apply to

²⁵ See Commission Decision of 19.5.2011, *Gazelle*, C (2011) 3424 at paragraph 29.

²⁶ Commission Staff Working Paper on exemption of new infrastructures of 6.5.2009, SEC(2009)642 final, paragraph 41.

²⁷ *Ibid.*, paragraph 42.

expensive gas storage facilities which seek to stabilize their future income by concluding long term capacity reservation contracts with third parties.

71. However, it would be wrong to assume that long term contracts generally require the granting of an exemption as they may in principle also be concluded for "regulated" infrastructure.²⁸
72. In the case at hand, the notified decision explains the need for a long term contract by reference to the correspondence between Globula a.s. and the Royal Bank of Scotland as well as with Komerční Banka a.s. In this correspondence, , the banks point out that to finance a project of this kind, they would seek a stable return on their loan which is only guaranteed if Globula a.s. could conclude "a long-term contract with a well-known company guaranteeing the long-term use of your company's services and payment for these services in amounts which ensure that the project is able to generate sufficient stable cash-flow to repay the loan interest and capital." Globula a.s. told the banks that due to "the legislation governing the services involved in operating underground storage facilities, [it is] not able to obtain a long term contract for storage capacity with a well-known partner before the construction of the PZP Dambořice begins."
73. Considering that the risk assessment of the notified decision is essentially based on the presumption that the financial viability of the project depends on the ability of Globula a.s. to conclude a long term contract with a financially reliable partner, it therefore has to be seen to which extent the applicable national rules indeed prevent such long term contracts.

Section 21 of Public Notice no. 365/2009 does not prevent long term contracts

74. The requirements on Member States which chose *negotiated* Third Party Access for storage according to Article 33 (3) Directive 2009/73/EC are rather light as compared to the requirements for *regulated* Third Party Access. Article 33 (3) allows national legislators to design a flexible regime provided that "the parties shall be obliged to negotiate access to storage, line pack and other ancillary services in good faith".²⁹
75. Section 21 of Public Notice no. 365/2009 makes use of this flexibility.³⁰
76. The default regime for selling capacity of gas storage facilities in the Czech Republic under section 21 of Public Notice no. 365/2009 allows storage operators to sell up to 90% of *new* capacity to one single bidder and up to 15 storage years under certain minimum procedural requirements.³¹
77. There is no reason why Globula a.s. could not find (a) reliable long term partner(s) under the terms set out in Section 21 of Public Notice no. 365/2009.

²⁸ *Ibid.*, paragraph 42 (box).

²⁹ See above at paragraph 25

³⁰ See above at paragraph 28.

³¹ See above at paragraph 32.

- First, Public Notice no. 365/2009 allows Globula s.a. as operator of the storage facility to auction up to 90% of the total capacity for up to 15 storage years. This is nothing but a long term contract. The capacity constraints and the time frame under section 21 of Public Notice no. 365/2009 are exactly the same as those allowed under the notified Decision.
- Second, Public Notice no. 365/2009 allows Globula s.a. as operator of the storage facility to determine the minimum price and price formula for capacity, thereby securing a minimum cash flow for the project.
- Third, Public Notice no. 365/2009 does not prevent the storage operator from excluding financially untrustworthy bidders from the auction process. To the contrary, bidders must submit deposits to be admitted to the bidding process.

78. Hence, the notified Decision does not adduce sufficient evidence to demonstrate that Globula a.s. is unable to find a reliable long term partner under the procedural conditions of Section 21 of Public Notice no. 365/2009 and consequently, why the risks related to the investment are such that an exemption is required.

Negotiated TPA for UGS facilities possible

79. A recent example from a large storage facility in a neighbouring country of the Czech Republic, Austria, also indicates that new gas storage facilities can in practice well be financed without an exemption from the requirement of negotiated Third Party Access according to Article 33 of Directive 2009/73/EC.

80. Phase II of the Haidach storage project doubled the storage capacity from 1 300 Million m³ to 2 600 Million m³ and was commissioned on 19 May 2011. The consortium operating the Haidach storage facility (2 600 Million m³ capacity with a daily withdrawal capacity of 28 Million m³) involves RAG, Gazprom Export and Wingas. The owners jointly invested EUR 300 Mio in this project and Gazprom is said to use approximately 1 900 Million m³, i.e. two-thirds of the total capacity. In October 2010, Gazprom Export as co-owner and operator of the Haidach II storage auctioned storage capacity for this UGS facility.³² The terms and conditions of this capacity allocation procedure were approved by the Austrian regulator E-Control.

Interim conclusion

81. The notified decision does not sufficiently demonstrate that the risks involved in building and operating the Dambořice UGS facility require an exemption from the rules on negotiated Third Party Access according to Article 33 (3) Directive 2009/73/EC.

82. In view of this interim conclusion, it is not necessary to examine the three remaining conditions of Article 36 (c), (d) and (e) of Directive 2009/73/EC.

³² <http://tech.gazpromexport.com/> ("Gazprom export LLC starts on October 1st, 2010 a transparent and non-discriminatory procedure to offer storage capacities in the underground natural gas storage facility Haidach, Republic of Austria. GPE will allocate the available capacities totaling 80 million cbm working gas for short-term agreements by an auction to the highest bidders.")

(6) Conclusion

83. The decision to exempt the Dambořice UGS facility from the rules on negotiated Third Party Access must be withdrawn because the notified exemption decision does not sufficiently demonstrate that the second condition of Article 36 of Directive 2009/73/EC is satisfied, namely that the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted.

HAS ADOPTED THIS DECISION:

Article 1

The notified decision of the Ministry of Industry and Trade of the Czech Republic no. 15439/2009 of 26 October 2010 granting Globula a.s., a joint stock company with headquarters in Uprkova 807/6, 69501 Hodonin, a temporary exemption from the obligation to provide negotiated Third Party Access to a planned Underground Gas Storage facility at Dambořice must be withdrawn within one month from the day the present decision is notified to the Czech Republic in accordance with Article 36 of Directive 2009/73/EC.

Article 2

The Ministry of Industry and Trade of the Czech Republic shall provide the Commission with a copy of the decision withdrawing the notified decision No. 15439/2009 of 26 October 2010.

Article 3

This Decision is addressed to the Czech Republic.

Done at Brussels,

For the Commission

Member of the Commission