



EUROPEAN COMMISSION

Brussels, XXX
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COMMISSION DECISION

of XXX

**on the exemption of the "Gazelle" interconnector from ownership unbundling within
the meaning of Article 9 of Directive 2009/73/EC**

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 9 and 36 thereof,

Whereas:

(1) Procedure

1. On 19 May 2011 the Commission adopted a Decision (C (2011) 3424) approving the exemption of the "Gazelle" interconnector from Third Party Access ("TPA") and tariff regulation subject to certain conditions.
2. On 18 August 2011, the European Commission received a notification from the Energy Regulatory Office of the Czech Republic ("ERU") for a second decision adopted on 2 August 2011 with file reference number 03068-3/2011-ERU ("the notified decision"). The notified decision exempts the "Gazelle" pipeline also from the requirement of ownership unbundling according to Article 9 of Directive 2009/73/EC.
3. On 19 September 2011, the Commission published a note inviting the public to comment on the notification received.

(2) Description of the project

4. For a description of the "Gazelle" project, reference is made to the Commission's preceding Decision of 19 May 2011 C (2011) 3424.

(3) The notified decision

5. The notified decision exempts the "Gazelle" interconnector from the obligation of "ownership unbundling" for a period ending on 1 January 2035. This exemption is unconditional:

¹ OJ L 211 of 14.8.2009, p.24.

6. *"An exemption from the obligation of the ownership unbundling of the transmission system operator within the meaning of Article 9 of Directive 2009/73/EC has been granted for the "VTL plynovod DN 1400 – HPS Brandov – Rozvadov" ["The Brandov Border Transit Station – Rozvadov DN 1400 High-pressure Gas Pipeline"], which is to directly interconnect the future Brandov/Olbernhau border transit station and the Waidhaus/Rozvadov border transit station, some 160 km long, for a period ending on 1 January 2035."*

(4) Assessment of the conditions for an exemption

7. As by the date the present decision is adopted, Directive 2003/55/EC has been repealed, the Commission services apply the substantive provisions of Article 36 of Directive 2009/73/EC which entered into force on 3 March 2011 irrespectively of the fact that the Czech legislator was delayed in transposing the provisions of this Directive into national law at the time the notified decision was adopted on 2 August 2011.
8. Notwithstanding the question whether Article 36 of Directive 2009/73/EC has direct effect and can be invoked by the applicant NET4GAS to obtain an exemption from the national energy regulator ERU, the Commission notes that the provisions of Article 9 and 36 of Directive 2009/73/EC have been transposed into national law in the meantime by means of Decree 211/2011.
9. Therefore, NET4GAS has a legitimate interest to obtain an exemption from ownership unbundling for reasons of legal certainty. While not taking a position on the direct applicability of Article 9 of Directive 2009/73/EC, the Commission therefore considers that it has to assess the notified decision on its merits according to Article 36 of Directive 2009/73/EC.

Application of Article 36 to Gazelle

10. "Gazelle" qualifies as "*interconnector*" within the meaning of Article 36 in conjunction with Article 2 (17) of Directive 2009/73/EC. Gazelle is a transmission pipeline and is the continuation of the Ostsee Pipeline Anbindungsleitung "OPAL" and as such part of the wider Nord Stream project which aims at transporting Russian gas to Europe via the Baltic Sea. Gazelle starts at the Brandov border point and ends at the German border station of Waidhaus where an exit point exists and where Gazelle is connected to the German transmission system.
11. As Gazelle crosses a border between Member States, namely the Czech/German border at the Waidhaus border station where it is connected to the German transmission system, Gazelle qualifies as "*interconnector*" within the meaning of Article 36 in conjunction with Article 2 (17) of Directive 2009/73/EC.
12. The fact that Gazelle uses 20 km of an existing pipeline between Primda and the German border station of Rozvadoc/Waidhaus must however be analysed further with respect to the question whether Gazelle is a "*new*" interconnector.
13. The Commission considers generally that the constituent elements of Article 36 of Directive 2009/73/EC, namely "*new*" and "*interconnector*", must be interpreted strictly as Article 36 is an exception to the general rules of the internal market. The

legislator of the Third Package neither intended to open the possibility for retrospective exemptions of existing interconnectors, nor for purely domestic transmission systems.

14. However, where the predominant aspect of a new transmission system is clearly to interconnect Member States, the qualification as "*interconnector*" is not prevented by the fact that a relatively small portion of the overall capacity of a new pipeline is used for domestic transmission purposes, as well.²
15. Likewise, whether a gas infrastructure is "*new*" within the meaning of Article 36 (1) in conjunction with Article 2 (33) of Directive 2009/73/EC must be assessed on a case by case basis. The fact that a relatively small portion of an interconnector is not constructed from scratch but rather achieved by rededicating an existing part of a domestic pipeline system, does not yet prevent the qualification of the entire pipeline as "*new*" gas infrastructure if the existing part is proportionately short compared to the total length of the interconnector and if the alternative of constructing a new piece of infrastructure raises environmental concerns, is technically not required and commercially unreasonable.
16. This is the case here. The predominant part of the 160 km Gazelle pipeline will be newly constructed, while only a 20 km stretch will be achieved through the transfer of an existing pipeline into the exclusive ownership and use by the Gazelle owner Brawa. According to NET4GAS, the existing Primda-Rozvadov pipeline system already exceeds the total exit capacity of the German pipeline system ending at Waidhaus. It would therefore be uneconomical to build a parallel pipeline next to the existing system.³ Building a new 20 km stretch of pipeline might also be problematic for environmental reasons, as the existing pipelines between Primda and Rozvadov cross an environmentally protected area.
17. In view of these facts, the Commission can agree with ERU to qualify Gazelle as new gas infrastructure within the meaning of Article 36 of Directive 2009/73/EC.

(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

18. As already set out in recitals 27 to 36 of the Commission's *Gazelle I* Decision (C (2011) 3424 and in recitals 37 to 41 of the Commission's *Gazelle I* Decision (C (2011) 3424), the Gazelle interconnector will positively affect the competitive situation on the Czech gas markets, without strengthening the position of dominant players on these markets.

Enhancement of competition

² The Commission concluded in the OPAL case that where a new interconnector is hooked up to an existing transmission system and where a relatively small capacity on the new interconnector is used for domestic use, this does not prevent the qualification of an interconnector as long as the predominant purpose of the pipeline is to interconnect transmission systems of two countries. See the Commission's decision in the OPAL case, K(2009) 4694 at paragraph 24. OPAL has a total capacity of 36.5 bcm/year and 4.5 bcm of the capacity will be used in Northern Germany for domestic use.

³ See page 9 of the notification of NET4Gas to ERU, section 2.1.2.

19. According to 36(1)(a) of Directive 2009/73/EC the investment must enhance competition in gas supply. For the analysis of this condition, the likely positive and negative effects of the investment on competition need to be analyzed and balanced. Only if the positive effects of the investment outweigh the negative effects, an exemption under Article 36 can be granted⁴.
20. In its decision, ERU concludes that the construction of Gazelle will overall enhance competition.⁵

Czech Republic

21. What concerns the competitive effects in the Czech Republic, ERU considers that if Gazelle were not built, gas from the new OPAL pipeline would have to be transported through the existing pipeline system on a much longer route (from Brandov via Lanžhot to Rozvadov/Waidhaus), thereby congesting the existing Czech pipeline system. According to ERU, the construction of Gazelle will, conversely, free almost the entire capacity on the existing pipeline system between Lanžhot, Rozvadov/Waidhaus and Hora Sv. Kateřiny. This capacity (approx. 30 bcm/year) will then be available for third parties who could transport gas from and to other countries and notably create transport alternatives for imports from Germany, Norway or Russia.
22. The Commission agrees with ERU that the construction of Gazelle will, on balance, have a positive effect on the Czech gas markets. The construction will notably not reinforce the dominant position of an undertaking active on the Czech wholesale or retail or the upstream gas production markets.
23. As concerns the upstream *producer market*⁶, gas purchased from Gazprom Export Ltd. ("Gazprom") accounts for the majority of the Czech gas consumption⁷. However, the construction of Gazelle will not strengthen Gazprom's market position on this market.
24. The gas volumes on Gazelle will be transported to Germany and other markets via the Rozvadov/Waidhaus exit point and are not intended to serve the Czech market,

⁴ COMMISSION STAFF WORKING PAPER Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – New Infrastructure Exemptions ("Staff Working Paper"), paragraphs 31 and 32.

⁵ Notified decision of ERU on page 6.

⁶ See on this market also "OPAL" exemption decision, K(2009) 4694 at paragraph 58 et seq. It appears that the definition of a *producer market* (also referred to as "*market for production and first time sale*" or "*upstream wholesale*" market) which concerns gas sales by gas producers to wholesalers sold on a long-term basis and in large volumes to Czech importers, is still appropriate. Indeed, the market conditions on this market vary from the customers' perspective from the conditions on other markets for the supply/import of gas (e.g. gas purchases via gas hubs which are usually for smaller volumes and short- or mid-term). The question of the exact market delineation can, however, be left open since the competition assessment would not substantially change if gas imports via hubs would be included to the relevant market.

⁷ Gas imports into the Czech Republic from Russia amounted to approx. 5 bcm in 2009, from Norway to approx. 3 bcm and from Germany to approx. 0.5 bcm. Gazprom therefore accounted for around 53% of domestic gas consumption. It must be noted that this figure includes only direct imports from Gazprom, not indirect imports via Germany.

except for emergency situations⁸. From a competition point of view, the Gazelle pipeline is thus rather a substitute for the "*Brotherhood*" pipeline, which is currently used for transports to the German border, than an additional source for gas imports to the Czech markets.

25. Furthermore, the Czech regulator rightly points to the fact that the available import capacities for competitors of Gazprom would rapidly decrease absent the construction of Gazelle, since the gas volumes arriving at Hora Sv. Kateřiny from the OPAL pipeline would have to be transported on the existing Czech gas transmission system, significantly reducing import capacities, in particular at the Lanžhot border point. The construction of Gazelle therefore ensures that the import capacities available to Gazprom's competitors will at least be maintained even after the change of gas transits to OPAL⁹.
26. As concerns the Czech *wholesale and retail markets*, the Commission notes that RWE Transgas is still by far the most important player on these markets. According to data provided by ERU, the market share of RWE Transgas was above 70% in 2010. On the retail market, companies belonging to the RWE Group had, according to ERU, a market share of 62% in 2010, which decreased to 59% in January 2011. However, the conditions imposed by ERU to its exemption decision make sure that RWE Transgas will not benefit from the exemption on the Czech market, e.g. by booking capacities which are exempted from regulatory provisions¹⁰. Transports on Gazelle are only insofar exempted from regulatory provisions as they concern bookings from *border to border*. Conversely, any volumes exiting within the Czech Republic cannot be exempted from regulatory provisions¹¹. Therefore, RWE Transgas will not be able to strengthen its market position as a result of the exemption decision.
27. The Commission agrees also with the conclusion of ERU that the construction of Gazelle will improve the competitive situation of competitors of RWE Transgas on the Czech gas wholesale and retail markets. A significant shortage of gas import capacities, resulting from "OPAL"-capacities on the Czech gas transmission system, would undoubtedly negatively affect the capabilities of RWE Transgas's competitors to compete with the incumbent on the Czech wholesale and retail markets.
28. Gazelle will therefore positively affect the competitive situation on the Czech gas markets, without strengthening the position of dominant players on these markets.

Germany and other countries

⁸ The conditions imposed by ERU to its exemption decision make in any case sure that gas exiting in the Czech Republic will not benefit from the exemption decision.

⁹ The current situation *after the construction of OPAL* differs from the capacity situation described by the ERU in 2008 (see "OPAL" exemption decision, K(2009) 4694 at paragraph 54/footnote 35). Before the construction of OPAL and the decision to redirect gas flows to the North Stream and OPAL pipeline, there were indeed no capacity bottlenecks in the Czech gas transmission pipeline system. However, ERU is correct in assuming that this situation is likely to change after the redirection of gas volumes through OPAL.

¹⁰ See Staff Working Document, paragraph 34.

¹¹ See in this context also the similar condition of the German regulator (Bundesnetzagentur) in the "OPAL" decision and the Commission's assessment of the impact of the OPAL pipeline on the German market, see decision K(2009) 4694 at paragraphs 76-78.

29. The Commission has also considered possible competition effects of the Gazelle project on the German gas markets which will be served by the Gazelle pipeline¹². Indeed, the Commission has made clear in previous cases that exemption requests introduced by dominant companies which might increase their dominant position in markets served by the new infrastructure are unlikely to meet the criteria of Article 36 (1) (a) of Directive 2009/73/EC¹³.
30. However, in the present case there is no risk that the Gazelle project might reinforce a dominant position of RWE Transgas or Gazprom.
31. Concerning the producer market, Gazelle replaces the previous transport route via the "*Brotherhood*" pipeline and will not result in increased gas imports from Gazprom. Since there is currently no free capacity at the entry point in Waidhaus and no substantial capacity expansion is envisaged, Gazprom is not in a position to substantially increase its imports into Germany on this point. Furthermore, the gas transported via Gazelle to Waidhaus has already entered the German market in Greifswald. Gazprom's position on the producer market, which is in any event significantly smaller in Germany than in the Czech Republic, will therefore not change through Gazelle.
32. Gazelle will also have no negative effect on the German wholesale and retail markets. The gas volumes entering the German market at Waidhaus will be owned by Gazprom according to the agreement between RWE Transgas and Gazprom. Due to the capacity constraints at Waidhaus, Gazprom will not have more gas volumes available at Waidhaus than today. Furthermore, Gazprom is not dominant on the wholesale and retail markets in the relevant market areas to which the entry point at Waidhaus is connected (Open Grid Europe market area).
33. Likewise, no negative effects on competition can be expected in other Member States.

(bb) Impact of Gazelle on security of supply

34. As set out in recitals 42 to 51 of the Commission's *Gazelle I* Decision (C (2011) 3424, the Commission considers that Gazelle will enhance the security of supply for the Czech Republic if the new border point of Brandov is treated as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from and to Germany.
35. According to ERU, a *physical* reverse flow capacity from the Waidhaus border point to the Brandov border point is possible in emergency situations by decreasing the operating pressure of the OPAL pipeline is decreased.¹⁴ The Brandov border point is

¹² See already the Commission's "OPAL" decision, in which the effect on the Czech markets were at the core of the analysis, see decision K(2009) 4694 at paragraphs 55-74.

¹³ Staff Working Paper, paragraphs 33 and 34.

¹⁴ Between the cross-border points of Brandov and of Waidhaus, there is no compression station for technical reasons. According to ERO (letter of 23 February 2011 on page 1), the reason for the absence of compressor stations on Gazelle is the fact that the pressure at the Brandov border point is 73 MPa while on the Waidhaus border point it must decrease to 50 MPa, the same (and required) pressure level of the downstream transmission system in Germany. Therefore there is no need for compression. The pressure drop occurs while transporting gas through the pipeline from Brandov to Waidhaus.

technically arranged to physically enable the transport of gas from the Czech Republic into Germany via Olbernhau or the Sayda border points, as well to the existing pipeline system of the Czech Republic. In emergencies, the transmission system operator can also use the existing transmission system for transporting gas from Waidhaus to Hora Sv. Kateřiny and from there to the North of Germany.

36. According to ERU, the Brandov border point of Gazelle is technically connected to the Olbernhau and Sayda border points. The Gazelle pipeline is moreover technically connected to the Czech transmission system in Brandov, Jirkov, Svinomazy and Přimda in emergency situations. If there is an emergency, as it was the case during the gas flow interruption via Ukraine in January 2009, the transmission system operator is able to put these connections into operation so that there is a direct and continuous flow of natural gas to the Czech system.
37. The decision however does not yet contain an explicit condition which obliges the operator of Gazelle to enable bi-directional capacity on Gazelle. To fulfill the condition that Gazelle enhances the security of supply, the operator of Gazelle must be obliged to offer an adequate capacity for bi-directional flows. In determining the bi-directional capacity, the operator of Gazelle will have to consult the competent authority in the Czech Republic.
38. Moreover, the Use It or Lose It requirements imposed by ERU foresee that the user of Gazelle loses the exempted capacity if and to the extent that it does not nominate transmission on the gas day (D-1) preceding the gas day on which the transmission is to take place. NET4GAS must then offer this capacity in a non-discriminatory manner to all other users as firm capacities for the following day and shall provide them well in advance to make possible their effective use on day D. To the unused capacities all provisions of Regulation (EC) No 715/2009 apply.
39. As far as virtual reverse flows on Gazelle are concerned, the notified decision applies to forward flow capacity from Brandov to Waidhaus, only.¹⁵ This means that physical and virtual reverse flows on Gazelle are subject to regulation.
40. Therefore, it is physically and contractually possible to make use of gas transported through Gazelle for supplying the Czech market or any neighbouring market by making use of at least virtual but possibly also physical reverse flow from Germany into the Czech Republic.
41. Moreover, the completion of Gazelle will relieve the existing system of transport capacity and this capacity can be used for new combinations of forward and reverse flows on the Olbernhau/Hora Sv. Kateřiny – Lanžhot route. The freed up capacity in the Czech transmission system will be important both in terms of short-term effects, for example, in the case of supply disruptions and in terms of long-term effects.
42. However, it is not yet foreseen that the two border points of Hora Sv. Kateřiny and Brandov will serve as one common virtual platform for trading gas from Germany to the Czech Republic and *vice versa*. This shortcoming prevents an increase of liquidity in the Czech market by foregoing the possibility of netting gas transports on

¹⁵ See III.A of ERO's Decision "*for its direct forward flow capacity of 30 bcm/year*". *E contrario*, the exemption does not apply to physical and virtual reverse flows on Gazelle.

the existing North-South/East axis between Hora Sv. Kateřiny and Lanžhot with gas transports on the new Brandov - Waidhaus connection through Gazelle.

43. ERU should therefore ensure by means of an additional condition that at the new border point of Brandov, regulated reverse flows apply from the exit point of Gazelle into OPAL and from the exit point of OPAL into Gazelle. The new border point of Brandov shall be treated as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from the Czech Republic to Germany and from Germany to the Czech Republic.

In conclusion, the Commission considers that Gazelle will enhance the competition and security of supply for the Czech Republic if the new border point of Brandov is treated as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from and to Germany. This exemption is notwithstanding the legal obligation of the operator of the Gazelle pipeline to offer bi-directional capacity according to Article 7 of Regulation (EC) No 994/2010.

(b) The level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted – Article 36 (1) (b) Directive 2009/73/EC

44. The Commission previously concluded that the risks of building Gazelle necessitate a (partial) exemption from Third Party Access and tariff regulation provided that the duration of the exemption remains limited to 22 years. Reference is made to recitals 52 to 57 of the Commission's *Gazelle I* Decision (C (2011) 3424).
45. As to the specific risks for the project related to ownership unbundling, NET4GAS argue in their submission to ERU that "if NET4GAS were [obliged] to transfer the shares of Brawa a.s. to a third party before that date [1 January 2035], NET4GAS would run the risk of not recouping its investment, which means that NET4GAS would not continue with the project". This is because "NET4GAS cannot be expected to assume the risk and make the investment without knowing for certain that the investment will be returned (together with a reasonable profit)". As NET4GAS still had made no final investment decision for Gazelle, the construction of the pipeline would depend on an exemption from ownership unbundling.
46. ERU agrees with NET4GAS for the following considerations.
47. According to ERU, Section 58b and 58h (1) of the Czech Energy Act No. 211/2011 – which transposes the unbundling requirements of Directive 2009/73/EC – stipulates that "one of the conditions which an independent transmission system operator shall satisfy is that it is the owner of the operated transmission system or that it operates a transmission system that has been granted an exemption from ownership unbundling". "In a situation where the only transmission system operator in the Czech Republic is NET4GAS, s.r.o., it is not possible at all, without granting an exemption from the obligation of the ownership unbundling of the operator of the Gazelle pipeline, that is, again NET4GAS, s.r.o., to anticipate the fate of the completed Gazelle pipeline in the case that this pipeline cannot be operated by the exclusive transmission system operator in the Czech Republic on the basis of an exemption from the ownership unbundling obligation. It is therefore obvious that in this situation, no entity acting in accordance with the reasonable person standard can

make a definitive decision on an investment of crucial importance such as the Gazelle investment."

48. The Energy Regulatory Office also considers that the Gazelle pipeline project is only feasible if the investment is amortised by 1 January 2035. Should the capital costs be amortised only later, the investment would not take place. The reason is that "it cannot be guaranteed that in the event of the sale of the investment caused by the discharge of the ownership unbundling obligation, it will actually be possible to attain a selling price that will secure the return of the invested means."

The effect of Ownership Unbundling on the Commercial Viability of the Project

49. The Commission notes that according to Article 9 of Directive 2009/73/EC, the principle of "ownership unbundling" implies the appointment of the network owner as the system operator and its independence from any supply and production interests.
50. Ownership unbundling obliges Member States to ensure that the same person or persons are not entitled to exercise control over a production or supply undertaking and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a production or supply undertaking.¹⁶
51. However, ownership unbundling –as much as Third Party Access and tariff regulation– may undermine the commercial viability of a new interconnector if it enhances the risks of the project promoter not to recoup its investment costs and an adequate return on equity.
52. RWE Transgas a.s., the sole shareholder of NET4GAS, is active in the production and supply of natural gas to the Czech Republic. If ownership unbundling applied in the present case, RWE Transgas a.s. would have to sell the (majority of its) shares in NET4GAS to a third party or NET4GAS would have to sell the Brawa a.s. to a third party. As the outcome of such a sales process cannot be predicted with sufficient certainty, it is plausible that NET4GAS may refrain from the investment in Gazelle.
53. Moreover, an exemption from the obligation under Article 9 (1) Directive 2009/73/EC is also needed because according to Article 36 (1) c of the same Directive, an exemption from Third Party Access and tariff regulation presupposes that the pipeline is owned by a natural or legal person which is separate at least in terms of its legal form from the system operator in whose systems that infrastructure will be built (see below at section c). As NET4GAS happens to own the Czech transmission system, this requirement can only be fulfilled if NET4GAS outsources the pipeline assets to a project company such as Brawa a.s., while Article 9 (1) of Directive 209/73/EC would in principle oblige NET4GAS to hold the assets directly. As an exemption from Third Party Access is essential to overcome the risks intrinsic

¹⁶ This form of unbundling is the most effective and stable way to permanently solve the conflict of interests which is typically inherent in vertically integrated energy companies. See Directive 2009/73/EC at recital 8, OJ L 211 of 14.8.2009, p.24.

in the Gazelle project, the requirement of Article 9 (1) of Directive 2009/36/EC must be lifted to enable Brawa a.s. to own the assets of the pipeline

54. The Commission can therefore agree with ERU that there is a need for a temporary exemption from ownership until 1 January 2035 in the present case.

Less restrictive measures than unconditional exemption from Ownership Unbundling

55. However, there are negative effects of lifting –without further conditions– the obligation to ownership unbundling for the ability of third party suppliers to gain access to the capacity which is not exempted from Third Party Access¹⁷ ("non exempted capacity").

56. Without additional measures, the transparent and non discriminatory management of this non exempted capacity by NET4GAS cannot be guaranteed.

57. Consequently, to limit the negative effects of an exemption from ownership unbundling for competition in the wholesale market, it must be explored further whether it is appropriate to impose additional conditions which enhance the transparency within the vertically integrated RWE Transgas a.s. group without endangering the commercial viability of the project.

58. ERU informed the Commission that the relationship between RWE Transgas a.s. NET4GAS will be structured according to the Independent Transmission Operator (ITO) model within the meaning Chapter IV of Directive 2009/73/EC.

59. The certification of NET4GAS as ITO (or alternatively as Independent System Operator within the meaning of Article 14 of Directive 2009/73/EC) will ensure that RWE Transgas a.s. cannot instruct the management of NET4GAS to grant RWE Transgas a.s. preferential access to that non exempted capacity of the Gazelle pipeline provided that the certification extends to the Gazelle pipeline and is not limited to the national transmission system. The independence of the management of NET4GAS, as well as all other measures taken to obtain certification as ITO, will ensure a level playing field between gas suppliers to obtain access to non exempted capacity of Gazelle¹⁸ while not endangering the commercial viability of the project.

60. The temporary exemption from ownership unbundling can therefore be endorsed in the present case subject to the condition that NET4GAS will indeed be certified, as ERU told the Commission, as ITO and that this certification extends to the Gazelle pipeline.

(c) Infrastructure must be owned by a legal person different from system operators in whose system that infrastructure will be built – Article 36 (1) (c) Directive 2009/73/EC

¹⁷ Out of 32.81 bcm, 30 bcm/y were exempted from TPA. This means that 2.81 bcm/year forward flow and the entire reverse flow capacity are subject to TPA.

¹⁸ In particular, according to Article 18 of Directive 2009/73/EC the Czech Republic must ensure that the vertically integrated company does not determine, directly or indirectly, the competitive behaviour of the transmission system operator in relation to day-to-day activities of the transmission system and management of the network.

61. The Gazelle pipeline will therefore be owned by Brawa a.s. which is a legal person that is distinct from the operator of the Czech gas transmission system, NET4GAS. The need for an exemption from ownership unbundling according to Article 9 (1) of Directive 2009/73/EC for Gazelle is precisely also rooted in the consideration that a legal entity *other than NET4GAS* must own the assets of the new pipeline for Gazelle to comply with the requirement of Article 36 (1) (c) Directive 2009/73/EC which is a precondition for an exemption from Third Party Access and tariff regulation

(d) Charges must be levied on users of the infrastructure – Article 36 (1) (d) Directive 2009/73/EC

62. As part of the indicative conditions for capacity allocation on the Gazelle route, RWE Transgas a.s. specified tariff conditions in point 3 of its letter of 1 November 2010. This confirms, as ERU concludes, that charges for the use of the interconnector must be levied on the users of Gazelle.

(e) The exemption must not be detrimental to competition or the functioning of the internal market – Article 36 (1) (e) Directive 2009/73/EC

63. The temporary exemption of Gazelle from ownership unbundling is not detrimental to competition between suppliers due to the transparency measures related to the certification of NET4GAS as ITO (above section b) which will ensure a level playing field between suppliers for non exempted capacity of Gazelle.

(f) Other

64. According to Article 36 (6) of Directive 2009/73/EC the national regulatory authority must oblige the transmission system operator to foresee both Use It Or Lose It (UIOLI) Principles and the possibility for users of this infrastructure to trade capacity on the secondary market. While the notified decision foresees UIOLI principles, it does not explicitly impose the possibility of secondary trading. This condition must therefore be added.

HAS ADOPTED THIS DECISION:

Article 1

The Commission requests the Energy Regulatory Office of the Czech Republic to modify according to Article 36 of Directive 2009/73/EC its decision of 2 August 2011, notified to the European Commission on 18 August 2011 with file reference number 03068-3/2011-ERU as set out in the subsequent articles.

Article 2

An additional condition shall be imposed on the addressee of the exemption decision to ensure that NET4GAS is subject to measures which adequately guarantee that any capacity of the Gazelle pipeline which is not exempted from Third Party Access under the terms of the Commission's Decision (C (2011) 3424) will be sold under conditions which ensure that third party suppliers cannot be discriminated against to the benefit of suppliers within the vertically integrated group to which NET4GAS belongs . This condition can be fulfilled, in particular,

by means of a certification of NET4GAS as Independent System Operator (ISO) or Independent Transmission Operator (ITO) within the meaning of Article 14 and Chapter IV of Directive 2009/73/EC, where such certification also covers the Gazelle pipeline.

Article 3

An additional condition shall be imposed on the addressee of the exemption decision to enable sufficient bi-directional capacity on Gazelle to safeguard the security of supply of the Czech market in emergencies based on an opinion of the Competent Authority in the Czech Republic.

Article 4

An additional condition shall be imposed on the addressee of the exemption decision which stipulates that at the new border point of Brandov, regulated virtual reverse flow shall apply from the exit point of Gazelle into OPAL and from the exit point of OPAL into Gazelle. The exemption must also be conditional upon the treatment of the border point of Brandov as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from the Czech Republic to Germany and from Germany to the Czech Republic, so that access from the Czech virtual hub (i.e. its entry/exit system) to the German exit point of OPAL and the German virtual hub, and vice versa from Germany to the Czech Republic, is possible.

Article 5

An additional condition shall be imposed on the addressee of the exemption decision which stipulates that users of the infrastructure must be entitled to trade their contracted capacities on the secondary market.

Article 6

In line with Article 36 (9) of Directive 2009/73/EC, the Commission's approval shall lose its effect two years from its adoption in the event that construction of the infrastructure has not started and five years from its adoption in the event that the infrastructure has not become operational unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

Article 7

This Decision is addressed to the Energy Regulatory Office of the Czech Republic, Masarykovo namesti 5, 586 01 Jihlava, Czech Republic.

Done at Brussels,

For the Commission

Member of the Commission