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Comments on commitments proposed by Gazprom pursuant to Article 27(4) of Regulation (EC) No 1/2003 in Case AT.39816 – Upstream gas supplies in central and eastern Europe

Gazprom has offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003 to meet the competition concerns raised in the European Commission's preliminary assessment in Case AT.39816 – Upstream gas supplies in central and eastern Europe ("the Commitments").

In accordance with Article 27(4) of Regulation (EC) No 1/2003, on 16 March 2017, the European Commission invited interested third parties to submit their observations on the proposed Commitments.

The Energy Community is an international organisation established by the Energy Community Treaty of October 2005. Parties to the Energy Community are the European Union as well as countries from South East Europe and the Black Sea region (Albania, Bosnia and Herzegovina, Georgia, Kosovo*, Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine; "the Contracting Parties"). The Energy Community aims at extending the EU internal energy market to South Eastern and Eastern Europe beyond the borders of the European Union on the basis of a legally binding framework, the Energy Community *acquis*.

The Energy Community Secretariat ("the Secretariat") is a permanent institution of the Energy Community. It is responsible, among other things, for reviewing and enforcing the proper implementation by the Parties of their obligations under the Energy Community Treaty. This includes competition rules modelled on Articles 101, 102 and 107 of the Treaty on the Functioning of the European Union ("TFEU") (Article 18 of the Energy Community Treaty) which are to be applied directly by all (non-EU) Contracting Parties, as well as the free movement of goods (Article 41 of the Energy Community Treaty), the prohibition of discrimination (Article 7 of the Energy Community Treaty) and the duty of loyal cooperation (Article 6 of the Energy Community Treaty), which are to be applied directly by all Parties, i.e. including the Europan Union. Article 216(2) TFEU stipulates that these duties "*are binding upon the institutions of the Union and on its Member States*."

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The Energy Community Secretariat performs its tasks as guardian of the Energy Community Treaty by way of a “dispute settlement procedure” (Article 90 of the Energy Community Treaty and the corresponding Rules of Procedure) which is modelled to a large extent on the infringement procedure established by Article 258 TFEU. Unlike the European Commission within the European Union, the Secretariat does not dispose of decision-making powers in the area of competition law. However, the Secretariat is monitoring enforcement activities by the national competition authorities and can take action in case it is incompliant with its obligation under the Energy Community Treaty.

According to the Energy Community Treaty’s duty of loyal cooperation, which corresponds to Article 4(3) Treaty on the European Union, Parties should support each other in the attainment of the objectives of the Treaty. One of these objectives is the development of energy market competition on a broader geographic scale (Article 2 of the Energy Community Treaty). The prohibition of discrimination requires Parties to accord equal treatment to persons, companies and authorities from another Energy Community Party as they would accord to their own persons, companies and authorites.

On this basis, the provisions of the Energy Community Treaty suggest that when exercising its enforcements powers, the European Commission as an institution of one of the Parties to the Energy Community Treaty, takes due care also of anti-competitive conduct in the entire Energy Community, i.e. including also the situation in and effect of anti-competive measures on other Parties of the Energy Community.

Additionally, due to the geographic proximity of the Contracting Parties to the EU Member States and based on the effects doctrine for the application of European competition law, anti-competitive practices in the Contracting Parties have actual or potential anti-competitive effects in EU Member States. The European Commission’s assessment should therefore also encompass anti-competitive conduct in the Contracting Parties which may have an effect in EU Member States.

In its own enforcement practice, the Secretariat regularly follows these considerations. In a review of the gas supply and transit contracts concluded between Gazprom and the Ukrainian incumbent Naftogaz, for instance, the Secretariat explicitly assessed the effect on trade of anti-competitive practices also with EU Member States and their supply companies. In a recent case concerning Serbia, the Secretariat took into account that a territorial restriction also potentially affects trade of gas between Contracting Parties of the Energy Community and EU Member States.

Moreover, the Secretariat would like to stress the importance of these proceedings for the integration

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of gas markets and its exemplary value for commercial practice in the EU and the broader region, including the Energy Community.

The Secretariat considers that Article 9 of Regulation No 1/2003 leaves room for extensions of commitments beyond what would be the content of a decision under Article 7 of Regulation No 1/2003, i.e. the prohibition of restrictive clauses in specific contracts: "*Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination*."[1] The Secretariat believes that there is no legal obstacle to respect the Energy Community Treaty by taking into account also Gazprom's conduct in Energy Community Contracting Parties and its impact in the EU.

Against this background, the Secretariat provides its comments on the commitments offered by Gazprom pursuant to Article 9 of Regulation (EC) No 1/2003.

1. Concerns on Market Segmentation

The European Commission has concerns that Gazprom imposed territorial restrictions in its supply agreements with wholesalers and some industrial customers, thereby preventing free trade of gas within Central and Eastern Europe.

The Secretariat generally supports the commitments proposed by Gazprom. However, as DG Competition represents the institution of the European Union, a Party to the Energy Community, the Secretariat recommends to extend the following commitments also to restrictive clauses in contracts with suppliers in Energy Community Contracting Parties (a.) and to interconnection agreements at the interconnection points between Bulgaria and Energy Community Contracting Parties (b.).

a. Restricting clauses

In order to meet these concerns, Gazprom undertakes (i) not to apply any Clause Restricting Resale or Territorial Restriction Clause and (ii) not to introduce any new such clause in any existing or new contract on gas supply, including contracts of Gazprom on gas supply sold via auctions for the entire duration of the commitments (paragraph 5 of the Commitments).

The Secretariat generally welcomes this commitment as it addresses a commercial practice that is

[1] Case C-441/07P *Alrosa*, ECLI:EU:C:2010:377, para. 48.

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very harmful to competition. The territorial restrictions addressed by this commitment hinder gas from flowing where it is most needed and where prices are commercially most attractive, the purpose of an integrated gas market. This also negatively affects gas prices. Territorial restrictions also keep national markets artificially separated and deny importers new sales opportunities while hindering consumers in other countries to benefit from alternative suppliers.[2][3] The Secretariat notes that based on the decision practice of the European Commission and the Court of Justice (relevant also under the Energy Community Treaty, cf Articles 18(2) and 94 of the Energy Community Treaty), destination clauses are anti-competitive and infringe Article 101(1) TFEU.[4] As such, they are automatically null and void. It may thus be questioned whether the commitment offered by Gazprom constitutes a true remedy to soothe the Commission's concerns, or rather confirms the well-established legal status of destination clauses in all gas supply contracts.

In any event, the Secretariat strongly supports the elimination of such restrictive clauses in any gas supply contract.

With regard to a destination clause included in the gas supply contract between Gazprom and Naftogaz, the Secretariat preliminarily concluded that destination clauses conflict with the fundamental goal of the Energy Community to create an internal market for gas and are therefore not compatible with Article 18(1)(a) of the Treaty (which corresponds to Article 101 TFEU). Moreover, the Secretariat in March 2017 sent a Reasoned Opinion to Serbia, in which it found that a destination clause stipulated in the intergovernmental agreement with the Russian Federation and implemented by a contract between Gazprom, Srbijagas and Yugorosgaz (a subsidiary of Gazprom) constitutes anti-competitive behaviour in the sense of Articles 18 and 6 of the Treaty.

The Secretariat has some comments on this commitment that it believes will render this commitment more effective and strengthen competition on a broader market:

- Gazprom undertakes not to apply nor introduce specific clauses which are defined as relating to customers which are gas suppliers or industrial customers active at the wholesale level in one or several of the **Central and Eastern European Countries**, i.e. Estonia, Lithunania, Latvia, Poland, Slovakia, the Czech Republic, Hungary and Bulgaria (paragraph 4 of the Commitments). However, the Secretariat would like to draw the European Commission's attention to the fact that such restrictive clauses are also included in contracts with customers

2 *Nyssens/Cultrera/Schnichels*, The territorial restrictions case in the gas sector: a state of play, Antitrust 2004, 48.
3 E.g. Case 391/82 *Société de Vente de Ciments et Béton de l'Est SA v Kerpen*, ECLI:EU:C:1983:374, para. 6.
4 Case 56 and 58/64 *Consten Grundig*, ECLI:EU:C:1966:41.

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in other countries, namely in Contracting Parties of the Energy Community; such anti-competitive conduct may not only have an impact on competition in the Energy Community and but also in the European Union.

The Secretariat therefore recommends not to limit the commitments regarding the restrictive clauses to the countries defined as Central and Eastern European Countries, but to include also the Contracting Parties of the Energy Community. The definition of 'Customer' in paragraph 4 of the Commitments should therefore read "…in one or several of the Central and Eastern European Countries as well as the Contracting Parties of the Energy Community". Also the definition of 'Contract on Gas Supply' in paragraph 4 of the Commitments should state "Delivery Point(s) at the border of the respective Central and Eastern European Countries or Contracting Parties of the Energy Community and sued for supply to such respective Central and Eastern European Countries or Contracting Parties of the Energy Community".

- Paragraph 22 of the Commitments defines the **duration of the commitments** and states that the Commitments will be applicable for a period of eight years. This seems to be add odds with the nullity of destination (and other restrictive) clauses under Artile 101(2) TFEU. Limiting the application of the Commitments to the duration of eight years leaves the door open for such clauses to be reintroduced or reapplied after eight years and therefore anti-competitive practices to take place again. Therefore, the commitment not to introduce or apply anti-competitive clauses cannot have any time limitations. The Secretariat is of the opinion that the limitation of the Commitment in paragraph 5 to the duration of eight years according to paragraph 22 is incompatible with competition rules and should therefore be deleted.

- Gazprom undertakes not to **apply** nor **introduce** restrictive clauses. The first part of this commitment concerns existing contracts; the second part new and existing contracts. As regards existing contracts, it seems not sufficient to commit not to *apply* restrictive clauses included in existing supply contracts. Rather, and in order to effectively meet the competition concerns, it would be preferable that such clauses are removed from existing constracts. Therefore, the Secretariat proposes to replace the term 'apply' with the term 'undertake all necessary steps together with its contractual counterpart to remove from its contracts'.

- Gazprom undertakes not to apply nor introduce **specific clauses** which are defined in paragraph 4 of the Commitments and further specified in Annex 1 to the Commitments.

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For more clarity and in order to avoid legal uncertainty for the contractual parties, the list of clauses should further include "price splitting mechanisms", "customer restriction clauses", and "use restriction clauses". Such clauses have been used (in the past) for the same restrictive aims and should figure on the indicative list of restrictive clauses. These additions would help avoiding other contractual provisions between Gazprom and its customers that have the same effect as the ones explicitly referred to from being used in gas supply contracts of Gazprom and therefore circumvent the commitment.

- According to paragraph 6 of the Commitments, Gazprom commits to approach all existing customers with gas supply contracts, **except** with contracts on gas supply **sold via auctions**, to inform them that the restrictive clauses are null and void and that provisions of their contracts do not restrict the resale of gas.

  The Secretariat acknowledges that the volumes of gas sold via auctions are rather low and of limited duration and therefore more unlikely to contain direct or indirect territorial restrictions. However, the Secretariat does not see any reason why to generally exclude such contracts from the duty to inform of the nullity of restrictive clauses if such exist even in contracts concluded via auctions. In order to guarantee non-application of restrictive clauses in all gas supply contracts, the exception for auction contracts should be removed.

- Gazprom undertakes to approach in writing all existing customers to **inform** them that the restrictive clauses are deemed null and void.

  In the Secretariat's opinion the unilateral written declaration of a party to a contract about the legal qualification of specific contractual clauses is not sufficient to effectively address the competition concern raised by the European Commission. The Secretariat deems it necessary for the contractual framework to be amended in order to have legal certainty in the sense that the restrictive clauses are no longer part of the contract and are therefore unenforceable. It follows that amendments to existing contracts need to be agreed by the parties to such contract (and in the form foreseen by such contract).

  The Secretariat therefore proposes to insert "and take all necessary steps together with its contractual counterpart to amend the respective contract accordingly".

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b. Bulgarian Gas System

Furthermore, Gazprom undertakes to change its contract with Bulgargaz and the contract for transportation of gas through Bulgaria with Bugartransgaz to the extent necessary to remove any obstacles for Bulgartransgaz to (i) the conclusion of interconnection agreements at the interconnection points between Bulgaria and other EU Member States and (ii) the adjustment of the current "allocation-as-measured" methodology at such points (paragraph 7 of the Commitments).

The Secretariat generally welcomes this commitment as it helps to interconnect Bulgaria with its neighbouring markets, thereby contributing to an integrated gas market. However, the Secretariat notes that also these commitments should be extended to interconnection points between Bulgaria and Contracting Parties, e.g. former Yugoslav Republic of Macedonia and Serbia[5]. As has been pointed out above, the European Union is a Party to the Energy Community which aims at extending the EU internal energy market to South Eastern and Eastern Europe. Furthermore, cross-border flows of gas and interconnection agreements between Bulgaria and non-EU Member States would also enhance competition on the European gas market.

c. Delivery points

Gazprom commits to give specific customers that want to resell gas across borders the possibility to ask for delivery for all or part of their contracted gas to entry points into the Baltic States and Bulgaria, giving them new business opportunities before the connecting gas infrastructure becomes available while charging a fixed and transparent service fee (paragraphs 10-17 of the Commitments).

The Secretariat generally welcomes this commitment as it may enhance competition in Bulgaria (and the Baltic states) which currently lacks access to interconnections with their EU neighbours and therefore cannot sell gas across borders, with knock-on effects for former Yugoslav Republic of Macedonia. By offering customers to change the delivery point to an entry point to Bulgaria, these customers are able to sell the gas contracted beyond its borders to Bulgaria which would otherwise not be possible due to a lack of access to interconnection to these countries. Such a change would open the possiblity for parallel trade that is currently inhibited by a lack of infrastructure. Although the extent of parallel trade that is enabled through this commitment is not foreseable, it opens the market at least for potential competition.

Furthermore, the Secretariat suggests to consider the extension of the commitment insofar as

[5] The interconnector Serbia-Bulgaria project is fairly advanced.

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Gazprom should offer the opportunity to change also Ukrainian delivery points to Eastern Ukraine. This would enable the full implementation of the Third Energy Package in Ukraine to the benefit of an integrated and competitive energy market.

Moreover, the Secretariat has some specific comments on this commitment that it believes will render this commitment more effective and strengthen competition on a broader market

- Gazprom's commitments in this regard provide for a right to request a change of the **Original Delivery Point** to a New Delivery Point. The Original Delivery Points include Kondradtki, Beregovo and Velka Kapunsany.

  The Secretariat believes that also Orlovka at the Ukrainian-Romanian border should be included among the Original Delivery Points, because the economic logic behind the selection of the Original Delivery Points is the same. Furthermore, also the delivery point Zidilovo at the border with former Yugoslav Republic of Macedonia should be able to be changed to another delivery point. The Service Fee should be determined in the same manner as for the other delivery points (paragraph 15 of the Commitments).

- Paragraph 12 of the Commitments lists two cases in which Gazprom may reasonably **refuse** a substantiated request of a customer for a change of delivery points.

  With regard to the second case ("lack of resources to ensure delivery of gas to the New Delivery Point(s)"), the Secretariat is of the opinion that this provision is unclear: Lack of resources may generally relate either to transport capacity or to the quantity of gas. Transport capacity can be firm and interruptible. Lack of firm transport capacity is dealt with under the first case as a reason for refusing change of the Delivery Points ("lack of free firm transmission capacities (…)"). Interruptible capacity is not encompassed because the minimum duration of supplies to New Delivery Point(s) is 12 months, i.e. it would be insecure to rely on interruptable capacity for a long term period. Therefore, the second case can only relate to the quantity of gas. The quantity of gas is the subject of the original gas supply contracts, and failure to provide the contracted quantities of gas is dealt with in those contracts. Therefore, lack of quantities cannot be treated as a justifiable reason to refuse a change of the Delivery Point(s). In other words, if there is enough quantity for one delivery point, there is enough quantity for another delivery point as well. Furthermore, the term 'resource' leaves potential for a too broad interpretation and therefore risks to be abused (e.g. lack of available funds for paying transport fees on the new route).

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The Secretariat therefore proposes to delete the second case under which a change of Delivery Point(s) can be refused.

- Paragraph 14 of the Commitments provides that Gazprom "*shall **not be liable** (e.g. for damages, penalties, etc.) under the Contract(s) on gas Supply for disruptions of supply at the New Delivery Point(s) beyond the control of Gazprom.*"

  Generally, any supply contract contains provisions that regulate the risks and allocate liability in connection with the loss of natural gas and damages of gas pipelines, as well as risks associated with the transport of natural gas. The risk passes from the seller to the buyer after the handover/delivery of the gas at the place of handover/delivery. Also, usually supply contracts contain a force majeure clause which deals with disruptions of supply beyond the parties' control. It follows that based on the usual contractual provisions, Gazprom as the seller is liable for disruptions of supply until delivery, unless it is a case of force majeure. The above commitment stands in stark contrast to these contractual provisions because it would effectively release Gazprom from its liability in cases of disruptions of supply caused by third parties that are not beyond its control. There is no justification for releasing Gazprom from its responsibility because it retains the right to be compensated for damages caused by disruptions of supply because of third parties. Such damages would include the compensation Gazprom had to pay to its buyer for the disruption of supply. Therefore, Gazprom should remain liable for all disruptions of supply that occur until the moment of handover/take delivery, except for disruptions caused by force majeure, as stipulated in the gas supply contracts.

  The Secretariat therefore recommends to delete paragraph 14 of the Commitments.

- Gazprom makes commitments regarding changes of delivery points with regard to **existing customers**, i.e. customers who at the date of the Commitment Decision are Gazprom's contractual counterpart with respect to a gas supply contract or the successor of such a customer (paragraph 9 of the Commitments).

  The Secretariat is of the opinion that Gazprom's commitments in this regard should be extended also to new customers and customers which are currently negotiating new contracts with Gazprom in order to continue such good practice also in the future. The rational for offering a change of Delivery Point(s) to existing customers, i.e. to enhance competition by enabling such customers to resell their gas beyond their borders, also applies to any new

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supply contract. Also these new customers should have the possibility to sell the gas they contracted for beyond their boarders, regardless of the lack of access to intereconnections.

- The right to request a change of the Original Deliver Point needs to be exercised **at least 6 months prior** to the intended commencement of the deliveries to the New Delivery Point (paragraph 11 of the Commitments).

  The Secretariat finds this lead-time unnecessarily long because the possibility to change Delivery Point should enable the customer to resell its gas as soon as possible beyond its boarders and be as flexible as possible when it decides to do so. The Secretariat therefore suggests the lead-time not to be longer than the reasonable time in which Gazprom can respond to the request.

- Paragraph 15 of the Commitments sets the amounts of fixed **Service Fees** and provides that these fees "are subject to recalculation and corresponding increase on April 1st of each year in accordance with the inflation rate in the European Union (…)."

  The Secretariat finds this formulation insufficiently precise and hazardous. The key problem lays in the fact that formulation "recalculation and corresponding increase" gives Gazprom an opportunity to change the amount of Service Fees on two grounds: (i) change with no preset criterion ("recalculation") and (ii) increase based on the inflation rate in the European Union. It would be important to prevent Gazprom from changing the Service Fee in an arbitrary manner. Therefore, the paragraph should state: "The aforementioned fixed Service Fees are subject to recalculation, based on the increase on April 1st of each year of the inflation rate in the European Union (…)."

d. Virtual reverse flows

Gazprom is party to a transit contract, dated 19 January 2009, with the incumbent vertically integrated company Naftogaz of Ukraine. The Ukrainian gas transmission system is a key route for the transit of Russian gas to the European Union. It could also be used for gas flows between EU Member States – in particular Poland, Slovakia, Hungary and Bulgaria – and Ukraine. However, this is currently hindered by Gazprom's contractual arrangements with those countries and because of the transit contract conferring de facto control over the Ukrainian gas transmission system (currently operated by Ukrtransgaz, a daughter company of Naftogaz and licensed TSO in Ukraine).

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As the Secretariat found in its review of the 2009 gas transit contract between Gazprom and Naftogaz shared with the Ukrainian authorities in November 2014, the arrangements pursuant to which Gazprom acts as a so-called "super-operator" of the Ukrainian gas network result in restrictions of competition on the market for gas transportation and effectively precludes Ukrtransgaz (or any other TSO) from providing services of virtual reverse gas flow on available interconnectors with the neighbouring EU countries (Poland, Hungary, Slovakia) and prevents customers from procuring natural gas from alternative suppliers.

In particular, Gazprom refuses to supply shipper codes to Naftogaz and Ukrtransgaz which constitutes essential information for TSOs to match cross-border flows of natural gas through their interonnection points with neighbouring systems. This refusal is based on clauses in the 2009 transit contract between Gazprom and Naftogaz, which the Secretariat considers to be in breach of Article 18 of the Treaty and Articles 101 and 102 TFEU, as well as legacy contracts with TSO in EU Member States. As a result, Ukrtransgaz and its neighbouring TSOs cannot effecively engage in management of cross-border gas flows including through virtual reverse flows. Virtual reverse flows would constitute the most efficient mechanism (as opposed to building new infrastructure) to trade natural gas between EU Member States and with Energy Community Contracting Parties such as Ukraine. To limit competition and inhibit market integration between EU Member States and Energy Community Contracting Parties is contrary to the Energy Community objectives and rules.

The current state of affairs where Gazprom affiliates (rather than Ukrtransgaz) act as matching partners for operators of neighbouring transmission systems in respect of gas flows through the Ukrainian territory is also non-compliant with the principles of the Energy Community acquis on gas. Such a de facto transfer of the TSO functions to an entity not duly designated under the Second Gas Directive and certified pursuant to requirements of the Third Gas Directive jeopardises effective implementation of the Energy Community law. In addition, it has an immediate potential of precluding further market integration as the de facto assignee is a member of a vertically integrated undertaking with identifiable interests in the Ukrainian downstream gas market.

In order to terminate this anti-competitive practice, the Secretariat proposes that Gazprom commits to provide the necessary matching information to the Ukrainian TSO (until a new gas transit contract is concluded between Gazprom and the Ukrainian TSO) and removes all anti-competitive provisions in legacy contract with European TSOs.

2. Concerns on Prices

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The European Commission has concerns that due to the territorial restrictions Gazprom was able to pursue an excessive pricing policy. In order to meet these concerns, Gazprom commits to introduce specific price review mechanisms or changes to its contractual price review mechanism (parapraphs 18 and 19 of the Commitments).

The Secretariat generally welcomes this commitment as it can effectively contribute to put an end to unfair pricing policies of Gazprom by removing the link to the price of oil products and replacing it with a link to prices at Western European hubs. The gas prices at wholesale level are of vital importance because of their impact on retail prices to households and businesses. In a letter by the Secretariat addressed to Ukraine regarding the supply contract with Gazprom, the Secretariat preliminarily concluded that an oil price indexation clause (frequently used by Gazprom) constitutes exploitative conduct prohibited under Article 18 of the Energy Community Treaty.

Based on this experience, the Secretariat suggests the following amendments to the commitments made by Gazprom:

- Paragraph 19(i) of the Commitments provides in case of which circumstances a price review may be **triggered** by a party to a supply contract. The second scenario is described as when "the prevailing price level resulting from the Contract does not reflect the development of the European gas markets as reflected, inter alia, in the development of the average weighted import border prices in Germany, France and Italy…". However, the Secretariat notes that the average weighted import price does not constitute an appropriate reference for market prices because import prices rather reflect prices in long-term contracts which generally lag behind market developments because such developments are subject of lengthy price review mechanisms. Furthermore, the reference to comparison to "European gas markets" should be clarified, e.g. by reference the liquid markets as defined by the EFET market assessment.[6] The Secretariat also notes that these characteristics to be taken into account when adjusting the price should include the contract delivery point because the transport costs may constitute a significant part of the cost of the delivered product. Any comparison between gas prices should take into account differences in deliver points and therefore transport costs.

- Paragraph 19 of the Commitments provides in which instances and how often a contractual party may request a Contract Price Revision. If a party substantiates the reasons for a

6 See e.g. http://efet.org/Cms_Data/Contents/EFET/Folders/Documents/EnergyMarkets/VTP_Assessment/~contents/E3326GFNEGX4UA9C/EFET-Gas-Hub-Review-2016.pdf.

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Contract Price Revision, the parties will review the Contract Price, taking into account specific benchmarks. However, the commitment does not contain a right to actual price revision; in case no agreement is reached, either Party has the right to refer the dispute to arbitration. However, the commitment does not stipulate based on which criteria the arbitral tribunal has to assess the price and determine the revised price. This is why the Secretariat considers this commitment a useful first step, but not sufficient to ensure effectively competitive prices. Therefore, the Secretariat recommends that the Commitments should contain a right of the contractual party to price revision, which can be enforced by an arbitral tribunal, based on the criteria contained in paragraph 19(iii) of the Commitments.

- Furthermore, Paragraph 19(ii) of the Commitments provides for the frequency of the right of a Party to ask for price review: one every two years for regular price review and once every five years for extraordinary price review.

  The Secretariat notes that neither the term 'regular price review' nor the term 'extraordinary price review' is defined in the Commitments. Therefore, it is unclear in which circumstances a regular or extraordinary price review will be possible. The Commitments should clearly explain in which cases the five year timeframe and in which cases the two year timeframe applies. The Secretariat therefore recommends to include a defintion of the term 'regular price review' and the term 'extraordinary price review'.

- The Secretariat also considers that two years for regular price review and five years for extraordinary price review are inadequate time periods. Due to the dynamics of the gas market, the trigger part for the gas review clause set in paragraph 19(i) can occur more frequently than once in two years. One Gas Year (1 October to 30 September) includes the period of intensive usage of gas and the period during which gas storages are intensively refilled. During one Gas year, prices and economic circumstances and prices can change in such a manner that a Party should be intitled to ask for price reviews. Therefore, the right of a Party to ask for a regular price review should be once per Gas Year and once per three Gas Years for an extraordinary price review.

To sum up, the Secretariat invites DG Competition to refine and broaden the commitments proposed by Gazprom by taking into account the effect of anti-competitive conduct by Gazprom in the Contracting Parties of the Energy Community, in line with the Energy Community objectives and rules.

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The Secretariat is at DG Competition's disposal for further clarifications.

Vienna, 4 May 2017

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