

Competition and State Aid law Vs Security of Supply

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Opponents or teammates?

Competition
and State aid
law



Security of
supply

Agenda

1. Competition law vs security of supply

- Long-term supply contracts (Art. 101/102 TFEU)
- TPA exemption decision for new infrastructure (regulatory)

2. State aid law vs security of supply

- LNG terminals
- Capacity mechanisms

1. Competition law vs security of supply

- **Security of supply: Long-term gas supply contracts (LTC)**

- *“The provisions of this Directive shall not prevent the conclusion of long-term contracts **in so far** as they comply with Community competition rules.”* (Art. 32(3) Gas Directive 2009/73/EC)

- **Competition law**

- Art. 101 TFEU
- Art. 102 TFEU

- **Conflicts?**

- Rationale of liberalization and market integration
- Foreclosure of markets/market segmentation
- LTCs regularly combined with anti-competitive clauses

Gazprom case

- **Territorial restrictions** (e.g. destination clauses/resale restrictions) in LTCs are preventing free flow of gas (Art. 102 TFEU) – **strategy of market segmentation** along national borders in eight Member States
- **Commitment decision** on 24 May 2018
 - **Removal of territorial restrictions**
 - **Active steps** of Gazprom to integrate gas markets in CEE. Obligation to **facilitate gas flows** to and from isolated markets, *i.e.* Baltic States and Bulgaria – interconnectors not sufficiently available yet
- Security of supply **enhanced** by using Art. 9 Reg. 1/2003

Open gas cases on gas flow restrictions

- **Qatar Petroleum** (opening proceedings: 21 June 2018)
 - Long-term agreements for supply of LNG into EEA may contain **territorial restrictions**

- **Transgaz** (opening proceedings: 1 June 2017)
 - Strategy to **restrict gas exports** from Romania to other Member States
 - Transgaz offered commitments on 21 September 2018

Interconnector Greece – Bulgaria (IGB)

- **Exemption decision** of 25 July 2018: IGB has been **exempted from TPA** (booked capacity), regulated tariffs, and ownership unbundling for 25 years (Art. 36 Gas Directive 2009/73/EC)
- Commission's assessment (DG ENER)
 - **Security of supply**: connection to TAP and Greek system
 - **Competition**: new entrants on upstream (Gazprom) and downstream market (Bulgargaz)
 - Exemption should **correspond to duration of LTCs** (25 years)
- Contradiction to BEH proceedings (DG COMP) (opening proceedings in 2013)?
Concern: **BEH** prevents competitors from gaining **access to key gas infrastructure**

2. State aid law vs security of supply

▪ **Security of supply**

- LNG terminals: Diversification and more independence
- Capacity mechanisms: Generation adequacy

▪ **State aid law**

- I. Existence of aid (Art. 107(1) TFEU)
- II. Compatibility assessment (Art. 107(3)(c) TFEU)

Assessment under Treaty and more specific assessment under EEAG 2014

- Clearly-defined objective of common interest
- Necessary, appropriate, incentive effect, and proportionate
- Aid must not affect competition to an extent contrary to the common interest

▪ **Conflict or convergence?**

LNG terminals

- State aid approvals for LNG terminals in Poland (2011), Greece (2012), Lithuania (2013), and Finland (2015 and 2016)
- **Objective of common interest: Security of supply**
 - Aid measures ensure availability of new sources of gas
- **Distortion of competition and balancing test**
 - Impact on competition between LNG terminals and between gas sources
 - Conclusion: On balance, the contribution to an **important objective of common interest outweighs the negative effects on competition**

Capacity mechanisms

- State aid approvals for mechanisms in several Member States: 2018 in Belgium, Germany, Italy, Poland, France and Greece
- **Objective of common interest: Security of supply**
 - Aid measures ensure availability of sufficient amount of electricity
- **Distortion of competition and balancing test**
 - Increase capacity in wholesale market (overcapacity?) and remuneration of only some market participants
 - Conclusion: Participation rules sufficiently addressed (different technologies; operators from other Member States); incentives to invest in interconnectors not reduced (Sect. 3.9 EEAG 2014). Negative effects of capacity mechanism are kept to minimum

Electricity market reform

- **Legislative proposal** for regulation on internal market for electricity (“Winter Package”)
- **New design principles** for national capacity mechanisms
- Trilogue discussions between EP and Council are currently under way. EP advocates stricter conditions but Member States prefer to retain more discretion
- Already approved capacity mechanisms might have to be reviewed and EEAG might have to be adapted

Conclusions

- Competition and State aid law **play together with security of supply in one team** and not against each other
- Gazprom case: Competition law was able to **ensure free flow of gas** despite LTCs, thereby enhancing security of supply
- Latest TPA exemption decision also supports security of supply