

NON-PAPER COMPETITION POLICY IN THE ENERGY COMMUNITY: SUPPORTING ACTIONS

1. INTRODUCTION

On 16 October 2015 the Ministerial Council of the Energy Community agreed¹ to discuss at the next meeting proposals to i) strengthen national competition authorities and ii) examine the potential application of EU guidelines in the field of competition.

Article 18 of the Energy Community Treaty lays down the obligations of Contracting Parties in the field of antitrust and state aid law. These obligations are limited to the product 'Network energy'².

The purpose of this non-paper is two-fold.

The first objective is to describe the main framework that Contracting Parties and the EU have chosen to implement competition law: bilateral agreements in the form of Association Agreements and Stabilisation & Association Agreements. This bilateral framework, which covers most sectors of the economy including 'network energy', has three pillars:

- Ambitious competition law provisions, often aimed at assimilating EU competition rules;
- A governance mechanism to monitor and report on implementation;
- Supporting actions to strengthen competition authorities and to assist implementing the legal provisions of the agreements.

It would be at odds with this comprehensive approach, chosen by Contracting Parties and the EU, to develop a separate energy-specific approach. Ultimately it would risk duplicating efforts and at worse it could lead to diverging positions with the existing procedures in the Contracting Parties and EU competition policy enforcement/ state aid control.

Therefore the second objective of this non-paper is to identify initiatives where the sector-specific, multilateral nature of the Energy Community could add value to the general framework by providing a platform for sharing energy-specific know-how.

2. BILATERAL AGREEMENTS: COMPETITION LAW PROVISIONS AND SUPPORTING PROGRAMMES

As part of the EU's Neighbourhood and Enlargement Policies, the EU has signed Association Agreements and Stabilisation & Association Agreements with all Contracting Parties of the Energy Community and Georgia³. These agreements –which generally cover all sectors of the economy and not only 'network energy' as in the Energy Community Treaty- oblige Parties to enforce competition law and in most cases to take

¹ See point §14 of the Conclusions of the 13th meeting of the Ministerial Council of the Energy Community

² Article 2(2) defines 'network energy' as the electricity and gas sectors falling within the scope of the EU directives regarding the internal electricity and gas markets

³ Candidate Contracting Party since 18 December 2007

over the EU competition *acquis*. Under that approach, the national competition authorities of the Contracting Parties (and/or State aid control bodies, where different) are in charge of ensuring enforcement of competition policy and/ or state aid control.

Within the context of these policies, technical assistance programmes have been set up to assist the countries concerned in implementing these provisions.

This section includes an overview of the existing commitments taken by the Contracting Parties in the field of competition as well as reference to technical assistance actions that have been undertaken to implement these commitments⁴.

2.1. European Neighbourhood Policy (Ukraine, Moldova, Georgia)

Ukraine

On 1 January 2016 the EU and Ukraine started applying the Deep and Comprehensive Free Trade Area (DCFTA) which forms part of the Association Agreement signed in June 2014. The DCFTA contains an ambitious goal of approximation to EU legislation including competition law. The DCFTA will be implemented over several years, allowing gradual legislative alignment and time for all affected stakeholders to adjust.

Under this Agreement Ukraine committed to address antitrust behaviour and to remedy or remove distortions of competition caused by subsidies where these affect trade. The Agreement also includes provisions to have in place authorities, appropriately equipped, for the effective enforcement of competition law. It is expressly noted that Ukraine will approximate its laws and enforcement practices, notably for the application of competition law, to the *EU acquis*. This applies to all sectors of the economy. Ukraine also committed to adopting a state aid control system similar to the one on place in the EU, including the establishment of an independent authority. Ukraine will prohibit certain types of particularly distortive subsidies. Both Parties committed to report annually the total amount, types and sectoral distribution of subsidies, Parties will also provide further information on subsidies or schemes on request. The rules on subsidies apply to all areas liberalised in the DCFTA except agriculture and fisheries.

Several technical assistance programmes have been set up (both by the European Commission and other entities) to assist Ukraine with implementing its commitments in the field of competition enforcement and state aid control.

In March 2016 for instance, the following twinning project was established: “Strengthening institutional Capacities of the Antimonopoly Committee of Ukraine (AMCU) to conduct market studies and effectively enforce competition law in accordance with EU standards”. This project, which runs until October 2018, is aimed at (i) further approximating the national competition legislation with EU standards in compliance with the EU-Ukraine Association Agreement and (ii) Strengthening the institutional capacity of the AMCU to effectively enforce competition law and to carry out market studies to promote competition in important sectors of the national economy. The project has five objectives: (i) Approximation of competition law and regulations to EU standards; (ii) alignment of merger control regime with EU standards; (iii)

⁴ Disclaimer: At the time of writing this non-paper the Commission had not received the complete overview of past and ongoing technical assistance actions per Contracting Party. Therefore the list of actions is not exhaustive.

improvement of competition law enforcement by AMCU; (iv) market studies in selected sectors and strengthening of competition advocacy and (v) strengthening institutional capacity of AMCU to implement reforms in competition policy.

Another project (which ran until March 2016) was the "European Commission's Group Project on Supporting of Ukraine" (TAIEX instrument) which focused on capacity building in the field of antitrust and state aid.

Under the 'Comprehensive Institution Building framework' (framework jointly developed and implemented by the EU and partner countries under the Eastern Partnership initiative), a multi-annual project has also been developed to specifically support the establishment of an effective and efficient State aid system in accordance with the 'rule of law'.

Moldova

On 27 June 2014 the EU and Moldova signed an Association Agreement and have applied it provisionally since 1 September 2014. The Agreement introduces a preferential trade regime – the Deep and Comprehensive Free Trade Area.

The Agreement includes a commitment to establish comprehensive competition laws which effectively address antitrust behaviour and anti-competitive agreements. Moldova also agreed to maintain an operationally independent authority with adequate human and financial resources in order to effectively enforce these competition laws. Moldova will also need to adopt a state aid control system similar to that in the EU, including an independent authority. Both Parties will ensure transparency in the area of state aid, reporting every two years to the other Party, following the methodology and the presentation of the EU annual survey on state aid.

Georgia

On 27 June 2014 the EU and Georgia signed an Association Agreement and have applied it provisionally since 1 September 2014.

The Agreement introduces a preferential trade regime – the Deep and Comprehensive Free Trade Area- and includes a commitment to establish comprehensive competition laws which effectively address antitrust behaviour and anti-competitive agreements. It also requires maintaining an authority appropriately equipped for the effective enforcement of these competition laws.

The competition chapter also includes an obligation of transparency with regard to the provision of subsidies to goods (similar to what exists under the Agreement of Subsidies and Countervailing measures of the World Trade Organisation). However, it also includes a consultation mechanism which allows each Party to seek information with regard to subsidies in the field of supply of services.

Governance structure for monitoring the implementation

In addition to the periodical high level policy dialogues, a so-called Association Council is responsible of the implementation of all these Agreements and convenes meetings at ministerial level. The Agreements also call for the issuing of progress reports to monitor implementation.

2.2. Enlargement countries (Albania, Bosnia Herzegovina, Kosovo, the former Yugoslav Republic of Macedonia, Montenegro and Serbia)

The Stabilisation and Association Agreement (SAA) constitutes the framework of relations between the European Union and the Western Balkan countries for implementation of the Stabilisation and Association Process. The Agreements are adapted to the specific situation of each partner country and, while establishing a free trade area between the EU and the country concerned, they also identify common political and economic objectives and encourage regional co-operation. In the context of accession to the European Union, the agreement serves as the basis for implementation of the accession process.

An applicant country for European Union membership may be granted candidate country status by the European Council on the basis of a recommendation by the European Commission. Montenegro and Serbia were granted candidate status in 2011 and 2012 respectively. Accession negotiations are ongoing with both countries. The former Yugoslav Republic of Macedonia was granted candidate status in 2005 and Albania in 2014, but membership negotiations have not started.

Bosnia Herzegovina and Kosovo are potential candidate countries. The EU-Bosnia Herzegovina SAA entered into force on 1 June 2015, and the EU-Kosovo SAA on 1 April 2016.

Before joining the EU, the acceding country must take up the entire competition acquis (including on State aid).

The Parties monitor the implementation of the Agreement through the subcommittee meetings and annual progress reports.

In order to implement the commitments, several technical assistance programmes have been set up with the countries concerned specifically aimed at strengthening the competition enforcement and setting up a state aid control mechanism.

With regard to the former Yugoslav Republic of Macedonia for instance there was a twinning project with the Commission for Protection of Competition (or "CPC") in the area of state aid which was implemented between 23 April 2012 and 30 April 2014. The project had two main components. First, to strengthen the institutional and administrative capacity of the CPC in line with EU acquis and European good practice in the field of state aid control. Second, to improve state aid awareness and the role of the CPC with the public at large. The Energy Regulatory Commission also took part in the project. Two further twinning projects with the competition and state aid authorities were implemented in the period 2003-2008 with twinning partners from Germany and Slovenia.

Another example was the twinning project that ran between September 2015 and April 2016 "to support the implementation of competition regulations in Bosnia-Herzegovina and further strengthening of competition policy including component on state aid". The beneficiary of this project was the Competition Council of Bosnia-Herzegovina and it included four objectives: (i) strengthen the institutional structure regulating EU competition; (ii) strengthen the cooperation between the Competition Council, regulators (including the energy regulator) and other governmental institutions; (iii) increase awareness on EU competition law and policy; and (iv) strengthen the state aid control operational structure.

Specific programmes were also set up to assist Montenegro in strengthening the capacity of their National Agency for Competition Protection. One programme ran in 2013 and another programme to facilitate the EU accession process by supporting alignment and implementation of Montenegrin legislation with EU acquis in the fields of competition and services ran partially in parallel between 17 February 2012 and 31 July 2016. The latter programme aims at strengthening the capacity of the Agency for Protection of Competition (APC) to protect competition.

CONCLUSIONS AND WAY FORWARD

The bilateral agreements signed by the contracting parties provide for a comprehensive competition law framework. It covers not only the principles (e.g. antitrust and state aid) but also the assimilation of EU procedural rules and EU interpretation sources (e.g. Commission Guidelines, European Court for Justice). These bilateral agreements also envisage a dedicated governance structure to monitor their implementation. Furthermore this framework entitles contracting parties to benefit from dedicated support programmes notably aimed at strengthening competition enforcement agencies and state aid control authorities.

It would be at odds with this comprehensive approach to develop a separate energy specific approach. Ultimately it would risk duplicating efforts and at worse it could lead to diverging positions with the existing procedures in the Contracting Parties and EU competition policy enforcement/ state aid control.

The general framework described above has however a bilateral nature between the EU and a given Contracting Party. The multilateral nature of the Energy Community could therefore add value regarding the strengthening of competition authorities and the application of EU Guidelines by focusing on initiatives aimed at sharing know-how among the Contracting Parties. This non-paper proposes three sets of initiatives:

1. Information submitted by the Contracting Parties

In the field of state aid, the relevant state aid control authorities in each Contracting Party could submit on a regular basis to the Energy Community Secretariat the following information:

- quantitative data on aid granted building on the information collected through the reporting systems set up under the bilateral agreements
- if applicable, the legal acts authorising the state aid measures.

In the field of antitrust, national competition authorities could report to the Energy Community Secretariat on significant antitrust cases in the field of 'network energy'.

2. Knowledge sharing events

National competition authorities and state aid control authorities could meet to present significant cases concerning 'network energy'. In particular to discuss the procedural and substantive challenges encountered, including those resulting from the application of EU Guidelines. These knowledge sharing events would help building up energy-specific expertise in national competition authorities and state aid control authorities. These events may also help identifying best practices among the Contracting parties. The

Commission would also be ready to contribute to the substantive discussions. The Energy Community Secretariat could be responsible of organising these events.

3. Reporting by the Energy Community Secretariat

The Energy Community Secretariat could produce and publish regular reports using the information compiled through the initiatives mentioned above. This report would also be a valuable input to the implementation process devised under the bilateral agreements.
