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ALERT

EU ANTITRUST SETTLEMENT WITH GAZPROM. OPPORTUNITIES FOR UKRAINE

On May 24, the European Commission has published its final and binding decision in its antitrust/cartel case 39816 on Upstream gas supplies in Central and Eastern Europe by virtue of which it has obliged Gazprom to rectify numerous abuses on the European gas market. Namely, in pursuance to Article 9 of the EU's antitrust Regulation 1/2003, the Commission required that Gazprom put an end to, and avoid in the future, the practices of disintegrating the gas markets in Central and Eastern Europe though (i) **contractual barriers to the free flow of gas**, (ii) **preventing gas flows to and from isolated markets (like the Baltic states and Bulgaria)**, (iii) **non-competitive gas pricing** and (iv) **leveraging of dominance in gas supply to gain political or other advantages**.

Specific commitments imposed by the Commission will be in force for 8 years and foresee significant penalties if disobeyed. As enforcement mechanism of Regulation 1/2003 suggests, for each failure to comply with the commitments stipulated by the decision, **Gazprom may be fined for up to 10% of its total turnover in the preceding business year**.

Importance for Ukraine

By targeting those contracts between Gazprom and its customers within the EU that use the contractual entry points on the territory **and at the borders of the EU states** the Commission has made a first step to impose and enforce the EU's competition legislation at interconnection points of the EU and Ukraine.

The final decision is important for Ukraine in different aspects, namely for creating facilitating conditions for potential further unblocking existing interconnection capacities with Slovakia, more reasonable gas prices in the CEE countries and finally for reinforced reciprocity and solidarity principles within the Energy Community.

More competitive gas purchases. Till now, Gazprom often resorted to various obsolete mechanisms for dividing the gas markets based on specific contractual limitations in combination with its dominant position of the by far largest source of gas. Now, with explicit and strict prohibition of gas resale restricting clauses and destination clauses, Ukraine may be more resilient in contracting natural gas from the neighbouring EU Member states. Additional contractual sources of gas in the EU would lead to increased energy security of Ukraine, which is under constant pressure from Gazprom.

Veľké Kapušany interconnector. Gas pipeline between Uzhgorod (Ukraine) and Veľké Kapušany (Slovakia) is a bulk and main connection point between Slovak TSO Eustream and Ukrainian TSO Ukrtransgaz. It is known for Eustream's prolonged refusal to enter into agreement with Ukrtransgaz based on the provisions of legacy contract with Gazprom that effectively serves as TSO within this interconnector, reserves almost all available pipeline capacity to operate in one direction and refuses to cooperate by withholding shipper codes from Ukrtransgaz.

Gas metering stations in Uzhgorod and Veľké Kapušany are connected with total of 4 parallel gas pipes with combined capacity of 92.6 bcm/year. In September 2014, Ukraine completed fifth pipeline in this region that connects Uzhgorod and neighbouring Slovak city Budince with the capacity of 14.5 bcm/year and this is the only way for reverse flow of gas for it for now. According to the legacy booking contract with Eustream, Gazprom Export LLC has reserved 74 bcm/year out of that total capacity of 92.6 bcm/year, in fact blocking all remaining capacity as well, thus factually preventing the possibility of physical reverse flow of gas to Ukraine from the west.

Back in 2015, Wikborg&Rein, a renowned international law firm has undertaken an in-depth legal analyses of the issues of this interconnection, which findings are still fully applicable today (but hopefully will get outdated following the current decision by the European Commission). The legal specialists mainly guide the line that, although Eustream is certified as a single Slovak TSO, based on this legacy contract Gazprom Export openly serves as GTS operator in the interconnection point. This situation effectively means Eurstream's direct violation of its duties as the TSO, as much as it may assign its responsibilities to no other party whatsoever. Moreover, Gazprom Export may under no conditions be eligible operator as much as it combines business of gas transmission and gas supply. Finally, under the Third energy package, namely Article 2(4) and 13(1)(a) of Directive 2009/73/EC, Article 12(2) of Regulation 715/2009, in view of market technical completion and interconnecting, each national TSO is obliged to cooperate with neighbour's TSO through signing a respective agreement. In practice, Gazprom effects its control via not providing shipper codes to Ukrtransgaz, which is a basic technical protocol for cross-border gas transportation. Thus, Gazprom prevents the interconnection from availability for any third parties, operates it in direct violation of unbundling and certification requirements., as well as clearly disrespect the principle of the optimal utilization of the gas interconnection capacities, thus damaging the market through division of the systems.

It is widely known, the legal opinion follows, that the energy laws of the EU do not protect the legacy contracts, which, if in contradiction to the Third energy package, must be amended and adapted. This rule is evidently derived from reach practice to prove the simple fact that signing of the contract prior to the Third energy package gaining its force does not prevent the Directives, Regulations and other respective provisions from being mandatory.

Freeing interconnection capacities and fair pricing. Even more importantly, by obliging Gazprom to allow its customers to re-arrange its deliveries across existing delivery points regardless of contractual obligations, the Commission provided arguments for Ukraine to demand unblocking unused capacities of the interconnectors with the EU member states. Revision of the contracts between Gazprom and its customers in accordance with the Third Energy Package would allow enabling third-party access (TPA) at all interconnection points. Furthermore, Commission demanded that Gazprom suggests a fair mechanism of price review to be added into all existing and new contracts of more than 3 years. While ensuring more just and market-based pricing across EEC and better competition in price with Western Europe, Ukraine may benefit from lower prices just as other countries in the region will do.

Reciprocity within the Energy Community. Since its establishment, Energy Community failed to fully live up to one of its most important principles – non-discrimination. While imposing legally binding obligations upon Contracting Parties (like Ukraine), the European Commission remained very reluctant in assuming respective obligations to them. The Secretariat of the Energy Community on numerous occasions tried to find an effective tool for establishing such reciprocity but earned little success. Thus, it was not until the current decision of the Commission that the EU directly demanded application of its competition (and, at least, partially) energy legislation on the borders with the Energy Community Contracting Parties. In this decision, Ukraine and other adhering states may see a significant step towards real implementation of non-discriminatory provisions of the Treaty establishing the Energy Community and Association Agreements, where in force.

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