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EU Energy Law: Key enforcement tools affecting infrastructure investments in the European gas sector

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Background

- Increasing gas demand from the EU
  - Increasing consumption
  - Renewables not sufficiently developed
  - Move away from lignite and nuclear
  - Decreasing indigenous production
- Consequence:
  - Need to ensure security of supply
- Diversification of gas routes
  - Southern Gas Corridor, TurkStream, Nord Stream 2
  - Focus on alternate sources (LNG)
- Crucial and strategic position of the Turkish gas market
  - Alternate route for Russian gas (TurkStream)
  - Alternate sources/routes of gas (Azerbaijan, Iran / Southern Gas Corridor)
  - Opportunity to develop Turkey as gas hub in the wider region
- Lack of regional market interconnectivity in CEC
- Requirements from an EU perspective
  - Need to align with EU energy policy

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Reminder: Key objectives of EU energy policy

EU energy policy … (Art. 194 TFEU)	• Ensure the functioning of the energy market • Ensure security of energy supply in the EU • Promote energy efficiency and energy saving and development of new and renewable forms of energy • Promote interconnection of energy networks … <u>in the spirit of solidarity</u> between EU Member States
Existing challenges	• Dependence on fossil fuels, limited number of supply sources, major differences of electricity and gas prices, energy islands, aging infrastructure, uncoordinated national policies, retail markets not functioning properly…
Energy Union strategy (Feb 2015)	• Security of supply (incl. diversification of supply sources) • A fully-integrated internal energy market • Energy efficiency • Emission reduction (decarbonisation of the economy) • Research, innovation and competitiveness
Enforcement	• Enforcement is first priority to establish Energy Union • Tools: Third Energy Package, competition rules and others…

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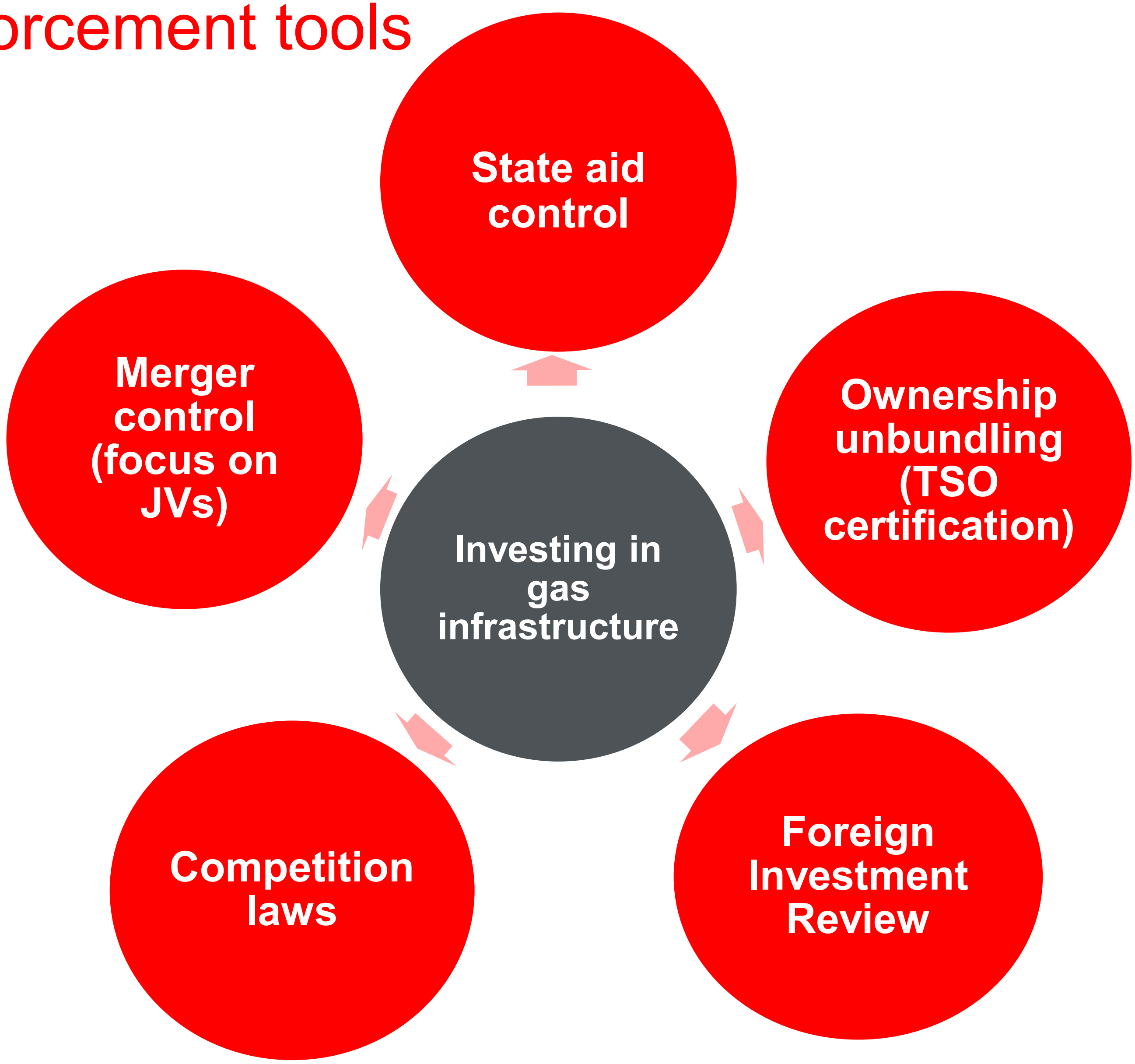
EU enforcement tools



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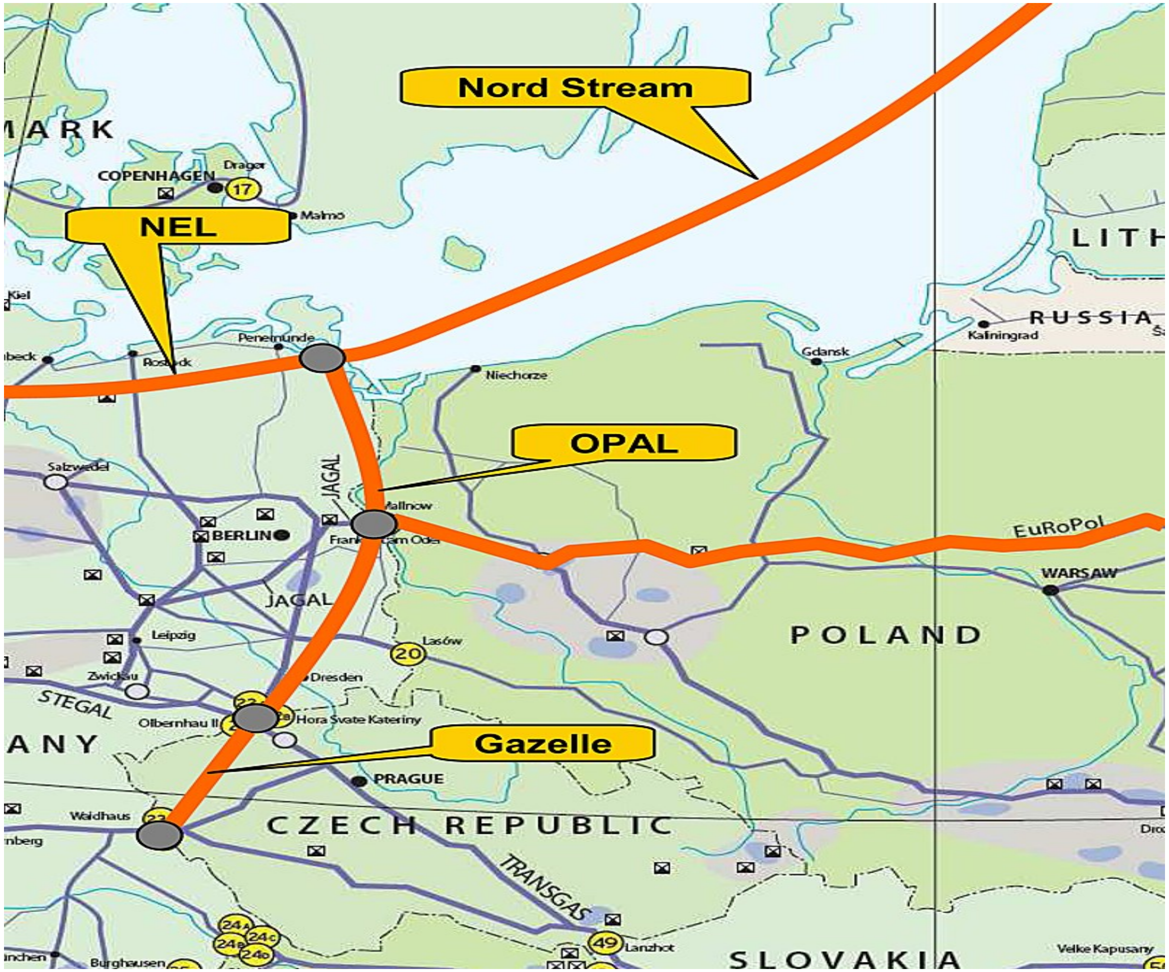
EU Regulatory requirements (Third Energy Package)

Third Energy Package: Overview

Unbundling	• Separation of transmission networks from production/supply • Full ownership unbundling or less stringent ISO and ITO models
Third party access (TPA)	• TSOs must provide TPA to capacity in infrastructure based on published tariffs / non-discriminatory basis
Certification / Enforcement	• All TSOs must be certified and comply with unbundling and other regulatory rules (e.g. TPA)
Exemption for new infrastructure	• Infrastructure enhances competition / **security of supply** • Level of risk attached to investment must be such that it would not take place unless exemption was granted • Exemption not be detrimental to competition or the effective functioning of the internal gas market
Practice to date	To date exemptions gas sector (subject to conditions) have been granted to pipelines (e.g., IGB (July 2018), OPAL, Trans-Adriatic Pipeline (TAP), Nabucco), LNG terminals and gas storage facilities)

OPAL exemption vs. Nord Stream 2



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OPAL exemption (1)

- OPAL pipeline connects Nord Stream 1 in Northern Germany with gas infrastructure in the CZ
- OPAL exemption decision in 2009
  - Exemption from TPA access and tariff regulation provision <u>but</u>
  - Companies with a dominant position on one of the Czech gas markets (incl. Gazprom and RWE) only allowed to book more than 50% of the capacity for CZ if they implemented gas release programme (with conditions set by NRAs)
- Gas release programme was never implemented and significant parts of the pipeline capacity remained unused
- In May 2016 the German Bundesnetzagentur notified changes to the 2009 exemption replacing the 50% booking limitation (gas release requirement) with non-discriminatory access to half of capacity
  - All parties (incl. dominant companies) could book this half of the pipeline, whereas the other half would remain fully exempt
  - Share of capacity would need to be made available as firm capacity

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OPAL exemption (2)

- EC adopted an exemption decision approving settlement between BNetzA, OPAL and Gazprom on 28 Oct. 2016
- Additional requirements:
  - Amount of firm short-term capacity from Gaspool hub to be made available has to be increased up to 20 % in case of demand (EC can request further increases of this capacity)
  - Companies with a dominant position in the Czech Republic or which control more than 50 % of natural gas arriving at Greifswald may bid for this capacity only at the base price (it may not exceed the average price of comparable capacity on other pipelines)
  - BNetzA must monitor and report on the effectiveness of the OPAL decision for improving competition on the Czech market. The OPAL operator shall be certified under the applicable unbundling provisions.
- Settlement agreement was signed on 28 November 2016
- PGNiG appealed against EC decision and settlement agreement in Luxembourg and Germany (also requests for interim reliefs)
  - Main argument: Capacity increase in OPAL will lead to reduction in transport of gas through Poland and threaten security of supply in Poland and energy solidarity
- EU and German courts suspended EC decision and settlement in Dec. 2016
- January 2017: BNetzA confirmed obligation by German court to prohibit OPAL from carrying out further auctions of daily, weekly, monthly and annual capacities

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OPAL exemption (3)

- President of General Court lifts suspension in July 2017
  - **Lack of urgency** since (i) Gazprom bound to supply to / transport gas through Poland under existing agreements until 2022 and 2020 respectively; and (ii) judgment on application annulment of amended OPAL exemption (substance) to be expected in course of 2019
  - **No findings on substance / amended exemption decision**
- Accordingly, German courts repealed suspension later in July 2017
- Gazprom started utilising spare capacity in OPAL at quarterly auctions held on 7 August for Q3/Q4 2017 and Q1/Q2 2018
- Gazprom announced that OPAL pipeline was used at full capacity for first time since suspension was lifted (9 August 2017)
- General Court **annuls the Commission decision** approving the modification of the exemption regime (10 September 2019)

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OPAL exemption (4)

- General Court **annuls the Commission decision** approving the modification of the exemption regime (10 September 2019)
  - Mainly based on **principle of solidarity** which is closely linked to security of energy supply (Art 194 TFEU)

  General Court recognised that
  - Decision enables Gazprom to redirect additional volumes of gas by fully exploiting the capacities of the North Stream 1 pipeline.

  Principle of solidarity
  - Entails rights and obligations both for the EU and Member States
  - Imposes not only obligations of mutual assistance (e.g. in case of natural disasters or acts of terrorism);
  - Also requires the EU and Member States to avoid adopting measures likely to affect the interests of the EU and other Member States as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and – to do so -
  - To take account of their interdependence and de facto solidarity.

  Commission failed to
  - Conduct this assessment (only analysed increase in capacity used in OPAL and the general positive effects this will have on security of supply in EU in general (German-Czech border) but not as regards Poland.

OPAL exemption (5)

- **Observations from GC's annulment decision**
  - It's a mess!
  - Many procedural questions (who needs to become active now?)
  - Some officials within DG Energy welcome judgement as it will give more room for EC to implement energy policy in a wider context
  - How to apply principle of solidarity in practice? General Court recognises that energy solidarity does not mean that the EU energy policy must never have negative impacts on the particular interests of a Member State in the field of energy.
  - Increased incentive for complaints?
  - Need for more sophisticated ex ante analysis

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Nord Stream 2 - background

- Expansion of the existing Nord Stream pipeline between Russia and Germany with two additional lines increasing total capacity to 110bcm / year
- Strong political opposition by EC and European Parliament and several MS
  - No access to a new source of supply or a new supplier
  - Decreasing gas transportation corridors from three to at least two (abandoning the route through Ukraine). Also the Yamal route via Poland could be endangered.
- Nord Stream 2 consortium filed for merger control approval in Poland in December 2015
  - Polish competition authority raised serious competition concerns:
    - JV would strengthen Gazprom’s dominant position and increase Gazprom’s negotiating position vis-à-vis users in Poland
    - JV partners withdrew Polish merger filing in August 2016
  - In April 2017, the Polish competition authority (based on media coverage that the JV partners signed a contract for financing the pipeline) re-examined the case and initiated proceedings against the JV partners for (illegal) gun jumping.
  - In November 2019, the Polish competition authority imposed a EUR 40m fine on Engie for refusing to respond to RFIs and to submit documents.

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Nord Stream 2 – new Gas Directive

- (Old) Third Energy Package (incl. OU, TPA, regulated tariffs) not applicable to offshore pipelines
- EC seeks MS mandate to negotiate with Russia key principles for Nord Stream 2 operation
  - Political divide within the MS on Nord Stream 2
  - Discrimination of Nord Stream 2 vis-a-vis other pipeline and import projects from third countries?
  - EU Council's Legal Service (September 2017) rejects legal need for mandate as no conflict of laws
- November 2017: EC proposed amendments to Gas Directive to expand scope to offshore pipelines
- Initial German resistance – compromise Germany-France
- February 2019: Political agreement by EU Parliament, Council and Commission
- Amended Gas Directive entered into force in May 2019
- Denmark grants permit (Oct 2019) and new Gas Directive already implemented by Germany (Nov 2019)

Nord Stream 2 – new Gas Directive

- Gas Directive rules now applicable to Nord Stream 2
  - OU or other forms which grant effective independence
  - TPA (?) - is it de facto an issue?
  - Tariff requirements
- Again, issue of security of supply (which is based on principle of solidarity). Will this again open the door for legal action by Poland?
- Nord Stream 2 seeks arbitration under Energy Charter Treaty (September 2019)
- Nord Stream 2 brought legal action for annulment of Gas Directive before General Court (July 2019) for breach of fundamental EU principles, such as non-discrimination.

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Relevance for investments in European infrastructure

- New investments in existing or new European gas transmission assets (e.g., pipelines) and LNG terminals
  - Can require (re-)certification by national regulator and/or exemption (in case of new infrastructure)
  - Ongoing infrastructure projects include Bulgarian-Greek gas interconnector (IGB)(EC recently approved Greek/Bulgarian exemption) and Poseidon pipeline
- New investments in European supply/generation activities raising potential conflicts of interests with existing participations in transmission activities in Europe
  - No certification required for investments in supply/generation activities
  - But: ongoing duty to comply with ownership unbundling rules for TSO

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IGB exemption from Third Energy Package (1)

- Interconnector between Greece and Bulgaria (IG
  - Designed to transporting 3 bcm/year in forward flow from Greece to Bulgaria (with option to increase to 5 bcm/y)
  - Physical reverse flow capacity from Bulgaria to Greece could be introduced in 2nd project phase
  - EU Project of Common Interest (PCI) to reduce dependency of Russian gas
  - May 2018: Bulgarian / Greek regulators adopt national exemption decisions which were approved by EC on 27 July 2018

- Exemption from the following Third Energy Package requirements:
  - Exemption from ownership unbundling for the entire project (but IGB must be certified under the ITO model by the NRAs)
  - Partial exemption from TPA for the advanced reservation contract agreements (1.57 bcm/y peak in firm forward mode of the overall 3 bcm/y) on 25-year basis
  - Exemption from tariff regulation for the entire capacity for 25 years
  - Additional measures to prevent the creation or strengthening of a dominant position (see next slide)

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IGB exemption from Third Energy Package (2)

Measures to prevent creation / strengthening of a dominant position

- Any undertaking with a market share of 40% (or more) in markets for supply of gas in BG/Greece or on the upstream markets for supplying gas into BG/Greece shall not reserve >40% on an IGB exit point in BG/Greece
- If two or more undertakings have combined MS of at least 80% and each has a MS of 20% on any market for the supply of gas in BG/Greece or on the upstream market for supply gas into BG/Greece, the NRAs have the right to impose a capacity cap on an IGB exit point in BG/Greece
- MS calculation must take into account all undertakings belonging to one group and average over last two years
- Any direct or long-term gas supply contract for BG/Greece entered into a company with a MS of 40% or group of undertakings with MS >80% fall under the above capacity cap
- If, due to lack of by interest by other parties, the imposed capacity caps results in the IGB capacity to be underutilized (i.e., if on average 20% of IGB capacity is not booked for a period of at least six months), NRAs may (upon request) allow booking of capacity beyond above caps on an interruptible short-term basis

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Poseidon pipeline

- Initially designed as offshore interconnector between Greek and Italian gas networks
  - IGI Poseidon (JV between DEPA and Edison) obtained TPA exemption in 2007 under Second Energy Package
- Plans to extend project to onshore connection to Greek/Turkish borders and connect it with EastMed Pipeline
- Regulatory issues to be considered
  - Will require (new) TPA exemption and certification under Third Energy package
  - Main issue will be:
    - Activities of shareholders (indirect VIU), in particular DEPA
    - Pipeline will be largely used by Gazprom
  - Should be doable in current structure
  - Nevertheless: attention to set up of structure and TPA conditions
- Antitrust and merger control issues
  - Project will require merger control filings (most likely to EU)
  - Main issues will be potential vertical foreclosure questions

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EU competition law enforcement

Application of EU competition rules (1)

- Focus on Art. 102 TFEU (prohibition of abuse of dominance) in past EC enforcement, incl.:
  - Refusal to grant / hindering access to network by
    - capacity hoarding, capacity degradation, strategic underinvestment
    - long-term booking of large share of capacity
    - exclusionary capacity management practices
  - Capacity withholding
  - Margin squeeze
  - Territorial restrictions (including destination clauses)
  - “Take or pay clauses”
  - Linking of oil and gas prices (Gazprom case)
- General prohibition of anti-competitive agreements (Art. 101 TFEU)
- EU competition law rules also enforced by NCAs
- Recent EC focus on dissolving bottlenecks in Central-Eastern European markets (Gazprom, BEH, Transgaz) and strengthen cross-border flow of LNG imports (Qatar Petroleum)

Application of EU competition rules (2)

- Focus on Art. 102 TFEU (prohibition of abuse of dominance) in past EC enforcement
- General prohibition of anti-competitive agreements (Art. 101 TFEU)

2. Free flow of gas in the Energy Union

→ Competition enforcement: focus on South-East Europe

Statement of J Lübking, Head of Unit Energy, DG COMP, Nov 2019

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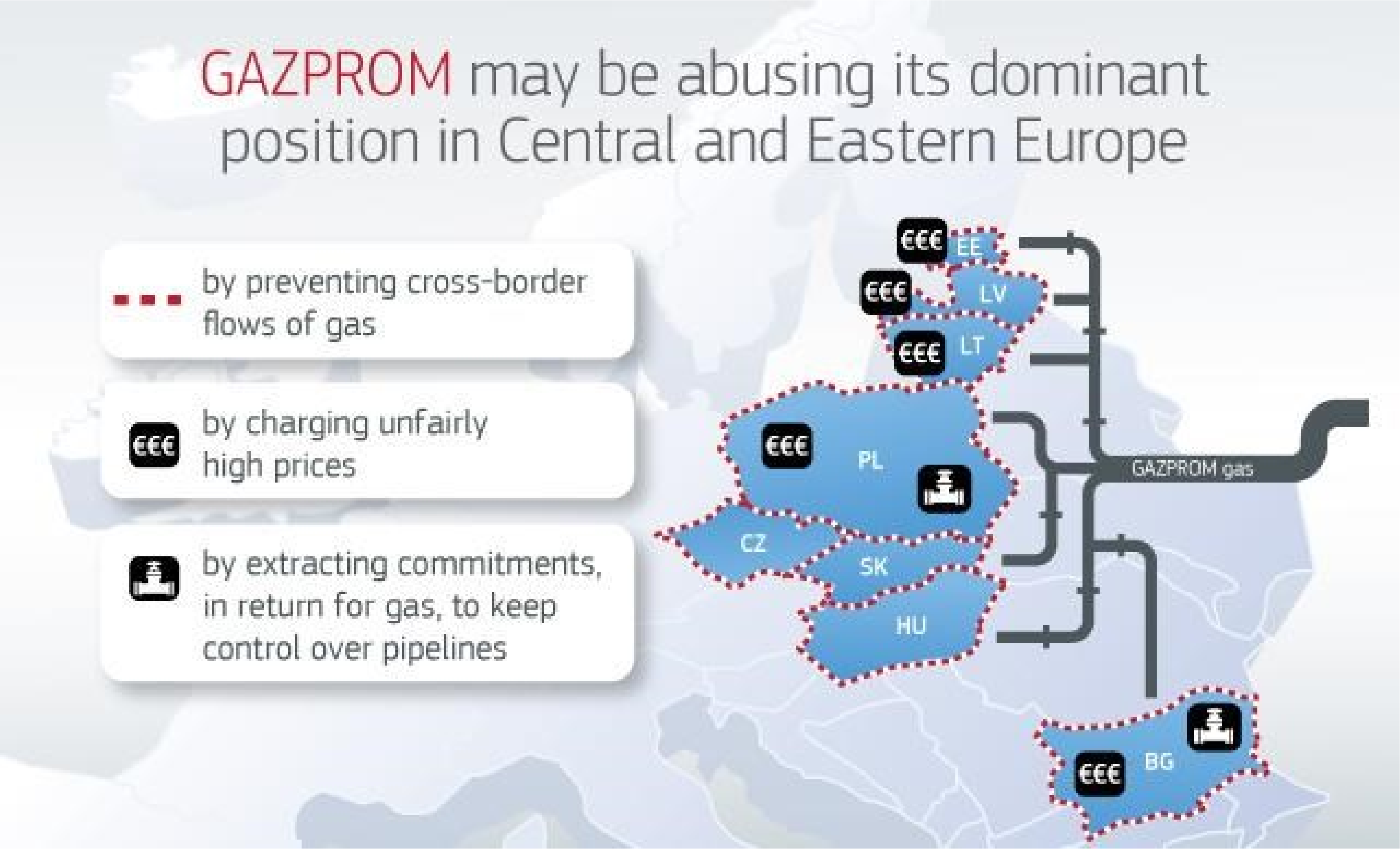
The Gazprom case – the allegations (1)



Source: European Commission

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The Gazprom case – the commitments (2)

Allegation 1:
Gazprom prevents cross-border flows of gas in eight MS

Solution:
Gazprom removes contractual barriers and implements additional measures to enable market integration

- **Remove market segmentation**: Gazprom removes and will not introduce direct resale restrictions (exports bans, destination clauses) and indirect restrictions that make resale economically less attractive (e.g. where Gazprom shares profit from resale)
- **Facilitate interconnection with Bulgaria**: Gazprom commits to change provisions in its contract related to the monitoring/metering of gas in BG that will enable Bulgarian TSO to control cross-border flow / facilitate interconnection between BG and GR and other MS
- **Create opportunities for more gas flows to Baltic States and BG**:
  - Gazprom gives relevant customers in HU, PL and SK the possibility to ask for delivery of all or part of their contracted gas to entry points into Baltics and BG (which currently lack access to interconnectors). Swaps will be possible in both directions.
  - Swaps available for customers with contracts of min. 18 months
  - Fixed and transparent service fee will be charged in line with market standards
  - Customers can exercise this option for small quantities (50m3) and at shorter notice (four months)
  - Limited grounds to refuse swap (lack of transmission capacity); monitored by independent trustee

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The Gazprom case – the commitments (3)

Allegation 2:
Gazprom charges unfairly high prices in five MS

Solution:
Gazprom amends / introduces price revision clauses to ensure competitive gas prices in BG, Baltic States and PL

- **Gazprom introduces competitive benchmarks in BG, Baltic States and PL (also in future contracts)**
- **Customer (old and new) will have explicit contractual right to trigger a price review** once prices diverge from competitive Continental Western European price benchmarks, including liquid hubs. Option can be exercised every two years, with an additional joker every five years.
- **New gas price must be set in line with benchmark** (new price applies retroactively from date of revision request)
- **Arbitration** if Gazprom does not agree within 120 days (arbitration must take place within the EU, tribunal must apply EU competition law and EC has amicus curiae right)

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The Gazprom case – the commitments (4)

<u>Allegation 3</u>:
Gazprom extracts infrastructure (South Stream / Yamal) related commitments in return for gas

<u>Solution</u>:
Gazprom removes demands obtained (to extent possible)

- **For South Stream**: Gazprom commits not to seek any damages from its Bulgarian partners following termination of the South Stream project (irrespective of whether such claims would have been valid in the first place)
- **For Yamal Pipeline**:
  - No commitment could be given to change the situation due to impact of an IGA between Poland and Russia
  - Future IGAs will be subject to an ex-ante check by Commission for compliance with EU law under the new Decision on IGAs

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The Gazprom case – impact on the market

- The commitments require Gazprom to take active steps to further integrate gas markets
- Compliance with commitments is being monitored
  - Monitoring Trustee
  - Margrethe Vestager: *“[Last time I was updated on the case] Gazprom was implementing as they should the new clauses*” (20 March 2019)
- Non-compliance with commitments can trigger fines of up to 10% if Gazprom‘s global turnover (no finding of actual violation of Artt. 101/102 required) – EC has not refrained from enforcement in the past (Microsoft, 2013)
- No finding of an actual violation of EU competition law and no fines (despite territorial restrictions)

Bulgarian Energy Holding (BEH) case (1)

BEH (Bulgargaz and Bulgartransgaz)	• Vertically integrated undertaking controlling Bulgarian gas transmission system and underground storage facility Chiren (UGS Chiren), capacity on main gas import pipeline into Bulgaria and gas supply • EC opened case against BEH in July 2013 and issued SO in March 2015 • December 2018: EC imposed EUR 77m fine on BEH group (important difference to Gazprom: no commitment decision)
Dominant position	• Markets for capacity-related services on the Bulgarian transmission network, Romanian Transit Pipeline 1 and for storage at UGS Chiren • (Downstream) wholesale gas market (supplied via Bulgarian transmission system) • Market for retail supply of gas to large end customers connected to the Bulgarian transmission system
Abuses	• Preventing, restricting and/or delaying access to transmission network and storage • Discriminatory access rules for storage with priority access to BEH group supply company (Bulgargaz) • Hoarding capacity (reserving capacity that BEH consistently did not use) on the import pipeline bringing gas into Bulgaria (Romanian Transit Pipeline 1) • No objective justification

Bulgarian Energy Holding (BEH) case (2)

BEH (Bulgargaz and Bulgartransgaz)

What Commission says

European Commission

BEH Gas

What was achieved?

BEH, Bulgartransgaz and Bulgargaz have infringed Art. 102 TFEU by foreclosing the Bulgarian gas supply markets.

- ✓ Deterrence: The Commission imposed a fine of EUR 77 million to ensure that BEH will not do it again (+ cease & desist).
- ✓ Confidence for the market: a signal that companies can enter Bulgaria because access to the network will be enforced

Statement of J Lübking, Head of Unit Energy, DG COMP Nov 2019

Action for damages

Any person or company affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the EU countries and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision that has become final constitutes binding proof that the behaviour took place and was illegal. Even though the Commission has fined the cartel participants concerned, damages may be awarded without being reduced on account of the Commission fine.

Extract from Commission press release on Decision (17 Dec 2018)

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Transgaz (Romania) – ongoing

Romanian gas investigations (Transgaz)

- June 2016: EC conducted dawn raids of companies active in gas transmission/supply in Romania (Romgaz, Transgaz, OMV Petrom)
- June 2017: EC formally opened **abuse of dominance investigation against TSO Transgaz** for alleged export restrictions by
  - Using interconnection transmission fees
  - Underinvesting in and delaying the building of infrastructure
  - Using un-founded technical arguments as a pretext to prevent exports
- **September 2018: EC market tests commitments** proposed by Transgaz to allow commercially meaningful exports of natural gas from Romania, namely to
  - Increase export capacities from 0.1 bcm to 4 bcm per year at interconnection points with HU and BG and guarantee these as minimum firm capacities
  - Ensure that TSO tariff proposal to the Romanian regulator (ANRE) will not discriminate between export and domestic tariffs;
  - Refrain from using any other means for hampering exports.
  - Commitments in force until the end of 2025 and a trustee would be in charge of monitoring Transgaz' compliance with them.
- **Separate case number / investigation concerning Romanian wholesale market** related to hindering of exports to other MS

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LNG imports (Qatar Petroleum) – ongoing

LNG imports (Qatar Petroleum)	
LNG imports (Qatar Petroleum)	• EC opened formal investigation against Qatar Petroleum for alleged violation of Article 101 and/or 102 (21 June 2018) • Qatar Petroleum largest LNG supplier in Europe (approx. 40% of EU LNG imports) • Allegations concern direct and/or indirect territorial restrictions in QP's long-term LNG supply agreements • LNG integral part of Energy Union strategy to diversify gas supply sources and to fully-integrated EU energy markets

Looking at the current landscape

- Turkey as a key country for EU's energy security and as a regional energy hub
  - Russian gas via TurkStream and the Southern Gas Corridor
  - Gas from Azerbaijan, Iran
  - New gas fields in the Mediterranean Sea
  - Important for the transportation of gas to EU markets
- Southern Gas Corridor is an important part of the EU's energy security and Turkey forms a vital part, with first deliveries of gas expected to start in 2020
  - As a result the Southern Gas Corridor is strongly supported by the European Commission, including support for the region's development into a natural gas hub and future provider of natural gas to the EU.
- The EU is active in monitoring and enforcement
  - TurkStream: Second leg is planned to go to the EU via Bulgaria (?). The Serbian NRA approved exemption from the Third Energy Package, however, the European Commission has stated that it would "*not support it*" if the pipeline did not meet conditions, and it would "*react within its remits*"
- **Conclusion**: It is crucial for all market players to ensure regulatory compliance in order to minimize risk to investment

Thank you very much!

Questions?

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