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# Case Note

The Case Notes section will identify and analyse important judgments that shape the interpretation and application of the EU law in the field of competition and regulation. If you are interested in contributing, please contact the Case Notes Editors Dimitris Vallindas at <dvallindas@sheppard-mullin.com> or Silvia Pronk at <silviapronk@gmail.com>.

## The *Gazprom* Case: A Tool to Foster an EU Internal Gas Market

Tatiana Shaburova\*

*Case AT.39816 Upstream gas supplies in Central and Eastern Europe, Decision of the European Commission of 24 May 2018*

*Article 102 TFEU - Gazprom - Upstream gas supplies in Central and Eastern Europe - Anti-competitive practice - Dominance - Territorial restrictions - Excessive pricing - Leverage of a dominant position - Commitment decisions - Article 9 of Regulation (EC) No 1/2003*

*On 24 May 2018, the European Commission adopted a commitment decision in the Gazprom Case AT.39816 - Upstream gas supplies in Central and Eastern Europe pursuant to Article 9(1) of Regulation (EC) No 1/2003. The Commission confirmed that commitments proposed by Gazprom met its concerns, are accepted and binding upon the Russian oil giant. The Commission closed the proceedings. It is not going to impose a fine but reserves the right to do it without having to prove an infringement of the European Union antitrust rules in the future.*

Following seven years of proceedings, the European Commission (Commission, EC) issued its final commitment decision (Decision)<sup>1</sup> in the *Gazprom*<sup>2</sup> case (Case). The purpose of the present case note is to draw attention to some critical issues arising from the *Gazprom* case. We will review the decision and analyse it from a legal, commercial and historical point of view.

### I. Facts

In 2011<sup>3</sup>, the Commission officially confirmed that it had initiated unannounced inspections (generally referred to as ‘dawn raids’<sup>4</sup>) at the premises of companies, incumbents and upstream suppliers, acting in the natural gas sector in ten Member States (MS), mainly in Central and Eastern Europe (CEE). The

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DOI: will be added later

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1 The Commission decision was taken on 24 May 2018 and published on 17 July 2018.

2 Public Joint Stock Company Gazprom exports natural gas through its subsidiary company Gazprom Export LLC, where it is the sole owner (Gazprom). The Russian state holds over 50% of Gazprom’s share capital. Gazprom is one of the key players in the world focused on production, processing and sales of gas. In the European gas market, it has been present since the mid-1970s.

For details see <<http://www.gazprom.com/investors/stock/>> accessed 8 October 2018.

3 European Commission, ‘Antitrust: Commission confirms unannounced inspections in the natural gas sector’ (Press release, 27 September 2011) Memo/11/641.

4 In order to protect competition on the European market, the Commission is entitled to carry out inspections and investigations as set out in Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L001, Article 5 (Regulation 1/2003). Inspections and investigations are strong measures which may seriously damage a company: cause significant business disrupt-

main concern of the EC was that such companies might have engaged in anticompetitive practices violating European Union (EU) competition rules, or are in possession of information in relation to such practices.<sup>5</sup>

A year later, in 2012, the EC opened proceedings against Gazprom (Case AT.39816). The core investigation was devoted to the question whether Gazprom had abused its dominant market position in the upstream gas supply markets in MS in CEE.<sup>6</sup>

A few days after the EC opened proceedings, the Russian president Vladimir Putin signed a notable legal act<sup>7</sup> according to which a Russian strategic company may disclose information on its activity to foreign public authorities only with prior consent from the relevant Russian public authorities. Immediately, the legal act was branded as a 'blocking statute' which could prevent an open investigation against Gazprom. A large number of commentators equated the legal act to 'an unfriendly measure, which goes against the spirit of international cooperation'.<sup>8</sup> Others on the other hand argued that the legal act was adopted as a protective measure against enforcement action taken extraterritorially.<sup>9</sup> One commentator noted that obtaining prior consent 'does not necessarily mean that international law will be violated where those obligations are provided for'.<sup>10</sup>

It could also be argued that the Commission failed to address the political dimension of the Case as it is fairly evident that the Russian-Ukrainian conflict of 2014 has had an influence on the Case. In fact, most official EU documents have made references to the geopolitical uncertainties in Ukraine and the possi-

ble reduction of gas from Russia.<sup>11</sup> The geo-political context had undoubtedly given an impulse to MS in CEE, especially the Baltic States, to renew discussions on the independence from Russian gas.

In 2015, the EC's investigation resulted in a statement of objections (SO).<sup>12</sup> The SO concluded that Gazprom was hindering competition in the gas supply markets in the following MS: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia, which resulted in higher gas prices. Further, the SO specified that Gazprom included territorial restrictions in its supply agreements (ie export bans and destination clauses<sup>13</sup>). Allegedly, such agreements contained requirements to obtain an approval to export gas. Moreover, under certain circumstances, Gazprom might have refused to change the location of gas delivery points.

Hence, it allegedly enabled Gazprom to charge higher gas prices in five MS (Bulgaria, Estonia, Latvia, Lithuania and Poland) and resulted in unfair pricing policies based partly on Gazprom's price formulae based on oil product prices.

According to the EC, Gazprom acted on advantages emanating from its dominant position of control over the gas transport infrastructure in Bulgaria and Poland.

During 2016 and 2017, the EC and Gazprom were seeking a solution that worked for both parties. As a result, on 14 February 2017 Gazprom proposed its initial commitments<sup>14</sup> despite the fact that it did not agree with the Commission's preliminary assessment. Gazprom's initial commitments included:

- the removal of any restrictions to re-sell gas cross-border and its facilitation in the CEE gas markets;

tion and negatively influence its reputation. This measure is widely used in cases where competition law infringements are suspected.

5 arts 101 and 102 of Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/13 ('TFEU').

6 Prohibited under art 102 TFEU, which may affect trade between Member States.

7 Decree of the President of the Russian Federation 'On measures protecting the interests of the Russian Federation associated with international economic activity by Russian legal persons', no 1285, 11 September 2012.

8 M Martyniszyn, 'Legislation blocking antitrust investigations and the September 2012 Russian executive order' (2014) WC 37/1, 103-119; N.Sartori, 'The European Commission vs. Gazprom: An issue of fair competition or a foreign policy quarrel?' (IAI Working Papers 1303, 2013) 1-19.

9 There are many examples in history when a state has adopted a law protecting its interests during antitrust investigations. For example the United Kingdom, Australia, Belgium, Denmark,

Finland, France, Germany, Italy, New Zealand, Norway, the Philippines, South Africa, Sweden inter alia.

10 P Sean Morris, 'Iron Curtain at the border: Gazprom and the Russian blocking order to prevent the extraterritoriality of EU competition law' (2014) 35(12)ECLR 601-612.

11 Commission, 'Quarterly Report On European Gas Markets' (2014) 7(3) Market Observatory for Energy <[https://ec.europa.eu/energy/sites/ener/files/documents/quarterly-gas\\_q3\\_2014\\_final\\_0.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/quarterly-gas_q3_2014_final_0.pdf)> accessed 5 December 2018.

12 Commission, 'Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets' (Press release, 22 April 2015) IP/15/4828.

13 Clauses requiring the purchased gas to be used in a specific territory.

14 According to art 9 of Regulation 1/2003, in order to meet concerns expressed by the Commission in its SO, an undertaking trying to resolve a dispute with the EC may offer commitments for the Commission's consideration.

- amendments or the introduction of a price review mechanism reflecting competitive benchmarks; and
- the confirmation that the Bulgarian part of the Southern Stream Project is terminated and that Gazprom would not seek damages following such termination. The Yamal transit pipeline issue was not addressed in its commitments.

On 16 March 2017, the EC invited all interested parties to make their comments on Gazprom's commitments.<sup>15</sup> In response to these comments, on 15 March 2018, Gazprom revised its proposal and offered its final commitments for a duration of eight years (Commitments).<sup>16</sup> The EC confirmed that the Commitments offered by Gazprom met all of its concerns<sup>17</sup> and on 24 May 2018, it adopted its commitment decision imposing binding obligations on Gazprom (Decision).<sup>18</sup> The EC's Decision confirmed that there was no finding of an infringement of Article 102 TFEU which would have resulted in imposing fines on the company.

## II. Decision and Comments

The Commission alleged that Gazprom's activity in a number of CEE countries was incompatible with Article 102 TFEU, arguing that Gazprom might have abused its dominant position within a substantial part of the common market which affected trade between MS.

While working on the Case, first, the Commission had to define relevant markets as 'the national markets for the upstream wholesale supply of natural gas'.<sup>19</sup> Further a market share of Gazprom in each of the relevant markets of eight MS was assessed. The EC concluded that Gazprom had a dominant position on all eight CEE markets.

Dominance may be established based on the substantial market power of an undertaking.<sup>20</sup> The Commission considers an undertaking's position which is 'capable of profitably increasing prices above the competitive level for a significant period of time' as dominant.<sup>21</sup>

In its practice, the EC frequently refers to the cases of *United Brands*<sup>22</sup> and *Hoffmann-La Roche*<sup>23</sup> defining dominance as an undertaking's economic strength and its ability to behave to an appreciable extent independently on the market. The general concept of 'independence' is rather vague, which gives more room for action to the Commission. In 2010, in the case of *AstraZeneca*,<sup>24</sup> the EU General Court directly connected the 'independence of its competitors, its customers (...) and consumers' with the ability to maintain high prices.<sup>25</sup> As a result, in the case law a dominant position is identified with a 'substantial market power which enables the undertaking concerned to profitably raise prices above the competitive level over a significant period of time'.<sup>26</sup>

The general position of the European Commission is that the higher the market share of the company and the longer period that market share is kept, the more likely it is that the undertaking in question has

15 Market Test Notice pursuant to art 27(4) of Regulation (EC) No 1/2003. The Commission received 44 responses from interested parties. Apart from the comments directly related to the investigation, some comments addressed issues outside of the Commission's concerns.

16 The term starts from the date of the notification of the Decision. With respect to the termination of the South Stream project, Gazprom confirmed that it would not seek damages for a period of 15 consecutive years.

17 Commission, 'Antitrust: Commission invites comments on Gazprom commitments concerning Central and Eastern European gas markets' (Press release, 13 March 2017) IP/17/555. The Commissioner in charge of competition policy, Margrethe Vestager, stated in a positive manner that Gazprom's commitments 'will enable the free flow of gas in CEE at competitive prices (...) and provide a forward-looking solution in line with EU rules

18 Nevertheless, the EC's decision based on art 9 of Regulation 1/2003 will not deprive it of the right to impose in the future a fine of up to 10% of the company's worldwide turnover, without having to prove an infringement of EU antitrust rules. Commission, 'Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in

Central and Eastern European gas markets' (Press release, 24 May 2018) IP/18/3921.

19 Decision (n 1) para 33.

20 An analysis of a market power includes the market position of the dominant undertaking and its competitors, expansion and entry and countervailing buyer power.

21 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/02, para 11.

22 Case 27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* [1978] ECR 207.

23 Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1978] ECR 461.

24 Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission* [2010] ECR II-2805.

25 A Jones and B Sufrin, *EC Competition law* (6th edn, OUP 2016) 287.

26 *ibid* 346.

a dominant position on the market. Provided that an undertaking has a market share below 40%, it is unlikely to be dominant. However, the Commission reserves the right to apply provisions of Article 102 TFEU to undertakings with a market share lower than 40%.<sup>27</sup> Nevertheless, two factors remain important in the qualification of dominance. The first one: a dominant position in itself is not anti-competitive, unless it leads to anticompetitive practices. The second one: a deep analysis of market power includes inter alia an analysis of actual and potential competitors' behaviour on the market.

According to the EC's Quarterly Report 4 of 2014, Russia was the main gas supplier for the EU with a 42% market share of total imports, whereas the total share of the Union's two main suppliers (Russia and Norway) for 2014 was 80%. In 2013, energy supplies from Russia accounted for 39% of EU natural gas imports or 27% of EU gas consumption.<sup>28</sup> Eurostat statistic data on imports of Russian natural gas into the European market varies between 32.4% and 39%.<sup>29</sup> Eurostat noticed in its report for 2013 that 12 European countries (Austria, Bulgaria, the Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia) imported more than 75% of their total national imports of natural gas from Russia.

There are almost no commentators who have denied that Gazprom holds a dominant position on the European gas market (whether within the territory of a single Member State or within the whole EU territory). The European Commission stated that the market share of Gazprom is above 50%, and in some cases up to 100%, in some EU MS markets.<sup>30</sup>

But a dominant position per se does not lead to an abuse. As Article 102 TFEU does not contain a definition of the concept of abuse, it sets out only an open list of abusive conducts. To violate Article 102 TFEU, an undertaking in a dominant position on the market has to adversely affect both the market structure and consumer welfare.<sup>31</sup> To find out whether the behaviour of a dominant undertaking is abusive, the Commission should analyse each case in a very detailed manner.<sup>32</sup>

Following the its analysis regarding Gazprom's dominant position, the EC set out its allegations, focused namely on the basis of alleged territorial restrictions, excessive pricing and leveraging of its dominance within the European internal market.

We will review these allegations below.

## 1. Territorial Restrictions

The Commission stressed that Gazprom's behaviour created barriers to entry in the form of long-term take-or-pay contracts which protected its dominant position and thus constituted an alleged abuse of its dominant position.<sup>33</sup>

In the past,<sup>34</sup> gas supply contracts were divided into gas supply contracts within the EU and external supply contracts.<sup>35</sup> This practice was justified by the fact that external supply contracts were long-term investment contracts. Generally, a State was a major shareholder in gas supply enterprises, thus also acting as a stakeholder in such supply contracts. As a result, long-term contracts were governed by international investment agreements.

The Commission considered that such contracts could lead to a risk of foreclose of competition in the gas sector because they acted as barriers to entry.<sup>36</sup> However, from a practical point of view, such long-term contracts allow the parties to reduce the price, control risks and encourage investments.

In the first decade of this century, the official European position sought to boost EU-Russia cooperation in the energy sector. It was stressed that the EU was not going to 'impose any limits on imports of

27 *ibid* 327. In case C250/92 *Cøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovareselskab AmbA* [1994] ECR I-5641 it was noted that an undertaking which holds market shares of 32% and 36% of the relevant markets and depends on the strength and number of its competitors, may be considered to be in a dominant position, para 48.

28 R Dickel et al, 'Reducing European Dependence on Russian Gas' (The Oxford Institute for Energy Studies, 2014) 6.

29 Reports cover the period of 2005-2015 and 2003-2013 respectively <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Main\\_Page](http://ec.europa.eu/eurostat/statistics-explained/index.php/Main_Page)> accessed 8 October 2018.

30 Commission, 'Antitrust: Commission sends Statement of Objections to Gazprom – Factsheet' (Factsheet, 22 April 2015) Memo/15/4829.

31 M Lorenz, *An introduction to EU competition law* (Cambridge University Press 2013) 358.

32 It should be noted that an undertaking's behaviour may be considered as non-abusive if it is justified by objective reasons. According to the Commission, Gazprom did not provide sufficient evidence to justify its behaviour and prove its necessity for achieving efficiency gains which could counterbalance negative effects on competition.

33 Decision (n 1) para 35.

34 I Gudkov, 'Европейская Комиссия против Газпрома' (The EC against Gazprom) (2015) 6(100) All Europe on-line media <<http://alleuropalux.org/?p=11819>> accessed 8 October 2018.

35 Within and out of the frame of the European Union (EU) / European Economic Area (EEA).

36 Gudkov (n 34).

fossil fuels and electricity'.<sup>37</sup> This period was characterised by the EU's activity in the liberalisation of the Union's gas market. Moreover, the Russian-Ukrainian gas supply crisis of 2009 proved the fragility of the existing European gas infrastructure.<sup>38</sup> It seems evident that, in the absence of a plan to diversify energy sources, cooperation with Gazprom was extremely useful for Europe.<sup>39</sup>

Being a key player in the Russian energy sector already since Soviet times, Gazprom supplied gas to the CEE countries<sup>40</sup> based on the intergovernmental agreements on cooperation and development (IGAs). With the accession of CEE countries to the EU,<sup>41</sup> the EU faced the problem that such IGAs dated from before 2009 when the Third Energy Package (TEP) was adopted.<sup>42</sup> The problematic issue was that these long-term contracts with non-EU or EEA countries provided a clause which limits gas re-export and resale by customers.<sup>43</sup> The Commission generally sought to solve this issue in an informal manner, through negotiations with the governments of such countries.<sup>44</sup> As an example, the EC reached a breakthrough with Gazprom and OMV (a similar outcome was reached in negotiations between Gazprom and ENI).<sup>45</sup> Given the fact that the Baltic States joined the EU in 2004, the territorial restrictions set in Gazprom's contracts in Lithuania should have been removed instantly given that they violated EU competition law. The terri-

torial restrictions were excluded from the contract only in October 2013 but before the EC issued its SO. Whereas Gazprom was criticised for removing the above-mentioned restrictions at such a late stage, it can be argued that the Lithuanian Competition Authority 'made no attempt to request a removal of these restrictions'.<sup>46</sup>

Responding to the Commission's concerns on market segmentation, Gazprom proposed to remove from its contracts a non-exhaustive list of prohibited clauses including: profit-splitting mechanisms, rebate schemes, expansion clauses, monitoring and metering provisions that restrict the resale of gas. The Commitments include gas auction contracts. All of these proposals were accepted by the EC.

## 2. Excessive Pricing

Gazprom was accused of dividing the European gas market by hindering the free flow of gas across MS, which resulted in excessive pricing for gas and unfair trading conditions in its supply contracts,<sup>47</sup> consequently harming EU consumers and preventing the entry into the market of other competitors.

Article 102(a) TFEU stipulates that an abuse may consist of 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading condi-

37 EU Council, 'Joint statement on EU Enlargement and EU-Russia relations' (Press release, 27 April 2004) C/04/122.

38 The energy sector accounts for little more than 2% of Europe's economy and less than 1% of employment. For more details see European Economic and Social Committee, 'The Energy Union and the European Energy Dialogue – April 2017' (Position paper, 2017) <<https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/energy-union-and-european-energy-dialogue-position-paper-april-2017>> accessed 8 October 2018.

39 The situation started to change only in the early 2010s when a number of projects on gas supply diversification to connect CEE countries within the European energy infrastructure (ie Baltic Energy Market Interconnection Plan, 2009; Poland-Slovak Gas Interconnection, 2014; Central and South-Eastern European Gas Connectivity, 2015) were launched. More details at: <<https://ec.europa.eu/energy/>>; <<https://www.ceep.be/>>; <<https://www.energy-community.org/>> accessed 8 October 2018.

40 During Soviet times, the CEE countries were either under the Soviet Union or the Council for Mutual Economic Assistance (Comecon, ceased to exist in 1991). Later Russia became a legal successor under these agreements.

41 CEE countries joined the EU in 2004 (except for Bulgaria which joined the EU in 2007).

42 Starting from the late 90s, the EU was concerned about the creation of the internal energy market in Europe, that would ensure secure energy supply at competitive prices.

43 The gas was supplied to these countries at a price lower than what was fixed in the contracts with western European countries,

and provided an export ban clause against a low resale price for the supplied gas to western European markets. See art 7 of IGA with Bulgaria as of 19 March 1986; art 7 of IGA with Czechoslovakia as of 16 December 1985; art 7 of IGA with Hungary as of 30 December 1985; art 8 of IGA with Poland as of 28 August 1993 (excluded in 2010).

44 Commission, 'Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG' (Press release, 12 December 2002) IP/02/1869; Commission, 'Competition: Commission secures changes to gas supply contracts between E.ON Ruhrgas and Gazprom' (Press release, 10 June 2005) IP/05/710; Commission, 'Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts' (Press release, 11 July 2007) IP/07/1074.

45 In both cases, the decision related to the elimination of territorial sale restrictions and free access to sell gas to other customers in Austria and Italy, by way of expanding capacity of the TAG Pipeline. For more details, see Commission, 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses' (Press release, 6 October 2003) IP/03/1345; Commission, 'Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom' (Press release, 17 February 2005) IP/05/195.

46 J Stern and K Yafimava, 'The EU Competition investigation of Gazprom's sales in central and eastern Europe' (The Oxford Institute for Energy Studies, 2017) 6.

47 In the form of contractual export bans or destination clauses and other kind of restrictions with an effect equivalent to territorial restrictions.



tions'. This article does not contain a reference to 'excessive' pricing, whereas the EC guidance on abuse of dominant conduct<sup>48</sup> explicitly states that charging 'excessive' prices violates provisions of Article 102 TFEU, but does not specify how to determine whether a price is 'excessive', and when 'excessive' becomes a synonym of 'unfair'. Furthermore, excessive pricing cases are relatively rare in the practice of the EC because it is notoriously difficult to demonstrate that a price is excessive and thus unfair. Only recently has the EC decided to open excessive pricing investigations again in the pharmaceutical sector.<sup>49</sup> European case law on excessive pricing is rather limited and dates back to the *United Brands* case of 1978, where the European Court of Justice (ECJ) reviewed the EC decision and stated that charging an excessive price which is not reasonably related to the economic value of the product is considered to be an abuse of an undertaking's dominant position.<sup>50</sup> The ECJ did not provide an analysis of the economic value of the product and it did not explain how excessive pricing becomes unfair. Instead it proposed a two-stage test which was used by the EC in the present case.<sup>51</sup>

In the *Gazprom* case, the EC confirmed that 'fairness of the individual price level (...) should be compared to a number of different benchmarks, such as Gazprom's costs, prices in different geographic markets or market prices'.<sup>52</sup> To be in line with the two-stage *United Brands* test, with respect to the five CEE countries,<sup>53</sup> the EC compared (a) the prices charged by Gazprom with its actual costs, and (b) prices in the long-term contracts with competitive price benchmarks (Dutch TTF hub and German NCG hub).

The Commission's investigation showed that Gazprom charged 'excessive' prices' (under (a) the price exceeded its costs by 170% in the period of 2009-2013, whereas under (b) the prices were on average between 22% and 40% higher in the period of 2009-2014. Moreover, the Commission came to the conclusion that Gazprom's long-term contract prices 'significantly exceeded' the German long-term contract prices by between 9% and 24% on average over 2009-2014).<sup>54</sup>

As we have seen the concept of 'fairness' is not envisaged by Article 102 of TFEU, and it cannot be measured in economic terms and it therefore implies a balance of parties' interests.<sup>55</sup> The economic value of the product characterised by what the consumers are ready to pay for products is not taken into consideration in order to determine whether a price is unfair.

It is interesting to note that at national level, 'excessive' means an increase of the price to at least more than 100 times comparable prices. A striking recent example is an infringement decision on *Aspen Pharma* issued by the Italian Competition Authority for increasing the price of a particular medicine by between 300% and 1500%.<sup>56</sup> The decision gave rise to the opening of an investigation against Aspen Pharma by the Commission.

It is also notable, that the first time when the Commission decided to examine the legality of a take-or-pay clause and an oil price linkage was another investigation against Gazprom. Before then, the precedents against take-or-pay clauses centred around the civil law arguments: the German Federal Court of Justice concluded that an oil indexation clause allowed 'the provider not only to compensate price increases but to also generate additional profit out of it';<sup>57</sup> an Austrian court made an award in favour of the Czech gas importer company RWE Transgas, confirming that the company should not have to pay for unused gas under the take-or-pay principle.<sup>58</sup>

48 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/02, para 7.

49 The Commission has opened a formal investigation against Aspen Pharma, alleging that the company engaged in excessive pricing concerning a number of medicines with respect to the violation of art 101 TFEU. See Commission, 'Antitrust: Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines' (Press release, 15 May 2017) IP/17/1323 <[http://europa.eu/rapid/press-release\\_IP-17-1323\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1323_en.htm)> accessed 11 November 2018.

50 In 1985, the ECJ reviewed another case C-226/84 *British Leyland v Commission* in which unlike in the *United Brands* case, it used an economic value test in order to determine an anticompetitive behaviour. Later in 2006, in case COMP/36.568 *Scandlines Sverige AV v Port of Helsingborg*, the EC confirmed the importance of the economic value of the product.

51 At the first stage, the Commission should have defined whether the price charged by Gazprom was suspiciously high. If the answer is affirmative, at the second stage the Commission should have assessed whether the excessive price was unfair

52 Commission, Memo/15/4829 (n 30).

53 Bulgaria, Estonia, Latvia, Lithuania and Poland.

54 Decision (n 1) paras 62-79.

55 M van der Woude, 'Unfair and excessive prices in the energy sector' (2008) 2(3) *European Review of Energy Markets* 1-29.

56 Case A480 *Incremento Prezzo Farmaci ASPEN*, Provvedimento no 26185, 29 September 2016.

57 K Talus, 'Long-term natural gas contracts and antitrust law in the European Union and the United States' (2011) 4(3) *The Journal of World Energy Law & Business* 260.

58 A Filippov, 'Czech company wins case against Gazprom over 'take or pay'' *Russia Today (RT)* (25 October 2012) <<https://www.rt.com/business/czech-rwe-gazprom-dispute-212/>> accessed 8 October 2018.

Traditionally, up to 2013, under long-term take-or-pay contracts<sup>59</sup> the gas price was linked to the oil price.<sup>60</sup> This formula was chosen to balance the supply and demand needs of both parties for a long period of time, and it helped the parties to plan long term investments and strategies.<sup>61</sup> The EC stated that the territorial restrictions allowed Gazprom to pursue its unfair pricing policy in the Baltic States, Bulgaria and Poland by way of linking the specific price formulae to oil prices.

The Commission mentioned in its Decision the isolation of the five CEE countries and Bulgaria from the rest of the EU's gas markets but did not stress - at least in official publicly available speeches and statements by the EC officials - that 'remoteness' played an important role together with technical transportation capacity, different needs and consumption in the price formation. Further, the size of a country and economies of scale justify the fact that the price for homogeneous natural gas delivered to Germany may cost less than price of the same gas to CEE countries, even if the standard of living is lower in the Baltic States.

According to Konstantin Simonov, head of the Russian National Energy Security Fund (Fund), it is a conundrum that the natural gas supply price is much lower than the price for the end-users (households / industry) in the same country, whereas in some other European countries the situation may be the opposite.<sup>62</sup> With regard to the Fund's statistical research, Gazprom's price for the European end-user (households / industry) includes Gazprom's share of

40% and the rest, 60%, are taxes and resellers' profit. As a result, it may be worth investigating the gas resellers' business model to ensure that they not exacerbate the so-called excessive pricing.

Gazprom did not agree with the EC statement on unfair price. However, wishing to resolve the conflict peacefully, it prepared an initial commitment proposal where it suggested to make a price calculation based on 'the average weighted import border prices in Germany, France and Italy and the price level at the relevant generally accepted liquid hubs in Continental Europe'. This price calculation was criticised by a number of respondents as being abstract and defective given that they did not consider it to be competitive price benchmark.<sup>63</sup> Later, Gazprom amended its initial commitments proposing to use the TTF gas hub in the Netherlands and the NCG gas hub in Germany, which was accepted by the EC as competitive price benchmarks. Gazprom had to amend its initial commitments and proposed to its customers (including new customers) to review the price every two years (plus extraordinary review of the price every five years) in its contracts with a total duration at least of three years, taking into account competitive price benchmarks.

The EC announced<sup>64</sup> that the EU's gas supply diversification strategy based *inter alia* on flexibility in gas supply is one of the key policy objectives for the European gas markets. The European focus was shifted from the security of gas supply to focusing on the production, transmission and storage of gas,<sup>65</sup> which may lead to an increase in prices to end-users in the mid to short term. The energy mix, as another aspect of diversification, so far fell short of expectations. The European aspiration for liquefied natural gas (LNG) global expansion in global supply from the United States for a competitive price has faded so far. One of the reasons is that the costs for transportation are very high. Again, supply and demand put everything in place. Currently, the Asian LNG market has pushed up demand. As a result, in Europe, the amount of natural gas consumed is still higher than the amount of LNG consumed.

Continuing discussions on the formation of the price, it is also worth noting that the price in the LNG supply contract between Poland and Qatar is \$800<sup>66</sup> per thousand cubic meters (whereas the price for Russian gas is half that price at \$400). According to the Quarterly Report on European Gas Markets,<sup>67</sup> Qatar is the main LNG supplier of the EU, having the

59 Under such agreements the buyer undertakes to pay the purchase price for an agreed amount of gas, regardless of whether it takes delivery.

60 It was based on the established practice to believe in the substitutability of these two products – oil and gas.

61 Talus (n 57).

62 О Самойлова, 'Газпрому есть чем ответить на претензии Еврокомиссии' (Gazprom knows how to respond on EC's claims) *Взгляд деловая газета* (2015) <<https://vz.r.u/economy/2015/4/22/741576.html>> accessed 8 October 2018.

63 Stern and Yafimava (n 46) 21.

64 Commission, 'Third Report on the State of the Energy Union' (2017) COM (2017) 688 final.

65 For more details see TEP.

66 *ibid.*

67 Commission, 'Quarterly Report On European Gas Markets' (2017) 10 (3) Market Observatory for Energy 12 <[https://ec.europa.eu/energy/sites/ener/files/documents/quarterly\\_report\\_on\\_european\\_gas\\_markets\\_q3\\_2017\\_final\\_20171221finalcover.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/quarterly_report_on_european_gas_markets_q3_2017_final_20171221finalcover.pdf)> accessed 8 October 2018.



largest market share at 35%. Qatar dominates in the Belgian (97%), Dutch (73%), Italian (67%), Polish (82%) and the United Kingdom (82%) markets. It is therefore surprising that the dominance of Qatar in the European LNG market, and the high prices that it has imposed, have not led to an EC investigation in that sector.

### 3. Dominant Position Leverage

Another alleged statement on Gazprom's dominance stressed by the Commission concerned 'its access to or control over gas infrastructure' under the South Stream project in Bulgaria and the Yamal pipeline in Poland. With respect to the South Stream pipeline, the project was announced in 2006 to build the South Stream pipeline system across the Black Sea - from the Russian Black Sea coast to the Bulgarian Black Sea coast. The EC stated that the IGAs were not in compliance with the TEP and in 2014 it initiated infringement proceedings against Bulgaria. As a result, Bulgaria was unable to fulfil its obligations and faced claims for damages under the IGA from the Russian counterpart. The project was cancelled at the end of 2014 due to the failure to resolve regulatory issues between Bulgaria and the EC concerning the IGAs' provisions.<sup>68</sup>

At the end, the Commitments contained a provision for Gazprom not to seek any damages from the Bulgarian undertaking as a result of the termination of the South Stream pipeline project. As for the Yamal pipeline, the legal framework of the project was based on the IGA signed between Russia and Poland in 1993 and three additional protocols of 2003 and 2010.

From the Commission's point of view, the European legislation on IGAs with a third country on energy issues was insufficient and subject to major changes. In 2017, the Commission's proposal according to which a competence from Member States was shifted to the EU on negotiation of IGAs with a third country was entered into force.<sup>69</sup>

Apart from the issue of the compatibility of IGAs with European competition law *acquis*, another issue raised by Poland concerned Gazprom's control over investment decisions or unrelated commitments with respect to the project.<sup>70</sup> In 2015, the Polish Energy Regulator failed to confirm the allegations brought by the Commission against Gazprom.<sup>71</sup> As

a result it seemed reasonable that Gazprom did not mention the Yamal pipeline in its proposed Commitments.

### III. Conclusion

This case note highlights the fact that the EC's allegations in the *Gazprom* decision have had, as their main concern, the establishment of the European energy policy and its development. The Commission's argumentation on a range of charges lack solid evidence and a coherent analysis. In particular, two out of the three allegations made by the EC, namely its allegations regarding excessive pricing and the leverage of dominance in the South Stream pipeline project, are questionable and seem to address inefficiencies related to the internal gas market and foreign policy considerations as opposed to serious competition law concerns. It is also unsurprising that the EC has chosen to pursue an Article 9 commitment decision which requires a less comprehensive decision as the EC is not required to demonstrate an infringement. A commitment decision also enables the EC to extract commitments which go beyond what it could have required Gazprom to do in the event of an Article 7 infringement decision. Lastly, Article 9 commitment decisions require the undertaking involved to accept the proposed commitment therefore decreasing the probability of the decision being appealed at the EU General Court level, especially with regard to allegations on excessive pricing.

EU competition rules do not shed much light on how the concept of excessive pricing corresponds

68 Stern and Yafimava (n 46) 10-13.

69 European Parliament, 'Legislative train schedule. Resilient Energy Union with a climate change policy' <<http://www.europarl.europa.eu/legislative-train/theme-resilient-energy-union-with-a-climate-change-policy/file-energy-related-intergovernmental-agreements-revision-of-a-decision>> accessed 8 October 2018.

70 *ibid* 14-20. Pipeline construction started in 1994. Originally two strings were envisaged, but due to a number of reasons only one was completed. Moreover, the project faced a huge opposition from Polish officials.

71 In 2010, the EU Commissioner for Energy, Günter Oettinger acknowledged that the IGA between the Russian Federation and the Republic of Poland of 25 August 1993 (as amended in 2003 and 2010) was 'in line with the EU energy *acquis*, including the TEP'. For more details see Commission, 'Günter Oettinger, EU Commissioner for Energy, Statement on the Yamal-Pipeline and the Gas Agreement between Poland and Russia' (Press release, 4 November 2010) *Speech/10/620*.

with unfairness within the meaning of Article 102(a) TFEU. From the ECJ's case law, it is also unclear what the limits of excessive pricing are and how excessive pricing becomes a synonym of unfair pricing. Another striking point is how to determine the economic value and price of gas, taking into account the complexity of the energy sector, the close link between energy and consumers, and political aspects of energy policies.

Applying Article 102 (a) TFEU based on the allegation of charging excessive prices is problematic because it can negatively affect the investment climate in the energy sector.

As an initial idea of European competition rules based on impartiality and beyond political bias, it is expected that the same set of rules and efforts of enforcement will be applied to all potential parties to investigations by the EC.

Based on the outcome of the EC's investigation, ie commitment decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, it may be concluded that both the Commission and the company had mutual interests. Gazprom did not want to damage its reputation, whereas the Commission might have been interested in improving the development of European gas policies.