CLIENT ALERT

The European Commission accepts commitments to eliminate cross-border sales restrictions of gas resulting from underinvestment in interconnection infrastructure

March 24, 2020

AUTHORS

Faustine Viala | Philipp Girardet | Susanne Zuehlke | Rahul Saha
David Kupka

On 6 March 2020, the European Commission ("**Commission**") accepted commitments by Transgaz, the manager and operator of the natural gas transmission network in Romania, aiming to facilitate gas exports to neighboring EU Member States.[1] This decision constitutes another example of the Commission's continuous efforts to eliminate any types of restrictions to cross-border sales within the EU. While the decision does not formally conclude that Transgaz abused its dominant position in violation of Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**"), it sheds some light on what practices could potentially be investigated by the Commission, especially in the energy sector.

Context of the promotion of the EU Energy single market policy

The Commission's investigation of Transgaz was announced in June 2017, following inspections conducted in June 2016. This was shortly after the Commission promoted the Energy Union as a key policy priority in 2015 for its overall action. One of the components of the Energy Union was the building of a fully integrated internal energy market enabling the free flow of energy throughout the EU. This part of the Energy Union policy was inspired by the action taken by the

[1] Commission decision of 6 March 2020, case AT.40335.

Commission's Directorate-General for Competition before 2015 and it fueled further antitrust investigations after 2015, such as the Transgaz case.

Indeed, before the Energy Union was announced as a key policy priority, the Commission took action in particular in the gas and electricity supply markets in an effort to promote interconnection between national energy networks and to eliminate any restrictions of cross-border supplies. In 2012, the Commission opened proceedings relating to the supply of natural gas from Russia into Central and Eastern European EU Member States, which finally resulted in a decision in 2018 to remove all restrictions placed on EU customers to resell imported natural gas from Russia into other EU Member States.[2] Similarly, in 2013, the Commission opened a separate investigation into the Bulgarian gas infrastructure manager, which led to a decision in 2018 fining the company EUR 77 million for hindering access of its competitors to the only gas import pipeline from Romania.[3]

Underinvestment in infrastructure could constitute an abuse of dominance

It stems from the Transgaz decision that the Commission intends to continue its efforts to promote the existence of a single EU market for energy by eliminating all impediments to cross-border sales, either in the form of trading conditions or interconnection capacity between national networks. With Romania being the second largest natural gas producer in the EU, the Transgaz decision is of particular importance from an EU perspective.

The Commission identified three issues relating to Transgaz's behavior. First, the Commission was concerned that Transgaz's underinvestment in or delaying construction of infrastructure for gas exports could have restricted sales of gas from Romania to Hungary and Bulgaria, its two EU neighbors. Second, the Commission feared that interconnection tariffs applied by Transgaz made exports from Romania to EU countries commercially unavailable. Third, Transgaz may have used unfounded technical arguments as a pretext for restricting exports to the EU.

It is, in particular, interesting to highlight the first concern of the Commission relating to the underinvestment in infrastructure by the infrastructure manager. It stems from the decision that the Commission considers that such underinvestment may constitute an abuse of dominance within the meaning of EU competition rules if it leads to the restriction of imports and/or exports. However, in business sectors where infrastructure is of the essence, any reduction of investment into the infrastructure generally leads to the restriction of the amount of sales which are technically possible. Any decision on the level of investments may thus in theory qualify as a potential abuse of dominance (assuming the infrastructure manager is dominant, which is often the case). Hence, the key questions are (1) what level of investment is considered as "standard", below which the underinvestment constitutes an abuse of dominance, and (2) what is the standard of proof the Commission must meet to quantify such "standard" level of investment. The full text of the decision, which is not available yet, will provide more clarity on the above without, however, providing total legal certainty given that

[2] Commission decision of 24 May 2018, case AT.39816.

[3] Commission decision of 17 December 2018, case AT.39849.

Transgaz committed to increase the minimum export capacities of natural gas from Romania and refrain from otherwise hindering exports to put an end to the Commission's investigation.

It is interesting to note that this is not the first time a Commission antitrust investigation resulted in the improvement of interconnection capacities between EU Member States. In 2018, the Commission considered that a German electricity network operator limited import capacity at the electricity interconnector between Denmark and Germany and this could have resulted, according to the Commission, in a discrimination against non-German electricity producers. Similarly to Transgaz, the infrastructure manager committed to increase cross-border flows between the two countries.[4] In another case relating to electricity interconnection, the Commission was also concerned that the network manager was limiting the amount of export transmission capacity available on electricity interconnectors situated along Swedish borders, with the objective of relieving internal congestion on its network. To alleviate these concerns, the network manager committed to manage congestion in the Swedish transmission system in a different manner, thus avoiding the limitation of trading capacity on interconnectors.[5]

Other recent antitrust investigations of cross-border sales restrictions within the EU

As illustrated by the Transgaz decision, the elimination of cross-border sales restrictions within the EU continues to mark the Commission's antitrust enforcement actions. In the energy sector, the Commission opened a formal investigation in 2018 to assess certain supply agreements for the import of liquefied natural gas ("**LNG**") to Europe. The Commission's ongoing probe aims to determine whether certain long-term supply agreements of LNG into the EU contain direct or indirect restrictions preventing EU-based importers from selling the LNG freely within the EU.[6]

The Commission is also actively prosecuting restrictions of cross-border sales in other markets. This is, in particular, the case of digital markets, which are under increased antitrust scrutiny since the implementation of the Digital Single Market Strategy and the e-commerce sector inquiry[7]. At the occasion of adopting a new decision sanctioning cross-border sales restrictions of licensing and distribution of merchandise products[8], which increased the amount of total fines imposed on three companies having imposed direct and indirect measures restricting out-of-territory sales by their licensees to EUR

[4] Commission decision of 7 December 2018, case AT.40461.

[5] Commission decision of 14 April 2010, case AT.39351.

[6] Commission press release of 21 June 2018, IP/18/4239.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and social committee and the Committee of the regions of 6 May 2015, COM(2015)192 final "*A Digital Single market Strategy for Europe*"; Communication from the Commission to the Council and the European Parliament of 10 May 2017, COM(2017)229 final "*Final report on the E-commerce Sector Inquiry*".

[8] Commission decisions of 30 January 2020, case AT.40433; 25 March 2019, case AT.40436; and 9 July 2019, case AT.40432.

33 million, Commissioner Vestager released a statement with a very clear message: "*the Commission will not tolerate restrictions, which undermine the EU Single Market*".[9]

Necessity to consider antitrust aspects in the decision-making process

The Transgaz decision shows that antitrust concerns may arise even with regard to decisions which, at first glance, may appear unrelated to the competitive strategy of a company, such as the setting of the amount of investments in a facility the company owns and operates. In light of this decision, it appears therefore important to integrate antitrust aspects into all decision-making processes and, hence, avoid or at the very least, limit the risk of engaging in a potentially anticompetitive behavior. The specific features of the Transgaz case make it especially important for infrastructure owners and companies managing a critical facility or infrastructure. It appears of upmost importance to duly and timely document the reasoning behind investment decisions to prevent any misinterpretation of the objectives of the company at the time when the decision was made.

[9] Statement of Executive Vice-President Margrethe Vestager of 30 January 2020, no. 20/165.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Faustine Viala	**Philipp Girardet**	**Susanne Zuehlke**	**Rahul Saha**
+33 1 53 43 45 97	+44 20 3580 4717	+32 2 290 18 32	+44 20 3580 4741
fviala@willkie.com	pgirardet@willkie.com	szuehlke@willkie.com	rsaha@willkie.com

David Kupka
+32 2 290 18 20
dkupka@willkie.com