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Antitrust

European Union

The European Commission Settles the Long-running Antitrust Case with Gazprom by Agreeing on Commitments

By Kristina Povazanova

After almost seven years, the European Commission (“Commission”) settled its long-running antitrust case with the Russian energy giant, PJSC Gazprom and its wholly-own subsidiary Gazprom Export LLC (“Gazprom”), concerning the abuse of a dominant position according to Article 102 Treaty on the Functioning of the European Union (“TFEU”) that may have hindered the free flow of gas at competitive prices in Central and Eastern European countries (jointly referred to as “CEE”).¹

On 24 May 2018, the Commission adopted a decision² in accordance with Article 9(1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty^{3,4}

¹ Namely Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia.

² Case AT.39816 - Upstream Gas Supplies in Central and Eastern Europe [2018] OJ C258/07

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the

(“Regulation 1/2003”) making commitments offered by Gazprom legally binding. These are meant to facilitate the integration of CEE gas markets and to enable efficient cross-border gas flow in contrast to alleged abuse of Gazprom’s dominant position on those markets.

Procedural aspects of Gazprom case

From 2011 to 2015, the Commission undertook several investigative measures to assess the situation in CEE gas markets. These included on-the-spot inspections in accordance with Article 20(4) Regulation 1/2003 as well as various information inquiries. On the basis of these investigative steps, the Commission opened formal proceedings with an intention to adopt a decision under Chapter III of the Regulation 1/2003.⁵ In its Statement of Objections (“SO”) of 22 April 2015, the Commission came to a preliminary conclusion that Gazprom is a dominant player in CEE markets for the upstream wholesale supply of natural gas, and that it might have abused its dominant position due to three potentially abusive practices:

- Gazprom included **territorial restrictions** in its gas supply contracts

Treaty; Official Journal L 001, 04/01/2003 P. 0001 - 0025

⁴ Article 9(1) Regulation 1/2003 provides: “Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.”

⁵ The Commission opened proceedings on 31 August 2012.

with wholesalers and other customers. These restrictions comprised: 1) destination clauses that obliged wholesalers to use the purchased gas only in a specific territory; and 2) export bans that prevented the free flow of natural gas to other countries. Gazprom required the wholesalers to obtain its approval to export gas to other countries and obstructed the change of location to which the natural gas was being delivered (the so-called gas delivery points). The aim of such restrictions may have been to hinder the integrity of the internal market by supposedly re-instating CEE national borders for the gas flow in exchange for securing Gazprom's pricing policy in CEE gas markets.

- According to the SO, territorial restrictions went hand-in-hand with an **unfair pricing policy** in several CEE countries. As a result of these practices, wholesalers were charged prices that were significantly higher than Gazprom's comparable costs or benchmark prices. This may have been caused by Gazprom's price formulae that linked the contractual gas prices to oil indexation disregarding prices in European liquid gas hubs.
- Last, but not least, the Commission pointed out that Gazprom leveraged its dominant position in relevant CEE gas markets by stipulating conditions for gas supplies and gas prices in Bulgaria and Poland that were dependent on obtaining unrelated **infrastructure commitments**, like investments in Gazprom's pipeline projects (e.g. South

Stream project).

It wasn't long before Gazprom sent its reply to the SO, disputing the Commission's preliminary assessment. As the world's largest natural gas reserves holder and exclusive undertaking to export natural gas from Russia, Gazprom's natural gas exports to Europe reached 194.4 billion cubic meters in 2017.⁶ The Commissioner, however, made it clear that all companies that operate in the European market have to comply with EU rules, notwithstanding their status.

Proposal of the First Commitments

To address the Commission's antitrust concerns, Gazprom proposed the first set of commitments ("First Commitments") to ensure the free flow of natural gas at competitive prices in CEE gas markets.⁷ However, one must bear in mind that Gazprom tried to challenge the Commission from the very beginning. In its First Commitments, Gazprom stated that *"this proposal of Commitments does not constitute an acknowledgement that Article 102 TFEU or Article 54 EAA Agreement or indeed any other substantive rule of EU competition law has been breached."*⁸

The First Commitments offered by Gazprom were regarded by the Commission as addressing competition concerns in CEE gas markets. Gazprom

⁶ <http://www.gazprom.com/about/marketing/europe/> (online; available on 28 July 2018)

⁷ The first set of Commitments was submitted to the European Commission on 14 February 2017.

⁸ Commitment Proposal – Non-confidential Version http://ec.europa.eu/competition/antitrust/cases/g2/gazprom_commitments.pdf (online; available on 20 July 2018)

addressed all three issues, by ensuring that:

- It will refrain from using and will not introduce in the future **any territorial restrictions**, such as destination clauses and export bans or any other measures having equivalent effect, in their gas supply contracts, effect of which could be the limitation or prohibition of customer's ability to resell natural gas supplied by Gazprom or to transfer the natural gas to another territory. With respect to market segmentation and specifically the isolation of Bulgarian gas market, Gazprom offered to change relevant gas supply and gas transport contracts to allow Bulgaria to conclude interconnection agreements with other EU Member States (mainly Greece). This commitment, together with the adjustment of the current gas allocation method, would enable the Bulgarian transmission system operator to gain full control of the gas flow in Bulgaria. In relation to gas delivery points that are considered as crucial for the free flow of gas in CEE gas markets, Gazprom committed to allow its CEE customers to request all or part of their gas volume to be delivered to Bulgaria or Baltic States instead of their delivery points.⁹
- It will introduce the price revision clause in gas supply contracts to address the Commission's **unfair pricing** concerns. This will apply to customers whose gas supply contracts

⁹ In the Czech Republic, Hungary, Poland and Slovakia the gas connecting infrastructure such as mechanisms for reverse flow and interconnectors has significantly improved. On the other hand, the Baltic States and Bulgaria are still very much isolated from the rest of CEE Member States.

do not contain a price revision clause. Otherwise, Gazprom committed to amend existing price revision clauses to enable its customers to request the price revision if either the economic situation in the European gas market is subject to change or the price does not reflect current trends and developments at liquid gas hubs in Western Europe. Gazprom proposed that its customers can request such a revision every two years. Importantly, Gazprom agreed that in case of the absence of mutual agreement on the revised price within 120 days, the conflict matter will be referred to arbitration.

- It will allow Bulgarian partners to leave the South Stream project and will refrain from claiming damages on the basis of this cancelation for the initial period of eight consecutive years. This commitment should have addressed the Commission's concern that Gazprom gained unjustified advantages resulting from stipulating conditions for gas supplies and gas prices in Bulgaria dependent on obtaining unrelated **infrastructure commitments**.¹⁰

Market Test

On 16 March 2017, the Commission invited interested third parties to comment and submit their observation on the First Commitments, pursuant to Article 24(7) Regulation 1/2003. The Commission

¹⁰ As regards the Yamal Pipeline, the Commission's investigation showed that the situation cannot be changed by this antitrust procedure due to the impact of an intergovernmental agreement between Poland and Russia.

received forty-four responses from interested third parties that dealt with various aspects of the First Commitments, ranging from technical elements to substantive issues, such as: a) Gazprom's responsibility for gas quality at entry points to either Bulgaria or changed gas delivery hubs, b) creation of bi-directional basis mechanism between gas delivery points of the Baltic States/Bulgaria and Central/Eastern Europe, or c) methodology behind the fee to be charged by Gazprom for a change of gas delivery point.

Final Commitments

In response to these observations, Gazprom submitted a modified version of the First Commitments on 15 March 2018 ("Commitments"). It addressed various minor and major comments. Among the most important modifications, Gazprom agreed to:

- delete the reference that all commitments are only made for the duration of the Commitments;
- remain liable for the gas quality at the entry point to Bulgaria;
- offer the change of delivery points on a bi-directional basis in CEE gas markets;
- remain liable for non-delivery of gas to changed gas delivery points except of force majeure and maintenance;
- reduce the service fee for a swap-like

operation including bi-directional flow;

- extend the scope of price revision clause by offering it to new customers as well;
- specify what are the benchmark prices for liquid hubs in continental Europe by listing TTF gas hub in the Netherlands and NCG hub in Germany;
- place the arbitration place for the price revision conflict matter within the EU;
- refrain from bringing any claims related to the South Stream project for a period of fifteen years.

Conclusion

Despite the strong opposition from few CEE Member States (e.g. Poland)¹¹, the Commission is convinced that the Commitments impose positive forward-looking set of obligations on Gazprom to enable the free flow of gas in CEE gas markets at competitive prices. Their purpose is to bring Gazprom's market behavior in compliance with EU competition rules and to allow customers to benefit from effective gas competition between various gas suppliers and supply sources. By adopting the decision in accordance with Article 9(1) Regulation 1/2003, the Commission made the Commitments legally binding on Gazprom and any legal entity that is directly or

¹¹ E.g. PGNiG S.A.: 'PGNiG S.A. observations on the commitments proposed by Gazprom on the basis of Article 9 of the Council Regulation (EC) No 1/2003 of 16th of December 2002 in Case AT.39816 — Upstream gas supplies in central and eastern Europe' <http://pgnig.pl/aktualnosci/-/news-list/id/oswiadczenie-pgn-1/newsGroupId/10184> (online; press release of 19 May 2017)

indirectly controlled by Gazprom for the period of eight years.

In case that Gazprom breaks the Commitments, the Commission can impose a fine of up to 10% of the company's annual turnover, without having to prove an infringement of EU competition rules.

Intellectual property

European Union

Update on EU Copyright Reform – Audiovisual Media Services and Copyright in the Digital Single Market

By Martin Miernicki

Two important legislative projects in the field of European copyright law have recently undergone substantial developments. The revision of the Audiovisual Media Services Directive (AVMSD) is likely to be adopted later this year, whereas the proposed Directive on Copyright in the Digital Single Market (CDSMD) will be subject to an extended debate in the European Parliament.

Background

In 2015, the Commission adopted its [Digital Single Market Strategy for Europe](#), calling for a better harmonization of the copyright laws of the EU member states as well as for an enhanced access to online goods and services. Against this background, the [proposal](#) for a revision of the [AVMSD](#) as well as the proposal for the new [CDSMD](#) were made in 2016. The

amendment to the AVMSD pursues a variety of policy goals, aiming at creating a clear level playing field for the provision of audiovisual content in the EU, especially addressing online services. The CDSMD contains provisions on the (collective) licensing of certain works and exceptions and limitation to rights of right holders provided for in other European directives on copyright, among these [Directive 2001/29/EC](#). Title IV's Art 11 and 13 of the proposed directive appear to be most controversial, providing for a right of publishers of press publications in the digital use of their press publications (so-called “link tax”) and an increased obligation of certain platform operators to monitor the content uploaded to their sites (so-called “upload filter”). Both reform projects have been intensely discussed and have yet to be adopted.

Current state of the reform projects

On 26 April 2018, the Commission [announced a breakthrough](#) in the negotiations with the Council and the European Parliament about the revision of the AVMSD, stating that a “preliminary political agreement” had been reached. This agreement was subsequently [confirmed](#) in June 2018. As regards the CDSMD, the Council's permanent representatives committee [agreed to its position](#) on the draft directive on 25 May 2018 for the negotiations with the European Parliament. On 20 June 2018, the Parliament's Legal Affairs Committee [voted to start the negotiations](#), upholding controversial parts of the proposed

CDSMD. However, the European Parliament [rejected this decision](#) in early July.

What can be expected?

Against the background of these developments, the revised AVMSD is likely to be adopted in autumn or winter, starting the period for the transposition of its rules into national law. It should be noted that Brexit also affects audiovisual media services, and it caused the Commission to publish a [notice to stakeholders](#) on this matter earlier this year. The future development of the CDSMD is less clear, as the proposal might be amended as a result of the upcoming debate. At this point, it is expected that the European Parliament will discuss the issue in September.

Intellectual property

European Union

U.S. and EU file WTO Complaint against China

By Pratyush Nath Upreti

On 23 March 2018, the United States launched a WTO complaint against China's discriminatory licence practices. The request for consultations filed by the United States highlights the grounds for complaint as:

"China denies foreign patent holders the ability to enforce their patent rights against a Chinese joint-venture party after a technology transfer contract ends. China also imposes mandatory adverse contract terms that discriminate against and are less favorable or imported foreign technology. Therefore, China deprives foreign intellectual property rights holders of the ability to protect their intellectual property rights in China as well as freely negotiate market-based terms in licensing and other technology-related contracts."¹²

¹² China-Certain Measures Concerning the Protection of Intellectual Property Rights-Request for Consultations by the United States (WT/DS542/1, 26 March 2018)

Later in April 2018, Ukraine, Saudi Arabia, Chinese Taipei (Taiwan), and the European Union (EU), formally requested to join the consultations requested by the US, citing a substantial interest in the matters related to the protection of intellectual property rights by WTO members, interpretation of TRIPS Agreement and trade interest.¹³

On 1 June 2018, the European Union filed its own WTO complaint against China's rules, which are applicable to technology transfer. According to the request for consultations, the European Union has accused China of using its domestic legislation to impose a different set of rules on the import of technology, including intellectual property rights, than the rules which are applicable to technology transfers occurring between Chinese companies.¹⁴ Further, in the consultations request, the EU argues;

"The Chinese measures at issue appear to (i) discriminate against foreign holders of intellectual property rights, and (ii) restrict the for-

<https://www.wto.org/english/news_e/news_18_e/ds542rfc_26mar18_e.htm> accessed 22 July 2018.

¹³ See communication from the Ukraine, Saudi Arabia, Chinese Taipei (Taiwan), and the European Union (EU) to join consultations requested by the United States.

<[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds542/*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds542/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#)> accessed 22 July 2018.

¹⁴ China-Certain Measures on the Transfer of Technology – Request for Consultations by the European Union (WT/DS549/1, 6 June 2018)

esign right holders' ability to protect certain intellectual property rights in China, contrary to China's WTO obligations."¹⁵

What Next?

The WTO consultations give the parties an opportunity to discuss the issues and to find a satisfactory solution without resorting to litigation.¹⁶ In case of failure to produce a satisfactory solution within 60 days, the complainant may request for adjudication by a panel.

Conclusion

In recent years, there have been few IP disputes brought to the WTO Dispute Settlement Understanding (DSU).¹⁷ From 1995-2016, the TRIPS Agreement has been invoked only 33 times in WTO complaints- (20 cases in 1995-99; 5 cases in 2000-04; 1 case in 2005-09; 7 cases in 2010-14; 0 cases in 2015-16).¹⁸ In the past, the US and the EU had a history of IP

related tension at WTO with China.¹⁹ However, the recent request for consultations by two key global actors has come at a time when the rise of bilateral and plurilateral trade agreements is at its peak. Thus, these requests for consultations depict their faith in the multilateral system.

¹⁵ Ibid.

¹⁶ For more information on WTO Dispute Settlement

<

https://www.wto.org/english/tatop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm>

accessed 22 July 2018.

¹⁷ Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2016- A Statistical Analysis' (2017) 20(1) *Journal of International Economic Law* 176. (Based on the statistical data, authors argue that with regards to intellectual property, the number of complaints has been limited and has been a decline in recent years.)

¹⁸ Ibid.

¹⁹ See China- Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WT/DS362) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm> accessed 22 July 2018/

Other developments

European Union

The European Data Protection Board starts its operations

By Nikolaos Theodorakis

The European Data Protection Board (EDPB) started its operations the same date the General Data Protection Regulation (GDPR) entered into force, 25 May 2018. The GDPR creates a harmonized set of rules applicable to all personal data processing taking place in the EU. The GDPR established the EDPB so that it contributes to the consistent application of data protection rules throughout the European Union, and promote cooperation between the EU's data protection authorities.

The EDPB is the transformation of the Article 29 Working Party, under the previous legal regime. The EDPB is composed of representatives of the national data protection authorities and the European Data Protection Supervisor (EDPS). The EDPB also comprises a secretariat provided by the EDPS and working under the instructions of the EDPB. The secretariat will have an important role in administering the One-Stop-Shop and the consistency mechanism, as explained below. The European Commission has the right to participate in the activities and meetings of

the Board, without however having a voting right.

Objectives

The EDPB aims to ensure the consistent application of the GDPR and of the European Law Enforcement Directive. In doing so, the EDPB is expected to adopt general guidance to clarify the terms of European data protection laws and provide a consistent interpretation regarding their options and obligations. It can also make binding decisions towards national supervisory authorities to ensure a consistent application of the GDPR.

In brief, the EDPB:

- Provides general guidance (e.g. guidelines and recommendations) to clarify the law;
- Advises the European Commission on personal data issues and proposed legislation;
- Adopts consistency findings for cross-border data protection issues; and
- Promotes cooperation and the effective exchange of information and best practice between national supervisory authorities.

The EDPB's principles are independence and impartiality, good governance, collegiality, cooperation, transparency, efficiency, and proactivity.

Program and future actions

The EDPB acknowledged the continuity of its predecessor, the Article 29 Working Party, and endorsed a series of important guidelines on the first day of operations:

- the guidelines on consent;
- the guidelines on transparency;
- the automated individual decision-making and profiling Guidelines on Automated individual decision-making and Profiling for the purposes of the GDPR;
- the personal data breach notification guidelines on personal data breach notification under the GDPR;
- the right to data portability guidelines;
- the data protection impact assessment guidelines determining whether processing is “likely to result in a high risk”;
- the Data Protection Officers guidelines;
- the Lead Supervisory Authority guidelines;
- the paper on the derogations from the obligation to maintain records of processing activities;
- the working document for the approval of “Binding Corporate Rules” for controllers and processors;
- the recommendation on the standard application for approval of Controller and Processor Binding Corporate

Rules, and the elements and principles to be found in said Rules; and

- the guidelines on the application and setting of administrative fines for the purposes of the GDPR.

Moving forward, it is expected that the EDPB will issue guidance for a number of important privacy related issues, like the data portability right, Data Protection Impact Assessments, certifications, the extraterritorial applicability of the GDPR and the role of Data Protection Officers. In doing so, the EDPB plans to regularly consult business representatives and civil society representatives regarding their views on how to implement the GDPR.

One-Stop-Shop and Consistency Mechanism

Apart from the guidelines and binding decisions, the EDPB will be instrumental in assisting with the One-Stop-Shop mechanism and the consistency mechanism. The One-Stop-Shop relates to designating a lead Data Protection Authority to resolve data protection issues involving more than one EU Member State. This innovative GDPR framework will allow for better cooperation for processing activities that span across different states.

The EDPB consistency mechanism is a reference to Article 63 of the GDPR, a mechanism through which DPAs cooperate to contribute to the consistent application of the GDPR. The GDPR makes several

references to this mechanism and it is expected that it will be an important issue for the EDPB to regulate and interpret. In essence, the EDPB should ensure that where a national data protection authority decision affects a large number of individuals in several EU member states, there is prior collaboration and consistency in the interpretation and application of said decision. This is in line with the EU's digital single market agenda that tries to bring consistent application of EU laws throughout the single market.

work as usual, the action plan indicates that the EDPB will undergo significant changes and that it aspires to be in the epicenter of data protection developments in the European Union. The first indications demonstrate that the EDPB wants to become a prominent body through administrative restructuring and a more clear communication strategy. The GDPR enforcement brought data protection in the spotlight, and the EDPB will certainly have a chance, if it so desires, to prove that it is larger, more influential, and more important body than its predecessor.

A true transformation?

It is too early to tell whether the EDPB will prove to be a transformed body, or whether it is a rebranded version of the Article 29 Working Party. Even though it seems that the WP29 subgroups will continue their

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