

TPA Exemption in the EU Gas Sector: Analysis of the EU Commission's Decisional Practice

Rio Pipeline 2019 – Estande da EPE

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Summary

- Context: The EU Natural Gas Market
- Third Party Access: Concept and Raison d'Être
- The Exemption Rule: Directive 2009/73/EC, Art. 36(1)
- Procedures Regarding the Awarding of Exemptions
- Analysis of the Commission's Decisional Practice
- The Opal pipeline case

Methodology

- Analysis of EU Commission's decisions regarding the granting of TPA exemption to interconnectors (Art. 2(17) of the Gas Directive).
- Case study: the OPAL pipeline TPA exemption process.

TPA (Third Party Access)

Context: the EU natural gas market

- In the latest 30 years: deverticalisation, liberalisation and unbundling of vertically integrated undertakings.
- Gas transmission remained regulated → natural monopoly
- Directive 2009/73/EC (The Third Gas Directive)

TPA (Third Party Access)

Concept and *Raison d'être*

- Essential facilities doctrine
- The owner of the infrastructure must provide non-discriminatory access to those who need to ship their production through the pipeline.
- Common practices to undercut TPA and thus abuse market power: refusal of access; withdrawal of access, tariff discrimination, customer “cherry-picking”.
- Target: control market power abuse and foster competition.

TPA (Third Party Access)

The exemption rule

Directive 2009/73/EC
Art. 36(1)

- a) the investment must enhance competition in gas supply and enhance the security of supply;
- b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;

* Content stated as before Directive 2019/692/EC entered into force.

TPA (Third Party Access)

The exemption rule

Directive 2009/73/EC
Art. 36(1)

- c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
- d) charges must be levied on users of that infrastructure; and

* Content stated as before Directive 2019/692/EC entered into force.

TPA (Third Party Access)

The exemption rule

Directive 2009/73/EC
Art. 36(1)

e) the exemption must not be detrimental to competition **or** the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

* Content stated as before Directive 2019/692/EC entered into force.

TPA (Third Party Access)

Granting TPA Exemption. Adjective rule aspects

Directive 2009/73/EC
Art. 36(4)

As regards interconnectors:

- After ruling on the awarding of an exemption, the National Regulatory Authorities (“NRAs”) concerned notify the Commission and send the exemption decision designed on the national level.
- Naturally, this exemption decision is a joint one, as it is the result of discussion between the NRAs of the Member States involved.

TPA (Third Party Access)

Granting TPA Exemption. Adjective rule aspects

Directive 2009/73/EC
Art. 36(9)

- The Commission also holds power either to amend or to withdraw the NRAs' exemption decisions.

Competition AND SoS

Usual conditions for the granting of exemptions:

Enhancement of competition

- Applying a capacity cap (ex.: 50%) on dominant undertakings (ex.: Nabucco; OPAL)

Directive 2009/73/EC
Art. 36(1)(a)

SoS

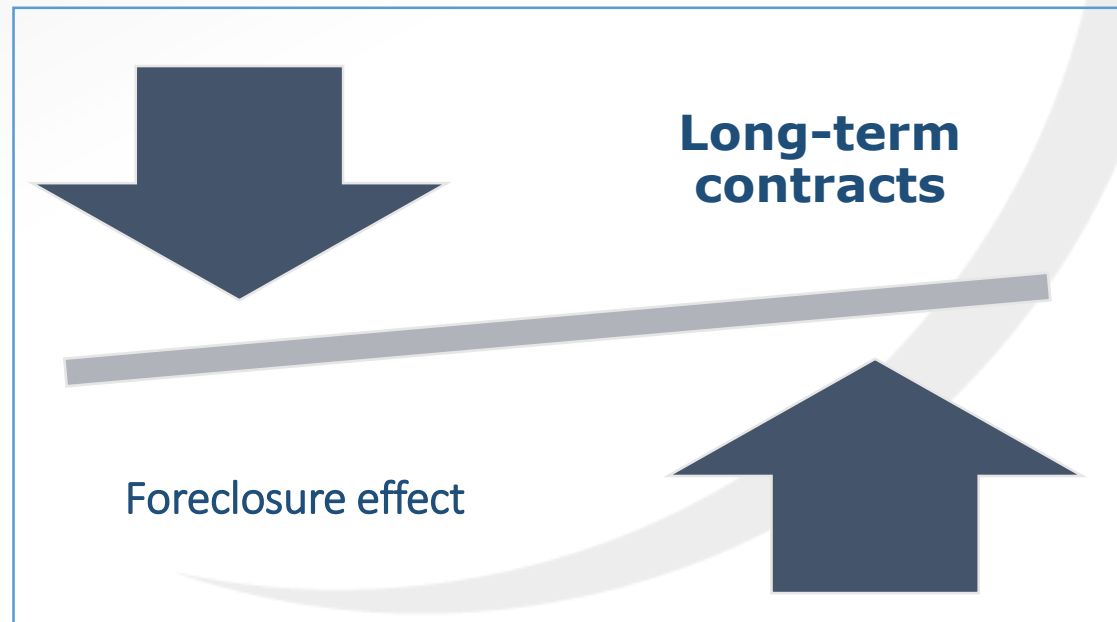
- Development of new routes (ex.: IGB and TAP-1)/Diversification of sources (ex.: IGB, TAP-1)
- Market tests (TAP-1)
- Connection with other markets (TAP-1; Greek market)
- Reservation of capacities for short-term contracts

Investment risk

Usual situation:

Directive 2009/73/EC
Art. 36(1)(b)

- Large upfront investments
- Need to ensure project bankability: long-term contracts



Investment risk

Course of regulatory action and conditions

- Analysis: current economic situation and future projections.
- UIOLI | Secondary market | Short-term contracts.
- Measures to create income stability (e.g. upstream ship or pay).
- Market test: mitigates risk of non-usage and helps assessing project`s dimensions.

The importance of having a forward-looking approach.

Unbundling | Charge levy

Directive 2009/73/EC
Art. 36(1)(c)(d)

- (c) Analysis of compliance with the rule of unbundling of vertically integrated activities was found to be pretty straightforward. Hence, the research did not approach it.
- (d) Charge levy on users: the condition intends to ring-fence non-regulated activities from TSO 's which operate exempted infrastructures. (EC, 2009).

Competition and the Internal Market

Directive 2009/73/EC
Art. 36(1)(e)

Assessment of projects future effects	<ul style="list-style-type: none">• Potential for increasing of market liquidity from more gas imports and short-term capacity.• <u>Each operator takes care of its own structure</u>, irrespective of cost repercussions for the network and congestion risk.
Condition	<ul style="list-style-type: none">• Performance of market tests to ascertain potential needs for capacity expansion.• Increased transparency and capacity management.
Examples	<ul style="list-style-type: none">• IGB and TAP-1 decisions.

Functioning of the Regulated System

Directive 2009/73/EC
Art. 36(d)(e)

Assessment of projects future effects	<ul style="list-style-type: none">• Interconnection enhancement of network.• Future additional gas flows.• Increasing network operation costs = > tariffs
Example	OPAL: "The regulation from tariffs protects the regulated systems from economic risks and additional gas flows increase market's liquidity."

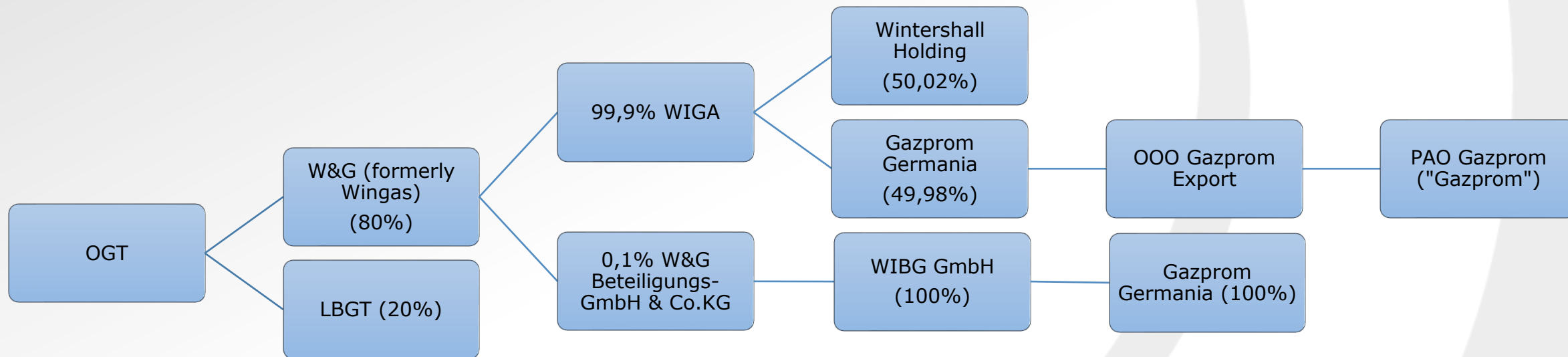
The Opal Pipeline Case

Judicial Review of a Commission's Exemption Decision



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	OPAL
Length	472 km
Diameter	1,400mm (55 in)
Capacity	36 bcm/a
Entry/exit	Greifswald/ Brandov
Operator	Opal Gastransport GmbH & Co KG



The Opal Pipeline Case

Timeline

2009 February: BNetzA: 22-year exemption

July: Commission imposed a capacity cap of 50% on dominant undertakings at the Brandov exit (Gazprom, RWE or Transgaz).

This cap could have been exceeded if Gazprom performed a gas release program of at least 3 bcm/a.

However, gas release program never took place.

The Opal Pipeline Case

Timeline

2013 October: BNetzA Settlement Agreement: Gazprom would be entitled to use 100% of the capacity unless third parties expressed interest through auctions.

The Commission did not validate the settlement and it expired.

2015/2016: unsuccessful auctions for the Greifswald entry point. Proved the absence of competition.

The Opal Pipeline Case

Timeline

2016 May: Second settlement agreement with BNetzA.

Oct: The Commission allowed Gazprom to bid for the remaining 50% alongside third parties without outbidding them for an ensured share of 20%.

10% = 2/3 of Czech Republic's capacity.
Controls potential dominance in the Czech
wholesale gas market.

The Opal Pipeline Case

Timeline

2016 Nov: Third settlement agreement with BNetzA incorporating EU recommendations.

Republic of Poland, PGNIG + German Subsidiary file a complaint in the CJEU questioning the Commission's October decision.

December: stay of execution → CJEU suspends Oct 2016 Commission's decision.

The Opal Pipeline Case

Timeline

2017 July: CJEU lifts the stay of execution. Poland had no evidence that it could not wait for the natural course of proceedings without endangering its SoS.

August: Gazprom started to use OPAL to its full capacity.

As it was seen in the 2015/2016 auctions, there was no third party interest in the OPAL capacity. Therefore, there was still no competition for capacity.

Concluding remarks

OPAL: The October 2014 Commission's decision took into account the effects in adjacent markets and framed potential market power abuse.

According to the Commission, OPAL would not replace Russian gas supply via other routes into the EU (October 2016 decision, para 50). Therefore, it could not be regarded as ill-balanced.

Concluding remarks

Market dominance becomes an issue when it starts being abused.

The more dominant one applicant is on the market, the highest level of scrutiny must be applied when awarding an exemption, **BUT**

When there is no competition (third party interest) and only one dominant undertaking, the regulator must put its efforts towards the fostering of competition.

Questions?



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