



AKADEMIA
LEONA KOŹMIŃSKIEGO

International (inter)connectivity via interconnectors? Gas and Energy market ramifications

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Rankings

Plan

1. Interconnectors as critical pieces of infrastructure in international trade
2. Axiological convergence and continuity between FTA and EU market regulations
3. Disruptions in the continuity between FTA and EU market regulations



1. Interconnectors as critical pieces of infrastructure in international trade

- **Energy market perspective – strictly intra-EU optics (art. 2 point (1) Regulation (EU) 2019/943)**
 - ‘interconnector’ means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States
- **Gas market perspective – international considerations (art. 1 point (1) Directive (EU) 2019/692 ; art. 2 point (17) Directive 2009/73/EC)**
 - ‘interconnector’ means a transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those Member States or a transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of that Member State
- **Commonalities:**
 - Gateway to the common market,
 - Key to the business of manufacturers,
- **Major difference:** capture of the gas pipelines with third countries within the EU regulatory framework,
- **International law challenges:**
 - Territorial jurisdiction (UNCLOS, TFEU),
 - Jurisdictional link v. territorial reach of decision-making powers and practice.



2. Axiological convergence and continuity between FTA and EU market regulations

Free Trade Agreement – Chapter Seven

- **Article 7.1. Objectives**

- In line with global efforts to reduce greenhouse gas emissions, the Parties share the objective of promoting, developing and increasing the generation of energy from renewable and sustainable non-fossil sources, particularly through facilitating trade and investment. To this effect, the Parties shall cooperate towards **removing or reducing tariffs as well as nontariff barriers**, and shall cooperate on **fostering regulatory convergence with or towards regional and international standards**.

- **Article 7.4. Principles**

- Each Party shall:
- ensure that the terms, conditions and procedures for the **connection and access to electricity transmission grids are transparent and do not discriminate against suppliers of the other Party**.



2. Axiological convergence and continuity between FTA and EU market regulations

Free Trade Agreement – Chapter Seven

- **Article 7.6. Exceptions**

- This Chapter is subject to the exceptions provided for in Article 2.14 (General Exceptions), Article 8.62 (General Exceptions), Article 9.3 (**Security and General Exceptions**) and, for greater certainty, to the relevant provisions of Chapter Sixteen (Institutional, General and Final Provisions).
- For greater certainty, subject to the requirement that such measures are not applied in a manner which would constitute a **means of arbitrary or unjustifiable discrimination** between the Parties' products, service suppliers or investors where the same conditions prevail, or a disguised restriction on trade and investment between the Parties, nothing in this Chapter shall be construed as preventing a Party from the adoption or enforcement of measures necessary for the **safe operation of the energy networks concerned, or the safety of energy supply.**

Free Trade Agreement – notable references to the principle of non-discrimination outside Chapter Seven

- **Article 2.11. Import and Export Licensing Procedures**

- Each Party shall ensure that all **export licensing procedures are neutral in application** and are administered in a **fair, equitable, non-discriminatory and transparent manner.**



2. Axiological convergence and continuity between FTA and EU market regulations

Free Trade Agreement – notable references to the principle of non-discrimination outside Chapter Seven

- **Article 6.1. Objectives (Customs and Trade Facilitation)**
 - (...) the Parties agree that **legislation shall be non-discriminatory**, (...) to protect legitimate trade.
- **Article 6.2. Principles (Customs and Trade Facilitation)**
 - The Parties agree that their respective customs provisions and procedures shall be based upon:
 - legislation that **avoids unnecessary or discriminatory burdens** on economic operators, that provides for further trade facilitation for economic operators with high levels of compliance, and that ensures safeguards against fraud and illicit or damageable activities;
 - rules that ensure that **any penalty** imposed for breaches of customs regulations or procedural requirements **is** proportionate and **non-discriminatory**, and that their application shall not unduly delay the release of goods.
- **Article XI:1 GATT 1994**
 - **No prohibitions or restrictions** other than duties, taxes or other charges, whether made effective through **quotas, import or export licences or other measures**, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.



2. Axiological convergence and continuity between FTA and EU market regulations

The principle of non-discrimination is one of the fundamental principles of EU law, enshrined in the Treaties.

EU energy market – notable references to the principle of non-discrimination

- The principle of non-discrimination is both in horizontal and in vertical relations.

Horizontal non-discrimination in the access to infrastructure

- **Article 32 item (1) Gas Market Directive**
 - Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users.
- **Article 6 item (1) Energy Market Directive**
 - Member States shall ensure the implementation of a system of third-party access to the transmission and distribution systems based on published tariffs, applicable to all customers and applied objectively and without discrimination between system users.
- General principles set out in the directives are complemented by i.a.:
 - **Regulation 715/2009** and **Regulation 2019/943**,
 - **Network codes**, especially establishing the rules of capacity allocation mechanism.
- **Duplicate protection of non-discriminatory access to infrastructure** (public enforcement by means of regulatory measures and antitrust law enforcement beside private enforcement).



2. Axiological convergence and continuity between FTA and EU market regulations

Vertical non-discrimination in measures related to gas and energy markets

- **Article 3 Directive (EU) 2009/73/EC**

1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and **shall not discriminate between those undertakings as regards their rights or obligations.**

2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such **obligations shall be clearly defined, transparent, non-discriminatory, verifiable** and shall guarantee equality of access for natural gas undertakings of the Community to national consumers. (...)



2. Axiological convergence and continuity between FTA and EU market regulations

Vertical non-discrimination in measures related to gas and energy markets

- **Article 3 Directive (EU) 2019/944**

1. Member States shall ensure that their national law does not unduly hamper cross-border trade in electricity, consumer participation, including through demand response, investments into, in particular, variable and flexible energy generation, energy storage, or the deployment of electromobility or new interconnectors between Member States, and shall ensure that electricity prices reflect actual demand and supply.

2. When developing new interconnectors, Member States shall take into account the electricity interconnection targets set out in point (1) of Article 4(d) of Regulation (EU) 2018/1999.

(the level of electricity interconnectivity; a socioeconomic and environmental cost-benefit analysis; five dimensions of the Energy Union (energy security; the internal energy market; energy efficiency; decarbonisation; and research, innovation and competitiveness); increasing system flexibility; market integration and coupling)

3. Member States shall ensure that no undue barriers exist within the internal market for electricity as regards market entry, operation and exit, **without prejudice to the competence that Member States retain in relation to third countries.**

4. Member States shall ensure a level playing field where **electricity undertakings are subject to transparent, proportionate and non-discriminatory rules, fees and treatment**, in particular with respect to balancing responsibility, access to wholesale markets, access to data, switching processes and billing regimes and, where applicable, licensing.

5. Member States shall ensure that **market participants from third countries**, when operating within the internal market for electricity, **comply with applicable Union and national law**, including that concerning environmental and safety policy.



2. Axiological convergence and continuity between FTA and EU market regulations

Vertical non-discrimination in measures related to gas and energy markets

- Complementary measures safeguarding market integrity and transparency, i.a. state aid.
- Measures requiring caution in their application from a viewpoint of international trade concerns:
 - **regulatory exemptions and commitments imposed therein,**
 - certification of third country transmission system operator,
 - third country investor scrutiny under the 94/22/EC Hydrocarbon Directive,
 - FDI screening under Regulation (EU) 2019/452.



2. Axiological convergence and continuity between FTA and EU market regulations

Regulatory exemptions

- In order to overcome the risk pertinent to capital-intensive investments in the energy infrastructure a regulatory exemption can be granted for a **definite period of time**. The purpose is to **allow the investor to recoup its investment outlays incurred**. The exemption refers to i.a. third party access, tariff regulation.
- Unlike in the gas industry, in the electricity market the grant of the regulatory exemption is:
 - regulated uniformly across the EU in art. 64 of 2019/943 Regulation in a manner similar to art. 7 of 1228/2003 Regulation and art. 17 of Regulation 714/2009,
 - not premised over a lack of adverse impact on the security of supplies; an utmost concern is the distortion of competition and functioning of European market.
- The exemption is granted by a national regulatory body or an EU agency for energy markets, ACER. It requires an approval from the European Commission. The EC frequently requests the **imposition of conditions and commitments before clearing the exemption**. Those conditions often encompass:
 - restrictions in booking the capacities (art. 3 Porto Empedocle LNG Terminal Decision, at 71 of Shannon LNG Terminal Decision) or
 - a maximum import through unregulated capacities (e.g. OPAL Gaspipeline Initial Decision).
- Currently pending case regarding a refusal of the grant of the regulatory exemption for an interconnector: Aquind v ACER, T-735/18.



2. Axiological convergence and continuity between FTA and EU market regulations

Regulatory exemptions – closer look

Article 36 Gas Market Directive

Substantive provisions for the grant of an exemption from the regulatory regime for new infrastructure

Major new infrastructure [interconnectors and, in the gas market, LNG and storage facilities] may, upon request, be exempted, for a defined period of time, from [such common gas market principles as TPA or tariff regulation] under the following conditions:

- (a) [positive impact on competition and security of supply] the investment must enhance **competition** in gas supply and enhance **security of supply**;
- (b) [incentive effect] the level of **risk attached to the investment** must be such that the investment would not take place unless an exemption was granted;
- (c) [no cross-subsidisation (1)] 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) [no cross-subsidisation (2)] **charges must be levied** on users of that infrastructure; and
- (e) [weighing up further implications] 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.

Criteria for a regulatory exemption under Article 64 (1) Regulation 2019/943 largely converge yet a security of supply is not examined in the electricity market.



2. Axiological convergence and continuity between FTA and EU market regulations

Article 36 Gas Market Directive

Procedural provisions for the grant of an exemption from the regulatory regime for new infrastructure

Step 1

- One-jurisdiction instance – NRA adopts a decision

(3) **The regulatory authority** (...) **may**, on a case-by-case basis, **decide on the exemption** (...)

- Multi-jurisdictional cooperation – ACER steps in

(4) Where the infrastructure in question is located in the territory of **more than one Member State**, the Agency may submit an **advisory opinion** to the regulatory authorities of the Member States concerned (...)

The Agency shall **exercise the tasks conferred on the regulatory authorities** of the Member States:

- (a) where all regulatory authorities concerned have not been able to reach an agreement within a period of six months from the date on which the request for exemption was received by the last of those regulatory authorities; or
- (b) upon a joint request from the regulatory authorities concerned.

Art. 64 (4) and (5) Regulation 714/2009 converges with the procedure established for regulatory exemption for the gas market.



2. Axiological convergence and continuity between FTA and EU market regulations

Article 36 Gas Market Directive

Procedural provisions for the grant of an exemption from the regulatory regime for new infrastructure

Step 2 – seeking EC’s approval (except a refusal to grant the regulatory exemption)

(8) The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, (...) to the Commission, together with all the relevant information with respect to the decision. (...)

(9) Within a period of two months from the day following the receipt of a notification, **the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption.** (...)

(...)

Step 3 – NRA’s role in bringing the decision in accordance with the EC decision

The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

Art. 64 (7) and (8) Regulation 714/2009 converges with the procedure established for regulatory exemption for the gas market.



3. Disruptions in the continuity between FTA and EU market regulations

Regulatory exemption(s) regarding the OPAL gas pipeline

2009 Initial decision **on the grant of the regulatory exemption** adopted by the German national regulatory body and notified to the EC,

- EC submitted its position, in which the institution indicated amendments in the decision adopted by the national regulatory body,
- *Bundesnetzagentur* brought its initial decision in compliance with the position of the EC, which resulted in the imposition of 50% cap on the utilisation of gas pipeline capacities (save for conducting the Gas Release and Capacity Release Programmes).

2016 Initial decision on the grant of the regulatory exemption subsequently revisited

- Initial national act in the form of a settlement agreement entered into by the German NRA, OPAL Gastransport, Gazprom and Gazprom Export,
- The settlement agreement in principle approved by the EC (in the form of a decision),
- Following the EC decision, parties to the settlement agreement made amendments to the original wording thereof and executed the agreement,
- This revision preceded an award of a WTO panel of the Dispute Settlement Body (WT/DS476/R, final report of 10 August 2018, the Appellate Body review pending).



3. Disruptions in the continuity between FTA and EU market regulations

- In its, final report of 10 August 2018 (WT/DS476/R), the WTO panel found that:
'two challenged OPAL conditions, that is, the 50% capacity cap and 3 bcm/year gas release programme, are inconsistent with Article XI:1 of the GATT 1994'
- Similarity in the language of FTA and GATT, probable convergence in the interpretation.
- However, international law does not produce direct legal effects in the EU decision-making:
 - international agreements concluded by the EU become an integral part of the EU legal order (Case 181/73 Haegeman is often cited as the first case to confirm this principle; recent cases see Case C-224/16 Aebtri, para 50; Case C-266/16 Western Sahara Campaign, paras 45-46.)
 - The conclusion of the agreement (usually by a Council decision) makes it directly applicable. In this sense, the EU may be said to adhere to a 'monist' approach. Direct applicability, however, should not be confounded with direct effect.
 - The 'nature and the broad logic' of the agreement does not preclude direct effect and the provisions relied upon appear, as to their content, to be 'unconditional and sufficiently precise' (Joined Cases C-659/13 and C-34/14 C & J Clark International EU:C:2016:74, para 84).
- Multilateral conventions found to lack direct effect on the basis of the 'nature and broad logic' of the agreement include the GATT and other World Trade Organization (hereinafter WTO) agreements (C-149/96 Portugal v Council, para 47; Joined Cases C-659/13 and C-34/14 C & J Clark International, n 18 above, para 85).



Thank you



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