

The European, Middle Eastern and African Antitrust Review 2018

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Global Competition Review is delighted to publish 2018 edition of *The European, Middle Eastern & African Antitrust Review*, one of a series of three special reports that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world’s increasingly complex competition regimes.

Like its sister reports, *The Antitrust Review of the Americas* and *The Asia-Pacific Antitrust Review*, *The European, Middle Eastern & African Antitrust Review* provides an unparalleled annual update, from competition enforcers and leading practitioners, on key developments in the field.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

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European Union: Energy

Salomé Cisnal de Ugarte and Matthew Levitt
Hogan Lovells

The European energy sector has remained under intense competition scrutiny by the European Commission but also by national competition authorities. State aid cases, alongside a few behavioural investigations and mergers, have been of particular relevance at European Union (EU) level. This article focuses on the main EU competition law developments in the energy sector during the past year.¹

The Energy Union Strategy

The EU aims at ensuring that Europe has secure, affordable and climate-friendly energy. To that end, European Commission president Jean-Claude Juncker adopted the Energy Union Strategy as one of his top priorities in February 2015. It pursues the following five closely related objectives:

- ensuring the security of energy supply;
- energy efficiency;
- emissions reduction through an increasing use of renewable resources;
- research and innovation in low-carbon technologies; and
- the creation of an integrated EU-wide energy market.²

EU competition law and policy continues to play an essential role in the attainment of these objectives.³ This preeminent role was further confirmed by the EU Commissioner for Competition, Margrethe Vestager, when she indicated that actions in the field of energy are more effective if the 'efforts to promote competition are combined with other policies aimed at building a true European market'.⁴

Behavioural Investigations

Antitrust enforcement in the field of energy has been carried out mostly by national competition authorities throughout Europe,⁵ with the European Commission concentrating on those cases with an EU-wide impact. This has in turn meant that the main decisions in the period of analysis were based on article 102 rather than article 101 TFEU. This approach is in line with the Commission's strategy stated above and the need for a strong internal market for energy, as emphasised by the February 2015 Commission Energy Union Communication:

Strict enforcement of the Treaty's competition rules [is needed] to prevent companies from distorting the internal energy market. Antitrust enforcement will ensure that energy can flow freely by addressing territorial restrictions in supply contracts as well as upstream/downstream and network foreclosure issues (including interconnectors).⁶

BEH Electricity

On 10 September 2016, the European Commission published the summary of its 10 December 2015 decision to accept commitments from Bulgarian Energy Holding (BEH), the state-owned vertically integrated energy company in Bulgaria.⁷ The Commission decision

concluded the antitrust investigation in relation to an abuse of dominant position.⁸

The Commission had opened the investigation against BEH in late 2012, accusing the company of abusing of its dominant position on the Bulgarian wholesale electricity market.⁹ In August 2014 the Commission reached the preliminary conclusion that BEH had hindered competition on the non-regulated wholesale market in Bulgaria by imposing contractual restrictions where the electricity supplied by the company could be resold. More specifically, the greatest majority of electricity supply contracts concluded between BEH and traders provided that electricity supplied by BEH could only be resold within the country or exported. The contracts enabled BEH to monitor effectively the restrictions and punish the traders who tried to circumvent them.

BEH offered a number of commitments to the Commission to address its concerns. Under these commitments, BEH would set up a power exchange in Bulgaria with the assistance of an independent third party and offer predetermined volumes of electricity on the day-ahead market on this new exchange for a period of five years. BEH also offered to transfer control of the exchange to the Bulgarian Ministry of Finance and, in response to some market testing concerns, it also committed to offer only hourly products on the day-ahead market and to ensure that sufficient volumes would be made available for purchase.

In September 2016 the European Commission also published the opinion of the advisory committee dated 30 November 2015 and the final report of the hearing officer in relation to this case.¹⁰ The advisory committee agreed with the Commission that the commitments offered by BEH were suitable and proportionate, and that in light of the commitments there were no longer grounds for action. The committee also agreed that the case could be concluded by decision pursuant to article 9(1) of Regulation 1/2003.

The other investigation against BEH, relating to access restrictions to key gas infrastructure in Bulgaria, is still ongoing.¹¹

Gazprom

On 13 March 2017, the European Commission invited interested parties to provide comments on the commitments offered by Gazprom to address competition concerns relating to an abuse of dominant position in Central and Eastern gas markets, in breach of article 102 of the TFEU, as a result of some of its business practices.¹² To address the Commission's competition concerns, Gazprom has offered a number of commitments for eight years. Subject to any comments received during market-testing, the Commission intends to adopt a decision under article 9(1) of Regulation 1/2003 to make the commitments binding.

The Commission had sent a statement of objections to Russian gas giant Gazprom alleging the violation of article 102 TFEU in the Central and Eastern European gas market in April 2015. It accuses Gazprom of abusing its dominant position by imposing territorial restrictions in its supply agreements with gas wholesalers. These

territorial restrictions include export ban clauses, destination clauses and other measures preventing the cross-border flow of gas. Moreover, according to the Commission preliminary findings, Gazprom has pursued an unfair pricing policy in five Eastern EU member states ‘by charging prices to wholesalers that are significantly higher compared to Gazprom’s costs or to benchmark prices’.

In terms of commitments, Gazprom has offered to remove all contractual barriers to the free flow of gas in Central and Eastern European gas markets. In addition, it has committed to take active steps to enable their better integration by removing all direct and indirect contractual restrictions that prevent its customers from reselling gas they have bought across borders, or make it economically less attractive for customers to do so. This means that in addition to removing restrictions on gas resale (eg, export bans, destination clauses), Gazprom will remove all clauses which reduce its customers’ business incentives to resell gas (eg, where Gazprom would get a share of the profit from reselling). Gazprom has also committed to make changes to the relevant contracts in order to facilitate market interconnections with Bulgaria. This will put the Bulgarian operator of the gas transmission infrastructure in control of the cross-border flows of gas and facilitate interconnection agreements between Bulgaria and its EU neighbours, in particular with Greece. Finally, Gazprom has committed to give relevant customers in Hungary, Poland and Slovakia the possibility to ask for delivery of all or part of their contracted gas to entry points into the Baltic States and Bulgaria. This shall enable customers to seek new business opportunities in the Baltic States and Bulgaria, even before the connecting gas infrastructure becomes available. Gazprom would be allowed to charge a fixed and transparent service fee, in line with what it would typically charge for such services in the market.

The Commission has also been concerned that territorial restrictions have allowed Gazprom to carve up the market; as a result it may have been able to pursue an excessive pricing policy in Bulgaria, Estonia, Latvia, Lithuania and Poland. Gazprom has therefore committed to introduce many important changes to its contractual price revision clauses to ensure competitive gas prices in these gas markets: gas prices linked to competitive benchmarks; and more frequent and efficient price reviews. For those contracts, for instance in the Baltic States, where price revision clauses do not currently exist, Gazprom will introduce clauses reflecting the above elements. Gazprom has also offered commitments to address the Commission’s concerns relating to the South Stream project in Bulgaria and the Yamal pipeline in Poland. As regards South Stream, Gazprom has committed not to seek any damages from its Bulgarian partners following the termination of the South Stream project. But regarding the Yamal Pipeline, the Commission’s investigation has shown that the situation cannot be changed by this antitrust procedure due to the impact of an intergovernmental agreement between Poland and Russia.

Merger control

In the course of last year, the Commission cleared a significant number of concentrations in energy-related sectors under article 6(1)(b) of the EU Merger Regulation. Most of these cases involved largely unproblematic transactions that were approved under the simplified merger procedure.¹³ Only a few transactions were assessed under the normal merger review procedure. This was the case of the acquisition of joint control over Slovenske Elektrarne (a company active in electricity generation, wholesale and retail supply of electricity, and balancing and ancillary services in Slovakia) by EPH of the Czech Republic and Enel SpA of Italy, as well as the acquisition of joint control over a newly created company, formed by the merger between

Enel Open Fiber and Metroweb Italia, by Enel and Cassa Depositi e Prestiti.¹⁴ The Commission concluded that these transactions would raise no competition concerns as the companies would continue to face strong competition from rival players.

Particularly noteworthy is the acquisition of Vattenfall Europe Generation and Vattenfall Europe Mining by Energetický a Průmyslový Holding (EPH) and PPF Investments (PPF), also approved under the normal merger procedure.¹⁵ The Commission assessed the impact of the acquisition on competition in the markets for the excavation and supply of lignite, the supply of pulverised lignite in Germany, and generation and wholesale supply of electricity, and concluded that the deal would not adversely affect competition in the relevant markets. The Commission’s investigation showed that the transaction would not have an adverse effect on the market for the excavation and supply of lignite as neither of the parties exerts any competitive constraint on each other in their respective regions. The Commission also considered that switching lignite supply between Vattenfall mines and EPH mines would be unlikely in the future because of the high transportation costs and differences in lignite quality between Vattenfall and EPH mines. Moreover, lignite would still face increasing competition from other sources of energy such as natural gas in the years ahead due to Germany’s energy policy aiming to reduce CO₂ emissions. The increase in market share in the supply of pulverised lignite in Germany through the merger was small and the merged entity will still face significant competition from RWE, the market leader in this sector. Finally, the Commission also analysed whether the merged entity would be able to foreclose access to generation and wholesale supply of electricity. The market investigation confirmed though that the merged entity would have neither the ability nor the incentive to deny customers access to supplies. This was in particular based on the limited substitutability of different lignite supplies, the existence of long-term supply agreements between players and the interdependency of the suppliers and customers.

State aid

Aside from the behavioural investigations and mergers outlined above, most of the Commission enforcement action in the past year has concentrated on state aid measures. Most of these cases have been assessed in the light of the Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG), a key element for the creation of an effective EU Energy Union and for the implementation of the EU Clean Energy Package.

The majority of the aid measures notified by EU member states under article 108(3) TFEU were cleared by the Commission without particular difficulties. This is true, most notably, for all forms of aid to energy from renewable sources under section 3.3 EEAG, as well as for the aid measures in the form of reductions or exemptions from environmental taxes under section 3.7 EEAG. Most of the aid schemes notified under section 3.4 EEAG (promotion of energy efficiency measures, including cogeneration, district heating and cooling) were also quite straightforward.¹⁶

The most significant Commission enforcement efforts focused however on capacity mechanisms, which are measures financed by the state to secure electricity supplies (section 3.9 EEAG).

Commission inquiry

On 30 November 2016, the Commission published its Final Report of the Sector Inquiry on Capacity Mechanisms. The report provides useful information on the policy rationales of capacity mechanisms, explains the Commission’s views on the most viable measures to

tackle different types of market failures, and illustrates the main competition problems linked with such measures. It recognises, however, that while ‘the EU as a whole is currently in a situation of overcapacity’ of energy supply, certain member states still face genuine security of supply challenges and are concerned that investments might be insufficient to ensure security of supply in the future.

Two important issues affect the ability of member states to adopt capacity mechanisms. First, ‘Member states proposing capacity mechanisms should make appropriate efforts to address their resource adequacy concerns through market reforms. In other words, no capacity mechanism should be a substitute for market reforms.’ The report identifies certain structural market reforms that if implemented would render capacity mechanisms largely superfluous. These reforms include the removal of excessively low energy price caps, the removal of barriers affecting the ability of demand response providers (ie, energy users that accept to reduce their demand while electricity is scarce), and the design of bidding zones (ie, areas where all energy demand and supply bids are settled at the same time and at the same price) ‘so that appropriate local prices can form to stimulate investment in capacity in those places where it is lacking.’ Second, the member states have an obligation under section 3.9.2 EEAG to identify a well-defined problem of security of supply that cannot be solved by the market itself. This analysis is known as ‘adequacy assessment’. According to the Commission, however, member states often fail to meet the obligation to perform complete adequacy assessments. Moreover, ‘approaches and practices to calculate adequacy vary widely between member states.’ For this reason, the Commission has proposed to introduce legislative measures for the creation of a coordinated European adequacy assessment.

The report then assesses the most appropriate capacity mechanisms depending on the security of supply’s challenges that member states are confronted with (long-term versus temporary adequacy concerns, local adequacy concerns, the need to develop a flexible demand side and educate the behavior of energy consumers). Moreover, the report recalls a general presumption according to which capacity payments – that is administrative payments made to energy operators to make their capacity available during peak demand periods – are unlikely to be an appropriate measure regardless of the specific concerns identified. Indeed, capacity payments ‘are unlikely to set the right price for capacity since they do not allow the market to competitively set the right capacity price, but rather depend on an ‘administrative’ price. They are therefore unlikely to correctly reflect the actual scarcity situation. For the Commission, there is a high risk of under- or over-procurement of capacity – especially as such schemes tend to react slowly to changing market circumstances.

Finally, the report lists the most important competition law principles that must be taken into account when assessing the legality of a capacity payment: the capacity mechanism should be open to all types of providers; competitive price setting; compliance mechanisms and sanctions; and explicit cross-border participation.

Approved capacity mechanisms

In the course of last year, the Commission approved, in the light of section 3.9 EEAG, a number of capacity mechanisms in Germany (the AbLaV interruptibility scheme, a country-wide measure aiming at stabilising the electricity network by reducing electricity consumption of large consumers and the Network Reserve, a temporary four years reserve to ensure sufficient electricity capacity in Southern Germany), France (a market-wide capacity mechanism that explicitly includes and remunerates foreign capacities) and the UK (a supplementary capacity auction scheme aimed to strengthen the auction system, previously approved in 2014, for the setting of the levels of capacity remuneration and the identification of the beneficiaries).

In-depth state aid investigation into the German capacity reserve

On 7 April 2017, the Commission announced the opening of an in-depth State aid investigation under article 108(2) TFEU into the German capacity reserve measure. In extreme synthesis, the capacity reserve measure would require ‘German network operators to procure 2 Gigawatt (GW) of capacity that would be held in reserve outside the market’. Such capacity reserve would be used to provide energy in the event of unforeseeable shortages during the German transition towards more renewable and low-carbon forms of supply.

According to the Commission the reserve has an incentive effect to change the behaviour of energy users, as requested by section 3.9 EEAG. However, the Commission concerns concentrate on other relevant requirements mandated by the EEAG. First, the measure might not contribute to a well-defined objective of public interest, namely protecting the market from unforeseen scarcity situations. Second, the capacity reserve might not be necessary, in view of the fact that is not intended to be temporary in time and some of the core assumptions of the worst case scenario of energy scarcity do not appear to be reasonable. Third, the capacity reserve might not be appropriate and proportionate in view of its restrictive eligibility requirements which, inter alia, do not allow cross-border capacity to explicitly participate in the capacity mechanism. Finally, the capacity reserve does not ‘sufficiently avoid impact on competition and trade, in view of the imperfect separation between the reserve and the market’.

Annex Overview of state aid decisions in the energy sector (1 June 2016 – 23 May 2017)

Case (decision date)	Member state	Legal basis	Summary
SA.42838 – <i>Support to French NEPTHYD tidal energy demo plant</i> (27 July 2016)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.3 (aid to energy from renewable sources) EEAG.*
SA.37345 – <i>Polish certificates of origin system to support renewables and reduction of burdens arising from the renewables certificate obligation for energy intensive users</i> (2 August 2016)	Poland	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG); 2008 Guidelines on State Aid for Environmental Protection (EAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3.2.4 (Aid granted by way of certificates) EEAG as well as the criteria of the EAG.
SA.44840 – <i>2011 Bulgarian RES support scheme</i> (4 August 2016)	Bulgaria	2008 Guidelines on State aid for environmental protection (EAG); Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.3 (Aid to energy from renewable sources) EEAG as well as the criteria of the EAG.

Annex Overview of state aid decisions in the energy sector (1 June 2016 – 23 May 2017)			
SA.45861 – <i>Support to energy intensive users in Bulgaria</i> (4 August 2016)	Bulgaria	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.7.2 thereof (Aid in the form of reductions in the funding of support for energy from renewable sources) EEAG.
SA.43719 – <i>CHP support scheme</i> (8 August 2016)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.4 (Energy efficiency measures, including cogeneration and district heating and district cooling) EEAG.
SA.43468 – <i>Taux réduits de taxe intérieure sur la consommation finale d'électricité (TICFE)</i> (11 August 2016)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.7 (Aid in the form of reductions in or exemptions from environmental taxes and in the form of reductions in funding support for electricity from renewable sources) EEAG.
SA.42955 – <i>German network reserve</i> (21 August 2016)	Germany	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.9 (Aid for generation adequacy) EEAG.
SA.43182 – <i>Support to small hydro power plants up to 10 MW</i> (22 August 2016)	Czech Republic	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.2 (General compatibility provisions) and 3.3 (Aid to energy from renewable sources) EEAG.
SA.43451 – <i>Support to heat production from biogas</i> (22 August 2016)	Czech Republic	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.2 (General compatibility provisions) and 3.3 (Aid to energy from renewable sources) EEAG.
SA.43442 – <i>SDE+: Biomass co-firing</i> (25 August 2016)	The Netherlands	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.3 (Aid to energy from renewable sources) EEAG.
SA.43128 – <i>Modification du soutien aux SER au Luxembourg</i> (26 August 2016)	Luxembourg	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.2 (General compatibility provisions) and 3.3 (Aid to energy from renewable sources) EEAG.
SA.43995 – <i>Competitive Bidding Process for RES in Malta</i> (26 August 2016)	Malta	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.2 (General compatibility provisions) and 3.3 (Aid to energy from renewable sources) EEAG.
SA.41539 – <i>EFSD Investment aid for high-efficiency cogeneration plant in Vilnius</i> (19 September 2016)	Lithuania	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.4 (energy efficiency measures, including cogeneration and district heating and district cooling) EEAG.
SA.44626 – <i>Pilot tender for solar energy</i> (27 September 2016)	Denmark	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3 (Aid to energy from renewable sources) EEAG.
SA.36518 – <i>Certificates of origin for CHP in Poland</i> (28 September 2016)	Poland	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG); 2008 Guidelines on state aid for Environmental Protection (EAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3.2.4 (Aid granted by way of certificates) EEAG as well as the criteria of the 2008 Guidelines on state aid for Environmental Protection (EAG).
SA.43751 – <i>350 MW offshore wind capacity</i> (3 October 2016)	Denmark	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of sections 3.3.1 and 3.3.2.1 (Operating aid granted for electricity from renewable energy sources) EEAG.
SA.41998 – <i>A) Support to electricity from renewable energy sources and combined heat and power installations, and B) Support for electro-intensive users in the form of reductions in electricity support scheme contributions</i> (10 October 2016)	Slovenia	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of sections 3.3 (Aid to energy from renewable sources), 3.4 (Energy efficiency measures, including cogeneration and district heating and district cooling) and 3.7.2 (Aid in the form of reductions in the funding of support for energy from renewable sources) EEAG.
SA.42393 – <i>Reform of support for cogeneration in Germany</i> (24 October 2016)	Germany	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure to support to cogenerated electricity with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.4 (Energy efficiency measures, including cogeneration and district heating and district cooling). Opening of an in-depth investigation under article 108(2) TFEU with respect to certain surcharge reductions. According to the Commission this proposed measure does not fall within the scope of the EEAG. The Commission is conducting its analysis on the basis of 107(3)(c) only.
SA.39621 – <i>French country-wide capacity mechanism</i> (8 November 2016)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.9 (aid for generation adequacy) EEAG

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SA.43913 – <i>Niederrhein–Ruhr heat pipe connection</i> (14 November 2016)	Germany	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of 3.4 (Energy efficiency measures, including cogeneration and district heating and district cooling) EEAG.
SA.43735 – <i>Interruptibility scheme AbLaV</i> (15 November 2016)	Germany	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.9 Aid for generation adequacy) EEAG.
SA.44666 – <i>New RES and CHP support scheme in Greece</i> (16 November 2016)	Greece	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3.2.1 (Operating aid granted for electricity from renewable energy sources) EEAG.
SA.45976 – <i>Aid scheme for promoting high-efficiency cogeneration based on heat demand</i> (16 November 2016)	Romania	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure to support to cogenerated electricity with the internal market (article 107(3) (c) TFEU). The proposed measure meets the criteria of 3.4 (Energy efficiency measures, including cogeneration and district heating and district cooling) EEAG.
SA.41161 § – <i>State aid to Polish coal mining in the period 2015-2018</i> (18 November 2016)	Poland	Council Decision 2010/787/EU	Closure aid of uncompetitive coal mines – Compatibility with the provisions of Council Decision 2010/787/EU.
SA.43414 – <i>Closure of hard coal mines in Romania</i> (24 November 2016)	Romania	Council Decision 2010/787/EU	Closure aid of uncompetitive coal mines – Compatibility with the provisions of Council Decision 2010/787/EU.
SA.44475 – <i>Supplementary Capacity Auction in GB</i> (5 December 2016)	United Kingdom	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3) (c) TFEU). The proposed measure meets the criteria of section 3.9 (Aid for generation adequacy) EEAG.
SA.45867 – <i>The Belgian federal regime governing renewable energy certificates and aid to the Rentel and Norther wind farm projects</i> (8 December 2016)	Belgium	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of sections 3.3 (Aid to energy from renewable sources) EEAG.
SA.43780 – <i>French support to small hydro</i> (12 December 2016)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of sections 3.3 (Aid to energy from renewable sources) EEAG.
SA.44863 – <i>State aid for electricity-intensive undertakings</i> (12 December 2016)	Denmark	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.7.2 (Aid in the form of reductions in the funding of support for energy from renewable sources) EEAG.
SA.46655 – <i>Complément de rémunération pour l'éolien terrestre en 2016</i> (12 December 2016)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of under section 3.3 (Aid to energy from renewable sources) EEAG.
SA.46898 – <i>Mécanisme de soutien aux installations utilisant le biogaz ou les gîtes géothermiques</i> (12 December 2016)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of under section 3.3 (Aid to energy from renewable sources) EEAG.
SA.46882 – <i>Danish RES financing</i> (14 December 2016)	Denmark	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU).
SA.46894 – <i>Amendments to Romanian green certificates system</i> (16 December 2016)	Romania	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3.2.4 (Aid granted by way of certificates for energy from renewable energy sources) EEAG.
SA.38760 – <i>Drax 3rd Unit Biomass Conversion</i> (19 December 2016)	United Kingdom	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3.2.1 (Operating aid granted for electricity from renewable energy sources) EEAG.*
SA.44679 – <i>Modification of the method used to define electro-intensity under the EEG</i> (20 December 2016)	Germany	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of under section 3.3 (Aid to energy from renewable sources) and section 3.7.2 (Aid in the form of reductions in the funding of support for energy from renewable sources) EEAG.
SA.45461 – <i>EEG 2017 – Reform of the Renewable Energy Law</i> (20 December 2016)	Germany	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of under section 3.3 (Aid to energy from renewable sources) and section 3.7.2 (Aid in the form of reductions in the funding of support for energy from renewable sources) EEAG.
SA.40349 – <i>Tarifs d'achat pour l'énergie solaire</i> (10 February 2017)	France	2008 Guidelines on state aid for Environmental Protection (EAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of the EAG.
SA.46259 – <i>Appel d'offre sur 60MW pour installations hydroélectriques</i> (10 February 2017)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of under section 3.3 (Aid to energy from renewable sources) EEAG.

Annex Overview of state aid decisions in the energy sector (1 June 2016 – 23 May 2017)			
SA.47267 – Amendment to UK CfD for RES (16 February 2017)	United Kingdom	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU).*
SA.44622 – Modification of UK Renewable Heat Incentive (RHI) Scheme (27 February 2017)	United Kingdom	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of EEAG.*
SA.38454 – Possible aid to the Paks nuclear power station (6 March 2017)	Hungary	Article 107(3)(c) TFEU. The measure does not fall within the scope of the Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Positive decision (article 107(3)(c) TFEU) with conditions.*
SA.45768 – Czech CHP support as of 2016 (7 March 2017)	Czech Republic	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.4 (Energy efficiency measures, including cogeneration and district heating and district cooling) EEAG.
SA.45974 – Support to Danish Kriegers Flak offshore wind farm (28 March 2017)	Denmark	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3 (Aid to energy from renewable sources) EEAG.*
SA.45852 – German capacity reserve (7 April 2017)	Germany	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Opening of an in–depth investigation under article 108(2) TFEU. According to the Commission there is preliminary evidence that the proposed measure does not meet the criteria of section 3.9 (Aid for generation adequacy) EEAG.
SA.43485 – Soutien à la production d'électricité à partir de gaz de station d'épuration en France (5 May 2017)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3 (Aid to energy from renewable sources) EEAG.*
SA.47205 – Complément de rémunération pour l'éolien terrestre àpd 2017 (5 May 2017)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3 (Aid to energy from renewable sources) EEAG.*
SA.47623 – FIT for solar installation in buildings in France (5 May 2017)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU). The proposed measure meets the criteria of section 3.3 (Aid to energy from renewable sources) EEAG.*
SA.46960 – Amendment to the Dutch renewable support scheme SDE+ – modified support for biogas (10 May 2017)	The Netherlands	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Compatibility of the measure with the internal market (article 107(3)(c) TFEU).*
SA.40454 – Tender for additional capacity in Brittany (15 May 2017)	France	Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG)	Positive decision (article 107(3)(c) TFEU) with conditions. The proposed measure meets the criteria of EEAG.*

* The public version of this decision is not yet available.

Notes

- The present chapter takes into account developments between May 2016 and May 2017. For the purpose of our analysis, we adopt a broad definition of 'energy sector' encompassing oil and gas, coal, nuclear and renewable energy sources, but also electricity and other energy infrastructures, as well as manufacturing of energy-related products such as turbines and power generators.
- For a detailed overview of the Energy Union strategy and of the legislative proposal adopted up to now by the Commission see http://ec.europa.eu/priorities/energy-union-and-climate_en.
- See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank. A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy (COM/2015/080 final), 25 February 2015 (also referred to as the Energy Union Communication).
- See speech of Commissioner Vestager 'Making energy markets work for consumers', 10 June 2016 (available at https://ec.europa.eu/commission/2014-2019/vestager/announcements/making-energy-markets-work-consumers_en).
- For a survey of the legal developments at national level, see U Scholz and T Vohwinkel, 'The Application of EU Competition Law in the Energy Sector', in *Journal of Competition Law & Practice*, 2017, Vol. 8, No. 3.
- See the Energy Union Communication, above No. 3, p. 2.
- Case AT.39767 – BEH Electricity. Summary of Commission Decision of 10 December 2015 published in the Official Journal C 334/6 of 10 September 2016 (see [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0910\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0910(02)&from=EN)).
- For further details see GCR's *The European, Middle Eastern and African Antitrust Review* 2018, pp. 22.
- See European Commission Press Release of 1 December 2012 (available at http://europa.eu/rapid/press-release_IP-12-1307_en.htm).
- See Official Journal of 10 September 2016 C 334/5 ([http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XX0910\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XX0910(02)&from=EN)).
- Case AT.39849 – BEH Gas.
- Case AT.39816. See Communication from the Commission published pursuant to article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39816 — Upstream gas supplies in central and eastern Europe, Official Journal (2017/C 81/09) (see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2017:081:FULL&from=EN>).
- See for instance, M.7859 *OMV/E-Con Gas*, M.7994 *the Kingdom of Denmark/DONG*, M.8032 *RAM/Termica Milazzo*, M.8042 *Centrica/Neas Energy*, M.8075 *Partners Group/Infrared Capital Partners/Merkur Offshore*; M.8092 *PSP/OTPP/Cubico/Renewable Energy Power Generation Companies*; M.8116 *Macquarie/SLFL GIO III/SGI Italia*; M.8119 *DIF/Electricite de France/Thyssengas*; M.8123 *Total/Lampiris*; M.8154 *Alpiq/Getec Energie/JV*; M.8165 *Eneco/Elicio/Norther JV*; M.8178 *First Reserve/Morrison Utility Services*; M.8211 *Marubeni/Toho Gas/Galp Energia/GGND*; M.8232 *Diamond Offshore Wind Holdings III*

- Eneco Wind Belgium/ELNU/Norther*; M.8235 *IPIC/Mubadala*; M.8289 *Engie/Omnes Capital/Predica/Maia Eolis*; M.8307 *EP Investment/EP Investment III/EPH*; M.8339 *Macquarie/Predica/Pisto*; M.8340 *Riverstone/Amci/Fitzroy*; M.8343 *DONG Energy/Macquarie/Swancor/Formosa 1 Wind Power*; M.8347 *EQT Fund MANAGEMENT/Getec Energie Holding/Getec Target Companies*; M.8377 *SPIE/SAG*; M.8400 *Engie Group/Soper/BPCE Group/LCS4 et LCS du Centre*; M.8412 *Engie Services Holding UK/Keepmoat Regeneration Holdings*; M.8413 *Engie/Omnes Capital/Predica/Engie PV Besse/Engie PV Sanguinet*.
- 14 M.7927 *EPH/Enel/SE*; M.8234 *Enel/CDP Equity/Cassa Depositi e Prestiti/Enel Open Fiber/Metroweb Italia*.
- 15 M.8056 *EPH/PPF Investments/Vattenfall Generation/Vattenfall Mining*. See press release http://europa.eu/rapid/press-release_IP-16-3161_en.htm.
- 16 Case SA.42393, *Reform of support for cogeneration in Germany*. In this case, the Commission preliminarily took the view that certain measures (surcharge reductions) proposed by Germany were not in line with the criteria of section 3.4 EEAG and accordingly opened an in-depth investigation under article 108(2) in October 2016.



Salomé Ciscal de Ugarte
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Dr Salomé Ciscal de Ugarte has recently joined the Brussels office of Hogan Lovells as a partner in their antitrust, competition and economic regulation practice. Salomé advises on all aspects of EU competition law, including merger control, investigations (cartels, state aid, dominance and other behavioural issues), compliance and litigation before the EU courts. She has worked extensively in the energy area, having represented companies in the coal and oil sectors, as well as energy consuming companies. In 2013, she received the International Law Office's (ILO) EU Competition Lawyer of the Year Client Choice Award, which recognises those lawyers and law firms around the world that stand apart for the excellent client care they provide and the quality of their service. Clients described her as providing 'brilliant and spot-on advice on the legal issues, as well as on the required strategy to get the best results', as well as her 'extensive experience with both competition law and consumer protection law [which] sets her apart from most practitioners'.

Salomé is associate professor on EU competition law at IE Law School and a fellow of the Centre for European Studies/IE in Madrid. She frequently writes and speaks on issues of competition. She is the president of the Harvard Club of Belgium and a member of the board of the global Harvard Alumni Association.

Salomé graduated summa cum laude in law and economics from the University of Deusto (Premio Extraordinario de Licenciatura) and holds a master of laws (LLM) from Harvard Law School, where she was an associate fellow of the Real Colegio Complutense at Harvard. She obtained a PhD in law from the European University Institute in Florence and has been a Fulbright scholar. Salomé is admitted to practise in Belgium and Spain.



Matthew Levitt
Hogan Lovells

Matthew Levitt is the managing partner of Hogan Lovells' Brussels office. With the globalisation of competition law and enforcement, Matthew helps clients navigate the increasingly challenging international antitrust environment. This includes developing and delivering the joined-up strategies which are essential when faced with the growing power of antitrust authorities globally and their increased ability to coordinate enforcement activity in international investigations and merger clearance processes. Described as 'an excellent and highly intellectual performer - very charismatic, but tough if needed', he handles international and EU cartel investigations and coordinates multi-jurisdictional merger filing processes. Matthew has over 20 years' experience and has been involved in virtually every significant EU and UK competition law case concerning the maritime sector including the formation of P3 and 2M shipping alliances, the container shipping price signalling investigation, the maritime car carriers investigation, the opposition by DFDS to the Eurotunnel/SeaFrance takeover, the investigation of the International Association of Classification Societies, the merger of Maersk and P&O Nedlloyd, and the successful annulment of the €273 million fines on the TACA parties.

Matthew has huge experience in the energy sector, advising on the EU regulatory aspects of the multibillion-dollar Shah Deniz gas pipeline project, and handling mergers in the utilities, water, ports and infrastructure sectors. He 'has the rare advantage of having litigation experience alloyed with superb knowledge', and has handled several ground-breaking cartel and abuse of dominance cases in the European Courts.

Matthew is an Oxford graduate, a member of the Belgium and England and Wales bars, and a member of the Middle Temple and the Law Society.

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As one of the European Union's key administrative and regulatory hubs, Brussels is a pivotal city for companies doing business in Europe. An in-depth understanding of the European Commission, Parliament, and Council can be of vital assistance to clients. Businesses need the best legal representation to ensure optimal results when dealing with European authorities that govern competition and economic regulation.

Our office handles the most challenging and complex projects at the cutting edge of antitrust, competition and economic regulation. Our multidisciplinary and multilingual lawyers enjoy strong professional and personal contacts within European regulatory and legislative bodies, offering clients up-to-the-minute knowledge of procedures and policy priorities at the European level.

Our team has detailed knowledge of key industries under the competition spotlight including transport (aviation, maritime, and rail), energy, consumer goods and IT, postal services, food, communications (media, telecoms and satellites), financial services, life sciences, and automotive. This knowledge allows us to quickly identify commercial practices or aspects of a business arrangement that could give rise to competition risks.

Our Brussels antitrust, competition and economic regulation's team was listed as 'recommended' in Global Competition Review's GCR 100: The World's Leading Competition Practices (2017). We help our clients across a range of competition issues including: advisory/counselling; cartels and abuse; compliance programmes and training; complaints; investigations; litigation and competition advocacy; merger control; private enforcement litigation; public procurement; and state aid.