



eni trading and shipping spa

TAR NC: Article 35 Existing contracts

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Article 35 Existing contracts (1/2)



ENTSOE - Implementation Document for TAR NC Second Edition (revised – July 2018)*

Article 35 Existing contracts

1. This Regulation shall not affect the levels of transmission tariffs resulting from contracts or capacity bookings concluded before 6 April 2017 where such contracts or capacity bookings foresee no change in the levels of the capacity- and/or commodity-based transmission tariffs except for indexation, if any

Article 3 Definitions

'Transmission tariffs' means the charges payable by network users for transmission services provided to them

Article 35 Existing contracts

Legitimate expectations

The TAR NC must not affect the tariff level in some existing fixed price contracts. **The application of the TAR NC to certain existing contracts would undermine the principle of legal certainty and legitimate expectations.**

Existing contracts must satisfy three criteria to qualify for Article 35: (i) Type: only fixed price contracts or capacity bookings under such contracts qualify, not floating price contracts since their signatories foresaw future price changes. (2) Extent: only the transmission tariff level qualifies for exemption. In principle, the TAR NC will apply to fixed price contracts, but not to their transmission tariff level. Article 35 extends both to capacity- and to commodity-based transmission tariffs. (3) Time: the 'existing' fixed price contracts must have been concluded before the TAR NC entered into force. Qualifying contracts cannot be renewed or extended after their termination date. [...]

Capacity-/commodity-based transmission tariffs in existing contracts

Some MSs have existing contracts that fix capacity- and/or commodity-based transmission tariffs for their entire duration, except for regular indexation. **The tariffs in such qualifying contracts are not subject to any future changes of the regulatory framework:**

- **For capacity-based transmission tariff: (1) if the exact 'initial' level is fixed (Great Britain);** (2) if the exact 'initial' level and the indexation formula is fixed (Bulgaria, the Czech Republic, the Netherlands (BBL Company), Slovakia);
- For commodity-based transmission tariff, if the exact level is fixed as a percent of transported gas, which is not subject to indexation (Bulgaria, the Czech Republic, the Netherlands (BBL Company), Slovakia).

Eni's legal opinion

"Our view is that it is the correct interpretation that EU TAR Article 35(1) provides protection for Eni and that the regulation will not apply to transmission tariffs resulting from Eni's contracts/capacity bookings (which do not contemplate changes in the levels of the capacity- and/or commodity-based transmission tariffs). This position may differ following Brexit, although it is currently contemplated that the provisions of EU TAR will be implemented into UK legislation in either current or materially similar form"

* https://www.entsog.eu/sites/default/files/entsog-migration/publications/Tariffs/2018/TAR1004_180501_2nd%20%28revised%29%20Implementation%20Document_Low-Res.pdf

Article 35 Existing contracts (2/2)



- The proper application of Article 35 of the EU TAR NC would ensure that the principle of legal certainty and legitimate expectations is met. It provides network users with confidence that once a long-term contract price for capacity has been struck it will be honoured for the entire duration of the relevant contract. This is also relevant given that they will not be able to adjust their capacity booking behavior in response to significant changes in the regulatory framework brought about by the new proposed charging regime.
- It is our opinion that Article 35 of the EU TAR NC shields both the reserve price and the capacity-based revenue recovery charge (RRC). In particular, we consider that the RRC is part of the overall transmission tariff and shapes the overall transmission tariff level. In fact, in other EU countries (e.g. Italy, Germany, France) where yearly floating transmission tariffs are being applied since several years, the RRC is an integral part of the capacity tariff to be paid by network users. In other words, the RRC is not a separate component of the transmission tariff and network users are presented with a tariff that includes potential adjustments due to revenues under/over-recovery of the Transmission System Operator (TSO) in previous year(s).
- Eni's proposal will provide the right solution in particular for long-term existing capacity contracts that cannot be utilised. Such contracts will not be forced to pay any additional charges that were not expected to be paid when these contracts were concluded and when the charging regime and market context were radically different. The implementation of Eni's proposal will safeguard the fair treatment of existing capacity holdings in the new proposed regime, avoid a serious distortion of competition and ensure that the market is efficient and certain:
 - Efficient, because it will allow existing capacity holders to make appropriate contributions towards revenue recovery based on the original contractual arrangements; and
 - Certain, because it will ensure sanctity of contracts and avoid exposing users to unacceptable levels of unforeseen regulatory risk.
- Finally, the suggested approach also prevents further undue penalisations to be incurred by holders of capacity at Bacton ASEP. It has to be considered that when Bacton ASEP was split to meet CAM compliance in November 2015, some of the Existing Bacton Capacity – requested by the relevant holders to be allocated to the new Bacton UKCS ASEP – due to congestion was forcefully re-allocated to the new Bacton IP ASEP. This resulted in a substantial interference in the property capacity rights of the affected capacity owners. Bacton IP Existing Capacity holders (unbundled CAM capacity) have now the legitimate expectation that the new prospective charging regime should see an improvement and not a further worsening of their conditions, ensuring respect and safeguard to their contractual rights.