



Press and Information

General Court of the European Union

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Judgment in Case T-616/18

Polskie Górnictwo Naftowe i Gazownictwo v Commission  
(Commitments by Gazprom)

**The General Court dismisses the action brought against a decision by the Commission to make binding on Gazprom commitments proposed by the latter in order to address competition concerns raised by the former in relation to the national markets for the upstream wholesale supply of gas in the countries of eastern and central Europe**

*The decision to approve those commitments is not vitiated by the procedural or substantive errors claimed by the applicant*

Between 2011 and 2015, the European Commission took several measures in order to investigate the functioning of the gas markets in central and eastern Europe. In that context, it launched an investigation into Gazprom PJSC and Gazprom export LLC (together, 'Gazprom') in relation to the supply of gas in eight Member States, namely Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland and Slovakia ('the countries concerned').

On 22 April 2015, the Commission sent a statement of objections <sup>1</sup> to Gazprom, claiming that it was abusing its dominant position on the national markets for the upstream wholesale supply of gas in the countries concerned for the purpose of preventing the free flow of gas there in breach of Article 102 TFEU, which prohibits such abuse.

In the statement of objections, the Commission, more specifically, considered that Gazprom's strategy involved three sets of potentially anticompetitive practices:

- first, Gazprom had imposed territorial restrictions in its gas supply contracts with wholesalers and certain industrial clients in the countries concerned ('the objections concerning territorial restrictions');
- second, those territorial restrictions had made it possible for Gazprom to pursue an unfair pricing policy whereby it charged excessive prices in five of the countries concerned, namely Bulgaria, Estonia, Latvia, Lithuania and Poland ('the objections concerning pricing practices');
- third, Gazprom had made its supplies of gas in Bulgaria and Poland conditional on its obtaining certain commitments from wholesalers in relation to gas transport infrastructure. Those commitments, in particular, concerned acceptance by the applicant, the Polish wholesaler Polskie Górnictwo Naftowe i Gazownictwo S.A., of Gazprom having increased control over the management of investments regarding the Polish section of the Yamal pipeline, one of the main gas transit pipelines in Poland ('the Yamal objections').

In order to resolve those competition issues, Gazprom submitted formal proposed commitments to the Commission and, after receiving observations from interested parties, submitted revised proposed commitments ('the final commitments').

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<sup>1</sup> In accordance with Article 10 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).

In parallel with those proceedings, the applicant lodged a complaint on 9 March 2017, alleging abusive practices by Gazprom, which overlapped to a great extent with the concerns already expressed in the statement of objections. However, the Commission rejected that complaint.<sup>2</sup>

By decision of 24 May 2018 ('the contested decision'),<sup>3</sup> the Commission approved and made binding the final commitments proposed by Gazprom and closed the administrative proceedings, in accordance with Article 9 of Regulation No 1/2003.<sup>4</sup>

The applicant brought an action for annulment of that decision before the General Court, arguing that the Commission, in particular, had in a number of respects infringed Article 9 of Regulation No 1/2003 and the principle of proportionality, inasmuch as the commitments were incomplete and insufficient, and also that it had infringed several provisions of the FEU Treaty, in particular inasmuch as the decision was contrary to Article 194 TFEU and the energy-policy objectives of the European Union.<sup>5</sup>

That action has been dismissed by the Eighth Chamber (Extended Composition) of the General Court.

### Findings of the General Court

The General Court finds that the contested decision is not vitiated by any of the procedural or substantive errors raised by the applicant in its six pleas in law.

In particular, first, the General Court rejects the plea alleging that the Commission accepted the final commitments even though they do not address the Yamal objections.

In that respect, the General Court notes that obligations related to observing the principle of proportionality, in the context of the commitments procedure provided for by Article 9 of Regulation No 1/2003, cannot mean that all the competition concerns set out in a preliminary assessment, including when, as in the present case, that assessment takes the form of a statement of objections, must necessarily be addressed in the commitments proposed by the undertakings concerned. Nevertheless, the Commission was required to justify the absence of commitments addressing the Yamal objections in the present case.

Thus, in accordance with its obligation in that regard, the Commission provided reasons why it had not required such commitments. In that respect, the Commission referred, in particular, to a decision of the Urząd Regulacji Energetyki (the Polish Energy Regulatory Office) adopted in May 2015, which, within the framework of the EU legislation relating to the gas sector,<sup>6</sup> certified the operator of the Polish section of the Yamal pipeline, Gaz-System S.A., as an independent system operator ('the certification decision'). Consequently, **even if Gazprom had attempted to increase its control over the management of investments regarding the Polish section of the Yamal pipeline, the fact remains that, at the stage of approving the final commitments and in accordance with the certification decision, it was Gaz-System that exercised decisive control over those investments** and that, in addition, certain large-scale investments relating to that section had been implemented.

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<sup>2</sup> Commission Decision C(2019) 3003 final of 17 April 2019 rejecting the complaint (Case AT.40497 – Polish gas prices). The action for annulment of that decision has been upheld by the General Court in its judgment of 2 February 2022, *Polskie Górnictwo Naftowe i Gazownictwo v Commission (Rejection of a complaint)*, T-399/19 (see also PR No 22/22).

<sup>3</sup> Decision C(2018) 3106 final of the European Commission of 24 May 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe) (OJ 2018 C 258, p. 6).

<sup>4</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

<sup>5</sup> The Republic of Poland and the Republic of Lithuania, inter alia, intervened in these proceedings in support of the form of order sought by the applicant.

<sup>6</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

Accordingly, the certification decision was capable of dispelling the concerns on which the Yamal objections were based. Therefore, having regard to the discretion enjoyed by **the Commission** in the context of accepting commitments under Article 9 of Regulation No 1/2003, that institution **was entitled to accept the final commitments**, even though they do not include any measure addressing the Yamal objections.

**Nor did the Commission, in accepting the final commitments**, despite the absence of commitments relating to the Yamal objections, **infringe the principle of sincere cooperation**. In that regard, the General Court rejects the claim that the Commission has prevented the national competition authorities and the national courts from taking action against the practices covered by those objections. While those bodies may not take decisions that would run counter to the contested decision, the Commission did not find that no infringement of EU competition law had taken place. Consequently, that decision is without prejudice to the power of the national competition authorities and the national courts to take steps as regards Gazprom's conduct in relation to the Yamal objections and their power to apply Articles 101 and 102 TFEU.

Second, **the General Court rejects the plea calling into question the fact that the Commission accepted the final commitments although those commitments did not adequately address the objections concerning pricing practices**. In that regard, Gazprom undertook to introduce, in gas supply contracts of at least three years' duration entered into with its clients in the five countries concerned, a new procedure for revising the price formulas that determine contractual rates. That new procedure stipulates in particular that those formulas are to be in line with the pricing guidelines included in those commitments and provides for the possibility to refer possible disputes on that issue to an arbitration tribunal established within the European Union. According to the General Court, **the Commission did not commit a manifest error of assessment** in that regard, including **in so far as it accepted a commitment that provided for that new revision procedure rather than imposing an immediate change to the pricing formulas in the contracts concerned**.

**Nor did the Commission err in law in finding in the contested decision that an arbitration tribunal established within the European Union would be obliged to respect and apply EU competition law**. In its judgment in *Eco Swiss*,<sup>7</sup> the Court of Justice confirmed that Articles 101 and 102 TFEU are public policy provisions which must be applied by national courts of their own motion, those courts being required to grant an application for annulment of an arbitration award if they consider that that award is contrary to those articles. In the light of those considerations and since Regulation No 1/2003 concerns the implementation of Articles 101 and 102 TFEU, the General Court rules that **national courts may also grant an application for annulment of an arbitration award if they consider that that award is contrary to a commitments decision adopted under Article 9 of Regulation No 1/2003**.

Third, **the General Court rejects the plea calling into question the fact that the Commission accepted the final commitments although those commitments did not adequately address the objections concerning territorial restrictions**. According to the General Court, **the Commission did not commit a manifest error of assessment in that regard, including in so far as concerns the commitment to establish a mechanism to change gas delivery points**.

Fourth, **the General Court rejects the plea that the Commission disregarded the energy-policy objectives of the European Union**, as set out in Article 194(1) TFEU.

In that connection, the General Court notes that as regards the commitments procedure, the Commission may, in its preliminary assessment, take account of objectives pursued by other provisions of the Treaty, in particular in order to find, on a preliminary basis, that there has been no infringement of the competition rules. However, with regard to the examination of proposed commitments, the Commission is to confine itself to determining, first, whether those commitments address the concerns it has expressed to the undertaking in question and, second, whether that undertaking has proposed less onerous commitments that equally adequately address those

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<sup>7</sup> Judgment of 1 June 1999, *Eco Swiss*, [C-126/97](#).

concerns, even if the procedure may not lead to a result which is contrary to the specific provisions of the Treaties.

In addition and in any event, the applicant has failed to demonstrate that the final commitments would, as such, be contrary to the energy-policy objectives or the principle of energy solidarity.

Fifth, **as regards purported breaches of procedure connected with the handling of the Yamal objections, the Commission, according to the General Court, committed no such breach during its consultation with the Advisory Committee on Restrictive Practices and Dominant Positions** provided for by Article 14 of Regulation No 1/2003. While consultation with the Advisory Committee is an essential procedural requirement, there can be no question in the present case of conduct on the part of the Commission that prevented that committee from delivering its opinion in full awareness of the facts nor, therefore, of an infringement affecting the legality of the contested decision. In that respect, the General Court also rejects the applicant's argument that the Commission misled the interested parties during the market consultation.

Sixth, **the General Court rejects the applicant's arguments alleging infringement of various procedural rights in the handling of its complaint of 9 March 2017 reporting various purportedly abusive practices by Gazprom** which overlapped to a large extent with the concerns set out in the statement of objections.

As regards the Commission's decision not to deal with that complaint as part of the administrative proceedings that were closed by the contested decision, the General Court finds that **the opening in the present case of separate proceedings to handle the complaint was not in itself improper**, taking account of the legitimate grounds put forward by the Commission, which concerned procedural economy and its wish not to delay the investigation of a case that was at an advanced stage by widening its scope.

Nevertheless, the General Court states that **the opening of separate proceedings to deal with the complaint cannot deprive the applicant of the enjoyment of its right as a complainant to receive a copy of the non-confidential version of the statement of objections and to make known its views in writing in the context of the commitments procedure**. In that respect, while the Commission, in conducting the two procedures in parallel, displayed some ambiguity with regard to the applicant's participation in the commitments procedure and also with regard to its right to receive a copy of the statement of objections and to submit observations relating to that document in the context of that procedure, those circumstances stopped short of affecting the effective exercise of its rights in the procedure in question, which was brought to an end by the contested decision.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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