



General Court of the European Union

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Order of the President of the General Court in Cases T-849/16 R, T- 883/16 R and T-130/17 R

PGNiG Supply & Trading GmbH, Poland, and Polskie Górnictwo Naftowe i Gazownictwo S.A. v Commission

Press and Information

The President of the General Court rejects the applications for a stay of execution of the Commission's decision that 50% of the transport capacities of the OPAL gas pipeline are to be subject to a bidding procedure

The applicants have failed to show that the harm suffered as a result of the contested decision is serious and irreparable and therefore that decision remains applicable until delivery of the judgments on its lawfulness

The OPAL gas pipeline, to the east, is the on-shore section of the Nord Stream 1 gas pipeline which transports natural gas from Russia to Western Europe via the Baltic Sea. Brought into service on 13 July 2011, it connects the town of Lubmin, near to Greifswald in Germany, with the town of Brandov in the Czech Republic. Its use is subject to the supervision of the German Federal Network Agency.

Under a Commission decision of 2009¹ and a decision of the German Federal Network Agency of the same year, the capacities of the OPAL pipeline are exempt, for a period of 22 years, from the application of the provisions of the directive concerning the internal market in natural gas.² That directive requires the pipeline managers to give gas suppliers non-discriminatory access to their services.

By virtue of that Commission decision, the Russian gas company, Gazprom, which has a dominant position on the natural gas supply market in a number of Member States of the European Union, was authorised to reserve a maximum of 50% of the transport capacities of the OPAL pipeline. However, the decision provides that that limit may be exceeded if Gazprom transfers a volume of 3 billion m³ of gas in the OPAL pipeline to the market under an open, transparent and non-discriminatory procedure.

The 50% of the capacities of that pipeline not reserved has, however, never been used, since Gazprom has never implemented the gas transfer programme.

At the request of the German Federal Network Agency, the Commission, by a decision of 28 October 2016,³ decided to open the non-reserved 50% of the capacities of the OPAL pipeline to competition. Despite the fact that, in that context, the manager of the OPAL pipeline was thus required to take measures to promote access by gas suppliers other than Gazprom to that network, it cannot be ruled out that, after the bidding procedure organised to sell the liberalised capacities, the greater part of those capacities will be acquired by Gazprom, which would enable that company to increase the diversification of the transport of gas from Russia to Western Europe.

The Republic of Poland and the companies PGNiG Supply & Trading GmbH, Poland, and Polskie Górnictwo Naftowe i Gazownictwo S.A. brought actions before the General Court of the European

¹ Decision C(2009) 4694 of 12 June 2009.

² 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).

³ Commission Decision of 28 October 2016 on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation, adopted on the basis of Article 36 of 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.

Union seeking the annulment of the 2016 Commission decision. They also requested the President of the General Court to stay the execution of that decision until the date of delivery of the judgments on the substance. They are of the view that the increase in transport capacities through the OPAL pipeline will lead, necessarily, to a reduction in the transports of gas via the Yamal-Europe and Fraternité gas pipelines (which also transport natural gas from Russia to Western and Eastern Europe) and, accordingly, will threaten the security of the gas supply in Poland or will adversely affect competition. They consider that that irreparable harm is likely to materialise before that date.

By orders of 23 December 2016, the President of the General Court granted a provisional stay of execution of the contested decision until a definitive decision on the applications for a stay.

By his orders published today, the President of the General Court recalls, first of all, that the stay of execution of an act may be granted if it is established that to grant it is, *prima facie*, justified in fact and in law and that it is a matter of urgency that it be granted in order to avoid the party seeking it suffering serious and irreparable harm before the decision in the main proceedings is made.

In the present case, the President of the General Court finds that there are two contracts concluded by Gazprom which are currently applicable, namely a transit contract for the transport of natural gas via the Polish section of the Yamal-Europe pipeline to supply the Western European markets (including Poland) until 2020 and a contract concluded in 1996 with PGNiG for deliveries of natural gas until the end of 2022. Consequently, **the use of the transport capacity of the Polish section of the Yamal-Europe pipeline and Gazprom's deliveries to the Polish market are, *prima facie*, guaranteed until the abovementioned dates.**

Thus, even if the certainty of the harm alleged by the Republic of Poland and the two companies were sufficiently demonstrated, it could occur at the earliest only on expiry of those contracts. In the light of the average duration of proceedings before the General Court, the judgments on the substance in the present cases will probably be delivered during 2019. Accordingly, the President of the General Court finds that **the Republic of Poland and the two companies have failed to adduce sound evidence that they are unable to await the outcome of the proceedings in the main actions without being exposed to serious and irreparable harm.**

With regard to the argument that the contested decision enables the conclusion of contracts under private law which it will no longer be possible to annul even in the event of an earlier annulment of the decision, the President of the General Court notes that, **in that hypothetical situation, remedies are available against the possible implementation of those acts.**

Since the harm alleged is not immediate, the President of the General Court finds that the requirement of urgency is not met. In those circumstances, he rejects the applications for a stay of execution of the contested decision and lifts the stay of execution ordered on 23 December 2016.

NOTE: The General Court will deliver final judgment on the substance of this case at a later date. An order as to interim measures is without prejudice to the outcome of the main proceedings. An appeal, limited to points of law only, may be brought before the President of the Court of Justice against the decision of the President of the General Court within two months of notification of the decision.

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The full text of the orders [T-849/16 R](#), [T-883/16 R](#) and [T-130/17 R](#) is published on the CURIA website.

Press contact: Holly Gallagher ☎ (+352) 4303 3355