



Press and Information

General Court of the European Union

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Judgment in Case T-883/16  
Poland v Commission

## **The General Court annuls the Commission decision approving the modification of the exemption regime for the operation of the OPAL gas pipeline**

*That decision was adopted in breach of the principle of energy solidarity*

The gas pipeline Ostseepipeline-Anbindungsleitung (OPAL) is the terrestrial section to the west of the Nord Stream 1 gas pipeline. Its entry point is located in Germany and its exit point is in the Czech Republic. In 2009, the Bundesnetzagentur (BNetzA, the German regulatory authority) notified the Commission of two decisions that exempted the capacities for cross-border transmission of the planned OPAL pipeline from the application of the rules on third party access and tariff regulation laid down in Directive 2003/55.<sup>1</sup> Those decisions concerned the shares belonging to the two owners of the OPAL pipeline.<sup>2</sup> The same year, the Commission adopted a decision by which it requested the BNetzA to modify its decisions by adding certain conditions.<sup>3</sup> Under those conditions, in particular, a dominant undertaking, such as Gazprom, could reserve only 50% of the cross-border capacities of the OPAL pipeline, unless it released onto the market a volume of gas of 3 billion m<sup>3</sup>/year on that pipeline ('the gas release programme'). In accordance with those three decisions of 2009, the capacities of the OPAL pipeline were exempted from the application of the rules on regulated third-party access and tariff regulation on the basis of Directive 2003/55.

The OPAL pipeline was put into service in 2011 and has a capacity of about 36.5 billion m<sup>3</sup>/year on its northern section. By contrast, its southern, cross-border section has a capacity of 32 billion m<sup>3</sup>/year. The difference of 4.5 billion m<sup>3</sup>/year was intended to be sold in the Gaspool market area, which comprises the north and east of Germany.

In the OPAL pipeline's current technical configuration, natural gas can be supplied at its entry point only by the Nord Stream 1 pipeline, which is used by Gazprom group to transport gas from Russian gas fields. Since Gazprom has not implemented the gas release programme referred to in the original decision, only 50% of the transport capacity of the OPAL pipeline has been used.

In 2016, the BNetzA notified the Commission, on the basis of Directive 2009/73,<sup>4</sup> of its intention, following the request submitted by Gazprom, to modify certain provisions of the exemption granted in 2009 concerning the share of the OPAL pipeline operated by OGT. In essence, that modification consisted of replacing the restriction on the capacities that could be reserved by dominant undertakings imposed by the application of the Commission decision of 2009 with the obligation, for OGT, to offer by auction at least 50% of the capacity operated by it, namely approximately 12.3 billion m<sup>3</sup>/year, of which 11 billion m<sup>3</sup>/year was to take the form of fixed dynamically attributable capacity (feste dynamisch zuordenbare Kapazitäten (DZK)) and approximately 1.4 billion m<sup>3</sup>/year

<sup>1</sup> Directive 2003/55/EC of the European Parliament and of the European Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

<sup>2</sup> The Opal pipeline is owned by WIGA Transport Beteiligungs-GmbH & Co. ('WIGA'), which owns an 80 % share of that pipeline, and E.ON Ruhrgas AG, which owns a 20 % share thereof. WIGA is jointly controlled by OAO Gazprom and BASF SE. The company operating the share of OPAL pipeline belonging to WIGA is OPAL Gastransport GmbH & Co. KG ('OGT').

<sup>3</sup> Decision C(2009) 4694 of 12 June 2009 ('the original decision').

<sup>4</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).

was to take the form of fixed freely attributable capacities (feste frei zuordenbare Kapazitäten (FZK)) at the exit point of the OPAL pipeline. If, for two consecutive years, the demand for FZK capacities exceeded the initial offer of 1.38 billion m<sup>3</sup>/year, OGT was required, subject to certain conditions, to increase the offer of such capacities up to a maximum of approximately 3 billion m<sup>3</sup>/year.

On 28 October 2016, the Commission approved the modifications to the exemption regime envisaged by the BNetzA, subject to certain changes.<sup>5</sup> The BNetzA then modified the exemption granted by its 2009 decision concerning the share of the OPAL pipeline operated by OGT by concluding with the latter a contract governed by public law.

Taking the view that the Commission decision infringes, inter alia, the principles of energy security and energy solidarity, Poland<sup>6</sup> applied to the General Court of the European Union for the annulment of the 2016 decision.<sup>7</sup> According to that Member State, the grant of a new exemption relating to the OPAL pipeline threatens the security of gas supply in the European Union, in particular in central Europe.

By its judgment today, the General Court rejects, first of all, Poland's submission that the 2016 decision granted a new exemption from third party access. It notes in that regard, in particular, that the Commission did not approve the introduction of a new exemption but the modification of an existing exemption.

The General Court next examines Poland's argument that the 2016 decision breaches the principle of energy solidarity<sup>8</sup> in that it enables Gazprom and undertakings in the Gazprom group to redirect additional volumes of gas onto the EU market by fully exploiting the capacities of the North Stream 1 pipeline. Taking into account the lack of significant growth in demand for natural gas in central Europe, according to Poland, that would, as its only possible consequence, influence the conditions of supply and use of transmission services on the pipelines competing with OPAL. The General Court observes, in that regard, that that principle imposes not only obligations of mutual assistance where, for example following natural disasters or acts of terrorism, a Member State is in a critical or emergency situation as regards its gas supply, but also requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures likely to affect the interests of the EU and other Member States as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.

The General Court states that the application of the principle of energy solidarity does not mean that the EU energy policy must never have negative impacts on the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests both of the European Union and of the various Member States and to balance those interests where there is a conflict. Therefore, the Commission was required, in the context of the 2016 decision, to assess whether the modification of the exemption regime for the OPAL pipeline proposed by the BNetzA could affect the interests, in the field of energy, of other Member States and, if so, to balance those interests with the interest that that modification had for Germany and, if relevant, the European Union.

The General Court finds that the principle of solidarity is not referred to in the 2016 decision and that it does not appear that the Commission, as a matter of fact, conducted an examination of that principle. Both the examination in the original decision and the additional examination in the 2016 decision concerned only the effect that the putting into service and the increase in the capacity effectively used of the OPAL pipeline on the security of supply in the EU in general. Thus, the

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<sup>5</sup> Commission Decision C(2016) 6950 final on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation ('the 2016 decision').

<sup>6</sup> Supported by Latvia and Lithuania.

<sup>7</sup> Supported by Germany.

<sup>8</sup> Article 194(1) TFEU.

Commission stated that, inter alia, first, the availability of additional transmission capacities at the German-Czech border would benefit all the regions accessible from that place by existing or future infrastructures and, second, that the additional capacity did not allow the other transit routes to be entirely substituted.

By contrast, the Commission did not carry out an examination of the impact of the modification of the exemption regime for the OPAL pipeline on Poland's security of supply. Furthermore, the wider aspects of the principle of energy solidarity were not addressed in the 2016 decision. It does not appear therefore that the Commission has examined what the consequences might be, in the medium term, in particular for Poland's energy policy, of the transfer to the Nord Stream 1/OPAL transit route of a share of the volumes of natural gas previously transported by the Yamal and Braterstwo pipelines, nor that it has weighed those effects against the increased security of supply at the EU level, which it found.

In those circumstances, the General Court finds that the 2016 decision was adopted in breach of the principle of energy solidarity.

Consequently, the General Court annuls that Commission 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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Press Contact: Jacques René Zammit 📞 (+352) 4303 3355

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