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Challenging the European Commission Decision on the Opal Gas Pipeline

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The European Commission decision permitting Gazprom to use a greater capacity of the Opal pipeline than it already does is based on the erroneous assumption that this will help enhance both security and competition in the supply of natural gas. The Commission evaluates the circumstances of the case incorrectly and ignores changes to EU energy legislation. Poland should consider challenging this decision before the EU Court of Justice, or intervening in a case already brought before the Court by private entities.

On 28 October, the European Commission (EC) announced a change to its 2009 decision defining the terms under which Gazprom may use the Opal gas pipeline. This change raises serious doubts about the Commission's interpretation of EU rules relating to the gas market.

Current Status of the Pipeline. Opal was built between 2009 and 2011, under the initiative of the Russian Gazprom and German BASF and E.ON. From the formal perspective, the pipeline is owned by their joint venture, OPAL NEL Transport, and managed by OPAL Gastransport, a company indirectly controlled by BASF and Gazprom. Opal is mainly used to transport natural gas (up to 36.5 billion cubic metres per year) from Russia through the Nord Stream gas pipeline. It runs from German Greifswald in the Baltic, along Poland's western border, to Brandov in the Czech Republic.

In 2009, German regulator Bundesnetzagentur (BNetzA) exempted the transmission of gas through the Opal pipeline to the Czech Republic from the obligations to apply regulated tariffs and to ensure non-discriminatory regulated access to all third parties (the "TPA rule") at 100% for 22 years. The European Commission ordered the BNetzA to modify this decision by limiting the use of the capacity of the Opal pipeline by companies with a dominant market position in the Czech Republic (Gazprom and RWE Transgas) to 50% in total. These companies could use the remaining 50%, but only if they sold three billion cubic metres of gas transported by the pipeline on competitive terms.

The EC Decision of 2016. Gazprom has taken steps to have the imposed limit repealed. The EC revised permission given by the BNetzA once again (the EC decision still not having been made public). According to the new rules, the transmission of the gas through the Opal pipeline to the Czech Republic will be exempt from the application of the TPA rule only to the tune of 50 per cent. The other half will be divided into 20% and 30% segments, the former to be made available exclusively through the German Gaspool gas trading hub, with Gazprom and RWE being able to bid for it at the base price. Therefore, they will be able to reserve this capacity only if there are no others willing to do so. The remaining 30% will be sold at auction without limitation, so will also be available to Gazprom. The use of this part will, however, be subject to tariffs. Thanks to the solution adopted by the European Commission, Gazprom will de facto be able to increase its use of the capacity of the pipeline by 30% and may increase it even further by at least a part of the remaining 20%. The latter is all the more probable, given that, at an auction in September, no other party expressed an interest in using the Opal pipeline.

The new decision of the EC was adopted based on Article 36 of Directive 2009/73/EC and will be evaluated in the light of the criteria laid down therein, which must be met cumulatively. The company which owns the pipeline must be separate, at least in terms of its legal form, from of the company which manages it; charges must be levied on users of the pipeline; the level of risk attached to the investment must be such that the investment would not be realised unless an exemption were to be granted; the pipeline must enhance competition in gas supply and enhance security of supply; the exemption

must not be detrimental to, among other things, competition or the effective functioning of the internal market in natural gas.

The most controversial aspect of the EC decision is the acceptance that the functioning of the Opal pipeline pursuant to the new rules will enhance the security of supply and competition in gas supply to the EU and that it will not be detrimental to competition.

Incorrect Interpretation of the Law. While interpreting the notion of “security of supply,” the EC disregards the changes which have taken place in EU energy law since 2009. According to Article 194 of the Treaty on the Functioning of the European Union (TFEU), EU energy policy shall aim, in a spirit of solidarity between the Member States, to ensure the security of energy supply throughout the EU. The obligation to ensure that this provision is applied lies with the EC, as confirmed by Regulation No 994/2010 of the European Parliament and the Council. Article 3 of this regulation provides that the security of gas supply is a shared responsibility of natural gas undertakings, Member States and the Commission, within their respective areas of activities and competences. At the same time, it entrusts the Commission with responsibility for coordinating the actions of national authorities in the field of security of supply at regional and EU level.

In this light, while assessing the BNetzA decision, the EC should interpret the notion of “security of supply” contained in Article 36 of Directive 2009/73/EC broadly, taking into account all EC legislation. It cannot focus exclusively on the consequences entailed by this decision for the energy security of Germany and the Czech Republic, countries directly involved in the Opal project. It must also assess whether this decision prejudices the security interests of Central European countries, which are closely linked to them, namely Poland and Slovakia, and the interests of the EU as a whole. In accordance with Annex 26 to the unratified, but temporarily applied (pursuant to Article 486) EU-Ukraine Association Agreement, the EC is also obliged to refrain from acts that could result in a significant disruption or interruption of the supply of natural gas between Ukraine and the EU.

With the option of utilising greater capacity of the Opal pipeline, Gazprom will be able to increase the transmission of gas through the Nord Stream pipeline, which is currently at approximately 70% capacity. This, in turn, will enable the company to reduce or even halt the transport of gas by the Brotherhood gas pipeline to Ukraine and Slovakia, or by the Yamal gas pipeline to Poland, on a discretionary basis. It will, therefore, threaten the security of supply of at least these three countries. It should also be emphasised that the actions of Russian government-controlled Gazprom are not in strict accordance with economic criteria. Some of its decisions, such as the sale of gas to Belarus at a preferential price prior to January 2015, are politically motivated, and the losses which result from them are compensated by the state. The possible penalties for the suspension of contracted gas supplies can therefore also be covered by the Russian budget.

Erroneous Assessment of the Facts. Allowing Gazprom to use the Opal gas pipeline to a much greater extent, and to pump even more gas to the Czech Republic (and, through the Czech-German Gazela gas pipeline, indirectly to Germany), will not lead to increased competition in gas supply to these countries. On the contrary, its effect will increase the dependence of Czech and German customers on Gazprom and will handicap competing suppliers entering the market. The current lack of broader interest in the transmission of gas by the Opal pipeline to the Czech Republic suggests a coordination of market behaviour of smaller players, subordinating them to a much stronger competitor based on fear of retaliation. Neither can Gazprom or its subsidiaries be regarded as competitors of RWE Transgas, which has a dominant market position in the Czech Republic, since the EC itself imposed a common total capacity limit on these companies in 2009, due to their very close cooperation on the Czech market. Increasing their share in this market cannot, therefore, be considered as a positive development in terms of competition.

The new exemption threatens other projects aimed at the real diversification of supply sources and the reduction of a part of Central Europe’s dependence on gas from Russia, which is often underlined by the EU. A significant increase in the supply of Russian gas will undermine the economic rationale for the implementation of these projects. The previous exemption granted to the Opal pipeline has already contributed to the withdrawal of German investors from the Nordal pipeline project, which was to partially overlap with Opal and be used to transport natural gas from the Nord Stream pipeline into the vicinities of Berlin. The new exemption may negatively affect the construction of gas interconnectors between Poland, the Czech Republic and Slovakia, the aim of which was to allow the delivery of gas from the LNG terminal in Świnoujście. In contrast to the Opal pipeline, both interconnectors, between Poland and the Czech Republic, and Poland and Slovakia, have been included as crucial elements of one of the four top-priority European gas corridors in Commission Regulation 2016/89. The EC should keep this in mind.

Conclusions and Recommendations. In its decision on the Opal pipeline, the EC assessed the effects on competition and security of gas supply. The EC assessment addressed only the markets of those countries through which the pipeline runs. The Commission did the same in the case of the Gazela pipeline in 2011, and the TAP pipeline in 2013. In view of the above, such an approach should be regarded as inappropriate.

Poland should consider challenging the EC decision in the Opal case before the EU Court of Justice, pursuant to Article 263 of the TFEU (action for annulment). It would be advisable to persuade Slovakia to undertake a similar step. The Polish government may also intervene in the case brought by private entities. On 4 December 2016, PGNiG Supply & Trading GmbH, a subsidiary of the Polish company PGNiG active on the German gas market, instituted proceedings against the EC decision before the Court and filed an additional application for implementation of the decision to be suspended.

Poland may also suggest that Ukraine trigger the “early warning mechanism,” provided for in Annex 26 to the EU-Ukraine Association Agreement, which would draw the EU’s attention to a situation that may potentially lead to a significant distortion or even interruption of the supply of natural gas to the Union through Ukraine, arising from the EC’s decision.