



Current Legal Situation of the OPAL Pipeline

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In December 2016, companies of the PGNiG Group took successful legal action to suspend the implementation of a European Commission decision on the rules relating to the operation of the OPAL gas pipeline, changed by the German regulator for the benefit of Gazprom. Nevertheless, Gazprom has increased the use of the pipeline to full capacity. While its behaviour cannot be considered incompatible with EU and German law, the actions of German authorities violate the EU principle of sincere cooperation. Poland should urge the European Commission to ensure that, pending the delivery of the final judgment, the new rules on the operation of the OPAL gas pipeline are not applied.

Legal Actions. On 4 December 2016, PGNiG Supply & Trading GmbH, a company belonging to the Polish PGNiG capital group, lodged a complaint with the Court of Justice of the European Union (CJEU) against a decision of the European Commission (EC) of 28 October 2016. The decision grants Gazprom de facto permission to significantly increase the amount of natural gas transported through the OPAL pipeline and, as a result, negatively affects Poland's energy security.¹ At the same time, the company requested that the CJEU suspend the enforceability of this decision. On 16 December, the Polish government lodged a similar complaint and request. On 23 December 2016, the CJEU ruled that implementation of the decision should be suspended. Comments by PGNiG officials and CJEU practice suggest that the order will remain in force until the final decision in the case is given. Also, according to the Rules of Procedure of the Court of Justice, the order is not subject to appeal.

On 15 December 2016, PGNiG Supply & Trading GmbH and its mother company, PGNiG S.A., lodged a complaint with the German Higher Regional Court in Düsseldorf against a settlement agreement signed on 28 November 2016 by the German Network Agency, Bundesnetzagentur (BNetzA), OPAL Gastransport GmbH & Co. KG, and two Gazprom subsidiaries. The agreement aimed to adapt rules relating to the operation of the OPAL gas pipeline to the decision of the EC. Both PGNiG Group companies also asked for a temporary suspension of the new rules. On 30 December 2016, the Düsseldorf court issued an order partly accepting their request, which prohibited auctions for the daily, weekly, monthly and annual capacities of the OPAL pipeline. On the same day, BNetzA issued a decision suspending the operation of the 28 November agreement.

Law and Reality. On 19 December 2016, OPAL Gastransport organised an auction of OPAL capacities for January 2017. According to media reports, Gazprom bought them all. Moreover, a significant increase in the use of the OPAL pipeline and the interconnected Nord Stream was observed just a few days later, on 22 and 23 December. Data provided by the European Network of Transmission System Operators for Gas (ENTSO) show that, on 22 December, the overall use of capacity of both pipelines was an estimated 69% and 76%, respectively. On 28 December, these figures had risen to 90% and 91%, and they currently stand at around 99% and 101%. The ENTSOG data relating to the period starting from 22–23 December 2016 until 1 January 2017 demonstrate gradually increasing one-day capacity reservations of the interruptible capacity of the OPAL pipeline (with a noticeable decrease on 31 December). One can thus assume that, until the end of 2016, Gazprom reserved limited OPAL capacity on the basis of one-day contracts, and from January 2017 it started to use it to the full extent, based on monthly auctions won on 19 December 2016.

The reason for Gazprom and OPAL Gastransport's disregard of the CJEU order is the poor legal construction of the procedure for granting exemptions from the application of certain provisions of the directive (such as the principle of

¹ More about the pipeline itself and the decision in: S. Zaręba, "Challenging the European Commission Decision on the OPAL Gas Pipeline," *PISM Bulletin*, no. 84 (934), 6 December 2016.

third-party access and tariff regulation), provided for in EU Directive 2009/73/EC. According to Article 36 of this directive (upon which the Commission decision, subsequently suspended by the CJEU, was based), the decision on exemption is addressed only to the regulatory authority of the Member State which notifies the European Commission that it has granted an exemption. Neither the owners of the pipeline nor its users or transmission system operators are its recipients. This interpretation is confirmed by the decision of 28 October, in which BNetzA is noted as the sole addressee. Meanwhile, Article 288 of the Treaty on the Functioning of the European Union (TFEU) clearly states that “A decision which specifies those to whom it is addressed shall be binding only on them.”

OPAL Gastransport and Gazprom subsidiary companies are therefore free from any obligations resulting from the decision of the EC or the order of the CJEU. Their activities are regulated solely by German law, and these companies have followed it nearly perfectly. Legally, the 28 November agreement between the Gazprom subsidiaries, BNetzA and OPAL Gastransport remained in force until the Düsseldorf court issued an order by which it was temporarily suspended. Gazprom and OPAL Gastransport could therefore successfully invoke the rights arising from the agreement and the gradual increase of Gazprom’s one-day capacity reservations did not violate German law.

The situation changed after the German court issued its suspension order on 30 December and BNetzA implemented it. Whereas the order itself was also addressed only to BNetzA, the German regulatory authority’s prohibition against, among other things, new daily auctions, was binding on the OPAL pipeline operator and its users. This is why the capacity reservation made by Gazprom for 31 December was noticeably lower than before (similar to the those earlier than December). It also explains why a decrease in the use of the pipeline was observed on that day. Thus, Gazprom signalled its compliance with the BNetzA decision as the rules of OPAL operation reverted to their previous form. Moreover, the subsequent increase of reservations made and capacities used by Gazprom since 1 January this year did not constitute a violation of the BNetzA decision, since the company won the auctions on 19 December and the BNetzA decision was not retrospective.

Conclusions. The complaint lodged against the settlement agreement signed on 28 November 2016, by the German Network Agency, OPAL Gastransport GmbH & Co. KG, and two Gazprom subsidiaries, should be considered an important step towards a real limitation of the use of the OPAL pipeline in accordance with the intention of the CJEU. For, in the light of EU law alone, one could only hope for voluntary compliance from Gazprom with the CJEU order suspending the EC decision. However, the importance of this step must not be overestimated. Inducing Gazprom to reduce the transport of gas through the OPAL pipeline to early December 2016 levels would be a difficult task. So far, the company has demonstrated its ability to take advantage of poorly constructed law and the permissive attitude of the German authorities. Among potential threats is the extremely strict material scope of the BNetzA decision, which only forbids the operator of the pipeline, OPAL Gastransport, from holding daily, weekly, monthly and annual auctions. It does not, however, prohibit auctions for other periods, such as within-day or quarterly, and nor does it limit Gazprom’s right to participate in such auctions. It is clear from the grounds of the BNetzA decision that the court in Düsseldorf imposed an obligation to adopt such a solution on the German regulatory authority. However, the imposition of an obligation so weak and easy to circumvent, in order to maintain the status quo and prevent irreparable harm to the complainants (which is the aim of interim measures introduced in such cases), may only be considered either as a basic error or deliberate negligence.

While Gazprom and OPAL Gastransport simply take maximum advantage of the room left for them to manoeuvre in, the actions of the German state authorities arouse surprise. One can infer from the judgments in cases C-465/93 *Atlanta Fruchthandelsgesellschaft* and C-94/00 *Roquette Frères* that, in cases in which the CJEU orders interim measures such as the suspension of the operation of an EC decision, the Member State authorities (including the courts) must take into account its position to the fullest extent possible. This is particularly crucial in cases where the EU and national authorities are obliged to coordinate their activities in their respective areas of competence in order to attain the objectives of the EU treaties. Otherwise, the national authorities violate the obligation of sincere cooperation provided for in Article 4, paragraph 3 of the Treaty on the European Union. Such a situation occurs in the case at hand.

Poland should consider prompting the European Commission to take action to force the German authorities to respect the CJEU order. An important test of the effectiveness of the measures already adopted by Germany, and Gazprom’s compliance, will arise in early February, when the period for which Gazprom bought the available capacity at auctions in December 2016 will be over. If the use of the capacity of the OPAL pipeline does not drop to the levels observed at the beginning of December 2016, it will be clear proof that the German authorities have not properly implemented the CJEU order.