Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

10 September 2019*

(Internal market in natural gas — Directive 2009/73/EC — Commission Decision approving the variation of the conditions for the exemption from EU requirements of the rules governing the operation of the OPAL pipeline in regard to third party access and tariff regulation — Article 36(1) of Directive 2009/73 — Principle of energy solidarity)

In Case T-883/16,

Republic of Poland, represented by B. Majczyna, K. Rudzińska and M. Kawnik, acting as Agents,

applicant,

supported by

Republic of Latvia, represented by I. Kucina, G. Bambāne and V. Soņeca, acting as Agents,

and by

Republic of Lithuania, represented initially by D. Kriaučiūnas, R. Dzikovič and R. Krasuckaitė, and subsequently by R. Dzikovič, acting as Agents,

interveners,

v

European Commission, represented by O. Beynet and K. Herrmann, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented initially by T. Henze and R. Kanitz, and subsequently by R. Kanitz, acting as Agents,

intervener,

ACTION pursuant to Article 263 TFEU seeking the annulment of Commission Decision C(2016) 6950 final of 28 October 2016 on the review of the conditions for exemption of the OPAL pipeline, granted under Directive 2003/55/EC, from the rules on third party access and tariff regulation,

* Language of the case: Polish.

THE GENERAL COURT (First Chamber, Extended Composition),

composed of I. Pelikánová (Rapporteur), President, V. Valančius, P. Nihoul, J. Svenningsen and U. Öberg, Judges,

Registrar: F. Oller, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 October 2018,

gives the following

Judgment

I. Legal framework

1 Directive 2003/55/EC of the European Parliament and of the 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common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57), was repealed and replaced by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural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).

2 Article 32 of Directive 2009/73, which is identical to Article 18 of Directive 2003/55, reads as follows:

‘Third party access

1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs — and the methodologies, where only methodologies are approved — are published prior to their entry into force.

2. Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.

3. The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules.’

3 Article 36 of Directive 2009/73, which replaced Article 22 of Directive 2003/55, reads as follows:

‘New infrastructure

1. Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:

(a) the investment must enhance competition in gas supply and enhance security of supply;

(b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;

(c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;

(d) charges must be levied on users of that infrastructure; and

(e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

…

3. The [national regulatory authority] may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2.

…

6. An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

…

8. The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. That information may be submitted to the Commission in an aggregated form, enabling the Commission to reach a well-founded decision. In particular, the information shall contain:

(a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted or refused the exemption together with a reference to paragraph 1 including the relevant point or points of that paragraph on which such decision is based, including the financial information justifying the need for the exemption;

(b) the analysis undertaken of the effect on competition and the effective functioning of the internal gas market resulting from the grant of the exemption;

(c) the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;

(d) in case the exemption relates to an interconnector, the result of the consultation with the regulatory authorities concerned; and

(e) the contribution of the infrastructure to the diversification of gas supply.

9. Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where

further information is sought by the Commission. That additional period shall begin on the day following the receipt of the complete information. The initial two-month period may also be extended with the consent of both the Commission and the regulatory authority.

…

The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

…'

4 Paragraph 28a(1) of the Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz — EnWG) (German law on the supply of electricity and gas) of 7 July 2005 (BGBl. 2005 I, p. 1970, 3621) ('the EnWG'), in the version applicable to the facts in the present case, allows the Bundesnetzagentur (BNetzA, Federal Network Agency, Germany), inter alia, to exempt interconnectors between the Federal Republic of Germany and other States from the provisions governing third party access. The conditions for the application of Paragraph 28a of the EnWG are the same, in essence, as those of Article 36(1) of Directive 2009/73.

II. Background to the dispute

5 On 13 March 2009, the BNetzA, the German national regulatory authority, notified the Commission of the European Communities of two decisions of 25 February 2009 which exempted the capacities for cross-border transmission of the planned gas pipeline Ostseepipeline-Anbindungsleitung (OPAL) from the application of the rules on third party access laid down in Article 18 of Directive 2003/55 and tariff regulation laid down in Article 25(2) to (4) of that directive. The OPAL gas pipeline is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, the point of entry to which is located close to the area of Lubmin, near Greifswald, in Germany, and the point of exit from which is in the area of Brandov in the Czech Republic. The two decisions concerned the respective shares held by the two owners of the OPAL pipeline.

6 The Opal pipeline is owned by WIGA Transport Beteiligungs-GmbH & Co. ('WIGA', previously W & G Beteiligungs-GmbH & Co. KG, previously Wingas GmbH & Co. KG), 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 the OPAL pipeline belonging to WIGA is OPAL Gastransport GmbH & Co. KG ('OGT').

7 By decision C(2009) 4694 ('the original decision'), of 12 June 2009, the Commission asked the BNetzA, pursuant to Article 22(4), third subparagraph, of Directive 2003/55 (now Article 36(9) of Directive 2009/73) to vary its decisions of 25 February 2009 by adding the following conditions:

'(a) Without prejudice to the requirement in (b), an undertaking dominant on one or several large markets in natural gas upstream or downstream covering the Czech Republic shall not be authorised to reserve, in a single year, more than 50% of the transport capacities of the OPAL pipeline at the Czech border. Reservations from undertakings belonging to the same group, such as Gazprom and Wingas, shall be examined together. Reservations from dominant undertakings/groups of dominant undertakings which have concluded significant long-term contracts for the supply of gas shall be examined on an aggregated basis …

(b) The limit of 50% of the capacities may be exceeded if the undertaking concerned releases to the market a volume of 3 billion m^3 of gas on the OPAL pipeline under an open, transparent and non-discriminatory procedure ("Gas Release Programme"). The undertaking managing the pipeline or the undertaking required to carry out the programme must ensure the availability of

corresponding transport capacities and the free choice of the exit point ("Capacity release programme"). The form of the Gas Release and Capacity Release programmes is subject to the approval of the BNetzA.'

8 On 7 July 2009, the BNetzA amended its decisions of 25 February 2009 by incorporating the conditions referred to in paragraph 7 above included in the original decision. The exemption from the rules was granted by the BNetzA for a period of 22 years.

9 The OPAL pipeline was put into service on 13 July 2011 and has a capacity of about 36.5 billion m^3 /year in its northern section between Greifswald and the entry point of Groß-Köris to the south of Berlin (Germany). By contrast, the southern section of the OPAL pipeline, between Groß-Köris and the exit point at Brandov, has a capacity of 32 billion m^3/year. The difference of 4.5 billion m^3/year was destined to be sold in the Gaspool market area, which comprises the north and east of Germany.

10 By virtue of the original decision and the decisions of the BNetzA of 25 February 2009, as amended by its decision of 7 July 2009, the capacities of the OPAL pipeline were entirely exempted from application of the rules governing third party access and tariff regulation on the basis of Directive 2003/55.

11 In the current technical configuration, natural gas can be supplied at the pipeline entry point close to Greifswald only by the Nord Stream 1 pipeline, used by the Gazprom group to transport gas from Russian gas fields. As Gazprom did not implement the gas release programme referred to in the original decision, the non-reserved 50% of the capacity of that pipeline has never been used, with the result that only 50% of the transmission capacity of the OPAL pipeline has been used.

12 On 12 April 2013 OGT, OAO Gazprom and Gazprom Eksport LLC formally requested the BNetzA to vary certain provisions of the exemption granted in 2009.

13 On 13 May 2016, the BNetzA notified the Commission, on the basis of Article 36 of Directive 2009/73, of its intention, following the request submitted by OGT, OAO Gazprom and Gazprom Eksport, to vary certain provisions of the exemption granted in 2009 regarding the share of the OPAL pipeline operated by OGT by concluding with the latter a public law contract, which, under German law, is equivalent to an administrative decision.

14 In essence, the variation proposed by the BNetzA consisted of replacing the restriction imposed by the original decision on the capacity that could be reserved by dominant undertakings (see paragraph 7 above) with the obligation, for OGT, to offer, by auction, at least 50% of the capacity operated by it, namely 15 864 532 kWh/h (approximately 12.3 billion m^3/year), of which 14 064 532 kWh/h (approximately 10.98 billion m^3/year) was to take the form of fixed dynamically attributable capacity (feste dynamisch zuordenbare Kapazitäten (DZK)) and 1 800 000 kWh/h (approximately 1.38 billion m^3/year) to take the form of fixed freely attributable capacities (feste frei zuordenbare Kapazitäten (FZK)) at the exit point of Brandov. If, for two consecutive years, the demand for FZK capacities exceeded the initial offer of 1 800 000 kWh/h, OGT was required, under certain conditions, to increase the offer of such capacities up to a ceiling of 3 600 000 kWh/h (approximately 2.8 billion m^3 /year).

15 On 28 October 2016, the Commission adopted, on the basis of Article 36(9) of Directive 2009/73, Decision C(2016) 6950 final on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation granted under Directive 2003/55 ('the contested decision'), which is addressed to the BNetzA. The procedure laid down in Article 36 of Directive 2009/73 corresponds in essence to that laid down in Article 22 of Directive 2003/55, which constituted the legal basis for the original decision. The contested decision was published on the Commission website on 3 January 2017.

16 In the contested decision, the Commission first of all observed, in recitals 18 to 21, that, although Article 36 of Directive 2009/73 did not contain a provision explicitly covering the possibility of varying an exemption, such as that contained in the original decision authorised under Article 22 of Directive 2003/55, it followed from the general principles of administrative law that decisions with long-lasting effects might be subject to a review. Thus, in view of the principle of congruent forms and in order to ensure legal certainty, the Commission found that it was appropriate in this case to examine the proposed variation to the original exemption, as submitted by the BNetzA, under the procedure set out in Article 36 of Directive 2009/73 for new installations. As to the substantial conditions that such a variation was required to satisfy, the Commission considered that, in the absence of specific review clauses, changes to the scope of an exemption granted previously or to the conditions attached to that exemption had to be justified and that, in that respect, new factual developments that had occurred since the original exemption decision could constitute a valid reason for a review of the original decision.

17 As to the substance, by the contested decision the Commission approved the variations to the exemption regime proposed by the BNetzA, subject to certain amendments, namely, in particular:

– the initial offer of capacities to be auctioned was required to cover 3 200 000 kWh/h (approximately 2.48 billion m^3/year) of FZK capacities and 12 664 532 kwh/h (approximately 9.83 billion m^3/year) of DZK capacities;

– an increase in the volume of FZK capacities had to be offered at auction in the subsequent year, if, at an annual auction, demand exceeded 90% of the capacities offered, and had to be made in tranches of 1 600 000 kWh/h (approximately 1.24 billion m^3/year) up to a maximum of 6 400 000 kWh/h (approximately 4.97 billion m^3/year);

– an undertaking or group of undertakings with a dominant position in the Czech Republic or controlling more than 50% of the gas arriving at Greifswald could bid for FZK capacities only at the base price, which was required to be set no higher than the average base price of regulated tariffs on transmission networks from the Gaspool area to the Czech Republic for comparable products in the same year.

18 On 28 November 2016, the BNetzA amended the exemption granted by its decision of 25 February 2009 concerning the share of the OPAL pipeline operated by OGT, in accordance with the contested decision, by entering into a public-law contract with OGT which, under German law, is equivalent to an administrative decision.

III. Procedure and forms of order sought

19 By application lodged at the Court Registry on 16 December 2016, the Republic of Poland brought the present action.

20 By a separate document, lodged at the Court Registry on the same day, the Republic of Poland submitted an application for interim measures, which was rejected by order of 21 July 2017, *Poland* v *Commission* (T-883/16 R, EU:T:2017:542). The costs were reserved.

21 By documents lodged at the Court Registry on 19 January, 20 and 29 March 2017 respectively, the Federal Republic of Germany applied to intervene in the present proceedings in support of the form of order sought by the Commission, whilst the Republic of Latvia and the Republic of Lithuania applied to intervene in support of the form of order sought by the Republic of Poland. Since the main parties raised no objections, the President of the First Chamber of the General Court granted those applications to intervene.

22 The defence was lodged at the Court Registry on 3 March 2017.

23 By a document lodged at the Court Registry on 13 March 2017 the Republic of Poland, following the publication of the contested decision on 3 January 2017, submitted written submissions complementary to the application and raised an additional plea in law.

24 By a document lodged at the Court Registry on 9 June 2017, the Commission lodged its observations on the Republic of Poland's written submission of 13 March 2017.

25 The reply and the rejoinder were lodged at the Court Registry on 2 June and 31 August 2017, respectively.

26 By a document lodged at the Court Registry on 22 December 2017, the Republic of Poland requested, pursuant to Article 28(1) and (5) of the Rules of Procedure of the General Court, that the case be referred to the Grand Chamber or, at the very least, a chamber sitting with five judges. On 16 February 2018, the Court decided not to propose referring the case to the Grand Chamber and took note of the fact that, under Article 28(5) of the Rules of Procedure, the case was attributed to the First Chamber, sitting in its extended composition.

27 As measures of organisation of the procedure, the Court invited the Republic of Poland and the Commission to produce various documents and reply to various questions. The Republic of Poland and the Commission complied with those requests.

28 The parties and the interveners presented oral argument and answered the questions put to them by the Court at the hearing on 23 October 2018.

29 The Republic of Poland claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

30 The Republic of Latvia claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

31 The Republic of Lithuania claims that the Court should annul the contested decision.

32 The Commission, supported by the Federal Republic of Germany, contends that the Court should:

– not take into account, owing to its inadmissibility, the written submission of the Republic of Poland of 13 March 2017;

– dismiss the application;

– order the Republic of Poland to pay the costs.

IV. Law

A. On the admissibility of the written submission of the Republic of Poland of 13 March 2017

33 The Republic of Poland lodged its action on 16 December 2016 on the sole basis of the press release relating to the contested decision, which was published by the Commission on the day that the contested decision was adopted, namely 28 October 2016. The contested decision itself was published on 3 January 2017 on the Commission's website.

34 The Republic of Poland submits that it was only following the publication of the contested decision on the Commission's website that it was able to know the precise content of that decision. Thus, it was after having examined the contested decision, as published, that it lodged, on 13 March 2017, 'a supplement to the application' ('the supplementary written submission'), in which it, first, submitted additional arguments in support of its first plea and, second, raised a supplementary plea in law.

35 The Commission contests the admissibility of the supplementary written submission. First, it submits that, by the application lodged on 16 December 2016, the Republic of Poland exhausted its right to bring proceedings pursuant to Article 263 TFEU by causing the period for an action based on the date of knowledge of the content of the contested decision to start to run, and that it was not entitled to benefit from a new period for bringing an action on the basis of the later publication of the contested decision. Secondly, the Commission recalls that the possibility of 'supplementing' an application is not provided for in the Rules of Procedure, since new pleas in law based on facts arising subsequently could be raised in the reply, in accordance with Article 84(2) of the Rules of Procedure. Thirdly, the Commission submits that the supplementary written submission, by invoking a new period for bringing an action, is a form of 'supplementary application', which is inadmissible on the ground of *lis pendens* since, inter alia, the commencement of the action on 16 December 2016 enabled the Republic of Poland to benefit from effective judicial protection, including through interim measures.

36 Under the sixth paragraph of Article 263 TFEU, the proceedings provided for in that article are to be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

37 Therefore, in the present case, since the contested decision was published on 3 January 2017, it is on that date that the period for bringing proceedings started to run. Under Article 60 of the Rules of Procedure, that period is to be extended on account of distance by a single period of 10 days. Consequently, the time limit for bringing proceedings in the present case expired on 13 March 2017.

38 Thus, the supplementary written submission, lodged at the Court Registry on 13 March 2017, was lodged on the last day of the period for bringing proceedings, that is to say before the time limit expired. It must therefore be declared admissible.

39 That finding is not called into question by the Commission's arguments.

40 First, the Commission's argument that the Republic of Poland has exhausted its right to bring proceedings by causing the period for bringing proceedings to start to run on the basis of the date of knowledge of the content of the contested decision cannot succeed.

41 It is, in the first place, settled case-law that the time limit prescribed for bringing actions is a matter of public policy and is not subject to the discretion of the parties or the Court, since it was established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice (see judgment of 18 September 1997, *Mutual Aid Administration Services* v *Commission*, T-121/96 and T-151/96, EU:T:1997:132, paragraph 38 and the

case-law cited). Thus, where an applicant brings an action before the period laid down in the sixth paragraph of Article 263 TFEU has started to run, it does not follow that the time limit laid down in that article is varied as a result. Consequently, in the present case, the period for bringing proceedings did not commence on the date on which the action was brought but, in accordance with the sixth paragraph of Article 263 TFEU, on the date of publication of the contested decision (see, to that effect, judgment of 26 September 2013, *PPG and SNF* v *ECHA*, C-626/11 P, EU:C:2013:595, paragraphs 38 and 39).

42 In the second place, the date of publication of a press release announcing the adoption of a decision cannot in any event be held to cause the period for bringing an action to start to run. In particular, since such a press release contains only a short summary of the decision in question, it cannot be assumed that reading it amounts to 'knowledge' of the contested decision within the meaning of the sixth paragraph of Article 263 TFEU.

43 Secondly, as regards the argument that the Rules of Procedure do not provide for the possibility of producing written submissions to supplement the application after the application has been lodged, it should be recalled that, according to the case-law, as the European Union is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EU Treaty, the procedural rules governing actions brought before the EU Courts must be interpreted in such a way as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under EU law (judgment of 17 July 2008, *Athinaiki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 45).

44 Accordingly, the mere fact that the Rules of Procedure do not provide expressly for the possibility of producing written submissions to supplement the application initiating proceedings once that application has been lodged cannot be construed as excluding such a possibility, provided that the submissions supplementing the application are lodged before the expiry of the time limit for bringing proceedings.

45 Similarly, although Article 84(2) of the Rules of Procedure provides that, where a new fact comes to light in the course of the procedure, new pleas in law or arguments must be introduced in the second exchange of pleadings, it does not follow from that provision that if, as in the present case, before expiry of the time limit for bringing an action and before lodging a reply, the applicant produces a separate document in order to introduce its pleas and arguments regarding the contested decision, which has been published after it lodged its application, that separate document is inadmissible.

46 In the present case the Commission was placed in the position of being able to respond to the pleas and arguments raised by the Republic of Poland in its supplementary written submission. Following an invitation by the Court, it submitted observations on the supplementary written submission on 9 June 2017. In those circumstances, declaring the supplementary written submission admissible would not harm the possibility for the Commission of replying to the pleas and arguments of the applicant in the instant case.

47 In the light of the foregoing, the supplementary written submission lodged by the Republic of Poland on 13 March 2017, thus before the expiry of the time limit for bringing proceedings, must be declared admissible.

B. Substance

48 In support of its action, the Republic of Poland relies on six pleas in law alleging, first, infringement of Article 36(1)(a) of Directive 2009/73, read in conjunction with Article 194(1)(b) TFEU and the principle of solidarity; second, the lack of competence of the Commission and infringement of

Article 36(1) of Directive 2009/73; third, infringement of Article 36(1)(b) of Directive 2009/73; fourth, infringement of Article 36(1)(a) and (e) of Directive 2009/73; fifth, infringement of international conventions to which the European Union is a party and, sixth, infringement of the principle of legal certainty.

49 It is appropriate to begin by examining the first plea.

1. The first plea in law, alleging the infringement of Article 36(1)(a) of Directive 2009/73, read in conjunction with Article 194(1)(b) TFEU and the principle of solidarity

50 In recitals 49 to 53 of the contested decision, after having recalled that, in the original decision, it had reached the conclusion that the OPAL pipeline would enhance security of supply, the Commission examined whether the changes proposed by the BNetzA to the regime governing the pipeline's operation were liable to lead to a different assessment. It reached the conclusion that that was not the case, taking into account, inter alia, the fact that the additional capacity that was likely effectively to be used on the Nord Stream 1 pipeline, resulting from the increase of the capacity actually used on the OPAL pipeline, was insufficient to replace entirely the quantities of gas flowing hitherto through the Braterstwo and Yamal pipelines.

51 The Republic of Poland, supported by the Republic of Lithuania, submits that the contested decision infringes the principle of energy security and the principle of energy solidarity, and hence contravenes Article 36(1)(a) of Directive 2009/73, read in conjunction with Article 194(1)(b) TFEU. According to it, the grant of a new exemption relating to the OPAL pipeline threatens the security of supply in the European Union, in particular in central Europe. In particular, the reduction of the transport of gas through the Yamal and Braterstwo pipelines could lead to a weakening of the energy security of Poland and considerably undermine the diversification of sources of supply of gas.

(a) The alleged infringement of Article 36(1)(a) of Directive 2009/73

52 The Republic of Poland recalls that, in accordance with Article 36(1)(a) of Directive 2009/73, an exemption to the rules may only be granted for the benefit of a major new gas infrastructure if the investment in the infrastructure concerned improves the security of supply of gas, which is a criterion that should, according to it, be interpreted consistently with Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ 2010 L 295, p. 1), and in the light of the primary objective of the energy policy of the European Union, set out in Article 194(1) TFEU, namely to ensure energy security in the European Union as a whole and in all its Member States individually.

53 The Commission, supported by the Federal Republic of Germany, disputes those arguments.

54 Article 36(1)(a) of Directive 2009/73 provides that 'major new gas infrastructures … may, upon request, be exempted, for a defined period of time, from the provisions [inter alia, on third party access] under the following conditions: (a) the investment must … enhance security of supply'.

55 As a preliminary point, it is necessary to reject the argument advanced by the Republic of Poland that that criterion applies in the present case because the contested decision grants a new exemption from third party access.

56 It must be held, in the present case, that by the contested decision the Commission did not approve the introduction of a new exemption but the variation of an existing exemption. It should be recalled, in that regard, that in accordance with the decisions of 25 February 2009 of the BNetzA, as varied by the decisions of 7 July 2009 (see paragraphs 5 and 8 above), the cross-border transmission capacities

of the OPAL pipeline were already covered by an exemption as to the application of the rules on third party access laid down in Article 18 of Directive 2003/55 and the rules on tariff regulation laid down in Article 25(2) to (4). As set out in paragraphs 14 to 16 above, the regime proposed on 13 May 2016 by the BNetzA, as varied in accordance with the contested decision, maintained that exemption in principle, while varying the conditions that were attached to it.

57 It should in that context be clarified that, as the Commission emphasised at the hearing, the contested decision did not vary the original decision. Under Article 36(3) of Directive 2009/73, it is the national regulatory authority which lays down the exemption referred to in paragraph 1 of that article. Thus, it was the BNetzA that made the exemption decision of 2009 (see paragraphs 5 and 8 above) and which, in 2016, varied the conditions of that exemption, by concluding a contract governed by public law with OGT (see paragraph 18 above). In both cases, the Commission restricted itself to exercising the power of review, which was conferred on it by the third subparagraph of Article 22(4) of Directive 2003/55 and subsequently by Article 36(9) of Directive 2009/73, by asking the BNetzA to make amendments to its decisions. The original decision and the contested decision were thus two independent decisions each of which ruled on a measure proposed by the German authorities, namely, first, the decisions of the BNetzA of 25 February 2009 (see paragraph 5 above) and, second, the contract governed by public law notified on 13 May 2016 (see paragraph 13 above), equivalent to an administrative decision.

58 As regards the criterion relating to the enhancement of security of supply, it is clear from the wording of Article 36(1)(a) of Directive 2009/73 that it is not the exemption applied for but the investment which must satisfy that criteria, namely, in the present case, the construction of the OPAL pipeline. Consequently, it is at the time of the original decision that the Commission was required to satisfy itself that the investment proposed met that criterion. By contrast, the Commission was not required to examine that criterion as part of the contested decision, which merely approved a variation to the conditions attached to the exemption. Indeed, since no new investment was being proposed at that stage, and the variation to the operating conditions proposed by the BNetzA did not alter the OPAL pipeline as an infrastructure, that question could not receive a different response in 2016 from that given in 2009.

59 The fact that, in the contested decision, the Commission carried out an assessment that was not required by the applicable rules cannot lead the EU Court, in the context of an action brought before it, to review that decision on the basis of a criterion that is not laid down by the law.

60 Therefore, to the extent that it is based on Article 36(1)(a) of Directive 2009/73, the first plea in law must be rejected as ineffective.

(b) The alleged infringement of Article 194(1) TFEU

61 As regards Article 194(1) TFEU, the Republic of Poland, supported by the Republic of Lithuania, submits that the principle of solidarity referred to in that article is one of the European Union's priorities in the field of energy policy. According to it, that principle obliges both the Member States and the EU institutions to conduct the EU energy policy in a spirit of solidarity. In particular, measures adopted by EU institutions that compromise the energy security of certain regions or in certain Member States, including their security of gas supply, would be contrary to the principle of energy solidarity.

62 The Republic of Poland points out that the contested decision enables Gazprom and undertakings in the Gazprom group to redirect onto the EU market additional volumes of gas by fully exploiting the capacities of the Nord Stream 1 pipeline. Taking into account the lack of significant growth in demand for natural gas in central Europe, that would, as its only possible consequence, have an

influence on the conditions of supply and use of transmission services of the pipelines competing with OPAL, namely the Braterstwo and Yamal pipelines, in the form of a reduction or even a complete interruption of the transmission of gas through those two pipelines.

63 First, in that regard the Republic of Poland fears that such a limitation or interruption in transmission through the Braterstwo pipeline would have the effect of rendering impossible the maintenance of supply on the territory of Poland through the pipeline from the Ukraine, which would result in it being impossible to guarantee the continuity of supply for clients on the territory of Poland, with the following consequences, which were apparently not examined by the Commission:

– the impossibility, for the companies responsible for it, of meeting their obligation to guarantee the supply of gas to protected clients;

– the impossibility of the gas system functioning effectively and of assigning commercial operating opportunities for gas storage facilities;

– the likelihood of a considerable increase in the cost of obtaining gas.

64 Secondly, taking into account the expiry in 2020 of the contract for the transport of gas via the Yamal pipeline towards western Europe, followed by the expiry in 2022 of the contract for the supply of gas towards Poland via that same pipeline, the Republic of Poland fears that there is a risk of reduction or even of a complete interruption of the supply of gas through the Yamal pipeline, which would have negative effects on:

– the availability of importation capacities into Poland from German and the Czech Republic;

– the level of transport tariffs from those two countries;

– the diversification of the sources of gas supply in Poland and in other central and eastern European Member States.

65 The Commission disputes those arguments. In particular it submits that energy solidarity is a political notion that appears in its communications and documents, whereas the contested decision must satisfy the legal criteria laid down in Article 36(1) of Directive 2009/73. According to it, the principle of solidarity between the Member States set out in Article 194(1) TFEU, first, is addressed to the legislature and not to the administration applying the legislation and, second, concerns only situations of crisis in the supply or functioning of the internal gas market, whereas Directive 2009/73 lays down principles relating to the normal functioning of that market. In any event, the criterion of enhancement of security of supply, set out in Article 36(1) of that directive, which it examined in the contested decision, may be regarded as taking into account the notion of energy solidarity. Finally, the Commission observes that the Nord Stream 1 pipeline is a project that is recognised as being in the common interest as it constitutes the realisation of a priority project of European interest provided for by Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC (OJ 2006 L 262, p. 1), and that the fact that the contested decision could enable the increased use of such an infrastructure is consistent with the common and European interests.

66 In addition, the Commission disputes that the variation of the regime under which the OPAL pipeline operated, which was approved by the contested decision, could detrimentally affect the security of supply of natural gas in central and eastern Europe in general or in Poland in particular.

(1) The scope of the principle of energy solidarity

67 Article 194(1) TFEU is worded as follows:

'In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.'

68 That provision, introduced by the Treaty of Lisbon, inserted into the TFEU an express legal basis for the European Union policy on energy which previously rested on the basis, inter alia, of ex-article 95 EC on the completion of the internal market (now Article 114 TFEU).

69 The 'spirit of solidarity' referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity between the Member States, mentioned, inter alia, in Article 2 TEU, in Article 3(3) TEU, Article 24(2) and (3) TEU, Article 122(1) TFEU and Article 222 TFEU. That principle is at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU (see, to that effect, judgment of 10 December 1969, *Commission* v *France*, 6/69 and 11/69, not published, EU:C:1969:68, paragraph 16).

70 As regards its content, it should be emphasised that the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.

71 In the context of energy policy, that implies, inter alia, obligations of mutual assistance in the event that, following for example natural disasters or acts of terrorism, a Member State is in a critical or emergency situation as regards its gas supply. However, contrary to what the Commission asserts, the principle of energy solidarity cannot be restricted to such extraordinary situations which would exclusively involve the competence of the EU legislature — a competence implemented by secondary law, by the adoption of Regulation No 994/2010 (replaced by Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation No 994/2010 (OJ 2017 L 280, p. 1)).

72 On the contrary, the principle of solidarity also entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders.

73 As regards, more specifically, the energy policy of the European Union, that policy 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 liable to affect the interests of the European Union and the 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.

74 In the context of Article 36(1) of Directive 2009/73, those considerations are shown, inter alia, in the concepts of 'effective functioning of the internal market in natural gas' and the 'efficient functioning of the regulated system to which the infrastructure is connected' set out in point (e) of that provision, without however being restricted to those concepts.

75 In that regard, as the EU legislature recalled in the fourth recital of Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39), the European Council of 4 February 2011 underlined the need to modernise and expand Europe's energy infrastructure and to interconnect networks across borders, in order to make solidarity between Member States operational, to provide for alternative supply or transit routes and sources of energy and to develop renewable energy sources in competition with traditional sources. It insisted that no Member State should remain isolated from the European gas and electricity networks after 2015 or see its energy security jeopardised by lack of the appropriate connections.

76 Therefore it is necessary to reject the argument advanced by the Commission at the hearing that, in essence, on the assumption that Article 36(1) of Directive 2009/73 implements the principle of solidarity set out in Article 194(1) TFEU, the Commission had duly taken that principle into account by the mere fact of having examined the criteria laid down in Article 36(1) of Directive 2009/73.

77 The application of the principle of energy solidarity does not however mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict.

78 Having regard to the scope of the principle of solidarity, the Commission was required, in the context of the contested decision, to assess whether the variation to the regime governing the operation of the OPAL pipeline, as proposed by the German regulatory authority, could affect the interests in the field of energy of other Member States and, if so, to balance those interests with the interests that that variation had for the Federal Republic of Germany and, if relevant, the European Union.

(2) Consideration of whether the contested decision infringes the principle of energy solidarity

79 It is clear that the examination referred to in paragraph 78 above was lacking in the contested decision. The principle of energy solidarity was not only not mentioned in the contested decision, but also the decision itself does not disclose that the Commission did, as a matter of fact, carry out an examination of that principle.

80 It is true that in paragraph 4.2 of the contested decision (recitals 48 to 53), the Commission made observations on the criterion of the enhancement of security of supply. Thus, after a reference to the examination of that criterion conducted in the context of the original decision, in which it had concluded that that criterion was satisfied, the Commission found that the proposal that had been submitted to it by the BNetzA did not alter that conclusion.

81 However, first, it should be observed that both the examination in the original decision and the supplementary examination in the contested decision concerned only the effect that the putting into service and the increase in capacity actually used of the OPAL pipeline had on the security of supply to the European Union in general. Thus, the Commission set out inter alia, in point 4.2 of the contested decision, first, that the availability of additional transmission capacities on the German-Czech border benefited all regions accessible from that location via existing or future infrastructure and, second, that the additional capacity did not allow for the full substitution of the

other transport routes. On the other hand, the Commission did not, inter alia, carry out an examination of the impact of the variation of the regime governing the operation of the OPAL pipeline on the security of supply in Poland.

82 Secondly, it must be observed that the wider aspects of the principle of energy solidarity were not addressed in the contested decision. In particular, it does not appear that the Commission examined what the medium term consequences, inter alia for the energy policy of the Republic of Poland, might be of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported via the Yamal and Braterstwo pipelines, or that it balanced those effects against the increased security of supply that it had found at EU level.

83 Accordingly, it must be held that the contested decision was adopted in breach of the principle of energy solidarity, as provided for in Article 194(1) TFEU.

84 Consequently, the first plea in law advanced by the Republic of Poland, to the extent that it is based on the breach of that principle, must be upheld.

85 In the light of the foregoing the action must be upheld and the contested decision must be annulled.

2. The other pleas in law

86 Since the contested decision must be annulled on the basis of the first plea in law, it is no longer necessary for the Court to rule on the other pleas relied on by the Republic of Poland.

V. Costs

87 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Republic of Poland.

88 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Republic of Latvia, the Republic of Lithuania and the Federal Republic of Germany are to bear their own costs.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2016) 6950 final of 28 October 2016 on the review of the conditions for exemption of the OPAL pipeline, granted under Directive 2003/55/EC, from the rules on third party access and tariff regulation;**

2. **Orders the European Commission to bear its own costs and those incurred by the Republic of Poland;**

3. **Orders the Federal Republic of Germany, the Republic of Latvia and the Republic of Lithuania to bear their own costs.**

Pelikánová Valančius Nihoul

Svenningsen Öberg

Delivered in open court in Luxembourg on 10 September 2019.

[Signatures]

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