



Reports of Cases

Joined Cases T-684/19 and T-704/19

**Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH)
and
FGSZ Földgázszállító Zrt.**

v

European Union Agency for the Cooperation of Energy Regulators

Judgment of the General Court (Second Chamber, Extended Composition), 16 March 2022

(Energy – Regulation (EU) 2017/459 – Network code adopted by the Commission including an ‘incremental capacity process’ – ACER decision approving the implementation of an incremental capacity project – Plea of illegality – Lack of competence of the Commission – Article 6(11), Article 7(3) and Article 8(6) of Regulation (EC) No 715/2009)

1. *Action for annulment – Natural or legal persons – Admissibility criteria – Decision of the European Union Agency for the Cooperation of Energy Regulators (ACER) approving the implementation of an incremental capacity project as regards a natural gas transmission network – Act establishing ACER providing for an internal remedy against the decision of ACER – Action for annulment brought against the decision of ACER without exhausting the internal remedy – Inadmissibility*
(Art. 263, fifth para., TFEU; European Parliament and Council Regulation 2019/942, recital 34 and Arts 28 and 29)

(see paragraphs 29-32, 35-39, 41, 42)

2. *Acts of the institutions – Temporal application – Procedural rules – Substantive rules – Distinction*

(see paragraph 33)

3. *Action for annulment – Action directed against a decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) – Act establishing ACER excluding the possibility of putting forward before the General Court pleas in law not submitted before that Board of Appeal – Plea of illegality raised for the first time in the context of the action for annulment – Admissibility*
(Arts 263 and 277 TFEU; European Parliament and Council Regulation 2019/942, Art. 29)

(see paragraphs 47-51)

4. *Plea of illegality – Scope – Measures the illegality of which may be pleaded – Regulation which was not challenged on the basis of Article 263 TFEU – Plea of illegality raised by a national authority whose standing to bring an action for annulment is not evident – Admissibility*
(Arts 263, fourth para., and 277 TFEU; Commission Regulation 2017/459)

(see paragraphs 54, 55)

5. *Plea of illegality – Scope – Measures the illegality of which may be pleaded – General measure providing the basis of the contested decision – Need for a legal connection between the contested measure and the contested general measure*
(Art. 277 TFEU)

(see paragraph 58)

6. *Approximation of laws – Measures of approximation – Common rules for the internal market in natural gas – Regulation No 715/2009 – Conditions for access to the natural gas transmission networks – Empowerment of the Commission to establish network codes in certain areas – Scope – Network code adopted by the Commission including an incremental capacity process – Unlawful*
(European Parliament and Council Regulation No 715/2009, Arts 6(11), first subpara., and 8(6); Commission Regulation 2017/459, Arts 22 to 31; European Parliament and Council Directive 2009/73)

(see paragraphs 66-74, 95-97, 100, 102-105, 109, 110, 114, 119, 123-126, 128, 134, 135)

7. *Approximation of laws – Measures of approximation – Common rules for the internal market in natural gas – Regulation No 715/2009 – Conditions for access to the natural gas transmission networks – Establishment of network codes – Commission regulation establishing a network code on capacity allocation mechanisms in gas transmission systems – Implementation of an incremental capacity process – Measure intended to ensure the proper functioning of the internal market in gas – Legal basis – Article 114 TFEU*
(Art. 114 TFEU; European Parliament and Council Regulation No 715/2009, Art. 1; Commission Regulation 2017/459, Arts 22 to 31)

(see paragraphs 83-88)

8. *EU institutions – Exercise of powers – Power conferred on the Commission to adopt delegated acts – Obligation not to modify essential elements of the basic legislative act – Basic regulation empowering the Commission to adopt network codes in certain areas – Network code including rules relating to an area not referred to by the basic regulation – Unlawful – Amendment concerning an essential element of the basic regulation*
(European Parliament and Council Regulation No 715/2009, Arts 6(11), second subpara., 7(3) and 8(6)(g); Commission Regulation 2017/459, Arts 22 to 31; European Parliament and Council Directive 2009/73)

(see paragraphs 137-141)

Résumé

In 2015, FGSZ Földgázszállító Zrt., the Hungarian gas transmission system operator ('FGSZ'), and its Bulgarian, Romanian and Austrian counterparts engaged in a regional cooperation project to increase energy independence by bringing Black Sea gas to markets. That project provided for an increase in incremental capacity at two interconnection points, one being that between Hungary and Austria ('the HUAT project'). On that basis, FGSZ and its Austrian counterpart, Gas Connect Austria GmbH ('GCA'), published a joint assessment report, in accordance with Regulation 2017/459 establishing a network code on capacity allocation mechanisms in gas transmission systems.¹

Pursuant to that regulation,² FGSZ formally submitted to the Hungarian energy and public utility regulatory authority, Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH), the proposal for the HUAT project, stating that it was not in favour of the implementation of that project. GCA submitted the proposal to the regulatory authority for the Austrian electricity and natural gas sectors, Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control).

E-Control approved the HUAT project proposal, whereas MEKH rejected it. As the national regulatory authorities had not reached an agreement, the European Union Agency for the Cooperation of Energy Regulators (ACER) adopted, in turn, a decision approving the HUAT project proposal ('the initial decision').

MEKH and FGSZ each lodged an appeal against the initial decision before the Board of Appeal of ACER. Their appeals having been dismissed by that Board of Appeal, MEKH (Case T-684/19) and FGSZ (Case T-704/19) brought before the General Court two actions for annulment of that dismissal decision, with MEKH's action seeking also the annulment of the initial decision. In support of its action, MEKH pleads, inter alia, that Chapter V of Regulation 2017/459 is unlawful.

In its judgment, the Second Chamber (Extended Composition) of the General Court, while declaring MEKH's action for annulment inadmissible in so far as it concerns the initial decision, upholds the plea of illegality raised by MEKH and annuls, consequently, the dismissal decision of the Board of Appeal of ACER.

Findings of the Court

As a preliminary point, the Court declares inadmissible MEKH's action for annulment in so far as it concerns the initial decision. In that regard, the Court states that the admissibility of an action brought by natural or legal persons against acts of ACER intended to produce legal effects in relation to them is to be examined in the light of the specific arrangements provided for in the act establishing that agency, namely Regulation 2019/942.³ In accordance with that regulation, only the decision of the Board of Appeal of ACER is capable of being the subject matter of an action for annulment before the Court.⁴

¹ Article 26 of Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (OJ 2017 L 72, p. 1).

² Article 28(1) of Regulation 2017/459.

³ Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) (OJ 2019 L 158, p. 22).

⁴ Recital 34 and Articles 28 and 29 of Regulation 2019/942.

By contrast, notwithstanding the fact that MEKH had not raised a plea of illegality as regards Chapter V of Regulation 2017/459 before the Board of Appeal of ACER, that plea, relied on by MEKH before the Court, is declared admissible by the latter. Since the EU Courts alone are entitled to rule that an act of general application is unlawful,⁵ MEKH is entitled to raise that plea for the first time before the Court with a view to challenging the validity of the dismissal decision of the Board of Appeal of ACER.

As regards the merits of that plea of illegality, the General Court notes, first of all, that Regulation 2017/459, which establishes a network code on capacity allocation mechanisms in gas transmission systems, establishes, by its Chapter V, an incremental capacity process which is capable of imposing an obligation on transmission system operators to make the investments necessary for the creation of incremental capacity on the network. It is apparent from the very wording of that Chapter V⁶ that an incremental capacity project is to be initiated where the various conditions laid down therein are met, which means that the transmission system operators are required to make the necessary investments to that end.

Next, the Court examines whether, in developing a network code providing for such a process for the creation of incremental capacity, the Commission exceeded the limits of the power conferred by the basic regulation, namely Regulation No 715/2009 on conditions for access to the natural gas transmission networks.⁷

In the light of the fact that, pursuant to that basic regulation, the Commission is solely empowered to develop network codes in certain areas which are exhaustively listed and on the condition that the European Network of Transmission System Operators for Gas ('ENTSOG') has not yet developed such a code in the area concerned,⁸ the General Court ascertains, in the first place, whether Chapter V of Regulation 2017/459 can be linked to one of the areas in question.

In that regard, it follows from a literal interpretation of the basic regulation that the areas listed therein are not capable of encompassing the matter of creation of incremental capacity on the network. Likewise, the contextual interpretation of that regulation reveals a distinction between, on the one hand, the areas for which the ENTSOG is competent to develop network codes, and, on the other hand, the framework for the investments necessary for the creation of incremental capacity on the network, in respect of which the ENTSOG coordinates the exercise by the Member States of their own competence. Furthermore, the Court states that it is under Directive 2009/73 concerning common rules for the internal market in natural gas⁹ that transmission system operators are subject, as the case may be, to the obligation to make the investments necessary for the creation of such incremental capacity. In that context, it is for the Member State to ensure compliance with that obligation, without any regulatory competence in that regard being conferred on the ENTSOG or the Commission. Lastly, none of the grounds for the basic regulation makes it possible to identify an aim of empowering the ENTSOG and, consequently, the Commission, to develop a network code extending to the matter of investments necessary for the creation of incremental capacity.

⁵ Article 277 TFEU.

⁶ Article 22(3) of Regulation 2017/459.

⁷ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36) ('the basic regulation').

⁸ Article 6 of the basic regulation.

⁹ 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).

As Chapter V of Regulation 2017/459 cannot be linked to one of the areas exhaustively listed in the basic regulation, the Court examines, in the second place, whether the Commission was empowered to adopt rules governing the incremental capacity process under other provisions of the basic regulation, authorising the Commission to amend the non-essential elements of that regulation when a network code is adopted.¹⁰

Pursuant to settled case-law, the essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature. In the present case, the EU legislature made a political choice to attribute the implementation of EU rules relating to the creation of incremental capacity to the Member States alone, the power conferred on the ENTSOG and, by extension, on the Commission in the area of capacity-allocation rules¹¹ concerning only existing capacity on the network. It follows that the amendment made by Chapter V, consisting in extending that power to the creation of incremental capacity, concerns an essential element of the basic regulation.

Finding, thus, that the Commission was not empowered to establish an incremental capacity process, the Court upholds the plea of illegality and declares inapplicable Chapter V of Regulation 2017/459. As the dismissal decision of the Board of Appeal of ACER applied that chapter, the Court upholds, furthermore, the actions for annulment in so far as they concern that decision, annulling it with effect *erga omnes*.

¹⁰ Article 6(11), second subparagraph, and Article 7(3) of the basic regulation.

¹¹ Article 8(6)(g) of the basic regulation.