



## Reports of Cases

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

2 February 2022\*

(Competition – Abuse of a dominant position – Gas markets of Central and Eastern Europe – Decision rejecting a complaint – No Union interest – State action defence – Obligation to undertake a diligent examination – Procedural rights under Regulation (EC) No 773/2004)

In Case T-399/19,

**Polskie Górnictwo Naftowe i Gazownictwo S.A.**, established in Warsaw (Poland), represented by K. Karasiewicz, radca prawny, T. Kaźmierczak, K. Kicun and P. Moskwa, lawyers,

applicant,

v

**European Commission**, represented by B. Ernst, G. Meessen and J. Szczodrowski, acting as Agents,

defendant,

supported by

**Gazprom PJSC**, established in Moscow (Russia),

and

**Gazprom export LLC**, established in Saint Petersburg (Russia),

represented by J. Karenfort, J. Hainz, B. Evtimov, N. Tuominen, J. Heithecker, lawyers, and D. O’Keeffe, Solicitor,

interveners,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2019) 3003 final of 17 April 2019 rejecting the complaint (Case AT.40497 – Polish gas prices),

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of M. van der Woude, President, J. Svenningsen (Rapporteur), R. Barents, C. Mac Eochaidh and T. Pynnä, Judges,

\* Language of the case: Polish.

Registrar: M. Zwozdziak-Carbonne, Administrator,

Having regard to the written procedure and further to the hearing on 20 May 2021,

gives the following

## **Judgment**

### **Background to the dispute**

- 1 The applicant, Polskie Górnictwo Naftowe i Gazownictwo S.A., is the parent company of the PGNiG Group, which operates in the gas and oil sector, mainly in Poland. The group engages in particular in the exploration and production of gas and crude oil and the importation, sale and distribution of gas.
- 2 The applicant seeks annulment of European Commission Decision C(2019) 3003 final of 17 April 2019 rejecting the complaint (Case AT.40497 – Polish gas prices) ('the contested decision'), adopted following the complaint it had filed against Gazprom PJSC and its subsidiaries, including Gazprom export LLC (together 'Gazprom').

### ***The procedures in Cases AT.39816 and AT.40497***

- 3 Between 2011 and 2015, the Commission took several measures in order to investigate the functioning of the gas markets in Central and Eastern Europe and in particular to examine, in the light of the prohibition of abuse of a dominant position laid down in Article 102 TFEU, the conformity of some of Gazprom's practices affecting those markets, particularly those of Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland and Slovakia (together 'the CEE countries concerned'). In that context, the Commission, inter alia, sent requests for information to the applicant. The administrative procedure relating to that investigation was registered as 'Case AT.39816 – (Upstream gas supplies in Central and Eastern Europe) ('Case AT.39816').
- 4 In that case, after opening proceedings provided for in Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), and in Article 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), the Commission, on 22 April 2015 and in accordance with Article 10 of Regulation No 773/2004, sent a statement of objections to Gazprom ('the SO'). In that statement, the Commission made the preliminary assessment that Gazprom was dominant on the national markets for the upstream wholesale supply of gas in the CEE countries concerned and that, in breach of Article 102 TFEU, it was abusing that position by pursuing an anti-competitive strategy designed to partition and isolate those markets and thereby hinder the free flow of gas in those countries.
- 5 The Commission considered that Gazprom's strategy involved three groups of anti-competitive practices affecting its customers in the CEE countries concerned, namely practices based on the fact that, first, Gazprom had imposed territorial restrictions in its gas supply contracts with wholesalers and with certain industrial customers in the CEE countries concerned, secondly,

those territorial restrictions had enabled Gazprom to pursue an unfair pricing policy in five of the CEE countries concerned, namely Bulgaria, Estonia, Latvia, Lithuania and Poland, and, thirdly, Gazprom had, so far as Bulgaria and Poland were concerned, made its supplies of gas dependent on obtaining certain commitments from wholesalers relating to gas transport infrastructure. As regards Poland in particular those commitments related to acceptance by the Polish wholesaler, that is to say the applicant, of Gazprom having increased control over the operation of the Polish section of the Yamal pipeline, one of the main gas transit pipelines in Poland ('the Yamal objections').

- 6 On 29 September 2015, Gazprom submitted its reply to the SO, disputing the Commission's competition concerns. On 14 February 2017, while continuing to dispute those concerns, it submitted draft commitments under Article 9 of Regulation No 1/2003.
- 7 On 16 March 2017, also in Case AT.39816, in order to obtain the observations of interested parties on those draft commitments, the Commission published a communication in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation No 1/2003 (OJ 2017 C 81, p. 9), containing a summary of Case AT.39816 and the main content of the draft commitments and giving those parties a time limit of seven weeks from that date to submit their observations ('the market test'). Subsequently, the applicant, the President of the Urząd Regulacji Energetyki (Polish Energy Regulator's Office; 'the Polish Energy Regulator') and Gaz-System S.A., the operator of the Polish section of the Yamal pipeline, among others, submitted observations.
- 8 On 9 March 2017, in parallel with the administrative procedure initiated by the Commission in Case AT.39816, the applicant filed a complaint, pursuant to Article 5 of Regulation No 773/2004, relating to Case AT.39816 and alleging abusive practices by Gazprom ('the complaint').
- 9 On 29 March 2017, the Commission acknowledged receipt of the complaint, which was registered in a separate procedure as 'Case AT.40497 – Polish gas prices' ('Case AT.40497').
- 10 In a letter to the applicant dated 31 March 2017, the Commission stated that the practices set out in the complaint appeared to overlap with those covered by the draft commitments and invited it to submit observations within the framework of the market test. After obtaining an extension of the relevant deadline, the applicant submitted its observations on the draft commitments on 19 May 2017, as mentioned in paragraph 7 above.
- 11 On 15 May 2017, Gazprom submitted its observations on the complaint to the Commission in Case AT.40497.
- 12 On 23 January 2018, the Commission informed the applicant in writing, in accordance with Article 7(1) of Regulation No 773/2004, that it intended to reject the complaint and invited it to make its views known within four weeks ('the pre-rejection letter'). In that context, the Commission also sent the applicant a non-confidential version of the SO in Case AT.39816 and a non-confidential version of Gazprom's observations on that complaint.
- 13 On 2 March 2018, the applicant submitted observations in response to the pre-rejection letter. Besides expressing dissatisfaction at the provisional findings contained in that letter, the applicant stated in particular that it did not consider that it had received all the documents on which the Commission had based its assessment and that some essential passages were missing from the non-confidential version of the SO in Case AT.39816 that had been sent to it.

- 14 On 24 May 2018, in Case AT.39816, after Gazprom had submitted an amended draft of the commitments following the market test, the Commission adopted Decision C(2018) 3106 final, relating to a procedure under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe), by which it approved and made binding the commitments made by Gazprom and closed the administrative procedure in that case, concluding that there were no longer grounds for action concerning the practices identified in the SO. On 15 October 2018, the applicant lodged an appeal before the Court against that decision, registered as Case T-616/18.
- 15 On 5 September 2018, in Case AT.40497, the applicant sent a letter to the hearing officer, under Article 7(2)(b) of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ 2011 L 275, p. 29), requesting certain documents in that case. On 17 September 2018, the hearing officer informed the applicant that he was forwarding its request to the Directorate-General (DG) for Competition, which was competent to answer it. On 25 September 2018, the Commission informed the applicant that it had based its assessment on the documents which it had already sent to the applicant and refused to grant the applicant access to other passages of the SO.
- 16 On 17 April 2019, the Commission closed the procedure in Case AT.40497 by adopting the contested decision.

### ***Contested decision***

- 17 In the contested decision, the Commission drew a distinction between the claims in the complaint that corresponded to the competition concerns covered by the commitments made binding by the decision adopted at the end of Case AT.39816, and the other claims made against Gazprom in that complaint.
- 18 With regard to the former claims, the Commission held in essence that the conduct referred to was adequately addressed by those commitments (see Sections 2.2 and 2.3 of the contested decision). With regard to the other claims, the Commission considered them in turn in Section 2.4 of the contested decision, entitled ‘Matters not covered by the commitments’.
- 19 Under Section 2.4.1, entitled ‘The Objection concerning the Yamal Pipeline’, the Commission dealt with the claims in the complaint that Gazprom – in the context of a supply shortfall faced by the applicant in 2009 and 2010 due to failure experienced by Gazprom’s Ukrainian subsidiary, Gazprom-RosUkrEnergo AG (‘RUE’) – made the conclusion of a short-term contract for the supply of additional volumes of gas subject to conditions unrelated to the subject matter of that contract (‘claims concerning infrastructure-related conditions’). Those conditions can be summarised as follows: first, the waiver of a claim against that Gazprom subsidiary, secondly, the applicant’s agreement that System Gazociągów Tranzytowych EuRoPol Gaz S.A. (‘EuRoPol’), the company owning the infrastructure of the Polish section of the Yamal pipeline, which was owned by the applicant and Gazprom, should waive a claim over the latter of United States Dollars (USD) [confidential],<sup>1</sup> thirdly, changes in the statutes of EuRoPol, granting Gazprom a right of veto in respect of certain decisions taken by EuRoPol, and, fourthly, the insertion of certain clauses into the contract between EuRoPol and Gaz-System concerning the latter’s operation of that section (see recital 18, third and seventh indents, of the contested decision).

<sup>1</sup> Confidential data removed.

- 20 With reference also to the claims concerning infrastructure-related conditions, the Commission first reiterated the applicant's position and then give its own assessment, each time in respect of two matters, namely, first, the decision of the Polish Energy Regulator of 19 May 2015 adopted through its president, certifying that Gaz-System was the independent system operator for the Polish section of the Yamal pipeline ('the certification decision') and, secondly, the imposition on the applicant of infrastructure-related commitments.
- 21 In its examination of that second matter, the Commission stated, under the subheading 'State compulsion defence could not be excluded', that it could not be ruled out that the State action defence might be applicable to the practices covered by the claims at issue, since it could not be ruled out in essence that Gazprom's conduct was required of it by Russian law or under irresistible pressure from the Russian authorities, with the consequence that such conduct might not be autonomous within the meaning of Article 102 TFEU and the possible restriction of competition at issue might not be attributable to that undertaking. On that point, the Commission noted in particular that the construction and operation of the Polish section of the Yamal pipeline were governed by an intergovernmental agreement concluded in 1993 between the Republic of Poland and the Russian Federation and by the later additional protocols (together, 'the Poland-Russia agreements').
- 22 In Section 2.4.2, entitled 'Supply Restrictions in the Winter Season 2014/2015', the Commission dealt with the claims in the complaint that Gazprom abusively reduced its gas supplies in the winter of 2014/2015 in order to prevent any re-exports of gas to Ukraine ('the claims concerning supply restrictions during winter 2014/2015'). As a result of those restrictions, the volumes Gazprom supplied to the applicant were below the contractually agreed volumes, which caused the latter to incur financial loss, particularly due to the high transmission fees it had to pay in order to import gas from Western Europe (see fifth indent of recital 18 of the contested decision).
- 23 Sections 2.4.3 and 2.4.4 of the contested decision concern claims relating to the transfer of ownership of the Belarusian gas transmission network and the purported infringements of the applicant's procedural rights as a complainant, respectively.
- 24 The Commission, on various grounds, rejected all the claims covered by Section 2.4 of the contested decision and rejected the complaint pursuant to Article 7(2) of Regulation No 773/2004, considering that there were insufficient grounds for conducting further investigation.

### **Procedure and forms of order sought**

- 25 By application lodged at the Court Registry on 25 June 2019, the applicant brought the present action. The defence, the reply and the rejoinder were lodged on 20 September 2019, 6 November 2019 and 9 January 2020, respectively.
- 26 By a separate document accompanying the application, the applicant, in accordance with Article 152 of the Rules of Procedure of the General Court, applied to the Court for the case to be decided under the expedited procedure. By decision of 2 August 2019, the Court rejected that application.

- 27 On 4 October 2019, upon a change in composition of the Chambers of the Court, the Judge-Rapporteur was transferred to the Eighth Chamber, to which the present case was consequently allocated.
- 28 By document lodged at the Court Registry on 7 October 2019, Gazprom sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By order of 5 December 2019, the President of the Eighth Chamber of the Court, after hearing the main parties, granted leave to intervene. On 17 January 2020, Gazprom lodged a statement in intervention, and the applicant submitted observations on that statement on 21 February 2020.
- 29 By decision of 28 May 2020, the President of the Eighth Chamber, under Article 67(2) of the Rules of Procedure in conjunction with Article 19(2) thereof, decided, in the light of the particular circumstances of the present case, to give it priority.
- 30 On 8 June 2020, on a proposal from the Eighth Chamber, the Court decided, under Article 28 of the Rules of Procedure, to refer the present case back to the Eighth Chamber, Extended Composition. As a Member of that Chamber was unable to sit in the present case, the President of the Court was designated to complete the Chamber, by decision of 15 June 2020.
- 31 On a proposal from the Judge-Rapporteur, the Court decided to open the oral proceedings. In view of that, in the context of measures of organisation of procedure, the applicant and the Commission were requested to respond in writing to questions raised by the Court, and the Commission was also requested to provide documents. The applicant and the Commission submitted their answers to those questions on 3 December and 8 December 2020, respectively, and the Commission provided the documents requested as annexes to its answers.
- 32 For reasons associated with the health crisis due to COVID-19 and following requests made by certain parties, the President of the Eighth Chamber, Extended Composition, decided to postpone the hearing, originally scheduled for 22 January 2021.
- 33 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 20 May 2021. On that occasion the Court also stated that it had taken note of the observations on the report for the hearing submitted by the Commission on 27 April 2021.
- 34 The applicant claims that the Court should:
- order the Commission to provide all the documents relating to Case AT.40497 apart from those annexed to the action;
  - annul the contested decision in part, in so far as it rejects the claims concerning the infrastructure-related conditions and the claims concerning the supply restrictions during winter 2014/2015, or, in the alternative, annul the contested decision in its entirety;
  - order the Commission to pay the costs.
- 35 The Commission, supported by Gazprom, contends that the Court should:
- reject the request for measures of organisation of procedure;
  - dismiss the action;

- order the applicant to pay the costs.

## Law

36 In support of its action, the applicant puts forward five pleas in law:

- first, misuse of power, in that the Commission (i) adopted the contested decision – in so far as it is based on the possible application of the ‘State action defence’ in respect of the conduct of which Gazprom is accused – on an incorrect legal basis, namely Article 7(2) of Regulation No 773/2004 and not Article 10 of Regulation No 1/2003, and (ii) decided to examine the complaint in a new procedure (Case AT.40497), with the aim of restricting the applicant’s right to be heard in Case AT.39816;
- secondly, infringement of Article 102 TFEU, in that the Commission accepted State compulsion exercised by a third country as a defence in respect of abuse of a dominant position;
- thirdly, infringement of Article 7(1) and Article 8(1) of Regulation No 773/2004, Article 296 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), as a result of failure to send all the relevant information in the pre-rejection letter and failure to send with that letter the documents supporting the Commission’s provisional assessment;
- fourthly, infringement of Article 7(1) of Regulation No 773/2004 and Article 296 TFEU, due to failure to comply with the obligation to undertake a diligent examination of all the factual and legal circumstances set out in the complaint, and with the obligation to state reasons;
- fifthly, infringement of Article 7(2) of Regulation No 773/2004, in conjunction with Article 102 TFEU, due to manifest errors of assessment concerning, first, the certification decision and, secondly, the claims concerning supply restrictions during winter 2014/2015.

37 The present action, with its various pleas, concerns essentially Sections 2.4.1 and 2.4.2 of the contested decision, regarding, first, the claims concerning infrastructure-related conditions and, secondly, the claims concerning supply restrictions during winter 2014/2015.

38 The Court considers it appropriate to examine the third plea first.

### ***Third plea: infringement of Article 7(1) and Article 8(1) of Regulation No 773/2004, Article 296 TFEU and Article 47 of the Charter***

39 The applicant complains that the Commission failed, first, to mention relevant information in the pre-rejection letter and, secondly, to send to it all the documents on which the provisional assessment made in that letter and the assessment contained in the contested decision were based. In so doing, the Commission infringed the applicant’s rights to be heard and to be informed, as laid down in Article 7(1) and Article 8(1) of Regulation No 773/2004, Article 296 TFEU and Article 47 of the Charter.

- 40 As regards infringement of Article 7(1) of Regulation No 773/2004, the applicant contends that, under that provision, the Commission must provide the complainant with all the facts and points of law on which it based its assessment, so that the complainant can respond appropriately.
- 41 The Commission did not state clearly in the pre-rejection letter that rejection of the claims concerning infrastructure-related conditions (set out in paragraph 19 above) is based on possible application of the State action defence, in view of the existence of State compulsion resulting from Russian law. In paragraphs 96 to 106 of that letter, it merely recalled the significance of the ‘intergovernmental character’ of relations in the gas sector, which could have influenced Gazprom’s conduct, and made vague references to provisions of the Poland-Russia agreements without however establishing a connection between their content and that conduct. The only allusion to Russian law is in paragraph 102 of that letter, which contains pure speculation without reference to any document that would have enabled the applicant to track the Commission’s reasoning and thus respond to it.
- 42 For its part, the Commission considers that the content of the Poland- Russia agreements, certain statements made in the complaint and the content of a letter dated 30 August 2016 from the Russian Energy Minister to his Polish opposite number (‘the letter of 30 August 2016’) were sufficient to justify its provisional finding regarding the Yamal objections.
- 43 The Commission therefore submits that it stated in paragraph 102 of the pre-rejection letter that its doubts were based on possible obligations that may have been imposed on Gazprom by Russian law or by the status of the Poland-Russia agreements under that law. Furthermore, in that letter, the Commission specified which provisions of those agreements governed matters relating to the construction and operation of the Polish section of the Yamal pipeline and laid the ground for the signing of the gas supply contracts between Gazprom and the applicant. Lastly, the Commission also stated in that letter that certain parts of the complaint suggested that it was the Russian Federation, not Gazprom, which made the conclusion of gas supply contracts conditional on obtaining commitments unrelated to those contracts and that matters relating to gas supplies were of an intergovernmental nature.
- 44 For the rest, in so far as the applicant contends that the Commission should have made reference to legislative acts or other documents, that position stems from the mistaken belief that the Commission is required to make findings that are reliable or, at least, highly probable, although there is no such requirement in the context of rejection of a complaint.
- 45 Article 7(1) of Regulation No 773/2004 provides that, where the Commission considers that, on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it is to inform the complainant of its reasons and set a time limit within which the complainant may make known its views in writing.
- 46 In that regard, according to settled case-law, the Commission has discretion in dealing with complaints and may therefore assign different priorities to complaints submitted to it, which includes the possibility of rejecting a complaint on the ground that there is an insufficient European Union interest in further investigation of the case (see judgment of 16 May 2017, *Agria Polska and Others v Commission*, T-480/15, EU:T:2017:339, paragraphs 34 and 35 and the case-law cited).



- 47 As that assessment of the EU interest raised by a complaint concerning competition depends on the factual and legal circumstances in each case, the number of assessment criteria to which the Commission may refer should not be limited, nor, conversely, should the Commission be required to have recourse exclusively to certain criteria. In any event, where the Commission decides not to initiate an investigation, it is not required to establish that there has been no infringement in support of such a decision (see judgment of 16 May 2017, *Agria Polska and Others v Commission*, T-480/15, EU:T:2017:339, paragraphs 35 and 37 and the case-law cited).
- 48 The Commission's discretion is not unlimited, however. Where the institutions have wide discretion, respect for the rights guaranteed by the EU legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the obligation to consider attentively all the relevant matters of fact and of law, in particular those brought to its attention by the complainant (see judgments of 16 October 2013, *Vivendi v Commission*, T-432/10, not published, EU:T:2013:538, paragraph 27 and the case-law cited, and of 16 May 2017, *Agria Polska and Others v Commission*, T-480/15, EU:T:2017:339, paragraph 36 and the case-law cited), and the obligation to give the complainant an effective hearing, in order to decide what action to take in response to the complaint submitted to it.
- 49 In the present case, it must be observed that in the contested decision the Commission dealt with the claims concerning infrastructure-related conditions under Section 2.4.1, entitled 'The Objection concerning the Yamal Pipeline', and particularly in recitals 99 to 110 thereof. It is clear from that decision and from the pre-rejection letter, supported by the Commission's answers to questions from the Court, that those claims were rejected on the ground of the limited likelihood of finding an infringement of Article 102 TFEU, which is based on two justifications, one was the possible application of the State action defence or, in the words of that decision, the State compulsion defence, and the other concerned the certification decision adopted by the Polish Energy Regulator.
- 50 Previously, in the pre-rejection letter, prior to the adoption of the contested decision, the Commission had also considered that there were insufficient grounds for investigating further the claims concerning infrastructure-related conditions, due to the limited likelihood of finding an infringement of Article 102 TFEU (see paragraphs 107 and 108 of that letter). That provisional conclusion was also based on two justifications, first, the certification decision and, secondly, the intergovernmental context of gas relations between the Republic of Poland and the Russian Federation (those justifications being examined in paragraphs 92 to 95 and paragraphs 96 to 106, respectively, of the pre-rejection letter).
- 51 The alleged infringement of Article 7(1) of Regulation No 773/2004 concerns the second justification, the intergovernmental context of gas relations between the Republic of Poland and the Russian Federation.
- 52 In that regard, in the pre-rejection letter, in respect of the intergovernmental context of gas relations in Poland and Russia, the Commission had, first, cited certain provisions of the Poland-Russia agreements and referred to the fact that those agreements established a comprehensive set of rules for the construction and operation of the Yamal pipeline and laid the ground for the conclusion of the gas supply contract between the applicant and Gazprom. Secondly, it had noted that the key role of the Polish and Russian governments was also clear from the applicant's complaint. Thirdly, the Commission had referred to the role that may have

been played by the Russian Federation and to specific provisions of the Poland-Russia agreements in order to explain that the factual claims and complaints made against Gazprom were not necessarily attributable to that undertaking.

- 53 The fact remains, however, that the concept of the State action defence does not appear in any of the relevant considerations of the pre-rejection letter.
- 54 It must be observed that the State action defence makes it possible to exclude anti-competitive conduct from the scope of Articles 101 and 102 TFEU and, therefore, to exempt undertakings from their liability for such conduct where that conduct is required of them by national legislation, by a legal framework created by that legislation or by irresistible pressure imposed by the national authorities. Articles 101 and 102 TFEU may apply, however, if it is found that undertakings are not precluded from engaging in autonomous conduct which prevents, restricts or distorts competition (see judgments of 11 November 1997, *Commission and France v Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraphs 33 and 34 and the case-law cited; of 18 September 1996, *Asia Motor France and Others v Commission*, T-387/94, EU:T:1996:120, paragraphs 60 and 65 and the case-law cited; and of 11 December 2003, *Strintzis Lines Shipping v Commission*, T-65/99, EU:T:2003:336, paragraph 119 and the case-law cited).
- 55 Moreover, according to case-law, that defence must be applied restrictively (see judgments of 30 March 2000, *Consiglio Nazionale degli Spedizionieri Doganali v Commission*, T-513/93, EU:T:2000:91, paragraph 60 and the case-law cited, and of 11 December 2003, *Strintzis Lines Shipping v Commission*, T-65/99, EU:T:2003:336, paragraph 121 and the case-law cited). The EU judicature has therefore held, in particular, that the Commission was entitled to reject complaints for want of autonomy on the part of the undertakings in question only if it appeared on the basis of objective, relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses (see judgment of 18 September 1996, *Asia Motor France and Others v Commission*, T-387/94, EU:T:1996:120, paragraphs 60 and 65 and the case-law cited).
- 56 Accordingly, bearing in mind the particular nature of the State action defence, which exempts from liability, and the fact that case-law has not recognised that it applies where State compulsion is exercised by a third country, the Commission, in order to enable the applicant to have a proper hearing with regard to the grounds justifying rejection of the complaint, should have expressly stated in the pre-rejection letter that the provisional assessment of the limited likelihood of finding an infringement of Article 102 TFEU was based on a possible case of that defence applying. The Commission could not expect the applicant to discern that implicit justification from the information given in that letter.
- 57 That conclusion is not called into question by the Commission's argument that, in paragraph 102 of the pre-rejection letter, it pointed out that the Republic of Poland's failure to ratify the Poland-Russia agreements would not necessarily have an effect on Gazprom's obligations under Russian law and the recognition afforded to such agreements under that law.
- 58 That reference cannot be regarded as being sufficiently specific, and the Commission cannot fulfil its duty to inform, under Article 7(1) of Regulation No 773/2004, by providing evidence of reliance, in essence, on the State action defence. That is true all the more since it is clear from

the wording of paragraph 102 of the pre-rejection letter, in the light of paragraph 99 of that letter, that the Commission sought primarily to respond to an objection raised by the applicant in its observations submitted in the context of the market test in Case AT.39816.

- 59 Furthermore, the content of its observations in response to the pre-rejection letter confirms that the applicant did not understand that the Commission, in mentioning the Poland-Russia agreements and the Russian legal order, was referring to the possible application of the State action defence. In those observations, the applicant stressed the fact that, in its view, those agreements did not govern Gazprom's conduct in a way that explained that undertaking's alleged anti-competitive conduct without ever mentioning that defence.
- 60 The Court must therefore hold that the Commission infringed Article 7(1) of Regulation No 773/2004.
- 61 However, according to settled case-law, that infringement can lead to the annulment in whole or in part of the contested decision only if it is shown that, but for that infringement, the procedure in Case AT.40497 could have had a different outcome and, consequently, the contested decision might have been substantively different (see judgments of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 80 and the case-law cited; and of 11 September 2014, *Gold East Paper and Gold Huasheng Paper v Council*, T-443/11, EU:T:2014:774, paragraph 113 and the case-law cited; see also, to that effect, judgment of 29 October 1980, *van Landewyck and Others v Commission*, 209/78 to 215/78 and 218/78, not published, EU:C:1980:248, paragraph 47).
- 62 In order to assess whether, but for that infringement, the procedure could have had a different outcome and whether the contested decision might have been substantively different, it must be observed that, in support of the first, second and fourth pleas raised in the proceedings before the Court, the applicant put forward, inter alia, arguments rejecting, in principle, application of the State action defence in the present case, calling into question diligent examination of the complaint by the Commission and challenging the assessments and reasoning specifically put forward to justify the fact that it could not be excluded that that defence applied to Gazprom's conduct.
- 63 As regards, first of all, the principle of the application of the State action defence, the applicant claimed, in the second plea, that that defence could not apply in a case such as this, that is to say, one in which, first, State compulsion was exercised by a third country, in this case the Russian Federation, rather than a Member State, and, secondly, the undertaking concerned, in this case Gazprom, is controlled by that third country and may itself have sought that compulsion be exercised.
- 64 It cannot be ruled out that the State compulsion covered by the State action defence may be exercised by a third country (see, to that effect, judgment of 30 September 2003, *Atlantic Container Line and Others v Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraphs 1128 to 1150). Nonetheless, the fact remains that, bearing in mind in particular the restrictive application of that defence, the Commission must, in its examination of the factual and legal circumstances connected with a complaint and, in particular, the level of autonomy of an undertaking, take into account the potential blurring of the distinction between the latter and the State structures from which the compulsion in question originates.

- 65 In that regard, it is clear from the application itself that during the administrative procedure the applicant could have invoked relevant circumstances in the light of the assessment of the existence and implications of such blurring of the distinction in the present case, in particular in view of the interventions of the Russian Federation mentioned in the complaint or of the latter's alleged control over Gazprom [*confidential*].
- 66 Next, it must be observed that arguments put forward in the context of the first and fourth pleas allege that the Commission provided inadequate reasoning for the contested decision and infringed its obligation to conduct a careful examination of the elements of fact and of law set out in the complaint. The applicant points out that the Commission did not mention any specific provision of Russian law but merely made general references to certain provisions of the Poland-Russia agreements, which is insufficient to justify rejection of the complaint. Those references are all the more questionable since some of Gazprom's requirements were imposed before the Additional Protocol was concluded on 29 October 2010 and that protocol was in fact concluded following pressure from Gazprom.
- 67 On the matter of the statement of reasons, the Court also notes that the wording of recital 110 of the contested decision gives rise to doubts regarding the precise content of the overall conclusion contained in that recital and, hence, regarding one of the justifications put forward for rejecting the claims concerning infrastructure-related conditions. The Commission appears to refer in that recital, first, to the possible application of the State action defence, as follows from the first two sentences of that recital, but also, secondly and separately, to the fact that the Poland-Russia agreements may have largely determined the content of the EuRoPol-Gaz-System operatorship agreement, as is clear from the third sentence of that recital and the use of the word 'furthermore'.
- 68 Moreover, in addition to the pre-rejection letter and the contested decision, it must be observed that, in its written answers to the questions put by the Court, the Commission stated that, even if it were established to the requisite legal standard, in the light of the content of the Poland-Russia agreements and the intergovernmental context relied on, that the conditions relating to the State action defence were not met *stricto sensu*, those agreements constitute nonetheless a political signal issued by a third country, which could, according to the principle of mutual respect (comity), be taken into account in order to assess the EU interest in further examining the claims made in the complaint.
- 69 This therefore results in – at least apparent – confusion surrounding the justifications for the ground that there was a limited likelihood of finding an infringement of Article 102 TFEU, or even for any other grounds enabling the Commission to find that the EU had insufficient interest in continuing the examination of Case AT.40497.
- 70 Although the Commission was free, by way of criteria for assessing the EU interest, to rely on the limited likelihood of finding an infringement or on considerations relating to the influence of intergovernmental agreements in a given sector, or even relating to the taking into account of considerations linked to the EU's international competition policy, it was also required to ensure that the applicant would be properly heard in that regard and to state clear reasons for the contested decision, those obligations being of even more fundamental importance where it had wide discretion (see, to that effect, judgment of 16 October 2013, *Vivendi v Commission*, T-432/10, not published, EU:T:2013:538, paragraph 27 and the case-law cited).

- 71 If follows from the above that, but for the Court finding an infringement of Article 7(1) of Regulation No 773/2004, the procedure in Case AT.40497 could have had a different outcome and the contested decision might have been substantively different as regards the justification connected to the State action defence.
- 72 However, since the rejection of the claims concerning infrastructure-related conditions is, as stated in paragraph 49 above, also based on a justification connected to the certification decision, the contested decision should be annulled only if that second justification is also challenged by the applicant. That second justification is in fact specifically covered by the first part of the fifth plea.
- 73 Therefore, if the first part of the fifth plea, which relates to that second justification, proves well founded, the present plea must be upheld, in so far as it alleges an infringement of Article 7(1) of Regulation No 773/2004, without the need to examine the alleged infringement of Article 8(1) of that regulation, Article 296 TFEU and Article 47 of the Charter.

***First part of the fifth plea: infringement of Article 7(2) of Regulation No 773/2004 in conjunction with Article 102 TFEU, in so far as the Commission committed a manifest error of assessment in relation to the claims concerning infrastructure-related conditions***

- 74 The applicant claims that the Commission committed a manifest error of assessment in considering that the certification decision established that Gaz-System had control over investments relating to the Polish section of the Yamal pipeline and so it was not necessary to assess other evidence concerning the claims concerning infrastructure-related conditions (set out in paragraph 19 above and dealt with in Section 2.4.1 of the contested decision). In particular, the Commission cannot validly rely on that decision as constituting justification that is essential for rejection of the complaint, whilst downplaying the fact that that decision was not properly implemented.
- 75 The applicant points out that the operative part of the certification decision comprised two paragraphs. Whilst paragraph 1 of the operative part of that decision certified Gaz-System as the independent operator of the Polish section of the Yamal pipeline, paragraph 2 stated that within a period of 24 months the daily operation of the compressor and metering stations of that section would be carried out by Gaz-System. Paragraph 2 was not implemented, however, due to blocking by EuRoPol, as the owner of the infrastructure of that section, and indirectly by Gazprom, in its capacity as shareholder of EuRoPol (as stated in point 19 above), in particular by taking advantage of the amendment of the statutes of that joint undertaking and the right of veto that Gazprom obtained by abusing its dominant position.
- 76 In that regard, three factors illustrate the significance of paragraph 2 of the operative part of the certification decision. First, the Polish Energy Regulator, in the context of the market test conducted during the procedure in Case AT.39816, pointed out that the transfer required in that paragraph had not been carried out. Secondly, in the letter of 30 August 2016, the Russian Energy Minister threatened to reduce or suspend gas supplies by Gazprom in the event of full implementation of that decision. Thirdly, the Commission itself, in two opinions issued in 2014 and 2015 on two draft decisions preceding the certification decision, stressed the relevance of the transfer to Gaz-System of the daily operational activity of the compressor and metering stations. It mentioned, in particular, the risk that, without that transfer EuRoPol would have unwarranted access to confidential information and would engage in discriminatory practices against its shareholders' competitors, namely the applicant and Gazprom. Thus, the certification decision cannot be considered independently from the reservations expressed in those opinions.

- 77 Therefore, it is not possible to infer from the certification decision absolute confirmation or incontrovertible proof of the absence of any practice restricting competition in relation to the Yamal pipeline on the part of Gazprom, especially since failure to implement paragraph 2 of the decision is attributable to the latter, and the company thus continues to exert unlawful influence over that pipeline.
- 78 The Commission, supported by Gazprom, stresses the fact that the contested decision concerns exclusively the likelihood of finding an infringement of the competition rules. The certification decision, however, provided an indication that that likelihood was low. Whilst the Commission's initial view had been that Gazprom exercised control over investments in the Polish section of the Yamal pipeline, that decision contained findings that the situation had altered in that regard.
- 79 Regarding the recommendation to transfer operational activity, made in paragraph 2 of the certification decision, the Commission points out that that decision confirmed unconditionally, and therefore definitively, Gaz-System as the independent transmission system operator. Contrary to the applicant's submissions, such a decision has real legal significance for the independence of the operator concerned and is not merely declaratory. Furthermore, the failure to implement that recommendation has no relevance as regards the Polish Energy Regulator's findings and assessments in respect of investments in the Polish section of the Yamal pipeline.
- 80 As for the two opinions which the Commission issued in the context of the Gaz-System certification procedure, first, they were not binding. Secondly, those opinions were intended to ensure full application of the rules of EU energy law and had no influence, in the context of examination of the complaint, on the Commission's doubts as to the possibility of finding, as regards the claims at issue, an infringement of competition rules as such.
- 81 For its part, Gazprom contends that the certification decision provided a significant indication of the low likelihood that it would exert any influence as regards investments relating to the Polish section of the Yamal pipeline, and therefore a low likelihood that an infringement could be found.
- 82 As regards the failure to implement the recommendation made in that decision, the complaint did not contain any evidence that that failure was attributable to blocking by Gazprom, which was not responsible for it. In support of that statement, Gazprom argues, first, that the certification decision is final under Polish law and grants Gaz-System prerogatives the exercise of which it cannot prevent, secondly, that Gaz-System is the sole addressee of the certification decision and, therefore, it alone is required to implement it, whereas, on the other hand, there is no reason to require EuRoPol (or Gazprom itself) to implement that decision, and, thirdly, that, in the event of failure to implement it, the Polish Energy Regulator could, even should, enforce the implementation of that decision, inter alia, by imposing financial penalties or even by revoking it.
- 83 The Court observes that, as stated in paragraph 49 above, in the contested decision the Commission rejected the claims concerning infrastructure-related conditions on the ground of the limited likelihood of finding an infringement of Article 102 TFEU, which was based on two justifications, one relating to the possible application of the State action defence and the other relating to the certification decision, the latter justification being set out in recitals 99 to 102 and 109 of the contested decision.

- 84 In that regard, in the first place, it is common ground that, by the certification decision, the Polish Energy Regulator certified Gaz-System's independence and, in particular, made various findings in relation to Gaz-System's control over investments in respect of the Polish section of the Yamal pipeline and over the making of certain investments in that section.
- 85 It is true, however, that the operative part of the certification decision also contained a paragraph concerning the transfer to Gaz-System of the daily operational activity of the compressor and metering stations on the Polish section of the Yamal pipeline. That transfer, whatever the Commission suggests and notwithstanding the fact that it is comes within the scope of EU gas legislation, also involves competition aspects that may come under EU competition rules.
- 86 The competent Commission services – although not DG Competition – had, in each of the two opinions the Commission issued on 9 September 2014 and 19 March 2015 in the context of Gaz-System's certification procedure, referred to the need to transfer the operational activity of the compressor and metering stations. In particular, in the opinion of 9 September 2014, those services had stated that the operation of those stations was one of the core tasks of a transmission system operator and pointed out the issues in the area of competition arising from the operation of those stations by EuRoPol, the owner of the Polish section of the Yamal pipeline, since, as a result of the control exercised over it by Gazprom and the applicant, it was part of a vertically integrated undertaking. In particular, the operation of those stations by EuRoPol increased the risk of discriminatory conduct and enabled that undertaking to access confidential information that might confer a competitive advantage on its shareholders, which included Gazprom.
- 87 More generally, it must be observed that EU gas legislation does concern competition issues and that, in particular, 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 is stated in recitals 4 to 17 of that directive, aims to create a level playing field for gas suppliers by establishing non-discriminatory network access, through unbundling the network operator from the vertically integrated undertaking owning the network.
- 88 Those considerations relating to the opinions issued by the competent services of the Commission in the context of the Gaz-System certification procedure cannot be called into question by the argument that those opinions are not binding, since, irrespective of their legal force, it was the content of those opinions, in particular the potential competition issues identified in them, that DG Competition had to take into consideration when assessing the certification decision.
- 89 The fact remains, moreover, that transfer of the operational activity of the compressor and metering stations had not taken place by the end of the 24-month period provided for in paragraph 2 of the certification decision, which was 19 May 2017, or by the date on which the contested decision was adopted, which was 17 April 2019. In that regard, it is necessary to dismiss the argument that responsibility for that failure lay with Gaz-System, the addressee of the certification decision, or with the applicant, which was a shareholder controlling EuRoPol jointly with Gazprom.
- 90 It is clear from the Russian Energy Minister's letter of 30 August 2016 that the blocking connected with the transfer of operational activity originated with Gazprom rather than with the applicant or Gaz-System, irrespective of any doubts as to whether that letter was an indication of pressure from the Russian Federation on Gazprom or might constitute intervention requested by the

latter in order to defend its own interests. In any event, the question of the origin of the blocking increases the relevance of the failure to transfer the operational activity of the compressor and metering stations.

- 91 The Commission could not therefore attach decisive importance to the certification decision without taking into consideration paragraph 2 of the operative part of that decision and, more generally, the circumstances surrounding the failure to transfer the operational activity of the compressor and metering stations.
- 92 Secondly, it must be observed that the Commission stated in the contested decision that the findings and assessments made in the certification decision regarding investments in the Polish section of the Yamal pipeline had enabled it to conclude that its preliminary competition concerns identified in the SO in Case AT.39816 relating to the Yamal objections had not been confirmed and hence no commitment was required in that regard.
- 93 However, as the applicant pointed out, the content of its complaint exceeded the scope of the objections contained in the SO, and in particular the claims concerning infrastructure-related conditions covered practices that went beyond the mere issue of control of investments in the Polish section of the Yamal pipeline. As stated in paragraph 19 above, those claims, made also in the complaint, concerned in a more general way practices by which Gazprom imposed a number of conditions: namely, it required amendments to the statutes of EuRoPol enabling it to block any activity by EuRoPol that it considered conflicted with its interests, it insisted on certain clauses in the operatorship agreement that was to be concluded by EuRoPol and Gaz-System, and it asked the applicant to agree, in its capacity also as a shareholder of EuRoPol, to waive certain debts owed by RUE and Gazprom.
- 94 Accordingly, relying on the findings and assessments contained in the certification decision concerning investments in the Polish section of the Yamal pipeline, the Commission reduced the claims set out in the complaint merely to the scope of the Yamal objections set out in the SO.
- 95 However, contrary to the Commission's arguments, such an approach cannot be justified by the fact that, as is clear from the complaint itself, Gazprom treated the conditions governing the conclusion of an agreement for the supply of additional volumes of gas as a single entity, so that the findings and assessments concerning investments in the Polish section of the Yamal pipeline had an impact on the assessment of those conditions overall. As is clear from the preceding paragraph, the practices concerned were of various types, in particular in so far as they also concerned waivers of debts owed by RUE and Gazprom and went beyond the matter of investments.
- 96 As to the remainder, in so far as the Commission challenges the applicant's premiss that it would be more appropriate in a competition procedure to resolve difficulties that are associated more with the implementation of the EU's gas legislation, it must be observed that by way of criteria for assessing the Union interest the Commission was free, where appropriate, to rely on a ground for rejecting a complaint related to the fact that there were other channels available for addressing the practices concerned, or at least some of them, such as verification by the Polish authorities that that legislation had been complied with. However, the Commission was required to ensure that the applicant was given a proper hearing in that regard and to state clear reasons for the contested decision, those obligations being of even more fundamental importance where it has wide discretion (see, to that effect, judgment of 16 October 2013, *Vivendi v Commission*, T-432/10, not published, EU:T:2013:538, paragraph 27 and the case-law cited).



- 97 Consequently, as regards the claims concerning infrastructure-related conditions, the Commission made a manifest error of assessment in holding that the findings and assessments made in the certification decision with regard to investments in the Polish section of the Yamal pipeline justified the conclusion that there was only a limited likelihood of finding an infringement of Article 102 TFEU.
- 98 It follows from the above that, as regards the infringement of Article 7(1) of Regulation No 773/2004 set out in paragraph 60 above, it must be held, in line with the findings set out in paragraphs 71 to 73 above, that, taking into account also the second justification, regarding the certification decision, the procedure in Case AT.40497 could have had a different outcome and the contested decision might have been substantively different, and that therefore that infringement must lead to the annulment of that decision.
- 99 The Court considers that it is nonetheless appropriate to examine the second part of the fifth plea.

***Second part of the fifth plea: infringement of Article 7(2) of Regulation No 773/2004, in conjunction with Article 102 TFEU, in that the Commission made manifest errors of assessment regarding the supply restrictions during winter 2014/2015***

- 100 According to the applicant, the Commission made several manifest errors of assessment in rejecting the claims concerning the supply restrictions during winter 2014/2015, set out in paragraph 19 above and dealt with in Section 2.4.2 of the contested decision, but for which errors it might have held that it was in the EU's interest to eliminate the risk that Gazprom might again use supply restrictions to prevent re-exports of gas.
- 101 First, the Commission was wrong to consider that the risk that disturbances in gas supplies would have an impact in the future was reduced due to the improved interconnection of the Polish market with the German market. The introduction of reverse flows on the Yamal pipeline predated the incident in question, since it took place in April 2014. Furthermore, that improvement was of no use for other Member States affected by the restrictions at issue.
- 102 Secondly, the Commission was wrong to state that it had no evidence that that incident constituted abuse of a dominant position when it had failed to examine properly the evidence available to it. The objective of the restrictions on re-exports of gas to Ukraine is demonstrated in a public statement by the Russian Energy Minister of 25 September 2014, referred to both in the complaint and in the reply to the pre-rejection letter. Other corroborating evidence was provided, which shows that those restrictions had affected Hungary, Austria and Slovakia and that Hungary had discontinued re-exports to Ukraine. Subsequently, in addition to the threats contained in the letter of 30 August 2016, such restrictions occurred again in 2018 in Romania and in Ukraine.
- 103 Thirdly, the Commission was wrong to describe the restrictions in question as breaches of contract, in respect of which the applicant could seek compensation under contractual mechanisms for settling disputes. That description resulted from failure to take into consideration the wider context in which those restrictions were set, namely Gazprom's strategy designed to restrict competition. Moreover, the fact that a practice has a contractual context and there is a contractual mechanism for settling disputes does not in itself mean that Commission intervention is not justified, since those circumstances do not exclude the existence of anti-competitive practices.

- 104 Fourthly, contrary to what the Commission held, the practice complained of by the applicant has not gone away and still has an impact on the current state of competition. The Commission's position is based on failure to take into consideration other evidence, namely other examples of restrictions provided by the applicant and the fact that such restrictions are used as an anti-competitive instrument, to segment markets or to impose the concessions sought by Gazprom on its customers. Furthermore, the Commission failed to take account of the fact that the development of gas transit infrastructure controlled by Gazprom, which made it possible to bypass the Central European Member States (the Nord Stream 1 Pipeline and the Nord Stream 2 and TurkStream pipeline projects), strengthened its capacity to implement such practices, which was not resolved by Gazprom's commitments made binding in Case AT.39816.
- 105 The Commission, supported by Gazprom, disputes the errors of assessment alleged by the applicant and therefore considers that this part of the plea should be dismissed.
- 106 In that regard, it is clear from the contested decision and from the pre-rejection letter that the Commission considered on essentially four grounds that it did not need to investigate further the claims concerning supply restrictions during winter 2014/2015. First, the practices at issue gave rise to a dispute of a contractual nature, but the evidence at its disposal did not enable the Commission to conclude that they were abusive. Secondly, the dispute settlement mechanism provided for in the contract between Gazprom and the applicant offered an alternative to a competition investigation and an appropriate way to address those practices. Thirdly, those practices were a thing of the past and it did not appear that they had affected competition at the time the contested decision was adopted. Fourthly and lastly, improvement of the interconnection between Germany and Poland had significantly reduced the risk of future supply problems affecting Poland.
- 107 With regard to the first ground, the Court notes that the main evidence of the existence of potentially abusive conduct is the Russian Energy Minister's public statement of 25 September 2014, which suggests that the motive for the supply restrictions may have been to prevent re-exports of gas from the CEE countries concerned to Ukraine. However, as the Commission states, that evidence is insufficient to establish an infringement of Article 102 TFEU, or to justify on its own further investigation of those restrictions, especially since, as is clear from the pre-rejection letter, there might be another reason for those restrictions, namely, to build up Russian gas reserves, even if the likelihood of that other reason may be disputed.
- 108 That is not called into question by the fact that supply restrictions during winter 2014/2015 formed part of a general strategy of Gazprom, which was documented in the SO in Case AT.39816 and is further confirmed by the threats contained in the letter of 30 August 2016.
- 109 Although such a strategy was mentioned in the SO, the strategy is made up of various categories of practices and, even assuming that the motive for those restrictions was to prevent re-exports to Ukraine, such restrictions are different from the practices set out in the SO, which relate to trade between the CEE countries concerned, and from the alleged threats contained in the letter of 30 August 2016, which concern the operation of the Polish section of the Yamal pipeline. It was therefore reasonable for the Commission to examine those restrictions separately, in view of the fact also that the decision adopted at the end of Case AT.39816, examined *inter alia* in Sections 2.2 and 2.3 of the contested decision, made the commitments undertaken by Gazprom to address the Commission's competition concerns in that case binding.

- 110 Furthermore, the fact that interconnection costs rose during winter 2014/2015 and the fact that supply restrictions during that season affected several Member States besides the Republic of Poland, which were mentioned by the applicant, do not, as such, demonstrate an infringement of Article 102 TFEU.
- 111 With regard to the second ground, it is true, as the applicant contends, that the contractual nature of a practice and the existence of a contractual procedure for settling disputes do not preclude that practice from constituting an infringement of EU competition rules. However, the applicant did not dispute the fact that, as is stated in the contested decision, there does exist such a procedure for settling disputes in the gas supply contract it concluded with Gazprom. It is reasonable, however, for the Commission to take into consideration the existence of alternative channels which, in principle, make it possible to address practices challenged by a complainant.
- 112 With regard to the third ground, namely that the supply restrictions in question were a thing of the past, it must be held, for the reasons set out in paragraph 108 above, that those restrictions could be considered separately by the Commission. For the rest, the other evidence mentioned by the applicant, in particular the problems allegedly created by Gazprom in Romania in 2018 and Gazprom's alleged control over the gas transit infrastructure in Europe, even supposing they do constitute practices comparable to those restrictions, was not mentioned during the administrative procedure or constitute claims that are too general to call into question the Commission's assessment.
- 113 With regard to the fourth ground, suffice it to say that the applicant does not dispute the reality of the improvement of the interconnection between Germany and Poland, or the increase in the volumes of gas transported from the former to the latter since 2016.
- 114 It must therefore be held that the Commission did not commit a manifest error of assessment in considering that there were insufficient grounds for investigating further the claims concerning supply restrictions during winter 2014/2015.
- 115 In light of all the above considerations and in particular the finding set out in paragraph 98 above that the Commission infringed Article 7(1) of Regulation No 773/2004, since, but for that infringement the procedure in Case AT.40497 could have had a different outcome and the contested decision might have been substantively different, the action must be upheld. In those circumstances, the Court considers that there is no need to adjudicate on the application for measures of organisation of procedure made by the applicant.

## **Costs**

- 116 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 applicant's costs, in accordance with the form of order sought by the latter.
- 117 Furthermore, in accordance with Article 138(3) of the Rules of Procedure, the Court may order interveners other than Member States or EU institutions to bear their own costs. In the present case, Gazprom must be ordered to bear its own costs.

On those grounds,

THE COURT (Eighth Chamber, Extended Composition)

hereby:

- 1. Annuls Decision C(2019) 3003 final of the European Commission of 17 April 2019 rejecting the complaint (Case AT.40497 – Polish gas prices).**
- 2. Orders the Commission to bear its own costs and to pay the costs incurred by Polskie Górnictwo Naftowe i Gazownictwo S.A.**
- 3. Orders Gazprom PJSC and Gazprom export LLC to bear their own costs.**

Van der Woude

Svenningsen

Barents

Mac Eochaidh

Pynnä

Delivered in open court in Luxembourg on 2 February 2022.

[Signatures]