Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

21 July 2017*

(Application for interim measures — Internal market in natural gas — Directive 2009/73/EC — Application by the Bundesnetzagentur for review of the exemption of the OPAL pipeline from the EU requirements for its operation — Commission decision amending the exemption from the EU requirements — Application for a stay of execution of a measure — Lack of any urgency)

In Case T-130/17 R,

Polskie Górnictwo Naftowe i Gazownictwo S.A., established in Warsaw (Poland), represented by M. Jeżewski, avocat,

applicant,

v

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

defendant,

supported by

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

intervener,

REQUEST on the basis of Articles 278 TFEU and 279 TFEU seeking a stay of execution of Commission Decision C(2016) 6950 final of 28 October 2016 on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC,

THE PRESIDENT OF THE GENERAL COURT

makes the following

* Language of the case: Polish.

Order

Background to the dispute

1 By Decision C(2009) 4694 of 12 June 2009, the Commission of the European Communities requested the Bundesnetzagentur (BNetzA), the Federal Networks Agency, Germany, under Article 22 of Directive 2003/55 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), to amend its decision of 25 February 2009 excluding the transport capacities of the Ostseepipeline-Anbindungsleitung ('OPAL') pipeline project, which is the eastern on-shore section of the Nord Stream 1 pipeline, the entry point of which is near to the town of Lubmin, near Greifswald, in Germany, and the exit point in the town of Brandov, in the Czech Republic, from the application of the requirements on third party access laid down in Article 18 of that directive and the tariff regulations laid down in Article 25(2) to (4) thereof.

2 The Commission Decision of 12 June 2009 laid down 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 having concluding 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.'

3 On 7 July 2009, the BNetzA amended its decision of 25 February 2009, adapting it to the abovementioned conditions laid down in the Commission decision of 12 June 2009. The exemption from the rules ('the 2009 exemption') was granted by the BNetzA for a period of 22 years.

4 The OPAL pipeline was put into service on 13 July 2011 and has a capacity of some 36.5 billion m^3. By virtue of the decision of the Commission of 12 June 2009 and the decision of BNetzA of 25 February 2009, as amended by its decision of 7 July 2009, the capacities of the OPAL pipeline were totally exempted from application of the requirements on third party access and tariff regulation on the basis of Directive 2003/55.

5 The non-reserved 50% of that pipeline's capacity has never been used since Gazprom did not implement the gas transfer programme referred to in the Commission decision of 12 June 2009. The entry capacity of the pipeline near to Greifswald is of interest only to third parties who are in a position to add gas at that point in the pipeline. In the current technical configuration, natural gas can be supplied at that entry point only by the Nord Stream 1 pipeline, used by the Gazprom group to transport gas from Russian gas fields, so that only 50% of the transport capacity of the OPAL pipeline appears, a priori, to be used.

6 On 13 May 2016, the BNetzA notified the Commission, on the basis of Article 36 of Directive 2009/73 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 (OJ 2009 L 211, p. 94), of its intention to amend certain provisions of the 'exemption granted in 2009' concerning the section of the OPAL pipeline managed by Opal Gastransport GmbH & Co. KG ('OGT').

7 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.

8 In the contested decision, the Commission has maintained the exemption from the requirements on third party access granted to the OPAL pipeline for the section between the entry point near Greifswald and the exit point at Brandov for a maximum of 50% of the capacities, which it had already approved in its decision of 12 June 2009. However, the remaining 50% of the capacity on that section — unused until then because of the lack of implementation of the gas transfer programme by Gazprom — was liberalised, that is to say, made subject to the requirements on third party access. That liberalisation is to be carried out in the form of an allocation of the transport capacities which the pipeline manager is required to make in a transparent and non-discriminatory auction.

9 Since the non-discriminatory and transparent provision of the transport capacities thus liberalised could, de facto, also result in their use by Gazprom eksport, the Commission, in order to ensure that third parties may actually have access to the 'liberalised' capacities, raised the ceiling proposed by the BNetzA concerning the FZK interconnection capacities (*feste frei zuordenbare Kapazitäten*/fixed freely-attributable capacities) at the exit point of the pipeline. Thus, the OPAL pipeline manager will be required to make available to users other than the dominant company on the Czech natural gas market, in a bidding procedure, an FZK interconnection capacity of an initial volume of 3.2 million kWh. If, however, it appears, at the annual bidding procedure, that the demand for FZK capacities at the Brandov exit point is higher than 90% of the capacities offered, the BNetzA is required to increase the FZK capacities available by 1.6 million kWh at the following annual bidding procedure. The available FZK capacities may eventually reach a volume of 6.4 million kWh, namely 20% of the total capacity of the OPAL pipeline.

10 Furthermore, having regard to the upward trend of bids and in order to avoid any overbidding by the dominant entity on the Czech market, the Commission introduced an additional condition that such an entity may submit its bid in the bidding procedure for the FZK capacities only at the base price of the capacities, thus meaning that the price proposed cannot exceed the average base price of the regulated tariff on the transport network from the commercial area of Gaspool in Germany to the Czech Republic for comparable products in the same year.

11 On 28 November 2016, the BNetzA amended the exemption granted to the OPAL pipeline manager by its decision of 25 February 2009 in accordance with the contested decision.

Procedure and forms of order sought

12 By application lodged at the Registry of the General Court on 1 March 2017, the applicant, Polskie Górnictwo Naftowe i Gazownictwo S.A. ('PGNiG S.A') brought an action for the annulment of the contested decision.

13 By a separate document, lodged at the Court Registry on the same date, PGNiG S.A. brought the present application for interim measures, in which it claims, in essence, that the President of the General Court should:

– stay the execution of the contested decision until delivery of the judgment closing the main proceedings;

– order the Commission to require the BNetzA to take all possible legal measures to suspend, until delivery of the judgment closing the main proceedings, the execution of a decision, operation, public law contract or any other implementing measure amending, supplementing, repealing or affecting in any other way the decision of the BNetzA of 25 February 2009, in the version of 7 July 2009;

– order the Commission to require the BNetzA to take all possible legal measures in order to suspend, until delivery of the judgment closing the main proceedings, the implementation of the decision, operation, public law contract or any other implementing measure amending, supplementing, repealing or affecting in any other way the decision of the BNetzA of 25 February 2009, in the version of 7 July 2009;

– order the Commission to require OGT to suspend, until delivery of the judgment closing the main proceedings, the bidding procedure for the transport capacities following from the implementation of the contested decision and the grant of access to the transport capacities of the OPAL pipeline on conditions other than those laid down in the decision of the BNetzA of 25 February 2009, in the version of 7 July 2009;

– order OGT to suspend, until delivery of the judgment closing the main proceedings, the bidding procedure for the transport capacities following from the implementation of the contested decision and the grant of access to the transport capacities of the OPAL pipeline on conditions other than those laid down in the decision of the BNetzA of 25 February 2009, in the version of 7 July 2009;

– order the Commission to require the BNetzA, OGT, OAO Gazprom and OOO Gazprom to suspend, until delivery of the judgment closing the main proceedings, the implementation of the settlement contract on the conditions approved in the contested decision;

– order the BNetzA, OGT, OAO Gazprom and OOO Gazprom to suspend, until delivery of the judgment closing the main proceedings, the implementation of the settlement contract on the conditions approved in the contested decision.

14 By orders of 23 December 2016, *PGNiG Supply & Trading GmbH* v *Commission* (T-849/16 R) and *Poland* v *Commission*, T-883/16 R, the President of the General Court, by virtue of Article 157(2) of the Rules of Procedure, granted the stay of execution sought by the applicants in both cases until delivery of the orders closing these interim proceedings.

15 In its observations on the application for interim measures, which were lodged at the Registry of the General Court on 15 March 2017, the Commission contends, in essence, that the President of the Court should:

– dismiss that application;

– order PGNiG S.A. to pay the costs.

16 On 22 March 2017, Gazprom export sought leave to intervene in the present procedure for interim measures in support of the form of order sought by the Commission. On 4 April 2017, the Commission and PGNiG S.A. lodged their observations on that application.

17 By application lodged at the Registry of the General Court on 30 March 2017, OGT sought leave to intervene in the present procedure for interim measures in support of the form of order sought by the Commission. On 6 April 2017, the Commission and PGNiG S.A. lodged their observations on that application.

18 On 28 April 2017, the President of the General Court granted the application for leave to intervene made by the Federal Republic of Germany, lodged on 28 March 2017, to which neither the Commission nor PGNiG S.A. expressed any objection in their observations lodged on 7 April 2017 respectively. The statement in intervention of the Federal Republic of Germany in support of the form of order sought by the Commission was registered by the Registry of the General Court on 15 May 2017. The Commission and PGNiG S.A. lodged their observations on that statement on 29 May 2017.

19 By letter of 22 June 2017, the parties were invited to a hearing on 5 July 2017 to set out their arguments concerning the conditions relating to the urgency and the balancing of the interests.

20 OGT and Gazprom were also invited to attend the hearing in order to put forward their arguments concerning the balancing of the interests, without prejudice to the final decision on admission of their respective applications for leave to intervene.

21 On 5 July 2017, PGNiG S.A., the Commission, the Federal Republic of Germany and the two applicants for leave to intervene submitted their arguments at the hearing and answered questions posed by the President of the General Court. Although OGT and Gazprom were permitted to submit arguments on the balancing of the interests present in the context of these interim proceedings, the President of the General Court nonetheless reserved his decision on their definitive intervention.

Law

General considerations

22 It is apparent from a combined reading of Articles 278 TFEU and 279 TFEU, on the one hand, and Article 256(1) TFEU, on the other, that the court hearing the application for interim measures may, if he considers that circumstances so require, order that application of an act contested before the General Court be suspended or prescribe any necessary interim measures, pursuant to Article 156 of the Rules of Procedure. Nevertheless, Article 278 TFEU establishes the principle that actions do not have suspensory effect, since acts adopted by the institutions of the European Union are presumed to be lawful. It is therefore only exceptionally that a judge hearing an application for interim measures may order suspension of the application of an act contested before the General Court or prescribe interim measures (order of 19 July 2016, *Belgium* v *Commission*, T-131/16 R, EU:T:2016:427, paragraph 12).

23 Moreover, the first sentence of Article 156(4) of the Rules of Procedure provides that applications for interim measures must state 'the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for'.

24 Accordingly, the judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid causing serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be

dismissed if either of them is absent. Where appropriate, the judge hearing such an application must also weigh the competing interests (see order of 2 March 2016, *Evonik Degussa* v *Commission*, T-162/15 P-R, EU:T:2016:142, paragraph 21 and the case-law cited).

25 In the context of that overall examination, the judge hearing the application has a wide discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (see order of 19 July 2012, *Akhras* v *Council*, C-110/12 P(R), not published, EU:C:2012:507, paragraph 23 and the case-law cited).

26 In the circumstances of the present case, without its being necessary to rule on the pleas of inadmissibility put forward by the Commission, it is appropriate to begin by examining whether the requirement of urgency is fulfilled.

Urgency

27 In order to determine whether the interim measures sought are urgent, it should be noted that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to prevent a lacuna in the legal protection afforded by the EU Court. For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage (see order of 14 January 2016, *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 27 and the case-law cited).

28 In the present case, PGNiG S.A. fears that it will suffer harm consisting, in essence, of the loss, firstly, of access to diversified supply sources and, secondly, of the possibility of ensuring the security and continuity of supplies to end users in Poland, if the application for interim measures is rejected.

29 It is of the view that the contested decision will have the effect of restricting its opportunities of diversifying its gas purchasing sources either due to the increase in the level of dependence on Gazprom's supplies, or due to the need to bear higher costs for gas supplies from alternative actors. That restriction would thus affect the security and continuity of the supply which PGNiG S.A. is bound to guarantee by virtue of the Energy Law and its company statutes.

30 Firstly, as regards the allegation concerning the loss of its access to diversified supply sources, on the one hand, PGNiG S.A. points out that the reservations of the transport capacities subject to the bidding procedure in accordance with the new conditions for use of the OPAL pipeline can be made for a period of 15 years. It states that it can be expected that Gazprom will reserve the greater part of the transport capacities for that period, thus freezing the situation for the next 15 years.

31 PGNiG S.A. argues that the execution of the contested decision will allow Gazprom to reserve at least 90% of the transport capacities of the OPAL pipeline. The contested decision organises a bidding procedure for 50% of the total transport capacity of the OPAL pipeline. However, in the view of PGNiG S.A., the conditions for the regulatory exemption laid down in the contested decision will mean that Gazprom will be able to take at least 80% of the partially regulated transport capacities of the OPAL pipeline which are subject to the bidding procedure. Since the other 50% of the transport capacities of the OPAL pipeline is outside EU law and the rules on third party access, and is granted in its entirety to Gazprom, that company will, in reality, have guaranteed access to at least 90% of the total transport capacities of the OPAL pipeline. Accordingly, by permitting Gazprom to use almost the entirety of those transport capacities for a period of 15 years, the contested decision will significantly alter the Polish natural gas distribution market.

32 On the other hand, PGNiG S.A. states that Gazprom's long-term reservation of the additional, newly 'liberalised', transport capacities of the OPAL pipeline will have irreversible effects on the downstream contracts concluded by operators involved in the transport, distribution and delivery of gas supplies by Gazprom. In the view of PGNiG S.A., the reservations, taking the form of agreements under private law, will then be sources of rights and obligations for natural or legal persons which will be protected whatever the outcome of the action in the main proceedings. Accordingly, even the annulment of the contested decision will not be able to give rise to the annulment of transport or supply contracts in respect of gas using the OPAL pipeline. It also points out that those transport contracts will have the parallel result of the conclusion of commercial gas trading contracts, thus giving rise to an additional obstacle to the termination of those transport contracts.

33 Thus, because, on the one hand, of the complexity of the relations between the administrative authorities and the individual entities involved and, on the other, the legal relationships connecting those entities which will act on the basis of measures benefiting from the presumption of legality of the contested decision, PGNiG S.A. is of the view that it will not be possible to obtain reparation for its loss.

34 Without it being necessary to assess the possibly hypothetical nature of the conduct which Gazprom will adopt when the transport capacities liberalised by the contested decision are put to the bidding procedure, it is sufficient to note that the harm alleged appears, a priori, to depend on the long-term irreversibility of the situations arising from the legal regime made possible by the contested decision.

35 PGNiG S.A. appears to be of the opinion that the fact that it is possible, in the next annual bidding procedure for that part of the 50% of transport capacities liberalised under the contested decision, for Gazprom to make long-term reservations will have the effect of freezing the situation so that the range of the legal effects of the contested decision will greatly exceed the period of its existence in law.

36 However, it must be noted, first of all, that that analysis rests on an incorrect understanding of the functioning of the specific legal order instituted by the Treaties (see, to that effect, judgment of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, p. 1158). If the contested decision were annulled, the conditions for use of the OPAL pipeline, as authorised under that decision, would no longer apply. Consequently, no private-law measure based on those conditions could be implemented. The Commission has, correctly, pointed to that aspect both in its written submissions and at the hearing on 5 July 2017, as did the Federal Republic of Germany on that occasion.

37 In that regard, in addition to legal obstacles, the existence of which cannot be accepted, as has been recalled in paragraph 36 above, PGNiG S.A. next alleges that there are practical difficulties in the implementation of the effects of such an annulment. However, that objection must also be rejected. Firstly, as the Commission points out categorically in its observations on the statement in intervention of the Federal Republic of Germany and at the hearing on 5 July 2017 and the Federal Republic of Germany on that occasion, if, on the one hand, the General Court annuls the contested decision, it will not be possible to perform the contracts reserving capacity products for periods after delivery of the judgment of the General Court. On the other, the Commission pointed out that, firstly, it is clear from the general conditions of the contract applicable to the transport of gas via the OPAL pipeline that the transport contract concluded between the users of the network and OGT as regards the acquisition of capacity products through a bidding procedure could be terminated immediately on serious grounds, annulment of the contested decision by the General Court undoubtedly being such a ground; secondly, that annulment constitutes a fortuitous circumstance with consequences in law for the contract, in that it would justify an amendment to the terms of that contract; and, thirdly, those general conditions authorised OGT to amend the terms of the contract in future if that were made necessary by the need to take account of a change in the legal situation, for example where a judgment is delivered by an international court. Moreover, it does not appear to be ruled out, a priori, in the light of the dispute pending before the General Court, for a safeguard clause to be inserted into all the contracts signed concerning the future bidding procedures (for example, the downstream

contracts concluded by the operators involved in the transport, distribution and delivery of gas supplied by Gazprom, but also the commercial gas trading contracts), in order to pre-empt the consequences of any new suspension of the contested decision or its annulment. In any event, in so far as the proceedings before the General Court were brought against the contested decision, there is undoubtedly a commercial risk of which the actors on the market cannot be unaware.

38 Finally, PGNiG S.A. points to the fact that, despite, in particular, the orders of the President of the General Court of 23 December 2016, *PGNiG Supply & Trading* v *Commission* (T-849/16 R) and of 23 December 2016, *Poland* v *Commission* (T-883/16 R), the OPAL pipeline has been operated at a level showing a use of capacities which were organised before the suspension of the execution of the contested decision following the conditions authorised by that decision. In that regard, it suffices to note, firstly, that, although legitimate questions may arise as regards the facts of the use of the transport capacities on the OPAL pipeline which followed the adoption of those orders, it is apparent from the file, confirmed at the hearing of 5 July 2017, that the current use of that pipeline in fact continues to be regulated by the conditions applicable before the adoption of the contested decision and, secondly, that, although the Federal Republic of Germany did indeed confirm, at that hearing, that some contracts, concerning bidding procedures organised before the adoption of the orders of 23 December 2016, *PGNiG Supply & Trading* v *Commission* (T-849/16 R) and of 23 December 2016, *Poland* v *Commission* (T-883/16 R), had been executed in breach of the effects of the suspensions declared by the Judge hearing applications for interim measures in his orders, it did, however, emphasise the confusion which surrounded that situation. Following the adoption of those orders, proceedings were brought before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) and led to the adoption of a decision of 30 December 2016 suspending the agreement concluded between OGT and the BNetzA on 28 November 2016. The Federal Republic of Germany thus took the view, incorrectly, as it accepted at the hearing, that only the organisation of bidding procedures for the future was affected, excluding any effect on the performance of the contracts relating to past bidding procedures. In the light of the exchanges which then took place in the context of the present proceedings, the Federal Republic of Germany is of the opinion that such an incorrect interpretation could not happen again in the event of either a new suspension declared by the Judge hearing applications for interim measures or an annulment of the contested decision by the General Court. In that regard, it has stated that the German legislation granted it powers of injunction against the BNetzA which suffice to ensure that the decisions of the General Court and the Judge hearing applications for interim measures are given their full effect. Accordingly, there is nothing to suggest that a new suspension, ordered in the hypothetical situation of an application to the Judge hearing applications for interim measures under Article 160 of the Rules of Procedure and the annulment of the contested decision would not be followed by the effects which accompany such legal decisions.

39 It follows from the foregoing that, even if their certainty were shown with the requisite degree of probability, all the consequences of the events described in paragraphs 30 to 32 above, far from being effective over a period of 15 years, would in fact be limited to the period preceding the date of delivery of the judgment of the General Court closing the main proceedings.

40 Accordingly, only the hypothetical situation described in paragraphs 30 and 31 above, suggested by PGNiG S.A., could potentially come about during the period preceding the delivery of the judgment of the General Court closing the main proceedings. That hypothetical situation, consisting of the use of at least 90% of the transport capacities of the OPAL pipeline by Gazprom, does not per se constitute the harm alleged by PGNiG S.A. since that depends on the long-term continuation of that situation. Consequently, although the effects of that hypothetical situation would be irreversible, the requirement that PGNiG S.A. show serious and irreparable harm justifying the adoption of the interim measures applied for is not satisfied.

41 Secondly, as regards the allegation concerning the loss of the possibility of guaranteeing the security and continuity of the supply to end users in Poland, PGNiG S.A. states that, as a statutory vendor, it is responsible for the supply of gas to clients in Poland, as follows from its company statutes.

42 It is of the opinion that, since the contested decision will lead to an increase in the transport capacities via the OPAL pipeline, the use of the other pipelines enabling the export of gas by Gazprom to western Europe, in particular the Yamal-Europe and Fraternité pipelines, will diminish. That reduction in use would give rise to an increase in tariffs for transport coming from the west. The increase in the transport tariffs would thus reduce the competitiveness of the alternative suppliers of gas from the west and the south as compared with Gazprom using, in the east, the entry points 'monopolised' in the Polish transport network. Accordingly, that would restrict the possibilities of diversifying PGNiG S.A.'s sources for buying gas, which would affect the security and continuity of the supply since, in the view of the applicant, Gazprom would be able to limit its deliveries by the Yamal-Europe pipeline pursuant to the contested decision. PGNiG S.A. points out that that will automatically and immediately give rise to a risk as regards its tasks, in particular, of guaranteeing the security and continuity of the supply, including to protected clients within the meaning of 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). What is more, the applicant would have to take a series of measures (find new suppliers, conclude fresh contracts) which would substantially alter its position on the market.

43 Again, without it being necessary to examine, on the one hand, the possibly hypothetical nature of the events described in paragraph 42 above, in respect of which PGNiG S.A. produces a certain amount of information and documents to show a sufficient degree of certainty, which is nonetheless disputed by the Commission and the Federal Republic of Germany, and, on the other, the reality of the causal link between those events and the contested decision, it is sufficient to note that the harm alleged in the present case lacks immediacy.

44 As has been recalled in paragraph 27 above, it is settled case-law that the urgency of an application for interim measures must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief before judgment is delivered on the principal action for annulment and that it is for that party to adduce sound evidence that it cannot wait for the outcome of the main proceedings if it is not to suffer personally harm of that kind.

45 In the present case, it is apparent from the application for interim measures that a transit contract concluded with Gazprom for the transport of natural gas via the Polish section of the Yamal-Europe pipeline to supply the western European markets, including Poland, and a contract concluded between PGNiG S.A. and Gazprom for deliveries of natural gas apply until 2020 and the end of 2022 respectively. In that application, PGNiG S.A. states that after the expiry, in 2020, of the contract between it and Gazprom concerning the transit of gas via the Yamal-Europe pipeline, it is highly likely, even certain, that the transport capacities of that pipeline will be used for only up to 2.9 million m^3 per year and that, after expiry, in 2022, of the contract between those two operators concerning the supply of gas to the Polish market, the transport capacities of that pipeline could be totally deactivated.

46 It follows from those contracts that the use of the transport capacity of the Polish section of the Yamal-Europe pipeline is, prima facie, guaranteed until at least the end of 2019 and that Gazprom's deliveries to the Polish market are guaranteed until 2022. As the Commission points out in its observations on this application, those two contracts ensure full use of the transport capacity of the Yamal-Europe pipeline. In that regard, it must be borne in mind that the failure to perform those contractual obligations would give rise to specific legal remedies which it would be for PGNiG S.A. to implement if necessary. In that context, it is, moreover, possible to envisage PGNiG S.A. having recourse to Article 160 of the Rules of Procedure, thus guaranteeing it effective judicial protection in its litigation before the General Court in the event of breach of those obligations.

47 Consequently, even if the harm alleged by PGNiG S.A. were shown sufficiently to be certain, it could not occur until those contracts had expired, at the earliest, if, in addition, those contracts were not renewed. Having regard to the average duration of proceedings before the General Court, the judgment on the substance in the present case will probably be delivered within two years, namely during 2019. Moreover, if those contracts came to an end before the General Court had delivered its judgment, it cannot be ruled out that the General Court would consider that there were exceptional circumstances so that it would decide of its own motion to rule in the case in an expedited procedure, by virtue of Article 151(2) of the Rules of Procedure. Failing that, it remains possible, if the circumstances so require, to decide to give the case priority over others, in accordance with Article 67(2) of those Rules.

48 Accordingly, it must be observed that PGNiG S.A. has failed to adduce sound evidence that it cannot wait for the outcome of the main proceedings if it is not to suffer personally serious and irreparable harm.

49 In that regard, it is appropriate, however, to note that PGNiG S.A. argues that the transport of gas may also be restricted for political reasons, despite the validity of the contracts. Due to the fact that it makes possible an increase in the transport of gas via the OPAL pipeline, the contested decision, according to the applicant, increases that risk. In support of its allegation, PGNiG S.A. refers to a series of full interruptions to the deliveries of natural gas via the Yamal-Europe pipeline to Poland and Germany while the gas supply contracts were in force and it was technically impossible to route the gas via other pipelines, which would henceforth be possible because of the contested decision. The increased possibility of redirecting volumes of gas over the Nord Stream I and OPAL pipelines would greatly increase the risk that similar situations recur in future.

50 Without it being necessary to rule at this stage, on the one hand, on the possibly hypothetical nature of the events described in paragraph 49 above and, on the other, on the existence of a link between those events and the contested decision, it suffices to note, firstly, that it cannot be ruled out that interruptions, the reasons for which are considered political by the applicant, could be explained by technical issues. In any event, in order to be serious and irreparable, the alleged loss must be caused by an interruption of long duration. It is not apparent from the information in the file that such a fear is justified since, if such a situation were to materialise, in all probability it would constitute a new fact enabling PGNiG S.A. to apply to the Judge hearing applications for interim measures, in accordance with Article 160 of the Rules of Procedure, who could then order a new stay of execution without hearing the other party, by virtue of Article 157(2) of the Rules of Procedure, in order temporarily to re-establish the rules applicable before the implementation of the system provided for in the contested decision until a decision on the merits of the new application in the light of the new evidence produced. Secondly, as pointed out by the Commission in its observations on this application and at the hearing on 5 July 2017, the applicant has failed, in its original application, to provide sufficient information to enable the Judge hearing applications for interim measures to assess whether it is impossible to fall back on alternative sources of supply.

51 Consequently, it must be concluded that, since the immediacy of the alleged harm has not be demonstrated, PGNiG S.A. has failed to satisfy the condition that it cannot await the outcome of the proceedings in the main action without personally suffering serious and irreparable harm due to the execution of the contested decision.

52 For the sake of completeness, it must be noted that PGNiG S.A. refers, in its arguments relating to the proof of its *locus standi*, to an additional loss consisting, in essence, of the loss of revenue caused by the effects of the contested decision on the company Europol Gaz S.A., owner of the Yamal-Europe pipeline, in which the applicant is the majority shareholder. The expected transfer of gas from the Yamal-Europe pipeline to the Nord Stream I pipeline would give rise to financial losses by the inability to cover the fixed costs of the activity of Europol Gaz S.A. and generate profits from the

transport activity. Accordingly, the applicant, as a shareholder in Europol Gaz S.A., would be deprived of the advantages connected with that company's activity, including the possibility of receiving dividends.

53 In that regard, it must be recalled that, in accordance with settled case-law, damage of a pecuniary nature cannot, otherwise than in exceptional circumstances, be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he suffered the damage. Any such damage could, in particular, be recouped by the applicant's bringing an action for compensation on the basis of Articles 268 TFEU and 340 TFEU (see order of 7 July 2016, *Commission* v *Bilbaína de Alquitranes and Others*, C-691/15 P-R, not published, EU:C:2016:597, paragraph 43 and the case-law cited).

54 Where the harm referred to is of a financial nature, the interim measures sought are justified where, in the absence of those measures, the party seeking the interim measures would be in a position that would imperil its financial viability before final judgment is given in the main action, or where its market share would be affected substantially in the light, inter alia, of the size and turnover of its undertaking and, if appropriate, the characteristics of the group to which it belongs (see order of 12 June 2014, *Commission* v *Rusal Armenal*, C-21/14 P-R, EU:C:2014:1749, paragraph 46 and the case-law cited).

55 In that regard, it is appropriate to point out that the applicant has not provided any information as to the size of its undertaking, its turnover or whether or not it belongs to a group and, if so, the characteristics of that group.

56 In the absence of any information concerning the factors referred to in paragraph 55 above, it cannot be concluded that the applicant, by alleging a substantial alteration to its position on the market, the weakening of its competitive position and the fall of its dividends and the value of its shares caused by the reduction in the value of the company, has shown proof of urgency.

57 Furthermore, on the same ground, namely the lack of any information on the factors referred to in paragraph 55 above, it cannot be concluded either that the alleged harm may be categorised as 'financial harm which is objectively significant' within the meaning of paragraph 33 of the order of the Vice-President of the Court of 7 March 2013, *EDF* v *Commission* (C-551/12 P(R), EU:C:2013:157).

58 In that regard, it must be added that it is settled case-law that, in order to determine whether all the conditions referred to in paragraph 27 above are fulfilled, the judge hearing the application for interim measures must have specific and precise information, supported by detailed, certified documentary evidence, which shows the situation in which the party seeking the interim measures finds itself and enables the probable consequences, should the measures sought not be granted, to be assessed. It follows that that party, in particular when it relies on the occurrence of financial damage, must produce, with supporting documentation, an accurate overall picture of its financial situation (see, to that effect, order of 29 February 2016, *ICA Laboratories and Others* v *Commission*, T-732/15 R, not published, EU:T:2016:129, paragraph 39 and the case-law cited).

59 Accordingly, if the applicant does not, in its application for interim measures, adduce such information, it is not for the judge hearing applications for interim measures to research into it, in the place of the party concerned.

60 It follows that the condition of urgency has not been met, so that this application for interim relief must be dismissed without its being necessary to examine whether there is a prima facie case or to weigh up the interests at stake.

61 In those circumstances, and having regard to the case-law according to which the interest invoked by the intervener is, if appropriate, taken into account in the balancing of interests (see order of 26 July 2004, *Microsoft* v *Commission*, T-201/04 R, EU:T:2004:246, paragraph 34), it is not necessary to rule on the applications for leave to intervene made by OGT and Gazprom.

62 In that regard, it must be noted that, by application of 13 April 2017, PGNiG Supply requested confidential treatment of a certain amount of information as regards OGT and Gazprom. In the light of paragraph 61 above, it is necessary to reclassify that request as a request for confidential treatment as regards the public in accordance with Article 66 of the Rules of Procedure. In that context, it suffices to note that, as regards the information in this order, either it was submitted and discussed at the public hearing held on 5 July 2017 or insufficient justification has been given for its omission and that there is therefore no legitimate ground on which to grant the application.

63 By virtue of Article 158(5) of the Rules of Procedure, it is appropriate to reserve the costs.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. The application for interim measures is rejected.

2. The costs are reserved.

Luxembourg, 20 July 2017.

E. Coulon
Registrar

M. Jaeger
President