



Will the European Commission's policy hinder gas supplies to Central and Eastern European countries? OPAL case decision



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ARTICLE INFO

Keywords:

Opal pipeline

Gas market

Exemption decisions

ABSTRACT

Natural gas has become one of the most important sources of energy. The liberalization of the gas sector in the last decades brought a dynamic development of the energy infrastructure in the EU. Thus it must be underlined that the liquidity of the gas market is dependent on the outside supplies. The study examines the European Commission's Policy taking into consideration specifically its decision on the exemption of OPAL gas pipeline from EU rules. The main question is what would be the long term effect of such policy. In the authors opinion there are several serious doubts whether the Commission has made an appropriate decision. The major one concentrate on the impact of the decision, which according to the Commission refers only to Germany and Czechia gas market. Nevertheless an analysis of gas flow based on the ENTSOG leads to a conclusions that decision could have a substantial influence on Slovakia and Poland. If so, under the EU provisions the investment can not be excluded form the EU rules. Therefore the authors will analyze step by step the Commission decision and present its possible future impact on the internal energy market.

1. Introduction

The recent decades have brought dynamic expansion of the European Union's energy infrastructure at all levels. On one hand, this state is the result of liberalizing the energy market, which forces technological advancement, on the other hand, the policy of the EU, aimed at, i.a., supporting projects relevant to its power safety (Jones, 2010; Cherp, 2012). Some of the projects in question, such as inter-connections, were deemed so important that the need of their development was regulated in the EU original law, i.e., art. 194 par. 1 letter d of the TFEU. Such an approach is in line with the internal market concept, which is intended to mitigate the barriers in the access to individual domestic markets.

The network infrastructure, necessary for the effective functioning of the power system is a special case (Diaz, 2012). It is the case especially in relation to the gas market, with its liquidity depending on the supplies from outside of the EU. However, a liberalized and competitive market is not always able to guarantee a return on investment in the infrastructure, which increases, after all, the competition and safety of the supplies (Erdamnn, 2006; Spanier, 2008). We need to remember, that the mechanism adopted in EU legislation, related to the remuneration of transmission system operators, based on administratively approved tariffs, does not fully take into account the risk

associated with new investments. It results from the fact that it is hard to estimate and reflect in the tariffs, which negatively impacts new investments. As a result, there was a need to provide the investors, who decided to make infrastructural investments, with a higher and more stable source of revenues (Cameron, 2010). As a consequence, already in the second energy package, solutions were provided for, which enables the exemption of significant new infrastructure from basic market liberalization principles (Ferman, 2009). Nonetheless, in order for the applied decision to be made, it is necessary to fulfil a number of conditions, which, although have been indicated numerus clausus in the regulations governing the functioning of the natural gas internal market, in the eyes of the authors require consideration in a broader context (Jones, 2010).

The aim of this paper is an attempt to analyze and assess the decision of the European Commission (hereinafter referred to as EC) of 28th October 2016, which notifies the exemption of the Ostseepipeline-Anbindungsleitung gas pipeline (hereinafter referred to as OPAL) from the liberalization principles stipulated in the directive 2009/73/EC (EU, 2009) in light of its long-term impacts (Jansen et al., 2009). Particular attention shall be paid to the impact of the decision in question on the safety and diversification of natural gas supplies to the European Union and the competition on the natural gas internal market.

It is crucial to note that except for short popular-scientific studies,

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there is a lack of a comprehensive development in the literature, corresponding to the analysis carried out by the authors. The only scientific study of the topic includes “The Opal Exemption Decision: past, present, and the future” (Yafimava, 2017) publication prepared by Katja Yafimava. However, this publication does not take into account the analysis from the perspective of Article 36 of Directive 2009/73/EC, and due to the publication date, it does not include the relocation test of natural gas volumes after 1 January 2017.

This publication consists of four basic sections, i.e. introduction, discussion of the European Commission initial decision of 2009, the Commission decision of 2016, and conclusion. The core of this article is the third section (divided into two subsections) that includes the legal assessment of specific terms of new exclusion, especially through the prism of premises resulting from Article 26 of Directive 2009/73/EC and the impact of the new decision on relocation of gas volumes.

The basic test method adopted in this paper is the dogmatic and legal method. The primary and secondary sources of the EU law, soft law of the European Commission, but also, in a limited scope the EU case-law (Court of Justice of the European Union and the General Court) were analysed.

2. Original decision of the Commission

The commented EC decision (EU, 2009) is, in fact, an extension of the position adopted by this body in 2009. As per the adopted legislation (art. 22 par. 4 of the directive 2003/55/EC, currently 36 par. 8 of the directive 2009/73/WE), the impetus for the EC to take the position was the notification of the decision by the national regulatory body - in the discussed case, the Bundesnetzagentur (hereinafter referred to as BNetzA) of 25th February 2009 on exempting the regulated Third Party Access and tariffs in relation to the OPAL gas pipeline (Kopp, 2014). In light of the decision by the German regulatory authority,¹ the exemption included the entire transit capacity of the gas pipeline along the Greifswald (entry point) - Brandov (exit point) section, over a period of 22 years, starting from the date of its commissioning.² Ultimately, however, the Commission voiced significant concerns regarding the above-mentioned decision, indicating that in the original wording it may have adverse impact on the competition in the natural gas wholesale market (both, downstream and upstream) in the Czech Republic, inter alia, by strengthening the position of Gazprom.³ As a consequence, pursuant to art. 22 par. 4 of the directive 2003/55/WE (EU, 2003a, 2003b), the Commission called BNetzA to introduce changes limiting the possibility to reserve available throughput capacity (hereinafter referred to as capacity) at the gas pipeline exit point, i.e., in the city of Brandov, at the German - Czech border, by entities having the dominant position on the upstream and downstream natural gas market in the Czech Republic and the entities supplying natural gas to the Czech Republic. The relevant changes were made on 7th July 2009. As a consequence, the exemption of the OPAL gas pipeline from the principles provided for in the liberalization directives was conditioned on stringency in the scope of reserving the available capacity by individual entities and a program of releasing gas prices. In reality, power companies having a dominant position in the upstream segment (OAO Gazprom) and the downstream segment (RWE Transgaz) of the

¹ In reality, these were two decisions. This article focuses solely on the decision BK7-08-009 regarding the limitation of the OPAL gas pipeline capacity, operated by OPAL Gastransport GmbH & Co. KG.

² This exemption did not include the capacity with the entry point in Greifswald and the exit point in Gross Körös, with the destination being the GASPOOL market (the regulated third party access was sustained).

³ The OAO Gazprom company, together with BASF SE, exercises ownership control over WIGA Transport Beteiligungs-GmbH & Co (remaining an 80% shareholder of the OPAL gas pipeline, 20% - E. ON Ruhrgas AG), which is in an indirect equity relationship with OPAL Gastransport GmbH & Co. KG, which is an 80% operator of the transmission system for the OPAL gas pipeline. The remaining 20% capacity operator is Lubmin-Brandov Gastransport GmbH belonging to E. ON Ruhrgas AG.

natural gas wholesale market in the Czech Republic were able to jointly⁴ reserve up to 50% of the gas pipeline capacity cap at the Brandov exit point.⁵ However, this restriction was only of relative character, since it was not subject to abolition in the case of the dominants implementing a programme releasing natural gas prices (sales within the auctions) at a level of 3 bn m³ a year (which was supposed to be the minimum security for the development of competition in the Czech gas market). However, in practice, this programme was not implemented,⁶ i.e., due to the lack of an actual intent on the Gazprom and Gazprom Expert sides for such a form of sales⁷ due to the circumstance that the adopted level of 3 bn m³ did not reflect the actual market conditions⁸ (the situation on the Czech gas market changed substantially, i.e., contrary to the forecasts, natural gas demand decreased and the position of the RWE competitors on the downstream market strengthened).

In light of the above, on 12th April 2013, the interested parties, i.e., OPAL Gastransport GmbH & Co. KG, OAO Gazprom and OOO Gazprom Export filed a request to BNetzA to change the commented decision. The applicant indicated that due to the ineffectiveness of the total exemption of the OPAL gas pipeline from the obligation of third party access (Spanjer, 2008) and tariffing, the provisions restricting the possibility of using the existing infrastructure should be repealed. Following the taken actions, an agreement was concluded (First Settlement Agreement), which revised the original decision of 2009 in the scope filed by the entities initializing the review of the decision. Nonetheless, due to the extending notification procedure, the agreement expired (31st October 2014) without the EC making a formal decision.

3. Decision of the European Commission of 28th October 2016s

A successful attempt to amend the decision of 2009 was made in 2016. In May of 2016, BNetzA notified the Commission about a New Settlement Agreement. Essentially, it maintained the basic assumption set out in the first document, with the stipulation that they would remain valid until the end of July 2016 (after agreements between BNetzA and the Commission, the deadline was shifted to 31st October 2016).⁹ In this point, the authors will concentrate on presenting and assessing the legal basis for the decision and statistical data, the detailed conditions of the new exemption, including the ones from the perspective of the premises resulting to art. 36 of the directive 2009/73/EC, and the impact of the new decision on using other routes of gas transmission to the EU.

3.1. Legal basis for changing of the original decision

A fundamental procedural issue at the initial stage of the proceedings was the legal admissibility of revising the decision including the exemption of the new gas infrastructure, pursuant to art. 36 of the directive 2009/73/EC. It stems from the fact that the quoted provision does not directly refer to the possibility to amend a previously issued decision. Therefore, it seems that since the EU legislator did not

⁴ Due to binding long-term vertical contracts between Gazprom and RWE Transgaz, the possibility to reserve 50% of the capacity needs to be considered jointly.

⁵ It should be noted that natural gas transported via the OPAL gas pipeline over the section from the entry in Greifswald to the exit in Brandov remains the property of OOO Gazprom Expert, which in practice, makes the 50% restriction apply only to reserving the capacity by Gazprom.

⁶ It is worth adding that the decision of 2009 did not oblige Gazprom to implement a gas release programme, as long as the 50% capacity reservation limit was respected by the entity, item 102 of the Commission decision.

⁷ Despite having expressed formal consent.

⁸ It is also worth to indicate the fact that the lack of interest in the programme resulted also from commissioning a GASPOOL hub, which enabled potential buyers from the Czech Republic access to a relatively liquid gas market.

⁹ At the same time, in agreement with the German regulatory body, the Commission extended the notification procedure, also until 31st October 2016.

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