t. LXXIII • nr 4/2020 (862) • DOI 10.33226/0137-5490.2020.4.5

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Milestone for Energy Solidarity Principle — Implication of the Judgment of the General Court of 10.09.2019 (T-883/16) for energy policy

Kamień milowy dla Zasady Solidarności Energetycznej — implikacje wynikające z wyroku Sądu z 10.09.2019 r. (T-883/16) dla prawa energetycznego

Abstract

The article refers to the impact of the Judgment of the General Court (of 10.09.2019 year) in the OPAL Case (T-883/16) on current and future energy policy of the European Union and its Member States. First of all it must be underlined that the present legislation and case-law did not explicitly define the concept of energy solidarity. In the legal doctrine, this term was mostly identified with the obligation of mutual assistance if, for example as a result of natural disasters, a Member State experiences a critical or emergency situation in gas supplies. That is why the judgement analyzed is crucial for proper understanding of the term of energy solidarity. In practice, it expands the concept of energy solidarity and make it legal criterion. The court draws attention to at least two levels of understanding of the above principle. Considering its position, the principle of energy solidarity not only concerns the interest of the EU as the whole, but has to take into account the interests of individual Member States as well. In this respect, the commented decision is a milestone in understanding the principle of energy solidarity, its place in the legal system, and its application by the European Union and national authorities.

Key words: energy solidarity, legal criterion energy policy, OPAL Case, energy law, European Union

Streszczenie

W artykule autorzy podejmują się oceny wpływu na bieżącą i przyszłą politykę energetyczną Unii Europejskiej i państw członkowskich wyroku Sądu (10.09.2019 r.) w sprawie OPAL (T-883/16). Przede wszystkim należy podkreślić, że obecne ustawodawstwo i orzecznictwo nie definiują wyraźnie zasady solidarności energetycznej. W doktrynie prawnej termin ten był najczęściej utożsamiany z obowiązkiem wzajemnej pomocy. Przykładem takiej współpracy jest pomoc Państwom Członkowskim w przypadku klęsk żywiołowych wywołujących nadzwyczajne sytuacje dotyczące chociażby dostaw gazu. Dlatego analizowane orzeczenie ma kluczowe znaczenie dla zrozumienia pojęcia solidarności energetycznej. W praktyce rozwija ono koncepcję solidarności energetycznej określając kryterium jej stosowania. Sąd zwraca uwagę na co najmniej dwa poziomy rozumienia powyższej zasady. W świetle swojego stanowiska zasada solidarności energetycznej dotyczy nie tylko interesu UE jako całości, ale musi także uwzględniać interesy poszczególnych państw członkowskich. Pod tym względem komentowana decyzja jest kamieniem milowym w rozumieniu zasady solidarności energetycznej, jej umiejscowienia w systemie prawnym, a także jej stosowania przez Unię Europejską i władze krajowe.

Słowa kluczowe: zasada solidarności energetycznej, prawne kryteria stosowania, polityka energetyczna, Sprawa Opal, prawo energetyczne, Unia Europejska

Introduction

So far, neither legislation nor case law have managed to explicitly define the concept of energy solidarity. In the legal doctrine, this term was usually associated with the obligation of mutual assistance, for example where, as a result of some natural disasters or terrorist attacks, a Member State is confronted with a critical situation or under threat in terms of gas supplies (Andura 2013, Przybojewska 2017, Austvik 2017). In fact, this status has resulted in a restrictive understanding of the concept in question.

In the judgement under analysis, the Court of First Instance (hereinafter the Court) has, for the very first time, defined the principle of energy solidarity in its broad meaning. The Court points to two planes of understanding of the above principle. In the Court's view, the principle of solidarity does not only concern the interest of the European Union as the whole. Instead, it also needs to take into account legitimate interests of individual Member States, such as the Republic of Poland. Moreover, the impact of the decision should be examined considering the consequences about to be experienced not only by the European Union (EU), but also by an individual country. A decision consistent with the EU principles can only be made basing on careful consideration to these standalone interests. In this respect, the authors believe that the judgement analysed sets a milestone in the understanding of the principle of energy solidarity, its placing within the legal system as a legal criterion, and the rules for its application by the EU and national authorities.

Commission decision

The judgement of the General Court of 10 September 2019 follows an action instituted by the Republic of Poland on 16 December 2016 against a decision of the European Commission (hereinafter EC) issued on 28 October 2016. The decision in question (C(2016) 6950 final) amended the EC decision from 2009 (C(2009) 4694). In practice, it led to replacing limits on capacity bookings by undertakings holding a dominant position in the Czech Republic natural gas market (these limits had been imposed by the previous decision) with an obligation binding on the operator of the OPAL (Ostseepipeline-Anbindungsleitung) pipeline, that is OGT (OPAL Gastransport GmbH & Co.KG), pursuant to which the company is bound to offer at least 50% of the transport capacity in auctions as:

- firm dynamically allocable capacities (festedynamisch-zuordenbareKapazitäten, DZK) and
- firm freely allocable capacities (festefreizuordenbareKapazitäten, FZK) in exit point Brandov.

In concreto:

- 50% of the OPAL pipeline capacity at the entry point in Greifswald and exit in Brandov (with limited allocation) were exempted from the (regulated) third party access requirement provided for in Article 32 of Directive 2009/73/EC and the tariff regulation referred to in Article 41 of Directive 2009/73/EC ("Exempted Coupled Interconnection Capacities"),
- OGT was obliged to offer 10% of the so-called FZK capacities ("firm freely allocable capacities") with uninterruptible access to the market area of GASPOOL (in the virtual trading point), as part of short- and medium-term auctions at tariff price as the base price ("FZK Partly Regulated Decoupled Interconnection Capacities"),
- OGT was obliged to offer in auctions 40% of the so-called DZK capacities ("firm dynamically allocable capacities"), with entry point in Greifswald and exit in Brandov (uninterruptible) and interruptible access to the market area of GASPOOL (in the virtual trading point) at tariff price as the base price ("DZK Partly Regulated Decoupled Interconnection Capacities"),
- entities holding a dominant position in the Czech gas market and entities which control more than 50% of gas at the entry point in Greifswald (Gazprom, Gazprom Export, RWE, etc.) could apply for the said booking at the so-called base price for FZK capacities (Paragraph 32 of the EC Decision).

The parties' positions on the breach of Article 194(1) of Treaty on the functioning of the European Union

In the opinion of Poland, Article 194(1) of the Treaty on the functioning of the European Union (TFEU), which regulates the principle of energy solidarity, constitutes one of the priorities for the European Union with regard to its energy policy. It binds Member States and the EU institutions to implement the EU energy policy in the spirit of solidarity (Point 61 of the Judgement).The decision of EC, on the other hand, makes it possible for Gazprom and Gazprom Group companies to direct additional gas volumes to the European Union market by exploiting the full capacity of NordStream 1 pipeline. As a result, transmission services are no longer provided by pipelines competing with the OPAL, *i.e.* the Brotherhood Pipeline and the Yamal Pipeline, which means that gas transmissions through these two pipelines could be limited or stopped altogether (Point 62).This circumstance may result in limiting gas transmission through the Brotherhood Pipeline and make it impossible to continue supplying gas through this pipeline from Ukraine to Poland. This, in turn, may make it impossible to ensure the continuity of supplies to customers in Poland and may lead to the following consequences:

- inability to fulfil the obligation to ensure gas supplies to customers protected by undertakings so obliged;
- inability to ensure the proper functioning of the gas

system, which will have an impact upon commercial exploitation of gas storage facilities;

- the risk of a significant increase in the costs of obtaining gas (Point 63). Moreover, due to the fact that the contract for gas transit through the Yamal Pipeline to Western Europe expires in 2020, whereas the contract for gas supply through this pipeline to Poland expires in 2022, Poland fears that gas transmissions through the Yamal Pipeline will be limited or even stopped altogether, which would negatively affect the following:
- import capacities from Germany and the Czech Republic to Poland;
- transmission fee rates on gas from these two countries;
- diversification of gas supply sources in Poland and other Member States from Central and Eastern Europe (Point 64).

In its response, the EC argued that energy solidarity is a political concept (not a legal criterion) expressed in its communications and documents, whereas the decision contested needs to meet legal requirements set forth in Article 36(1) of Directive 2009/73. Moreover, in the view of the EC, the principle is essentially addressed to the legislator rather than to administration which applies legal provisions. It also concerns only crisis situations related to gas supplies or the functioning of the internal gas market, whereas Directive 2009/73 sets out principles concerning the proper functioning of this market. According to the view of the EC, the criterion of enhancing energy security, set forth in Article 36(1) of the above Directive (as the reason for exemption from liberalization principles), may be regarded as a criterion which includes the concept of energy solidarity. Finally, the Commission pointed out that NordStream 1 pipeline is a project of common interest. In fact, it implements a priority project of European interest (Point 65).

Court Judgement on the breach of Art 194(1) of TFEU and its impact on energy policy

First of all, it needs to be pointed out that the Court explained procedural matters concerningcalculation of time limits for making a complaint against a Commission decision. This time the time lapse in this respect starts when the Commission publishes its full decision along with its justification. This is the earliest opportunity for a third party to read the decision and file a complaint with the court. It should be observed that just a mention of the fact that the decision was issued is not enough in this context where it was not possible to read the entire decision. Another important procedural point explained by the Court is that it is possible to lodge an appeal against decision and supplementary letters until the expiry of the time limit for the appeal. As a consequence, when the appeal is submitted, it can still be supplemented until the expiry of the 2-month time limit for the appeal. At the same time, the Court noted that, in accordance with established case law, time limits for making complaints are binding unconditionally and neither the parties nor the court may administer them, as they were set to ensure the clarity and certainty of legal situation, as well as to prevent any discrimination or arbitrary treatment within the system of justice[1].

By assuming that time limits to submit means of appeal against decision are unconditional, the Court also took notice of other means of protecting the interest of the interested party. At the same time by invoking general rules of administrative law, the Court pointed out that in the case of decisions which produce long-term effects, they can be reviewed. It seems that the basic premise which follows from this justification is the change in circumstances as compared to those which accompanied the original decision. In the opinion of the Court, what is of particular importance to making a new assessment are new factual circumstances which have arose since the issuing of the previous exemption decision. It was an important reason for reviewing the original decision.

The assessment of the Court's judgement should be preceded by pointing out the question of interpreting Article 36(1)(a) of Directive 2009/73 with regard to the principle of security of supplies and the moment of assessing the principle of the EU and national solidarity. It is of vital importance from the perspective of future proceedings.

The Court maintained that Article 36(1)(a) of Directive 2009/73 applies solely to investment matters, not to exemptions. The premise which arises from the above provision should be examined during the process of granting the construction permit for the OPAL pipeline. However, it is something entirely different to use the constructed infrastructure to provide transmission services. Even if technologically the investment itself meets the criteria of security of supplies, it can and should be examined including the European and national energy solidarity(as a legal criterion) during the process of issuing an exemption decision. A change in the terms of use must not change the technological infrastructure itself, both on the date of issuing the contested decision and at present.

Subsequently, the Court observed that "the spirit of solidarity", expressed in Article 194(1) of TFEU constitutes a special manifestation of the general principle of solidarity between the Member States, mentioned e.g. in Article 2 of TEU, Article 3(3) of TEU, Article 24(2) and (3) of TEU, as well as Article 122(1) of TFEU and Article 222 of TFEU (Point 69). It is worth mentioning here that, due to the difficult geopolitical location of Poland and dependence on gas supplies from Russia, it was at the request of Poland, among others, that this principle was regulated in the Treaty. However, what is important, the Court challenged the stance of the EC on the understanding of the energy solidarity principle, claiming that it cannot be limited to extraordinary situations only (Point 71 of the Judgement).Undeniably, this matter is of critical

importance to understanding of this principle. It extends the range of potential circumstances which Member States and the EU should take into account in the spirit of energy solidarity. As a consequence, this approach may lead to the need to verify the previous energy policy of these entities. Moreover, as the Court pointed out, the solidarity principle includes the rights and obligations of both the EU and its Member States (Point 70 of the Judgement).When it comes to the EU energy policy in particular, it means that the EU and its Member States, in exercising its competences granted to them in relation with this policy, are obliged to endeavour to avoid taking measures which could violate the interest of the EU and other Member States with regard to the security of supplies, their economic and political effectiveness and the diversification of delivery or supply sources. This is required in order to accept their actual interdependence and solidarity (Point 73 of the Judgement).

Consequently, the Court has explicitly confirmed that the obligation to develop the energy policy in the spirit of solidarity rests not only with the EU, but also with its individual Member States. Above all, this is important because in its previous meaning, the nature of energy solidarity was considered solely ex post. Formally, this solidarity was "activated" only when there was a crisis situation concerning supplies or the functioning of the internal gas market. The Judgement of the Court discussed, instead, changes the current state of affairs. It obliges both the EU and individual Member States to consider the interests of other Member States ex ante, *i.e.* in the process of developing their energy policy (Point 72 and 73 of the Judgement). The only thing that can diminish the scope of the said obligation is the fact that the Court is not consequent. On the one hand it points to the obligation to consider the interests of other entities in the process of exercising their relevant competences (Point 72 of the Judgement), but on the other hand it points to "the obligation to endeavour" to avoid taking measures which could violate the interests of the EU and other Member States (Point 73 of the Judgement). In particular, the expression "the obligation to endeavour" may constitute a legal loophole, which will allow for a relatively loose relationship between the way in which the EU and its Member States develop their energy policy, and the measures taken by them[2] . Against this background, there naturally emerges the question of whether the implementation of Nord Stream 2 is *in genere* consistent with the principle of energy solidarity. Given that this project is not a matter of common concern, it raises reasonable doubt as to whether its implementation is inconsistent with the Member States' obligation to consider the interests of other Member States, referred to in Point 72 of the Judgement. In view of potentially negative consequences of releasing the capacity of the OPAL pipeline, and therefore increasing the flow of natural gas through Nord Stream 1 pipeline, it is to be expected that the construction of Nord Stream 2 pipeline may lead to a violation of Polish interests (with regard to the security of gas supplies). In practice, it may ultimately lead to a situation in which gas transit through Yamal and Brotherhood pipelines will be discontinued and, as a result, gas supplies through the Yamal pipeline may be reduced or expired completely. Nevertheless, what gives rise to some confusion is the matter of a potential lack of passive mandate of the defendant before judicial authorities of the European Union. Since Nord Stream 2 was deemed a commercial project (even though, on the other hand, Member States in a sense legitimize such projects by issuing environmental decisions), there is still the question of whether the project constitutes an element of the energy policy of any Member State. Even if we assume that the answer is positive, a judicial authority guided by Point 73 of the Judgement would have to determine to which extent a given Member State endeavoured to avoid taking measures which could violate the interests of other Member States.

However, what was fundamental for the Court to rule that EC decision of 2016 needs to be annulled, was its mistaken approach. According to it, by assuming that Article 36(1) of the Directive 2009/73/EU implements the principle of solidarity expressed in Article 194(1) of TFEU, the Commission paid due regard to this principle by the mere fact that it examined the criteria set forth in Article 36(1) of the Directive 2009/73 (Point 76). In fact, the Court found that the EC failed to assess whether the change in the terms of using the OPAL pipeline, proposed by a German regulatory authority, may violate the interests of other Member States in the field of energy (and, if the answer occurs positive, the Commission should have balanced these interests with the interest of the Federal Republic of Germany and, if necessary, with the interest of the whole European Union, taking into consideration the principle of energy solidarity, Point 78). Moreover, the EC not only failed to make a reference to the energy solidarity principle in the contested decision, but it also does not follow from this decision that EC examined this principle (Point 79). In our opinion, the approach of the Court is essentially right. It is because the Commission considered only the interest of the European Union as the whole, mainly in perspective of increasing gas market liquidity. It did not examine the consequences which changing the terms of using the OPAL pipeline would have for the security of supplies to Poland. Even though it does not follow from the judgement of the Court, the EC decision from 2016 shows that the EC had relied solely on "Energy Stress Tests" (COM(2014) 654 final) carried out by ENTSOG in 2014. It followed from them that increasing the capacity of the OPAL pipeline would have no influence on the security of gas supplies to Eastern Europe, due to the possibility of importing gas from the West and through the LNG terminal. At the same time, EC has *ex lege* accepted the said document as the basis for its decision and did not make an individual and autonomous assessment based on the then existing circumstances. Despite the technical nature of the document and the lack of

references to the principle of energy solidarity, we believe that this document could not serve as the basis for the EC opinion expressed in Point 50 of its decision from 2016, according to which enhancing the use of the OPAL pipeline would not lead to limiting or stopping transmissions through alternative routes, e.g. through Poland (Krzykowski; Krzykowska 2017). It is enough to say that the very first monthly auctions (on PRISMA platform) organized in accordance with the new rules[3] (PRISMA, 2019), which took place on 19 December 2016, led to the greatest ever use of the OPAL pipeline (Greifswald/OPAL — OPAL Gastransport entry), *i.e.* from 82 to 98 million cubic metres per day from 1 January 2017 to 31 January 2017, as compared to 58–82 million cubic metres per day in December 2016 (and from 1 to 22 December 2016 the gas transmission level was essentially constant and amounted to c. 58 million cubic metres per day). At the same time, it needs to be indicated that the significant decrease of gas transfer across the Ukraine had already been observed since 21st December 2016. The daily flow of gas at the VelikeKapušany point decreased in just 4 successive days from 162 million m^3 to 117 million m^3 (25th December 2016). As a consequence, it was right for the Court to conclude that in the contested decision, the EC failed to consider broader aspects of the energy solidarity principle. In particular, it failed to examine what medium-term consequences the Polish energy policy could suffer after redirecting some of the natural gas which used to be transmitted through the Yamal and Brotherhood pipelines, to Nord Stream 1/OPAL. Moreover, the EC failed to balance these consequences with enhancing the security of supplies at Union level (Point 82).

In fine, it needs to be emphasized that the judgement is neither final nor non-appealable. As this publication is being submitted, its authors do not have any information about any appeal being brought by either party.

Conclusion

Undoubtedly, the judgement discussed will have a significant impact on the application of the EU law rules by the EU authorities. At the same time, it might contribute to change the relationship between Member States with regard to their current and future energy policy. It should be expected that, on the one hand, the judgement of the Court will most probably have an impact on limiting third country investments in the European Union. On the other hand, it will lead to enhancing cooperation between Member States with regard to increasing the security of supplies. From this perspective, the discussed judgement seems to be the next step towards making the process of establishing an Energy Union between the Member States more dynamic. In case the above judgement is appealed, it should be expected that the appellant will claim that the principle of energy solidarity is not a legal criterion, and does not impose on executive bodies an obligation to act.

The publication was written as an outcome of the author's (Michał Krzykowski) internship in European University Institute in Florence, co-financed by the European Union under the European Social Fund (Operational Program Knowledge Education Development), carried out in the project Development Program at the University of Warmia and Mazury in Olsztyn (POWR.03.05. 00-00-Z310/17)

Przypisy/Notes

[1] Referring to this principle, the court quotes the judgement of 18 September 1997, Mutual Aid Administration Services/Commission, T-121/96 and T-151/96, EU:T:1997:132, Point 38 and the case law quoted therein.

[2] It should be observed that, according to Point 77 of the Judgement, applying the energy solidarity principle cannot mean that the EU energy policy will never have any negative consequences for special interest of a given Member State in the field of energy. Nevertheless, EU institutions and Member States are obliged to consider both the interests of the EU as the whole and the interests of individual Member States, and balance these interests in the event of a conflict.

[3] PRISMA, 2017; https://platform.prisma-capacity.eu/ (28.02.2020).

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