Analyses OSW

CENTRE FOR EASTERN STUDIES 16.07.2021 www.osw.waw.pl

The OPAL gas pipeline: the CJEU dismisses Germany's appeal

Agata Łoskot-Strachota, Ryszarda Formuszewicz, Szymon Kardaś

On 15 July, the Court of Justice of the EU dismissed Germany's appeal against the judgement handed down by the General Court of September 2019 annulling the decision of the European Commission to allow Russia's Gazprom greater use of the OPAL gas pipeline's capacity, as this would violate the principle of energy solidarity (for more, see *Gazprom's interests hit by CJEU judgement on OPAL pipeline*). The CJEU's 2019 judgement was issued in connection with a complaint filed on 16 December 2016 by Poland (with support from Lithuania and Latvia) against the European Commission's decision. In its appeal against that judgement, Germany argued that energy solidarity is a political concept, not a legal one. Meanwhile, on 15 July 2021, the Court concluded that the principle of solidarity is a fundamental principle of EU law and underpins all the objectives of the EU's energy policy. As a result, contrary to Germany's arguments, the legality of any act of the EU's institutions related to the field of energy should be assessed in to the light of the principle of energy solidarity. This also applies to the present case of gas directive 2009/738. The CJEU also stated that the principle of energy solidarity is not limited to exceptional situations (terrorist attacks, natural disasters or catastrophes), but also applies to every action covered by the EU's energy policy, and should also cover cases of legislation concerning the EU's internal gas market.

Commentary

- As a result of the CJEU's judgement, Gazprom's use of the OPAL gas pipeline's capacity will remain restricted. The amount available to it will amount to 50% of the pipeline's capacity attributable to Gazprom, i.e. around 12.34 bcm per year, at the German/Czech border point of Brandov (6.4 bcm is attributable to E.ON). At the same time, pursuant to an earlier decision by the European Commission and the German regulator BNetzA, Gazprom will maintain the option to access 100% of this capacity provided that it implements a programme to release 3 bcm of its gas onto the open market (e.g. through auctions). This will have a negative impact on the degree to which the Nord Stream 1 gas pipeline will be used, especially after Nord Stream 2 is launched. Despite the restrictions imposed on its use of OPAL in 2019, in order to maximise transmission via NS1 Gazprom is currently sending some of its gas from the Baltic route via the EUGAL gas pipeline; this is the overland branch of NS2, which has been operating since the beginning of 2020. The company's statistical data confirms that NS1 is being used to its full capacity (and even above the nominal maximum); during 2018-2020 transmission along the route

remained at basically the same level (58.7 bcm in 2018, 58.5 bcm in 2019, 59.3 bcm in 2020).

- The CJEU's judgement confirms the importance of the principle of energy solidarity and its broader application to the activities of EU institutions and member states, including the implementation of legal acts in the field of energy. This will directly affect both Germany (or more precisely, its regulator's) application of the provisions of the amended gas directive in the case of the Nord Stream 2 gas pipeline, and the assessment of Germany's decisions which is to be made by the European Commission in this case. It may also become another obstacle on the way to opening NS2 up to its full usage by obtaining exemptions or derogation from the provisions of EU law, including the requirement of unbundling, ensuring third-party access (TPA), and applying regulated and transparent transmission tariffs.
- The possibility that the full use of the Baltic gas pipelines' capacity could be restricted may contribute to greater interest in continuing transmission via the existing routes. The need to maintain a transit role for Ukraine can increasingly be seen in terms not only of Berlin working out an agreement with the US on NS2, but also of ensuring the security of supplies.
- The verdict is a success for those opposed to the Nord Stream 2 project and the strengthening of Gazprom's position in Europe, including Poland, the Baltic states and Ukraine. On the other hand, it affects the interests of the Russian and German sides by making it more difficult to use both NS1 and NS2 to their fullest extent. In Germany, the few comments on the verdict have come from those critical of NS2 and the preferential approach to Gazprom. The CJEU's ruling calling the previous government's interpretation of the principle of energy solidarity into question will strengthen its position in the internal German debate. The new application for obtaining an exemption to the OPAL gas pipeline may be expected in the near future, as well as the re-start of the procedure by the German regulator, although this time it would take the principle of energy solidarity into account.
- The official reactions from Russia have been terse and fairly predictable. Gazprom Export, a subsidiary of Gazprom, expressed its disappointment with the decision, stating that it created artificial barriers to investing in the development of the European gas network. However, it is very likely that in the coming months the CJEU's judgement will bring about harsher rhetoric from both Gazprom's management and the Russian government regarding the prospects for gas cooperation between Russia, Ukraine and the EU. It is possible that the pressure Russia has been putting on the European partners in recent months to bring the Nord Stream 2 gas pipeline into operation as soon as possible may continue. The main instrument which Gazprom is currently using for this purpose is the maintenance of high gas prices for Europe, principally by declining to sell additional gas volumes on the spot markets, or not making long-term bookings of the transit capacities in Yamal-Europe gas pipeline or the Ukrainian transmission system (through the auctions held on 5 July). These actions may have particularly severe effects in the context of the upcoming autumn/winter season and the EU's record-low levels of storage reserves. We should expect the Russian side, in parallel with its lobbying to launch NS2 as soon as possible, to start putting pressure on European countries and EU

institutions (mainly the European Commission) to agree to privileged treatment for the new Russian gas transmission pipelines in order to ensure that Russian gas supplies to Europe stay at adequate levels.

- It is also possible that at the same time Gazprom will take some steps to adapt to the new situation. The easiest way for the Russian company to counteract the negative effects of the CJEU ruling and increase its chances of using the OPAL and NS1 gas pipelines would be to implement the gas release programme, which remains a condition if it wishes to regain access to 100% of the OPAL gas pipeline's capacity. However, it is unclear under what conditions and within what timeframe Gazprom would be ready to do so, especially as it has previously declined to take such an action. Also, it would most likely require the disclosure of some of its commercial secrets (such as the price of the gas transmitted via OPAL). It therefore cannot be ruled out that the company will try to sell its gas through auctions (via the platform launched by Gazprom Export on 17 August 2018) in order to circumvent the restrictions resulting from the ruling; this would give it flexibility regarding which gas delivery points it could use. Selling its gas at the entry point of the pipeline's offshore part would avoid some of the legal problems related to the provisions of the Third Energy Package (mainly restrictions resulting from the TPA rule); this in turn could resolve the problems regarding the operation of both NS1 and potentially NS2. However, this would require a fundamental change in Gazprom's current practice, as well as the admission of third parties to transport the gas via the trans-Baltic pipelines. Moreover, such a move would require not only clear interest from European companies in new ways to purchase Russian gas, but also guarantees that they would be ready to bear the costs of transferring it onto the European market from the Russian entry points into the NS1 and NS2 pipelines.