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The OPAL Exemption Decision: a comment on the CJEU's ruling to reject suspension

Introduction: the 2016 OPAL exemption decision¹

In June 2009, the European Commission (EC) adopted an exemption decision (“The June 2009 exemption decision”), which prevented Gazprom from being able to utilise more than 50 per cent of capacity in the OPAL pipeline (one of Nord Stream 1’s onshore extensions). This led to a situation when capacity in OPAL (and Nord Stream 1) remained underutilised as there was a continuous lack of demand from third parties. In October 2016 the EC revised its decision and allowed Gazprom to bid for the remaining 50 per cent of OPAL capacity alongside third parties at auctions organised by the PRISMA platform (“The October 2016 exemption decision”).² The decision effectively guaranteed the third parties’ access to up to 20 per cent, as Gazprom was not allowed to outbid them for that share. Furthermore, the decision allowed the EC significant room for manoeuvre, both in respect of judging whether conditions for a further increase of capacity offered to third parties are met, as well as in respect to the certification of OPAL’s operator (OPAL Gastransport).³ In November 2016 the German regulator (BNetzA), OPAL Gastransport, Gazprom, and Gazprom Export signed a settlement agreement (“The November 2016 settlement agreement”) bringing the rules of operating the OPAL pipeline in line with the October 2016 exemption decision. In December 2016 the first auctions were held for OPAL capacity.⁴

Although the October 2016 exemption decision established a fine balance between the interests of all parties involved in line with the EU *acquis*, it was met with an avalanche of criticism from several central and eastern European countries, which argued that Gazprom’s increased access to OPAL capacity would undermine their energy security.

Especially sharp criticism came from Poland and its 100 per cent state-owned gas company, PGNiG, which filed several complaints against the decision in the Court of Justice of the EU (CJEU), calling for it to be temporarily suspended (until the date of delivery of the judgement on substance) and eventually annulled:

- PGNiG’s German subsidiary (PGNiG Supply & Trading GmbH) vs EC (4 December 2016, case T-849/16),⁵

¹ The author is grateful to Professor Jonathan Stern, a distinguished research fellow on the OIES Natural Gas Research Programme, for his useful comments on the paper. Responsibility for all the views expressed and all the conclusions reached is solely that of the author.

² For a detailed analysis of the October 2016 exemption decision, see Yafimava (2017).

³ Yafimava (2017), p. 15-17.

⁴ *Ibid.* p. 23-26.

⁵ Action brought on 4 December 2016 – PGNiG Supply & Trading v Commission (Case T-849/16), OJ C 38/42, 6 February 2017.

- Poland vs EC (16 December 2016, case T-883/16),⁶
- PGNiG vs EC (1 March 2017, case T-130/17).⁷

In parallel, on 15 December 2016 PGNiG and its German subsidiary, PGNiG Supply & Trading, filed a complaint at the German Higher Regional Court in Düsseldorf (“The Düsseldorf Court”) in respect of the aforementioned November 2016 settlement agreement, calling for its temporary suspension.

Applications for provisional suspension granted in December 2016: auctions halted

On 27 December 2016 the General Court of the CJEU issued a decision to *provisionally* suspend execution of the October 2016 exemption decision, requesting (a) the EC to present ‘detailed explanations with respect to the proposed *procedure of capacity allocation* on the OPAL pipeline’ and (b) PGNiG Supply & Trading to submit ‘an in-depth analysis of the EC’s decision *impact on the security and competitiveness of gas supplies to Poland*’.⁸ In January 2017 a CJEU spokeswoman stated the suspension would be in place *until other interim measures have been decided or the President of the General Court lifts it*.⁹ It was expected by the gas community that the CJEU would clarify its position on the interim measures in the first quarter of 2017, indicating how and whether the exemption decision was to be applied until the judgements on the applications for its annulment are made.¹⁰ On its part, OPAL Gastransport stated that should the suspension be lifted by 13 March 2017, it would be possible to re-start monthly auctions, while noting that it would be too late to re-start annual auctions.¹¹ However, the CJEU provided no indication of its position and made no decision during the first quarter of 2017.

On 30 December 2016, the Düsseldorf Court followed suit and adopted an interim decision to *provisionally* suspend the November 2016 settlement agreement (which brought the rules of access to OPAL capacity in line with the 2016 exemption decision) with immediate effect. This suggested the June 2009 exemption decision (under which Gazprom could not utilise more than 50 per cent of OPAL capacity) remained in force. Consequently, the Düsseldorf Court ordered BNetzA to suspend any further daily, weekly, monthly, and annual auctions for the remaining (i.e. non-exempted) 50 per cent of OPAL capacity. The suspension was to remain in place until a decision is made by the Düsseldorf Court under the urgent appeal procedure. The Court stated that it had decided on the suspension ‘in the light of’ the CJEU’s interim decision made on 23 December 2016.¹² In early March 2017 the Court decided to keep the suspension in place until March-April 2018.¹³ Notably, this decision was adopted *after* it would have been too late to offer additional OPAL capacity at the annual auctions planned for 6 March 2017.¹⁴ This suggests that given that – contrary to expectations – the CJEU made no decision on the interim measures in the first quarter of 2017, the Düsseldorf Court might have waited for such decision to be made *before* the time when it would have still been possible to hold annual auctions (if the suspension had been lifted). Had this happened, the Court could then have simply taken the same decision as the CJEU. However, given that this did not happen, the Court decided to keep the suspension in place, perhaps also reflecting an unwillingness to lift it before the CJEU itself decided to do so.

⁶ Action brought on 16 December 2016 – Republic of Poland v Commission (Case T-883/16), OJ C 38/52, 6 February 2017.

⁷ Action brought on 1 March 2017 – Polskie Górnictwo Naftowe i Gazownictwo v Commission (Case T-130/17), OJ C 121/48, 18 April 2017.

⁸ PGNiG (2016).

⁹ ‘Gas industry awaits clarity on OPAL capacity issue’, *Interfax Natural Gas Daily*, 12 January 2017.

¹⁰ It is worth noting that on average it takes between 1.5 and 2.5 years for the CJEU to make its judgements, therefore it is important that there are interim measures covering the period during which the CJEU is preparing its judgement on substance.

¹¹ ‘Extra OPAL capacity sales for Apr still possible’, *Platts European Gas Daily*, 2 March 2017.

¹² Oberlandesgericht Düsseldorf, VI-3 Kart 1203/16 (V), 27 July 2017 (“The Düsseldorf Court Decision”) (in German).

¹³ ‘Court blocks OPAL capacity auctions until next year, says PGNiG’, *Russia & CIS Oil and Gas Daily, Interfax*, 7 – 15 March 2017.

¹⁴ ‘Extra OPAL capacity sales for Apr still possible’, *Platts European Gas Daily*, 2 March 2017.

Applications for suspension rejected in July 2017: auctions restart

Finally, on 21 July 2017 – just before the CJEU closed for the summer holidays – the President of the General Court of the CJEU issued an Order (“The President’s Order”), stating that he ‘rejects the applications for a stay of execution¹⁵ of the Commission’s decision that 50 per cent of the transport capacities of the OPAL gas pipeline are to be subject to a bidding procedure’.¹⁶ In so doing the Order lifted the suspension of the October 2016 exemption decision until judgements are made by the General Court on the applications for its annulment.¹⁷ The Order indicated that ‘[I]n light of the average duration of proceedings’ such judgements ‘will probably be delivered during 2019’. This means that the October 2016 exemption decision will continue to apply and remain valid *at least* until 2019.

On 27 July 2017, the Düsseldorf Court followed suit and repealed its previous December 2016 decision, which ordered BNetzA to suspend the November 2016 settlement agreement, confirming the continued validity of the October 2016 exemption decision. Subsequently, BNetzA withdrew its provisional order to implement the December 2016 decision thus enabling OPAL Gastransport to re-start the auctioning of OPAL’s capacity in line with the November 2016 settlement agreement with immediate effect. First auctions for daily capacity were held on the PRISMA platform on 1 August 2017.¹⁸

The timing of both the CJEU and the Düsseldorf Court decisions was important as it allowed the suspension to be lifted before 31 July 2017 thus enabling Gazprom to utilise spare capacity in OPAL at quarterly auctions held on 7 August 2017 for the third and fourth quarters of 2017 and the first and second quarters of 2018.¹⁹ OPAL Gastransport data suggests that on 2 August 2017 flows via OPAL increased by approximately 25 per cent thus confirming Gazprom’s keenness to use OPAL capacity.²⁰ On 9 August 2017 Gazprom announced that it used the OPAL pipeline to full capacity for the first time since the suspension was lifted.²¹

The July 2017 CJEU President’s Order: rationale for rejecting suspension

The threshold for granting the application for suspension (a stay of execution) is very high. The President’s Order recalled that a stay of execution ‘may be granted *if* it is established that to grant it is, *prima facie*, justified in fact and in law and that it is a matter of urgency that it be granted in order to avoid the party seeking it suffering serious and irreparable harm before the decision in the main proceedings is made’ (emphasis added). Thus for a stay of execution to be granted both requirements must be met. The fact that the Court, having requested additional materials from both the EC and PGNiG/Poland and having considered them for more than half a year, finally decided to reject a stay of execution and lift the suspension demonstrates unequivocally that the Court believes the threshold for granting the suspension was not met.

As stated in the President’s Order, the main PGNiG/Polish government argument against the execution of the 2016 exemption decision was that ‘the increase in transport capacities through the OPAL pipeline will lead, necessarily, to a reduction in the transports of gas via the Yamal-Europe and Fraternité gas pipelines (which also transport natural gas from Russia to Western and Eastern Europe) and, accordingly, will threaten the security of the gas supply in Poland or will adversely affect competition’.

The Court appears to have refrained at this stage of the proceedings from explicitly expressing a view on whether the (first) requirement for a stay of execution to be granted – that is *prima facie* justification

¹⁵ A legal term, which means an order to temporarily stop an auction or an earlier court decision being carried out, *Cambridge Dictionary Online*.

¹⁶ ‘The President of the General Court rejects the applications for a stay of execution of the Commission’s decision that 50% of the transport capacities of the OPAL gas pipeline are to be subject to a bidding procedure’ (“The President’s Order”), General Court of the European Union, press release No 83/17, Order of the President of the General Court in Cases T-849/16 R, T-883/16 R and T-130/17 R, Luxembourg, 21 July 2017.

¹⁷ The President’s Order.

¹⁸ PRISMA is the joint capacity booking platform of major European transmission system operators.

¹⁹ ‘Court to hear Gazprom access to Opal case’, *Platts European Gas Daily*, 5 July 2017.

²⁰ OPAL Gastransport website flows data.

²¹ ‘OPAL pipeline operating at full capacity: Gazprom’, *Reuters*, 9 August 2017.

in fact and in law – is met. However, the wording of the Order, which reads ‘even if the certainty of the harm alleged [...] were sufficiently demonstrated’, appears to suggest that in the Court’s view the certainty of the alleged harm (threat to the security of supply or reduction of competition) has not been sufficiently demonstrated at present.

The Court is unequivocal that the (second) requirement for a stay of execution to be granted – that is urgency – is not met. The Order starts by saying: ‘there are two contracts concluded by Gazprom which are currently applicable, namely a transit contract for the transport of natural gas via the Polish section of the Yamal-Europe pipeline to supply the Western European markets (including Poland) until 2020 [“the transit contract”] and a contract concluded in 1996 with PGNiG for deliveries of natural gas until the end of 2022 [“the supply contract”]’ and continues: ‘[C]onsequently, the use of the transport capacity of the Polish section of the Yamal-Europe pipeline and Gazprom’s deliveries to the Polish market are, *prima facie*, guaranteed until the aforementioned dates’. Thus the Court believes that even if the certainty of the alleged harm were sufficiently demonstrated, such harm ‘could occur *at the earliest* only on expiry of those [supply and transit] contracts’, thus suggesting there is no reason for granting a stay of execution prior to their expiry. Given that the Court stated it would likely deliver its judgement on substance²² during 2019 (i.e. before the expiry of the transit contract), the requirement of urgency would continue to be unmet by the time such judgement is made, thus giving the Court no reason to revise until the end of the proceedings. The Order further states that the applicants ‘have failed to adduce sound evidence that they are unable to await the outcome of the proceedings in the main actions without being exposed to serious and irreparable harm’. Finally the Order declares that ‘the requirement of urgency is not met’. Given that both requirements – *prima facie* justification in fact and in law and urgency – need to be met for a stay of execution to be granted, the Court rejected the application for a stay of execution on the basis that (at least) one requirement (urgency) is not met.

It is worth stressing that on 23 December 2016 the CJEU only granted a provisional suspension of execution of the 2016 exemption decision, with the decision on whether or not to approve an unconditional suspension was to be taken after the CJEU had a sufficient time for careful consideration of the cases. Given that the two cases were filed in quick succession on the 4 and 16 December 2016 in the run-up to the Christmas holidays (with the third case being filed on the 1 March 2017), the fact that the CJEU only granted a provisional suspension suggests that (a) it did not feel there was sufficient justification for granting an unconditional suspension, and (b) it felt that granting a provisional suspension was appropriate as it would have allowed it more time to analyse the cases in detail before deciding whether to leave it in place. Thus we disagree with the argument advanced by some experts that the CJEU’s grant of a provisional suspension in December 2016 implied that PGNiG had demonstrated it had a *prima facie* case and it will suffer serious and irreparable damage if the suspension was not granted.²³ On the contrary, had the CJEU believed this to be the case it would not have made such suspension provisional. By granting a provisional suspension the CJEU had simply allowed itself sufficient time for assessment of whether a suspension was justified, following which it ruled definitively that it was not. Furthermore, the Court’s decision not to introduce any other interim measures in respect of how the exemption decision could be applied before a judgement is made on the substance, suggests that the Court has no reason to believe that the exemption decision is not in line with the EU *acquis*.

The July 2017 CJEU’s Order: implications for final judgement

Understanding the CJEU’s reasoning, which led it to decide to lift the suspension, is important in its own right as it could provide an insight into the court’s thinking and hence final judgement on the applications for annulment of the October 2016 exemption decision.

The CJEU clearly views the presence of commercial contracts in place under which Gazprom is obliged to transit and supply gas across, and to, Poland as a *guarantee* for continued supply to Poland and use of capacity in the Yamal-Europe pipeline until these contracts expire. Specifically, the Order reads: ‘...

²² I.e. to rule whether or not to annul the October 2016 OPAL exemption decision.

²³ Riley (2017).

the use of the transport capacity of the Polish section of the Yamal-Europe pipeline and Gazprom's deliveries to the Polish market are, *prima facie*, guaranteed until the aforementioned dates [end of 2019 and end of 2022 respectively]' (emphasis added).

This suggests that the CJEU, when making its judgement in 2019, is likely to consider which contractual arrangements might replace the existing supply and transit contracts upon their expiry.

It is worth recalling that the existing Polish-Russian agreements envisage extensions of both existing supply and transit contracts. As far as the supply contract is concerned, the Polish-Russian long-term gas sector cooperation agreement, signed in January 2010 by Gazprom, PGNiG and EuroPolGaz, envisaged its extension to cover the period until 2037.²⁴ However, Poland has since made clear that it did not plan to renew this contract after its expiry at the end of 2022. In May 2017, the Polish government representative for energy infrastructure, Piotr Naimski, was quoted as saying that although Poland 'did not rule out' buying Russian gas if the price is 'competitive enough ... but definitely not as part of a *long term* contract' (emphasis added).²⁵ It is worth noting that Poland's successive governments have repeatedly stated their determination to diversify their gas imports and reduce dependence on Russian gas. To this end, Poland expressed an intention to increase imports of LNG by expanding the capacity of its LNG terminal at Świnoujście on the Baltic Sea. At present, Poland has a long term supply contract to import Qatari LNG under its Qatargas contract while also purchasing spot LNG from Norway under its Statoil contract.²⁶ Poland has also imported its first US LNG cargo in 2017, while the Polish president announcing an intention to conclude a long term supply contract to import US LNG.²⁷ Furthermore, Poland wants to start importing pipeline gas from Norway. With a view of doing so, it has conducted a feasibility study and requested expressions of interest for capacity in Baltic Pipe connecting Poland with the Norwegian Continental Shelf via Denmark.²⁸ On its part, Gazprom has never suggested it would refuse to supply gas to Poland and repeatedly expressed readiness to renew the existing supply contract.²⁹

As far as the transit contract is concerned, the January 2010 Polish-Russian cooperation agreement stipulated its extension until 2045.³⁰ This commitment was later re-affirmed in the October 2010 protocol (amending the August 1993 Polish-Russian intergovernmental agreement (IGA)), which stipulated that the two countries would 'aim' that a new contract to transit around 28 bcma of gas across Poland during 2010-2045 would be concluded 'as soon as possible' (Art. 2).³¹ Although Gazprom has since repeatedly expressed readiness to renew the transit contract, with deputy CEO, Alexander Medvedev, saying in January 2017 that '[W]e don't have plans for and haven't even thought about cuts or stoppages to transit via Poland',³² Poland's position remains unclear and, according to Medvedev, '...Poland does not intend to prolong the transit deal'.³³ Interestingly, in August 2017, the Polish foreign minister, *Witold Waszczykowski*, when asked whether Poland plans to renew the transit contract, was quoted as saying 'Maybe, yes. But only if Russia offers a much lower price [for gas] than now'.³⁴ This statement appears to be at odds with the EU *acquis*, under which gas transmission is a regulated business whereby neither the fact of allocation of capacity nor its price (tariff) could be conditioned on the price of gas for transportation of which such capacity is used.

²⁴ Gazprom (2010).

²⁵ 'Poland aims to end long-term gas supplies from Russia after 2022', *Reuters*, 31 May 2016.

²⁶ Poland has a long term supply contract to import Qatari LNG (Qatargas contract) while has also been purchasing LNG from Norway on spot basis (Statoil contract), see PGNiG Annual Report 2016, p. 53.

²⁷ 'Trump says gas deal with Poland should take '15 minutes'', 7 June 2017.

²⁸ Gaz-System (2017).

²⁹ At present, the supply contract is under arbitration by the Stockholm Institute of Arbitration, where it was referred to by PGNiG due to disagreement with Gazprom on price, see PGNiG Annual Report 2016, pp. 53-54.

³⁰ Gazprom (2010).

³¹ 'The 2010 Protocol amending the 2003 Additional Protocol', 29 October 2010.

³² 'Gazprom says Poland transit deal delay endangers gas exports to EU', *Reuters*, 25 January 2017.

³³ *Ibid.*

³⁴ 'Vzaimnosti i gotovnosti k dialogu mi ne vidim' (in Russian), *Kommersant*, 7 August 2017.

Importantly, any transmission contract replacing the existing transit contract would have to be compatible with both the Polish-Russian IGA and the EU *acquis* (specifically the Third Energy package (TEP), as represented by Third Gas Directive, Regulation 715/2009, and ACER Regulation, and the EU Network Codes (NCs)). The TEP outlined general rules in respect of Transmission System Operator (TSO) certification and unbundling, transportation tariffs, and third party access (TPA): our previous analysis concluded that the IGA (as amended in October 2010) is compatible with the TEP.³⁵ The EU Network Codes prescribed more specific procedures, including on capacity allocation mechanisms (CAM NC) and tariffs (Tariffs NC) which together with congestion management procedures (CMP) (set in Annex to Regulation 715/2009) constitute a regulatory framework under which capacity is allocated and congestion is managed within the EU.

All EU Network Codes and CMP apply to intra-EU interconnection points (IPs) whereas their application to entry points from third countries is subject to the decision of the relevant national regulatory authority. Thus, as far as capacity in the Yamal-Europe pipeline is concerned, the Polish regulator would be obliged to apply the CAM NC and CMP at the IP with Germany whereas such an application would be optional in respect of the IP with (non-EU) Belarus. It is worth noting that ACER has published a list of IPs to which CAM NC applies (as part of its annual contractual congestion reports) which included *inter alia* IPs between Poland and Ukraine, which suggests that the Polish regulator has indeed decided to apply the CAM NC to entry points from third countries.³⁶

Thus if one assumes CAM NC and CMP applicability to IPs with both Germany and Belarus, capacity in the Yamal-Europe pipeline (once it becomes available upon expiry of the existing transit contract) – both at the Polish-German and the Polish-Belarusian IPs – would have to be allocated via auctions as these are the only means available under CAM NC for allocating existing capacity (Art. 8 of the CAM NC).³⁷ This would apply to bundled entry-exit capacity at the Polish-German IP and to entry capacity at the Polish-Belarusian IP. Realistically, it is Gazprom and/or its European buyers that would be likely to be interested in bidding for Yamal-Europe capacity. Notably, due to an obligation to offer the maximum technical capacity (Art. 6.1 of the CAM NC) the Polish TSO would be required to offer technical capacity in Yamal-Europe to any network user, including Gazprom. Furthermore, it would be impossible for any network user, including Gazprom, to hoard capacity in Yamal-Europe as the TSO would be required by the Polish regulator to apply firm day-ahead use-it-or-lose (UIOLI) CMP ‘if, on the basis of the yearly monitoring report of the Agency [...] it is shown that at IPs demand exceeded offer [...] (a) for at least three firm capacity products with a duration of one month or (b) for at least two firm capacity products with a duration of one quarter or (c) for at least one firm capacity product with a duration of one year or more or (d) where no firm capacity product with a duration of one month or more has been offered’, thus suggesting that it would become prohibitively expensive for any user to prevent other users from utilising Yamal-Europe capacity.

On the other hand, if one assumes that CAM NC and CMP are not applicable to the Polish-Belarusian IP, then allocation of capacity at the entry point to the Polish system could be made by means other than auctions (e.g. “first-come-first-served”). Given that Gazprom holds a monopoly on Russian pipeline gas exports and given that Belarus covers most of its gas import requirements from Russia, realistically Gazprom would be the only party interested in booking Yamal-Europe entry capacity at the Polish-Belarusian border. However, should any delivery points, specified in Gazprom’s European long term supply contracts (LTSCs), be renegotiated and moved to e.g. the Polish-Belarusian border, Gazprom’s European buyers could also become interested in booking Yamal-Europe entry capacity. In our view, it would be impossible for the Polish TSO to refuse to offer entry capacity either to Gazprom or to any other party, as this would contradict both the World Trade Organisation (WTO) and the Energy Charter Treaty (ECT) principles of freedom of transit.

³⁵ Stern and Yafimava (2017), p. 19.

³⁶ ACER (2016); ACER (2015).

³⁷ CAM NC. Alternative allocation mechanisms are possible in respect of incremental capacity (Art. 30).

An important caveat to the above analysis is that the terms of the Polish-Russian IGA might impact some of its assumptions, specifically in respect of the mandatory application of auctions at IPs (both intra-EU and with third countries). This is because the IGA (as amended in October 2010) stipulated that Poland and Russia would aim for a conclusion of a new contract to transit around 28 bcm of gas across Poland annually during 2020-2045 thus creating legitimate expectations on the part of Gazprom that it would continue to be able to transit this volume after the expiry of the existing transit contract. Should any aforementioned auctions result in Gazprom only being able to book less than 28 bcma of capacity in Yamal-Europe, these expectations would not be fulfilled. Therefore, it could be argued that third parties should not be allowed to outbid Gazprom for capacity in Yamal-Europe *for the amount necessary for delivery under its existing European LTSCs*. This approach would be in line with the agreement achieved between the EU and Russia in the Gas Advisory Council (GAC).³⁸

Gazprom has a portfolio of LTSCs, under which the majority of its gas is exported to Europe, with expiry dates stretching up to 2035.³⁹ These LTSCs oblige Gazprom to deliver gas to agreed delivery points (at various European borders); they also oblige European buyers to purchase a minimum offtake (“Take or Pay” (TOP) quantity) at a defined price irrespective of opportunities that might arise in other markets. Under-delivery by Gazprom constitutes a breach of contractual obligations; under-offtake by a European buyer only constitutes a breach if the buyer did not pay for the gas it failed to take below TOP volumes. Normally a TOP clause of 85 per cent of annual contractual quantity (ACQ) and a possibility to nominate to a maximum of up to 125 per cent of ACQ would be expected in a traditional Gazprom LTSC but it is understood that in some contracts the TOP levels have been reduced to 70 per cent of ACQ over 2010-2015 (as a result of renegotiations and arbitrations). Under these LTSCs Gazprom has to deliver as much gas as its European customers nominate (up to a maximum which can be up to 125 per cent of ACQ) and although it is only required to deliver contractual minimum TOP volumes, it would have to pay penalties for failing to deliver the difference between the contractual minimum and nominated volumes. This suggests that Gazprom would need to have access to export capacity at least at the 70-85 per cent TOP level (~126-153 bcm) for meeting its TOP commitments and up to ~220 bcm if it wants to avoid penalties for not meeting maximum nominations and maximise sales. Overall there are significant limitations on the options to reduce the volumes in these LTSCs or to terminate them before expiry.

If the OPAL exemption decision is upheld and if one string of Turkish Stream is built (but Nord Stream 2 is not built), the overall total annual export capacity available to Gazprom in 2020 would be around 225 bcm (including the Ukrainian and the Polish transit networks), approximately matching the maximum nominations level in Gazprom’s European LTSCs. This suggests that even if Gazprom were to be able to utilise more than 50 per cent capacity in OPAL, it would still need Polish and Ukrainian transit capacity if it were to deliver on European buyers’ maximum nominations (~220 bcm). Gazprom would be able to meet its 70 per cent TOP obligations (~126 bcm) without transiting its gas across Poland only if it was able to rely on 50-60 bcm of capacity in the Ukrainian network, and it would be able to meet its 85 per cent TOP (~153 bcm) only if it was able to rely on 70-80 bcm of capacity in the Ukrainian network. (This calculation necessarily overestimates Gazprom’s ability to meet its obligations as it is only based on the assessment of *overall* export capacity and does not take into account domestic pipeline constraints within the EU which would limit it further). Importantly, according to OIES research, even if LTSCs were to disappear, in 2020 Europe could still need to import ~200-220 bcm of Russian gas to meet its requirements. Gazprom would only be able to export these volumes to Europe without transiting gas across Poland if it was able to utilise 110-130 bcm of Ukrainian capacity. But Gazprom’s ability to utilise capacity in the Ukrainian network post-2020 is not assured, because its existing transit contract will expire at the end of 2019. Furthermore, unless technical modernisation of the Ukrainian system takes place before 2020, its ability to transit more than 90 bcm in 2020 could not be guaranteed. Notably, Ukraine stated in 2013 that it might close down half of its network thus reducing its transit

³⁸ Conclusions of the 7th EU-Russia Gas Advisory Council, 14 June 2013, pp. 5-6. These Conclusions suggest that should the implementation of the TEP and the network codes have a negative impact on Gazprom’s ability to meet its existing contractual obligations, transitional arrangements would be agreed.

³⁹ Pirani and Yafimava (2016). Notably, Gazprom’s sales outside LTSCs have increased sharply over 2015-2016.

capacity to ~50 bcm.⁴⁰ In 2016, it repeated its intention to ‘optimize’ the network leaving it capable of transiting volumes in the range of ‘zero, 30 and 70 bcm’.⁴¹ Given that Ukraine, unlike Poland, is not an EU member state – although it is a contracting party to the Energy Community Treaty – the legal means for ensuring that a new transit contract will be concluded and be compatible with the EU *acquis* is uncertain. This suggests that even if the OPAL exemption decision is upheld, thus enabling Gazprom to utilise more capacity in Nord Stream, Gazprom’s contractual obligations and European buyers’ gas demand are such that *capacity in the Yamal-Europe pipeline would need to be utilised post-2019* either by Gazprom (if delivery points in its existing LTSCs remain unchanged) or by its European buyers (if renegotiated or new supply contracts specify the Polish-Belarusian border as a new delivery point) on the basis of new transportation contracts.

Consequently, the CJEU will be likely to adopt the same view in its 2019 final judgement as it did in its July 2017 Order i.e. that the 2016 exemption decision will not necessarily lead to a reduction of gas transport via the Yamal-Europe pipeline as new transmission contracts would provide a *prima facie* guarantee of continued transit, and hence to reject the application for the annulment of the October 2016 exemption decision.

Possible impact of Gazprom’s competition commitments and Nord Stream 2 on CJEU’s final judgement

In making its final judgement, the CJEU is likely to take into consideration two more factors, which are not fully present yet but will be relevant in 2019:

- progress (or lack thereof) reached on the construction of Nord Stream 2 pipelines (planned to be completed by the end of 2019, and run parallel to Nord Stream 1), regulatory treatment of Nord Stream 2’s EUGAL pipelines (planned to run parallel to OPAL), and whether their regulatory treatment will be the same as for the OPAL pipelines (governed by the October 2016 exemption decision);
- acceptance (or otherwise) by the EC’s Directorate for Competition (DG COMP) of Gazprom’s commitments in respect of its sales to central and eastern European countries made in the course of anti-trust investigation and their implementation by Gazprom.⁴²

By 2019 it will be clear whether Nord Stream 2/EUGAL will have proceeded on schedule and whether Gazprom’s commitments have been implemented. Therefore, the CJEU would be able to assess their potential impact both on competition and on the security of gas supply to Poland, in conjunction with the October 2016 OPAL exemption decision. This, in turn, could influence the CJEU’s judgement on whether to uphold the latter. Given that the EC adopted its exemption decision around the time when DG COMP came to its provisional agreement with Gazprom on the commitments, it must have taken into account their impact on both Polish security of supply (as Poland was one of the six countries assessed during investigation) and competition. Furthermore, DG COMP itself spoke in favour of the commitments, saying their acceptance and implementation would improve competition in central and eastern Europe.⁴³ This suggests that the commitments are unlikely to lead the CJEU to annul the exemption decision on the grounds of causing a threat to security of supply and competition.⁴⁴

In our view, it is also unlikely that Nord Stream 2 would be a factor leading the CJEU to annul the exemption decision, but it is possible that its final judgement might provide an indication as to whether the October 2016 exemption decision might serve as an adequate guidance for the regulatory treatment of Nord Stream 2’s onshore extensions.

⁴⁰ ‘Transity trubyat otboy’, *Kommersant*, 23 September 2013 (in Russian).

⁴¹ ‘Ukraine may decommission part of gas network in lower Russian supplies: paper’, *Reuters*, 13 September 2016.

⁴² For detailed analysis of Gazprom’s commitments, see Stern and Yafimava (2017). Should DG COMP accept them, the commitments will cover the period of eight years.

⁴³ EC (2017).

⁴⁴ Notably the commitments envisage a right of a buyer to request a change from the existing delivery points to the new ones, see Stern and Yafimava (2017).

Conclusions

The July 2017 decision by the President of the CJEU to reject the stay of execution of the October 2016 exemption decision suggests that the latter will remain in force at least until 2019 (meaning that the auctions of OPAL capacity will continue), when the CJEU is expected to make its judgement on substance, confirming or annulling the exemption decision. Should the CJEU confirm the exemption decision it will continue to apply until 2033, thus enabling Gazprom's continued utilisation of more than 50 per cent of OPAL capacity. In the event of the CJEU not confirming the exemption, Gazprom's utilisation of OPAL capacity would be capped at 50 per cent.

The approach taken by the President of the CJEU in his judgement to reject the stay of execution due to the continued validity of both long term transit and supply contracts, taken together with Poland's official position not to renew the long term supply contract upon expiry and make post-2019 contractual arrangements for transit conditional on a gas price reduction, suggest that the CJEU is unlikely to annul the exemption decision. This is because Gazprom's contractual obligations and European buyers' projected gas demand in the 2020 time-frame will require *capacity in the Yamal-Europe pipeline to continue to be utilised post-2019* either by Gazprom (if delivery points in its existing LTSCs remain unchanged) or by its European buyers (if renegotiated or new supply contracts specify the Polish-Belarusian border as a new delivery point). Therefore it is likely that new transportation contract(s) enabling the utilisation of Yamal-Europe pipeline post-2019 will be concluded. This suggests that annulment would be groundless as the future presence of such contracts would mean that the exemption decision would not *necessarily* lead to a reduction of flows via Poland, thus refuting the Poland's argument.

More generally, Poland argues that a reduction of gas transit across its territory would threaten its security of gas supply and competition. This suggests that it views the continued transit of Russian gas across Poland as a guarantee of continued supply of Russian gas to Poland. The logical connection between the two is not clear given that supply and transit are contractually separate issues. Even if this logical connection were to be valid – which we do not believe – the argument appears inconsistent given that senior Polish politicians and executives have said that its long term contract for imports of Russian gas will not be renewed when it expires in 2022. There is no clarity in respect of post-2019 contractual arrangements for transit which appears to equate to delaying tactics. Therefore, in our view, it would be unreasonable to expect the Court to annul the exemption decision on its basis. It is worth noting that Poland has concluded a long term supply contract for Qatari gas and has stated its intention to conclude a long term supply contract for US LNG, both of which question the claim that its security of gas supply is threatened.⁴⁵

When making its final judgment, the CJEU is likely to take into account the impact of Gazprom's commitments (made in the course of DG COMP investigation into its gas sales in central and eastern Europe as well as the progress of Nord Stream 2, but these factors are unlikely to lead it to annul the exemption decision. However, they might cause the judgement to reflect whether the October 2016 exemption decision should serve as guidance for the future regulatory treatment of the Nord Stream 2 onshore extensions (the EUGAL pipelines), given that Nord Stream 2 would significantly expand Russia's export capacity towards Europe.

⁴⁵ PGNiG Annual Report 2016; 'Trump says gas deal with Poland should take '15 minutes'', 7 June 2017.

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