



Press and Information

General Court of the European Union

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Judgment in Case T-399/19

Polskie Górnictwo Naftowe i Gazownictwo v Commission  
(Rejection of a complaint)

## **The General Court annuls the Commission's decision to reject a complaint lodged by a Polish wholesaler**

*The Commission failed to respect the Polish wholesaler's procedural rights in the proceedings which led to the adoption of that decision*

Between 2011 and 2015, the European Commission took several measures in order to investigate the functioning of the gas markets in central and eastern Europe. In that context, it launched an investigation into Gazprom PJSC and Gazprom export LLC (together, 'Gazprom') in relation to the supply of gas in eight Member States, namely Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland and Slovakia ('the countries concerned').

On 22 April 2015, the Commission sent a statement of objections<sup>1</sup> to Gazprom, claiming that it was abusing its dominant position on the national markets for the upstream wholesale supply of gas in the countries concerned for the purpose of preventing the free flow of gas there in breach of Article 102 TFEU, which prohibits such abuse.

In the statement of objections, the Commission considered, among other things, that Gazprom had made its supplies of gas in Poland conditional on its obtaining certain commitments relating to gas transport infrastructure. Those commitments concerned acceptance by the applicant, the Polish wholesaler Polskie Górnictwo Naftowe i Gazownictwo S.A., of Gazprom having increased control over the management of investments regarding the Polish section of the Yamal pipeline, one of the main gas transit pipelines in Poland ('the Yamal objections').

By decision of 24 May 2018,<sup>2</sup> the Commission approved and made binding the commitments proposed by Gazprom in response to the former's competition concerns and closed the administrative proceedings in that case.

In parallel with those proceedings, the applicant lodged a complaint on 9 March 2017, alleging abusive practices by Gazprom, which overlapped to a great extent with the concerns expressed by the Commission in the statement of objections. The complaint included claims that Gazprom, amid a supply shortfall that the applicant faced in 2009 and 2010, had made the conclusion of a contract for the supply of additional volumes of gas subject to conditions that were intended, in particular, to increase Gazprom's influence over the operation of the Polish section of the Yamal pipeline ('the claims concerning infrastructure-related conditions'). Those claims, in part, denounced practices that were similar to those concerned by the Yamal objections.

On 23 January 2018, the Commission informed the applicant in writing that it intended to reject the complaint and requested that the applicant make its views known within four weeks ('the letter

<sup>1</sup> In accordance with Article 10 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).

<sup>2</sup> Decision C(2018) 3106 final of the European Commission of 24 May 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe) (OJ 2018 C 258, p. 6). The applicant brought an action for annulment against that decision, which has, however, been dismissed by the General Court in its judgment of 2 February 2022, *Polskie Górnictwo Naftowe i Gazownictwo v Commission (Commitments by Gazprom)*, [T-616/18](#) (see also PR [No 21/22](#)).

concerning the intended rejection of the complaint'). By decision of 17 April 2019 ('the contested decision'),<sup>3</sup> the Commission rejected the applicant's complaint.

In its examination of the claims, the Commission drew a distinction between the claims in the complaint that corresponded to the competition concerns covered by Gazprom's commitments and the other claims put forward in the complaint and, with regard to that second category, rejected in particular the claims concerning infrastructure-related conditions.

The applicant brought an action for annulment against the contested decision, which has been upheld by the Eighth Chamber (Extended Composition) of the General Court.

### **Findings of the General Court**

In the first place, the General Court examines the applicant's complaints that the Commission infringed its right to be heard and to be informed in the administrative proceedings that were opened as a result of its complaint.

In that regard, the General Court observes first of all that under Article 7(1) of Regulation No 773/2004, where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it is to inform the complainant of its reasons and set a time limit within which the complainant may make known its views in writing.

In the letter concerning the intended rejection of the complaint that was sent to the applicant pursuant to that provision, the Commission, in particular, had considered that there were insufficient grounds to carry out a further investigation into the claims concerning infrastructure-related conditions owing to the limited likelihood of establishing an infringement of Article 102 TFEU as against Gazprom. That preliminary conclusion was based on two grounds, namely the decision of the Urząd Regulacji Energetyki (the Polish Energy Regulatory Office) to certify the operator of the Polish section of the Yamal pipeline, Gaz-System S.A., as an independent system operator ('the certification decision') and the 'intergovernmental context' of relations between the Republic of Poland and the Russian Federation in relation to gas.

However, although the Commission, in the contested decision, referred again to the certification decision as a ground supporting its finding that there was a limited likelihood of establishing an infringement in relation to the claims concerning infrastructure-related conditions, it also included a reference to the defence known as State action as a second ground.

Thus, the General Court observes that the State action defence, which must be applied restrictively, makes it possible to exclude anti-competitive behaviour from the scope of Articles 101 and 102 TFEU when that behaviour is imposed on the undertakings concerned by national legislation, by a legal framework created by that legislation, or by the exercise of irresistible pressures by the national authorities.

However, the General Court finds that that defence does not appear in the relevant considerations of the letter concerning the intended rejection of the complaint that preceded the contested decision. Taking account of the particular nature of the State action defence, in that it leads to exemption from liability, and the fact that the case-law has not recognised its application where State action is exercised by a non-Member State, the Commission should have specifically warned the applicant in the letter concerning the intended rejection of the complaint that its preliminary assessment was based on a possible application of that defence in order to allow the applicant to be heard in that regard. According to the General Court, the Commission could not expect the applicant to infer that implicit ground from the information given in that letter.

**Consequently, by failing to provide that information in the letter concerning the intended rejection of the complaint, the Commission failed to fulfil its obligation to inform the**

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<sup>3</sup> Commission Decision C(2019) 3003 final of 17 April 2019 rejecting the complaint (Case AT.40497 – Polish gas prices).

**applicant** under Article 7(1) of Regulation No 773/2004. Furthermore, in the light of the information in the file, the General Court finds that in the absence of that infringement of Regulation No 773/2004, the contested decision might have been substantively different as far as concerns the ground connected with the State action defence, with the result that that infringement is capable of entailing the annulment of that decision.

However, that annulment is justified only on condition that the other ground put forward in the contested decision, connected with the certification decision, does not support the Commission's finding that there was a limited likelihood of establishing an infringement as against Gazprom in relation to the claims concerning infrastructure-related conditions.

In that regard and in the second place, the General Court finds that the Commission could not give decisive importance to the certification decision without having regard to the fact that the operative part of that decision required that the operation of compression and metering stations located on the Polish section of the Yamal pipeline, carried out by a joint venture owned by the applicant and Gazprom, be transferred to Gaz-System and without having regard to the circumstances surrounding that transfer not taking place.

In addition, the General Court notes that, in relying on the findings and assessments in the certification decision relating to investments regarding the Polish section of the Yamal pipeline, the Commission reduced the claims set out in the complaint solely to the scope of the Yamal objections set out in the statement of objections, whereas the practices in question were different in nature and went beyond the lone issue of investments.

Consequently, the General Court finds that **the Commission committed a manifest error of assessment in referring to the certification decision in support of its finding that there was a limited likelihood of establishing an infringement by Gazprom of Article 102 TFEU in relation to the claims concerning infrastructure-related conditions.**

As a consequence of that manifest error of assessment and the prior finding of an infringement of Article 7(1) of Regulation No 773/2004, inasmuch as the Commission failed to fulfil its obligation to provide the applicant with information about the ground based on the State action defence, the General Court annuls the contested decision.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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