



Press and Information

General Court of the European Union

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Judgment in Joined Cases T-684/19 and T-704/19
MEKH and FGSZ v ACER

The General Court declares inapplicable the provisions of Regulation 2017/459 relating to the process for the creation of incremental capacity for gas transmission

The decision of ACER on the creation of incremental capacity for the transmission of Black Sea gas between Hungary and Austria, adopted pursuant to those provisions, is consequently annulled

In 2015, FGSZ Földgázszállító Zrt. (FGSZ), the Hungarian gas transmission system operator, and its Bulgarian, Romanian and Austrian counterparts engaged in a regional cooperation project to increase energy independence by bringing Black Sea gas to markets. Entitled 'ROHUAT/BRUA', that project provided for the creation of incremental capacity, inter alia between Hungary and Austria.

In May 2017, the project was split into two separate projects, one relating to the transmission infrastructure connecting Hungary to Austria ('the HUAT project'). In accordance with Regulation 2017/459 ('the Network Code Regulation'),¹ FGSZ and the Austrian gas transmission system operator (GCA) carried out an assessment of market demand for the HUAT project.

On 6 April 2018, FGSZ submitted to Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH), the Hungarian energy and public utility regulatory authority, the proposal for the HUAT project, stating that it was not in favour of the implementation of that project. On 9 April 2018, GCA submitted the HUAT project proposal to the regulatory authority for the Austrian electricity and natural gas sectors (E-Control). On 27 April 2018, E-Control adopted a decision approving the HUAT project proposal, whereas, on 5 October 2018, MEKH adopted a decision rejecting that proposal.

On 10 October 2018, the European Union Agency for the Cooperation of Energy Regulators (ACER) informed MEKH and E-Control that, as those national regulatory authorities had failed to adopt a coordinated decision, it was empowered, under the Network Code Regulation and the ACER Regulation,² to decide on the HUAT project proposal. By decision of 6 August 2019, ACER approved that proposal.

MEKH and FGSZ each brought an action against the decision of ACER before the General Court of the European Union. In its action, MEKH pleads, in particular, that the provisions of the Network Code Regulation pursuant to which the decision of ACER was adopted³ are unlawful. According to MEKH, the basic regulation,⁴ which served as the basis for the adoption of the Network Code Regulation, does not allow the Commission to adopt a network code providing for a process for the creation of incremental capacity that may lead to the obligation being imposed on the operator to make the necessary investments for the creation of such capacity.

¹ Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (OJ 2017 L 72, p. 1).

² Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1; 'the ACER Regulation'). That regulation was replaced by Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22), which entered into force on 4 July 2019.

³ Chapter V of the Network Code Regulation.

⁴ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36; 'the basic regulation').

By its judgment delivered today, the General Court finds that the **Network Code Regulation does in fact establish a process that could lead to an obligation on the part of transmission system operators to make the investments necessary for the creation of incremental capacity.**

As regards the lawfulness of the provisions of the Network Code Regulation providing for that process, the Court states that, pursuant to the basic regulation, it is, in the first place, for the European Network of Transmission System Operators for Gas ('ENTSOG'), which is the structure for cooperation at EU level of gas transmission system operators, to develop network codes in certain areas which are exhaustively listed by that regulation. It is thus only where the ENTSOG has failed to develop a network code that the Commission may adopt one or more codes in those same areas. In that regard, the Court finds that, pursuant to the very wording of the basic regulation, the only area in respect of which the establishment of a network code in the matter of creation of incremental capacity might be conceivable is the one relating to capacity allocation and congestion management rules.

The Court states that, within the meaning of the basic regulation, **the concept of 'capacity' refers only to current capacity on the network and that congestion management is conceived only on the basis of existing capacity.**

In addition, the basic regulation draws a clear distinction between, on the one hand, the abovementioned exhaustively listed areas, for which the ENTSOG is competent to develop relevant rules in the context of network codes, and, on the other hand, the framework for the investments necessary for the creation of incremental capacity on the network, in respect of which the ENTSOG plays only a role of support and coordination. **The EU-wide network development comes primarily within the competence of the Member States, with the role of the ENTSOG relating solely to coordinating the exercise of that competence and identifying potential investment gaps, notably with respect to cross-border capacities.**

Consequently, **the basic regulation does not confer any regulatory competence on either the ENTSOG or the Commission as regards the adoption of rules governing the creation of incremental capacity on the network.** In that regard, the Court points out that **it is under the Gas Directive⁵ that a transmission system operator is subject to the obligation to make the investments necessary for the proper functioning of the network and, as the case may be, for the creation of incremental capacity.** Pursuant to that directive, **it is for the Member States alone to ensure, via their respective national regulatory authorities, compliance with those obligations.**

In those circumstances, the Court concludes that, as the basic regulation does not empower the ENTSOG to include in a network code rules capable of imposing on a gas transmission operator the obligation to create incremental capacity, **the Commission, in substituting itself for the ENTSOG, was not competent to adopt the provisions of the Network Code Regulation governing a process that could lead to the imposition of such an obligation.** Accordingly, the Court **declares inapplicable those provisions of the Network Code Regulation and annuls the decision of ACER, which was adopted on the basis of those provisions.**

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.

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. The appeal will not proceed unless the Court of Justice first decides that it should be allowed to do so. Accordingly, it must

⁵ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

be accompanied by a request that the appeal be allowed to proceed, setting out the issue/issues raised by the appeal that is/are significant with respect to the unity, consistency or development of EU law.

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[The full text and the résumé](#) of the judgment are published on the CURIA website on the day of delivery

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