Reports of Cases

ORDER OF THE GENERAL COURT (First Chamber)

14 December 2017*

(Action for annulment — Internal market in natural gas — Directive 2009/73/EC — Commission decision amending the conditions for exemption from the EU requirements of the rules governing operation of the OPAL pipeline in regard to third-party access and tariff regulation — Lack of direct concern — Inadmissibility)

In Case T-849/16,

PGNiG Supply & Trading GmbH, established in Munich (Germany), represented by M. Jeżewski, lawyer,

applicant,

v

European Commission, represented by O. Beynet and K. Herrmann, acting as Agents,

defendant,

ACTION based on Article 263 TFEU and seeking annulment of Commission Decision C(2016) 6950 final of 28 October 2016 on the review of the conditions for exemption of the OPAL pipeline, granted under Directive 2003/55/EC, from the rules on third-party access and tariff regulation,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová (Rapporteur), President, P. Nihoul and J. Svenningsen, Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: Polish.

Order

Legal framework

1 Article 36 of 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) is worded as follows:

'1. Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:

(a) the investment must enhance competition in gas supply and enhance security of supply;

(b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;

(c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;

(d) charges must be levied on users of that infrastructure; and

(e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

…

3. The [national regulatory authority] may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2.

…

6. An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

…

8. The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. That information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision. In particular, the information shall contain:

(a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted or refused the exemption together with a reference to paragraph 1 including the relevant point or points of that paragraph on which such decision is based, including the financial information justifying the need for the exemption;

(b) the analysis undertaken of the effect on competition and the effective functioning of the internal market in natural gas resulting from the grant of the exemption;

(c) the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;

(d) in case the exemption relates to an interconnector, the result of the consultation with the regulatory authorities concerned; and

(e) the contribution of the infrastructure to the diversification of gas supply.

9. Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where further information is sought by the Commission. That additional period shall begin on the day following the receipt of the complete information. The initial two-month period may also be extended with the consent of both the Commission and the regulatory authority.

…

The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

…’

2 Paragraph 28a(1) of the Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz — EnWG) (German Law on electricity and gas supply — Law on the energy industry) of 7 July 2005 (BGBl. 2005 I, p. 1970, 3621) (‘the EnWG’), in the version applicable to the facts in the present case, allows the Bundesnetzagentur (BNetzA, Federal Network Agency, Germany), inter alia, to exempt interconnectors between the Federal Republic of Germany and other States from the provisions governing third-party access. The conditions in which Paragraph 28a of the EnWG applies are the same, in essence, as those of Article 36(1) of Directive 2009/73.

Background to the dispute

3 By Decision C(2009) 4694 of 12 June 2009, the Commission of the European Communities requested the BNetzA, pursuant to Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57), to amend its decision of 25 February 2009 to exclude the transport capacities of the Ostseepipeline-Anbindungsleitung (OPAL) pipeline project, which is the eastern onshore section of the Nord Stream 1 pipeline, the entry point of which is near

to the town of Lubmin, near Greifswald, in Germany, and the exit point in the town of Brandov, in the Czech Republic, from the application of the requirements on third-party access laid down in Article 18 of that directive and the tariff regulations laid down in Article 25(2) to (4) thereof.

4 Decision C(2009) 4694 laid down the following conditions:

'(a) Without prejudice to the requirement in (b), an undertaking dominant on one or several large markets in natural gas upstream or downstream covering the Czech Republic shall not be authorised to reserve, in a single year, more than 50% of the transport capacities of the OPAL pipeline at the Czech border. Reservations from undertakings belonging to the same group, such as Gazprom and Wingas, shall be examined together. Reservations from dominant undertakings/groups of dominant undertakings which have concluding significant long-term contracts for the supply of gas shall be examined on an aggregated basis …

(b) The capacity limit of 50% may be exceeded if the undertaking concerned releases onto the market a volume of 3 billion m^3 of gas on the OPAL pipeline under an open, transparent and non-discriminatory procedure ("Gas Release Programme"). The undertaking managing the pipeline or the undertaking required to carry out the programme must ensure the availability of corresponding transport capacities and the free choice of the exit point ("Capacity Release Programme"). The form of the Gas Release and Capacity Release programmes is subject to the approval of the BNetzA.'

5 On 7 July 2009, the BNetzA amended its decision of 25 February 2009, adapting it to the abovementioned conditions laid down in Decision C(2009) 4694. The exemption from the rules was granted by the BNetzA for a period of 22 years.

6 The OPAL pipeline was put into service on 13 July 2011 and has an annual capacity of some 36.5 billion m^3. By virtue of Decision C(2009) 4694 and the decision of the BNetzA of 25 February 2009, as amended by its decision of 7 July 2009, the capacities of the OPAL pipeline were totally exempted from application of the rules governing third-party access and tariff regulation on the basis of Directive 2003/55.

7 In the current technical configuration, natural gas can be supplied at the pipeline entry point close to Greifswald only by the Nord Stream 1 pipeline, used by the Gazprom group to transport gas from Russian gas fields. As Gazprom did not implement the gas release programme referred to in Decision C(2009) 4694, the non-reserved 50% of the capacity of that pipeline has never been used, with the result that only 50% of the transport capacity of the OPAL pipeline appears, a priori, to have been used.

8 On 13 May 2016, the BNetzA notified the Commission, on the basis of Article 36 of Directive 2009/73, of its intention, further to an application made by Opal Gastransport GmbH & Co. KG (operating company of the OPAL pipeline, 'OGT'), OAO Gazprom and Gazprom Eksport LLC, to amend certain provisions of the 2009 exemption concerning the section of the OPAL pipeline managed by OGT.

9 On 28 October 2016, the Commission adopted, on the basis of Article 36(9) of Directive 2009/73, Decision C(2016) 6950 final on review of the exemption of the OPAL pipeline from the requirements on third-party access and tariff regulation granted under Directive 2003/55 ('the contested decision'), which is addressed to the BNetzA. The procedure laid down in Article 36 of Directive 2009/73 corresponds to that laid down in Article 22 of Directive 2003/55, which constituted the legal basis for Decision C(2009) 4694, amended by the contested decision.

10 In the contested decision, the Commission maintained the exemption from the requirements on third-party access granted to the OPAL pipeline for the section between the entry point near Greifswald and the exit point at Brandov for a maximum of 50% of the capacities, which it had

already approved in its Decision C(2009) 4694. However, the remaining 50% of the capacity on that section — unused until then because of the non-implementation of the gas release programme by Gazprom — was liberalised, that is to say, made subject to the requirements on third-party access. That liberalisation is to be carried out in the form of an allocation of the transport capacities which the manager of the pipeline is required to make in a transparent and non-discriminatory auction.

11 Since the non-discriminatory and transparent provision of the transport capacities thus liberalised could, de facto, also result in their use by Gazprom Eksport, the Commission, with a view to ensuring that third parties may indeed have access to the 'liberalised' capacities, raised the ceiling proposed by the BNetzA concerning the FZK interconnection capacities (feste frei zuordenbare Kapazitäten/fixed freely-attributable capacities) at the exit point of the pipeline. Thus, the OPAL pipeline manager will be required to make available to users other than the dominant company on the Czech natural gas market, in a bidding procedure, an FZK interconnection capacity of an initial volume of 3.2 million kWh. If, however, it should appear, at the annual bidding procedure, that the demand for FZK capacities at the Brandov exit point is higher than 90% of the capacities offered, OGT is required to increase the FZK capacities available by 1.6 million kWh at the following annual bidding procedure. The available FZK capacities may eventually reach a volume of 6.4 million kWh.

12 Furthermore, having regard to the upward trend of bids and in order to avoid any overbidding by the dominant entity on the Czech market, the Commission introduced an additional condition that such an entity could submit its bid in the bidding procedure for the FZK capacities only at the base price of the capacities, thereby implying that the price proposed cannot exceed the average base price of the regulated tariff on the transport network from the commercial area of Gaspool in Germany to the Czech Republic for comparable products in the same year.

13 On 28 November 2016, the BNetzA amended the exemption granted to the manager of the OPAL pipeline by its decision of 25 February 2009, in accordance with the contested decision, by entering into a public-law contract with OGT which, under German law, is equivalent to an administrative decision.

Procedure and forms of order sought

14 By application lodged at the Registry of the General Court on 4 December 2016, the applicant, PGNiG Supply & Trading GmbH, brought the present action.

15 By a separate document, lodged at the Court Registry on the same day, the applicant submitted an application for interim measures, which was rejected by order of 21 July 2017, *PGNiG Supply & Trading* v *Commission* (T-849/16 R, EU:T:2017:544). The costs were reserved.

16 By documents lodged at the Court Registry on 19 January, 16 February, and 1, 9 and 22 March 2017 respectively, the Federal Republic of Germany, the Council of the European Union, the European Parliament, OGT and Gazprom Eksport applied to intervene in support of the form of order sought by the Commission.

17 By document lodged at the Court Registry on 28 February 2017, Naftogaz Ukrainy SA applied to intervene in the proceedings in support of the form of order sought by the applicant.

18 By document lodged at the Court Registry on 13 March 2017, the applicant lodged a document containing a 'supplement' to the application, in which it raised new pleas in support of the action.

19 In its observations lodged at the Court Registry on 8 May 2017, the Commission raised an objection of inadmissibility to the supplementary pleading of 13 March 2017.

20 By separate document lodged at the Court Registry on 21 March 2017, the Commission raised an objection of inadmissibility to the action.

21 By document lodged at the Court Registry on 29 May 2017, the applicant submitted its observations on the objection of inadmissibility.

22 The Commission claims that the Court should:

– dismiss the action as manifestly inadmissible;

– order the applicant to pay the costs.

23 The applicant contends that the Court should:

– dismiss the objection of inadmissibility,

– in the alternative, reserve until final judgment the issue of the admissibility of the action;

– annul the contested decision;

– order the Commission to pay the costs.

Law

24 Under Article 130(1) of its Rules of Procedure, the Court may, if the defendant so requests, rule on inadmissibility or lack of competence without going to the substance of the case. In the present case, the Court considers that it has sufficient information from the material in the file and has decided to give a decision without taking further steps in the proceedings.

25 In support of its objection of inadmissibility, the Commission argues that the applicant does not have standing to bring proceedings under the fourth paragraph of Article 263 TFEU. According to the Commission, the contested decision is not a regulatory act and is not of direct or individual concern to the applicant. Furthermore, the Commission doubts whether the applicant has any interest in bringing proceedings.

26 The contested decision is addressed to the BNetzA, in accordance with Article 36(9) of Directive 2009/73. The applicant, which is a company active in the import and export, storage, sale and distribution of gas and liquid fuels, is therefore not an addressee of that decision and its standing to bring proceedings may be founded only on the second or third limb of the fourth paragraph of Article 263 TFEU.

27 Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

28 In the present case, as the applicant is not an addressee of the contested decision, its standing to bring proceedings could be founded only on the second or third limb of the fourth paragraph of Article 263 TFEU. It will therefore be considered in turn below whether the contested decision is of direct concern to the applicant, whether it is of individual concern to the applicant and whether it is a regulatory act.

Whether the applicant is directly concerned by the contested decision

29 The Commission argues that the contested decision does not directly concern the applicant, inter alia as it does not directly affect its legal situation.

30 The applicant contends that the direct effect of the contested decision on its legal situation is, inter alia, that it impedes its access to the auction of the capacities of the OPAL pipeline. It emphasises that both the Commission and the German authorities claim that the contested decision will have positive effects on the applicant and it infers from this claim that it will be directly concerned to the same extent by its negative effects. What is more, the applicant submits that, as a competitor of the companies in the Gazprom group, which, it is common ground, are directly concerned by the contested decision, the applicant must also be regarded as being directly concerned, through application by analogy of the case-law on State aid.

31 It is settled case-law that the 'direct concern' condition requires that the contested measure must directly affect the legal situation of the individual and that it must leave no discretion to the addressees of the measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting solely from the contested rules without the application of other intermediate rules. The same applies where the possibility for addressees not to give effect to the EU measure is purely theoretical and their intention to act in conformity with it is not in doubt (see judgment of 5 May 1998, *Dreyfus* v *Commission*, C-386/96 P, EU:C:1998:193, paragraphs 43 and 44 and the case-law cited).

32 However, the second of those two requirements, relating to the addressees' lack of discretion, is not satisfied in the present case. The decision of the national authority implementing the contested decision was not automatic. Article 36 of Directive 2009/73 imposed no obligation on the BNetzA to implement the contested decision, as it was free to withdraw its proposal to amend the operating conditions of the OPAL pipeline. Furthermore, the possibility for the BNetzA not to give effect to the contested decision was not, in the present case, purely theoretical. It should be recalled, in this regard, first, that, in the contested decision, the Commission attached additional conditions to its approval of the measure proposed by the BNetzA, going beyond the restrictions proposed by the latter (see paragraphs 11 and 12 above). Although the BNetzA was therefore unable as a result to decide to amend the operating conditions of the OPAL pipeline without taking those additional conditions into account, it could, within the discretion conferred on it by Paragraph 28a of the EnWG, reassess whether it was appropriate to adopt that measure in the light of those conditions and, as the case may be, withdraw the proposed measure. Secondly, the proceedings at national level were opened by an application brought by OGT, operator of the OPAL pipeline (see paragraph 8 above). In those circumstances, it was possible for OGT to withdraw its application and, thus, prevent the implementation of the contested decision, whether by a decision or by a contract, if it was of the opinion that the additional conditions imposed by the Commission were inappropriate or unsuitable.

33 The applicant could therefore not be directly affected by the contested decision for the purposes of the case-law cited in paragraph 31 above.

34 It should also be noted, in this regard, that, even if the applicant's legal situation could be regarded as having been directly affected, it would have been so affected by the national measures adopted by the BNetzA, which would have been, as the case may be, a matter to bring before the national courts, invoking the illegality of the contested decision in order to obtain a reference for a preliminary ruling under Article 267 TFEU (see, to that effect, order of 8 April 2008, *Saint-Gobain Glass Deutschland* v *Commission*, C-503/07 P, EU:C:2008:207, paragraph 78).

Whether the applicant is individually concerned by the contested decision

35 The Commission argues that the contested decision does not concern the applicant individually.

36 The applicant contends that it is concerned individually by the contested decision, in the light of its specific attributes and of the particular circumstances which allow it to be distinguished individually just as in the case of the addressee of that decision. In that regard, it invokes, first, the nature of the market for gas exports to Poland, and of the gas transport market, second, the harm that it will suffer as a result of the contested decision and, third, the weakening of its competitive position in relation to the Gazprom group.

37 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by such a decision (see judgment of 13 March 2008, *Commission* v *Infront WM*, C-125/06 P, EU:C:2008:159, paragraph 70 and the case-law cited).

38 It is also clear from the case-law of the Court of Justice that, where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders (see judgment of 13 March 2008, *Commission* v *Infront WM*, C-125/06 P, EU:C:2008:159, paragraph 71 and the case-law cited).

39 In that regard, it should be noted that the contested decision concerns the conditions under which OGT, as operator of the OPAL pipeline, must make gas available to third parties at the exit point of the OPAL pipeline on Czech territory, at Brandov. The applicant, for its part, is active in the field of marketing and transporting natural gas on the German market, and in the field of gas exports to Poland. Admittedly, it cannot be excluded that the amendment to the conditions for the operation of the OPAL pipeline may have economic repercussions on those activities of the applicant, inter alia further to an increase in the gas flows transported by that pipeline.

40 In that regard, first, the applicant fears that there will be a considerable increase in transport capacities for the Gazprom group, as well as a decrease in the use of the transport capacities of the Yamal-Europe pipeline, which transports gas from Russia to Poland through Belarus, as from 2020, or even its complete deactivation after 2022, which would strengthen the Gazprom group's dominant position and thereby weaken the applicant's own position on the market. Secondly, the applicant asserts that the contested decision will create a sudden rise in tariffs for gas transport from the German market to Poland, further to the decrease in gas transport by the Yamal-Europe pipeline, which will limit the opportunities for the applicant to conclude contracts for exporting gas from Germany to Poland. Thirdly, the applicant maintains that the contested decision reduces its competitiveness on the wholesale and retail gas markets in Germany in relation to the undertakings connected to the Gazprom group. Fourthly, the applicant argues that the contested decision, due to the increase in the regulated use of the OPAL pipeline, will have the result of restricting, or even preventing, access to the OPAL pipeline for wholesale market participants which do not belong to the Gazprom group, including the applicant itself.

41 However, on the one hand, that alleged damage remains largely speculative and depends, in any case, on many future factors, the scope of which is uncertain. The occurrence of consequences liable to flow from a potential future decrease in the use of the transport capacities of the Yamal-Europe pipeline as from 2020, or even its complete deactivation as from 2022, thus depends on whether or not the supply contract between the applicant's parent company and Gazprom will be renewed. Even if the applicant were to be treated in the same way as its parent company, the principal Polish gas distributor Polskie Górnictwo Naftowe i Gazownictwo S.A, would be treated in the circumstances for

the purposes of assessing the consequences of the contested decision, the answer to that question depends, inter alia, on Gazprom's future commercial strategy, on the future competitive position of the applicant's parent company, and on the overall future developments on the gas markets. A meaningful answer cannot therefore be given to that question at present.

42 On the other hand, the applicant has not shown that the alleged damage is of such a nature as to differentiate it from all other market participants active in the trade, transport, import and export of gas in Germany or in Poland and, therefore, to distinguish it individually just as in the case of the person to whom that decision is addressed. Thus, if the contested decision were liable to reduce the applicant's competitiveness in relation to the undertakings connected to the Gazprom group, on the wholesale and retail gas markets in Germany, that decision would necessarily affect all market participants active in that sector, and not solely the applicant. Finally, with regard to the alleged damage flowing from the fact that, further to the contested decision, access for the Gazprom group's competitors to the OPAL pipeline would be restricted or even discontinued, it should be noted, apart from the fact that such damage would also affect the other market participants active in that sector, that that allegation has no basis in fact.

43 More specifically, the applicant's allegation that 'due to the introduction [by the contested decision] of an additional exemption to the [principle of third-party access] in favour of the OPAL pipeline, the applicant's legal situation [would] be affected in such a way that it [would] not have free access to that pipeline, contrary to the principles of the internal market in gas defined by Directive 2009/73' is incorrect. It was under the initial exemption regime, approved by Decision C(2009) 4694 (see paragraphs 3 and 4 above), that the applicant enjoyed no free access to the OPAL pipeline, since that regime excluded the entirety of the transport capacities of that pipeline, between Greifswald and Brandov, from the application of the third-party-access rules. By contrast, the contested decision provides that 50% of the capacities of that section are to be opened to third-party access by a transparent and non-discriminatory auction (see paragraph 10 above), in such a way that other undertakings, including the applicant, will have the opportunity to acquire capacity. Contrary to what the applicant claims, the contested decision therefore does not introduce an additional exemption, but, quite to the contrary, removes in part the existing exemption.

44 Moreover, the applicant cannot be regarded as being a member of a group of persons which were identified or identifiable when the contested decision was adopted by reason of criteria specific to the members of the group, for the purposes of the case-law cited in paragraph 38 above. The fact that it belongs to the alleged closed circle of participants in the market in the trade and transport of gas in Germany, invoked by the applicant, cannot distinguish it individually in respect of the operating conditions of the OPAL pipeline transporting gas through Germany towards the Czech Republic as fixed by the contested decision. For the sake of completeness, it should be noted, as the Commission has, that the applicant has not indicated the identity or even the number of members which, according to it, belong to that group.

45 To the extent that the applicant invokes its involvement in the proceedings before the BNetzA, suffice it to note that the fact that the applicant sent letters to the BNetzA in the context of the proceedings at national level which preceded the notification of 13 May 2016 does not provide a sufficient basis for the conclusion that the applicant was involved in the proceedings which led to the adoption of the contested decision at EU level.

46 Consequently, it must be held that the applicant is not individually concerned by the contested decision.

Whether the contested decision is a regulatory act

47 The Commission argues that the contested decision, as an act of individual scope, is not a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU.

48 The applicant contends that the contested decision affects a category of persons defined solely according to the nature of the activities that they carry out. Therefore, in the absence of any individual distinction in respect of a wide category of gas market operators, that decision has a general and abstract scope.

49 According to the case-law, in order to determine the scope of a measure, it is appropriate to consider whether the measure in question concerns specific subjects individually. In this regard, the EU Courts must not look merely at the official name of the measure but must first take account of its purpose and its content (judgment of 14 December 1962, *Confédération nationale des producteurs de fruits et légumes and Others* v *Council*, 16/62 and 17/62, EU:C:1962:47, p. 471, at p. 478). Accordingly, a decision which is addressed to a Member State is regarded as being of general application if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract (see, on the scheme established by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), order of 8 April 2008, *Saint-Gobain Glass Deutschland* v *Commission*, C-503/07 P, EU:C:2008:207, paragraph 71).

50 In the present case, as is apparent from Article 1 of the contested decision, the latter merely approves, subject to certain modifications, the amendment to the exemption decision of 25 February 2009, proposed by the BNetzA on 13 May 2016. In turn, the purpose of that amendment to the initial exemption decision, which took effect on 28 November 2016 (see paragraph 13 above), is to amend, subject to certain conditions, the exemption from the application of certain provisions of Directive 2009/73 granted in respect of the OPAL pipeline. Therefore, the contested decision concerns only a single individual and defined situation, namely the conditions under which OGT operates part of the capacity of the OPAL pipeline. More specifically, the potential economic consequences which that decision may have for market participants in the gas transport and trade sector other than OGT do not constitute legal effects for a category of persons envisaged generally and in the abstract, for the purposes of the case-law cited in paragraph 49 above.

51 The applicant argues, moreover, that the contested decision is, 'by its nature, close to a decision on [State] aid' and that the Court has held that 'a decision on [State] aid is of general application', even if it is addressed only to one single person.

52 Suffice it, in order to reject that argument, and without there being any need to rule on the alleged proximity by nature of the contested decision to a decision on State aid, to note that, in the case-law relied on by the applicant, the Court did not rule, as a general rule, that decisions on State aid are of general application. On the contrary, referring to settled case-law, the Court made such a finding conditional on the fact that such a decision applies to situations which are determined objectively and that it entails legal effects for a class of persons envisaged in a general and abstract manner (judgment of 15 September 2016, *Ferracci* v *Commission*, T-219/13, EU:T:2016:485, paragraph 52). As pointed out in paragraph 50 above, that is not the case here.

53 Consequently, contrary to what the applicant contends, the contested decision cannot be a measure of general application and, therefore, is not a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU.

54 What is more, it should be recalled that the concept of a 'regulatory act which is of direct concern to [any natural or legal person] and does not entail implementing measures', within the meaning of the third limb of the fourth paragraph of Article 263 TFEU, is to be interpreted in the light of that provision's objective, which, as is clear from its origin, consists in preventing an individual whose legal situation is nevertheless directly altered by an act from being denied effective judicial protection with regard to that act. In the light of that objective, it appears that the third limb of the fourth paragraph of Article 263 TFEU is designed to apply only when the disputed act, in itself, in other words irrespective of any implementing measures, alters the legal situation of the applicant. Accordingly, where this is not the case, that finding suffices for the conclusion that the third limb of the fourth paragraph of Article 263 TFEU is inapplicable, without there being any need in those circumstances to verify whether that act entails implementing measures in respect of the applicant (see, to that effect, judgment of 7 July 2015, *Federcoopesca and Others* v *Commission*, T-312/14, EU:T:2015:472, paragraphs 27 to 43).

55 In the present case, any potential infringement of the applicant's rights, invoked by the latter, would arise as a consequence of the implementing measure, that is to say, the contract between the BNetzA and OGT as operator of the OPAL pipeline.

56 Consequently, in accordance with the case-law cited in paragraph 54 above, the third limb of the fourth paragraph of Article 263 TFEU is inapplicable.

57 It follows that the action must be dismissed as being inadmissible, without there being any need to rule on the admissibility of the supplementary pleading lodged by the applicant on 13 March 2017.

The applications to intervene

58 In accordance with Article 142(2) of the Rules of Procedure, the intervention is ancillary to the main proceedings and becomes devoid of purpose, inter alia, when the application is declared inadmissible.

59 Consequently, there is no longer any need to adjudicate on the applications to intervene brought by the Federal Republic of Germany, the Parliament, the Council, Naftogaz Ukrainy, OGT and Gazprom Eksport.

Costs

60 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

61 Since the applicant has been unsuccessful in its action, it must be ordered to bear its own costs and to pay those of the Commission, in accordance with the form of order sought by the Commission, including the costs relating to the interlocutory proceedings.

62 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Federal Republic of Germany is to bear its own costs relating to the interlocutory proceedings.

63 Furthermore, under Article 144(10) of the Rules of Procedure, if the proceedings in the main case are concluded before an application to intervene has been decided upon, the applicant for leave to intervene and the main parties must each bear their own respective costs relating to the application to intervene.

64 In the present case, the applicant, the Commission, the Federal Republic of Germany, the Parliament, the Council, Naftogaz Ukrainy, OGT and Gazprom Eksport are therefore each to bear their own respective costs relating to the applications to intervene.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby orders:

1. **The action is dismissed as being inadmissible.**

2. **There is no longer any need to adjudicate on the applications to intervene.**

3. **PGNiG Supply & Trading GmbH shall bear its own costs and pay those of the European Commission, including the costs relating to the interlocutory proceedings.**

4. **The Federal Republic of Germany shall bear its own costs relating to the interlocutory proceedings.**

5. **PGNiG Supply & Trading, the Commission, the Federal Republic of Germany, the European Parliament, the Council of the European Union, Naftogaz Ukrainy SA, OPAL Gastransport GmbH & Co. KG and Gazprom Eksport LLC shall each bear their own respective costs relating to the applications to intervene.**

Luxembourg, 14 December 2017.

E. Coulon
Registrar

I. Pelikánová
President