Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

6 September 2013*

(Internal market in natural gas — Directive 2003/55/EC — Obligation on natural gas undertakings to organise a system of negotiated third party access to gas storage facilities — Decision of the Czech authorities granting the applicant a temporary exemption for its future underground gas storage facilities in Dambořice — Commission decision ordering the Czech Republic to withdraw the exemption decision — Time at which Directive 2003/55 takes effect)

In Case T-465/11,

Globula a.s., established in Hodonín (Czech Republic), represented by M. Petite, D. Paemen, A. Tomtsis, D. Koláček and P. Zákoucký, lawyers,

applicant,

supported by

Czech Republic, represented by M. Smolek, J. Očková and T. Müller, acting as Agents,

intervener,

v

European Commission, represented by O. Beynet and T. Scharf, acting as Agents,

defendant,

APPLICATION for the annulment of Commission Decision C(2011) 4509 of 27 June 2011 on the exemption of an Underground Gas Storage Facility in Dambořice from the internal market rules on third party access,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 23 April 2013,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 On 14 April 2009, the applicant, Globula a.s., filed an application with the Czech Ministry of Industry and Trade ('the Ministry') for authorisation to build an underground gas storage facility ('UGS facility') at Dambořice (Czech Republic). In that application, it also applied for a temporary exemption from the obligation to provide negotiated third party access for the entire new capacity of the UGS facility.

2 By decision of 26 October 2010, the Ministry authorised the construction of the UGS facility and temporarily exempted the applicant from the obligation to provide negotiated third party access for 90% of the capacity of the UGS facilities for 15 years, starting from the effective date of the authorisation of use ('the decision of 26 October 2010').

3 By letter of the Ministry of 11 February 2011, received by the Commission on 18 February 2011, the decision of 26 October 2010 was notified to the Commission.

4 By letter of 15 April 2011, the Commission asked the Ministry for additional information, indicating to it that if the Commission were to ask it to amend or withdraw the decision of 26 October 2010, it would do so by 18 June 2011. The Ministry responded on 29 April 2011, within the time-limit set by the Commission.

5 By letter of 13 May 2011, the Commission sent the Ministry a second request for additional information, again indicating to it that if the Commission were to ask it to amend or withdraw the notified decision, it would do so by 18 June 2011. The Ministry responded on 20 May 2011, within the time-limit set by the Commission.

6 By letter of 23 June 2011, signed by the Commissioner responsible for Energy, the Commission informed the Ministry that the Commission would adopt a formal decision by 29 June 2011.

7 On 27 June 2011, the Commission adopted Decision C(2011) 4509 on the exemption of an underground gas storage facility at Dambořice from the internal market rules on third party access ('the contested decision'), by which it ordered the Czech Republic to withdraw the decision of 26 October 2010. The contested decision was notified to the Czech Republic on 28 June 2011.

Procedure and forms of order sought by the parties

8 By application lodged at the Registry of the General Court on 26 August 2011, the applicant brought the present action.

9 By a document lodged at the Registry of the General Court on 1 December 2011, the Czech Republic applied for leave to intervene in the present proceedings in support of the applicant. By order of 11 January 2012, the President of the Fourth Chamber of the Court granted leave to intervene. The intervener lodged its statement in intervention and the other parties lodged their observations on that statement within the prescribed periods.

10 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.

11 The parties presented oral argument and replied to the Court's oral questions at the hearing on 23 April 2013.

12 The applicant, supported by the Czech Republic, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

13 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

14 In support of its claim for annulment of the contested decision, the applicant puts forward three pleas in law. The first plea alleges errors in the determination of the applicable law, the second, infringement of the principle of the protection of legitimate expectations, and the third, a manifest error in the assessment of the facts.

15 The first plea raised by the applicant has two parts, alleging errors in the determination of the applicable procedural and substantive law respectively.

16 The applicant, supported by the Czech Republic, submits that the Commission should have applied the procedure and substantive criteria laid down in 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) ('the Second Gas Directive') and not those laid down in 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 (OJ 2009 L 211, p. 94) ('the Third Gas Directive'). While the decision of 26 October 2010 was notified to the Commission on 18 February 2011, it was only on 3 March 2011 that the Second Gas Directive was replaced by the Third Gas Directive.

17 The Commission contests both the admissibility and the substance of those arguments.

Admissibility of the first plea

18 The Commission contests the admissibility of the first plea. In its submission, if it had applied the procedure in Article 22 of the Second Gas Directive, it would then have had to send the Czech Republic an informal request to withdraw the decision of 26 October 2010. This would not have been a challengeable act. Accordingly, the present action is not likely to procure any advantage for the applicant on that issue and the applicant therefore, in this respect, does not have any legal interest in bringing proceedings. In any event, contrary to what the applicant submits, the Commission could, if necessary, following any annulment of the contested decision by the General Court, take a new decision on the basis of the Second Gas Directive.

19 The applicant disputes those arguments.

20 It must be noted, in that respect, that, unlike the procedure laid down in Article 36 of the Third Gas Directive, which allows the Commission to address a binding decision to the Member State concerned directly, the procedure laid down in Article 22 of the Second Gas Directive requires the Commission to first address a non-binding request to the Member State to amend or annul its decision to grant a derogation from the provisions of that directive, a request which is not a challengeable act.

21 However, the applicant's aim, in the part of its first plea relating to the applicable procedure, is not that the Commission address to it an unchallengeable act rather than a challengeable one, but rather the annulment of a binding decision that is, in its view, unlawful, which would clearly procure it an advantage.

22 Moreover, the Commission's argument that it could, if necessary, following any annulment of the contested decision by the General Court, take a new decision on the basis of the Second Gas Directive must be rejected. First, under the Second Gas Directive, as noted in paragraph 20 above, a binding decision presupposed that a non-binding request had first been addressed to the Member State concerned. Since such a non-binding request may give rise to negotiations between the Member State and the Commission as regards its content, it is not certain, at this stage, whether or not the Commission would have ultimately adopted a binding decision, or what its content would have been. Moreover, the applicant also claims that, since the period laid down in Article 22(4) of the Second Gas Directive expired on 18 May 2011, the Commission could therefore no longer contest the decision of 26 October 2010.

23 Consequently, and without prejudice, at this stage, to the decision on the substance of the applicant's pleas, the latter has an interest in pursuing the proceedings in respect of the first plea, with the result that the plea of inadmissibility put forward by the Commission in that respect must be rejected.

Substance of the first plea

24 According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22, Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 29, and Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 58).

25 However, an exception to that principle has been allowed where the legislation contains both procedural and substantive rules, which form an indivisible whole and the individual provisions of which may not be considered in isolation with regard to the time at which they take effect. In such circumstances, the entirety of the provisions at issue may not be accorded retroactive effect unless sufficiently clear indications lead to such a conclusion (see, to that effect, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraphs 11 and 12).

26 In the present case, Article 53 of the Third Gas Directive provides that the Second Gas Directive is replaced by the Third Gas Directive with effect from 3 March 2011 and, thenceforth, references to the Second Gas Directive are to be construed as references to the Third Gas Directive and are to be read in accordance with the correlation table in Annex II to the latter. In accordance with that table, Article 36 of the Third Gas Directive corresponds to Article 22 of the Second Gas Directive.

27 It must be noted, in that respect, that Article 22 of the Second Gas Directive as well as Article 36 of the Third Gas Directive contain both procedural and substantive rules and that, in particular, the rules governing the adoption of an exemption decision by the national authorities have been altered significantly.

28 Thus, as regards, in the first place, the rules governing the adoption of an exemption decision by the national authorities, first, where the infrastructure in question is located in the territory of more than one Member State, Article 36(4) and (5) of the Third Gas Directive attributes certain powers to the Agency for the Cooperation of Energy Regulators (ACER) established by 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). In particular, ACER may take decisions in the place of the national authorities if those authorities have not been able to reach an agreement.

29 Secondly, the third subparagraph of Article 36(6) of the Third Gas Directive introduced the obligation, for the national authority, before granting an exemption, to decide upon the rules and mechanisms for management and allocation of capacity of the infrastructure in question, to require that the operators of the infrastructure in question invite all potential users to indicate their interest in contracting capacity ('market test') and to require that the management of the newly created capacity meet certain criteria.

30 As regards, in the second place, the procedure at European Union level, the key changes concern, first, the fact that the Commission is no longer required to ask initially the Member State concerned to withdraw or amend its decision, but can now adopt a binding decision directly. Secondly, the Commission's binding decision is no longer subject to the 'comitology' procedure. Thirdly, the periods within which the Commission may act have been changed. Whereas, under the Second Gas Directive, the initial two-month period could be extended by a month where the Commission sought further information, that initial period may be extended, under the Third Gas Directive, by an additional period of two months from the receipt of the additional information.

31 It must be held that, with regard to the time at which they take effect, the procedural changes introduced by Article 36 of the Third Gas Directive cannot be considered in isolation from the substantive changes.

32 First, the exemption procedure governed by that Article is a single procedure, although it takes place partly at national level and partly at European Union level. Accordingly, the changes that affect the national stage of the procedure cannot be assessed separately from those that affect the European Union stage.

33 Secondly, the changes to the distribution of decision-making powers between the various actors involved in the procedure are considerable, and, in particular, are liable to have repercussions on the outcome of the procedure.

34 In that regard, on the one hand, it is necessary to highlight the role that ACER now plays as a new actor in the procedure to be followed by the national authorities. In the event of a persistent disagreement between the national authorities on the appropriateness of granting an exemption or on the criteria governing the management of the newly created capacities, the single decision that ACER is called on to make, in accordance with the rules of the Third Gas Directive, is liable to differ substantially from the individual decisions that would have been taken, under the rules of the Second Gas Directive, by the national authorities concerned. Moreover, ACER's significant consultative role before those national authorities must be emphasised. Although the present case does not relate to an infrastructure situated in several Member States, that feature of the present case cannot affect the examination of the divisible nature of the procedural and substantive rules, which is independent of any specific case.

35 On the other hand, as regards the procedure to be followed by the Commission, its powers have been considerably reinforced by the new wording of paragraphs 8 and 9 of Article 36 of the Third Gas Directive. As noted in paragraph 20 above, the Commission may now address a binding decision to the Member State concerned directly, without initially addressing to it a non-binding request and without having recourse to the 'comitology' procedure. As stated in paragraph 22 above, the fact that a potential stage of negotiations was thus removed from the procedure is liable to have repercussions on the content of the Commission's final decision.

36 In the light of all of the foregoing, it follows that the procedural and substantive changes introduced by Article 36 of the Third Gas Directive form an indivisible whole, with the result that, in accordance with the case-law cited in paragraph 25 above, the entirety of those provisions may not be accorded retroactive effect unless sufficiently clear indications lead to such a conclusion.

37 Such indications are not present in the present case. In particular, although the Third Gas Directive specifies, in Articles 53 and 54, the date from which the rules it lays down must be applied, it contains no rules for the treatment of procedures pending at the time of its entry into force capable of justifying a derogation from the principle developed by the case-law cited in paragraph 25 above.

38 Consequently, contrary to the Commission's view, it is the rules of the Second Gas Directive which apply to the present case, as regards both the substance and the procedure.

39 Accordingly, the first plea must be accepted and the contested decision must be annulled, and there is no need to examine the other pleas put forward by the applicant.

Costs

40 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs, and to pay those incurred by the applicant, in accordance with the form of order sought by the latter.

41 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. Accordingly, the Czech Republic shall bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Decision C(2011) 4509 of the Commission of 27 June 2011 on the exemption of an Underground Gas Storage Facility in Dambořice from the internal market rules on third party access;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Globula a.s.;**

3. **Orders the Czech Republic to bear its own costs.**

Pelikánová Jürimäe van der Woude

Delivered in open court in Luxembourg on 6 September 2013.

[Signatures]