Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 June 2014*

(Failure of a Member State to fulfil obligations — Internal market in energy — Gas transmission — Regulation (EC) No 715/2009 — Articles 14(1) and 16(1) and (2)(b) — Obligation to guarantee maximum capacity — Virtual reverse flow gas capacity — Admissibility)

In Case C-198/12,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 26 April 2012,

European Commission, represented by K. Herrmann, S. Petrova, O. Beynet and T. Scharf, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Bulgaria, represented by D. Drambozova, E. Petranova and Y. Atanasov, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 September 2013,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2013,

gives the following

* Language of the case: Bulgarian.

Judgment

1 By its action, the European Commission asks the Court to declare that, by not providing services for virtual reverse flow gas transmission to all market participants, the Republic of Bulgaria has failed to fulfil its obligations under Articles 14(1) and 16(1) and (2)(b) of 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).

Legal context

2 The infringement procedure initiated by the Commission against the Republic of Bulgaria was initially based on Articles 4(1) and 5(1) and (2) of Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks (OJ 2005 L 289, p. 1), which was repealed in the course of the pre-litigation procedure, with effect from 3 March 2011, by Regulation No 715/2009. Those provisions were replaced by Articles 14(1) and 16(1) and (2) of Regulation No 715/2009.

3 Article 1 of Regulation No 715/2009, which is entitled 'Subject-matter and scope', replaced Article 1 of Regulation No 1775/2005. Article 1(a) of Regulation No 715/2009 provides:

'This Regulation aims at:

(a) setting non-discriminatory rules for access conditions to natural gas transmission systems taking into account the special characteristics of national and regional markets with a view to ensuring the proper functioning of the internal market in gas'.

4 Article 2 of that regulation is entitled 'Definitions'. Article 2(1) of Regulation No 715/2009, which replaced Article 2(1) of Regulation No 1775/2005, is worded as follows:

'For the purpose of this Regulation, the following definitions apply:

(1) "transmission" means the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply;

...

(3) "capacity" means the maximum flow, expressed in normal cubic meters [sic] per time unit or in energy unit per time unit, to which the network user is entitled in accordance with the provisions of the transport contract;

...

(5) "congestion management" means management of the capacity portfolio of the transmission system operator with a view to optimal and maximum use of the technical capacity and the timely detection of future congestion and saturation points;

...

(7) "nomination" means the prior reporting by the network user to the transmission system operator of the actual flow that the network user wishes to inject into or withdraw from the system;

...

(9) “system integrity” means any situation in respect of a transmission network including necessary transmission facilities in which the pressure and the quality of the natural gas remain within the minimum and maximum limits laid down by the transmission system operator, so that the transmission of natural gas is guaranteed from a technical standpoint;

...

(18) “technical capacity” means the maximum firm capacity that the transmission system operator can offer to the network users, taking account of system integrity and the operational requirements of the transmission network;

...

(20) “available capacity” means the part of the technical capacity that is not allocated and is still available to the system at that moment;

(21) “contractual congestion” means a situation where the level of firm capacity demand exceeds the technical capacity;

...

(23) “physical congestion” means a situation where the level of demand for actual deliveries exceeds the technical capacity at some point in time’.

5 Article 14 of Regulation No 715/2009 is entitled ‘Third-party access services concerning transmission system operators’. Article 14(1) of that regulation, which replaced Article 4(1) of Regulation No 1775/2005, provides:

‘Transmission system operators shall:

(a) ensure that they offer services on a non-discriminatory basis to all network users;

(b) provide both firm and interruptible third-party access services. The price of interruptible capacity shall reflect the probability of interruption;

(c) offer to network users both long and short-term services.

In regard to point (a) of the first subparagraph, where a transmission system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions, either using harmonised transport contracts or a common network code approved by the competent authority in accordance with the procedure laid down in Article 41 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)].’

6 Article 16 of Regulation No 715/2009 is entitled ‘Principles of capacity-allocation mechanisms and congestion-management procedures concerning transmission system operators’. Article 16(1) and (2) of that regulation, which replaced Article 5(1) and (2) of Regulation No 1775/2005, provides:

‘1. The maximum capacity at all relevant points referred to in Article 18(3) shall be made available to market participants, taking into account system integrity and efficient network operation.

2. The transmission system operator shall implement and publish non-discriminatory and transparent capacity-allocation mechanisms, which shall:

(a) provide appropriate economic signals for the efficient and maximum use of technical capacity, facilitate investment in new infrastructure and facilitate cross-border exchanges in natural gas;

(b) be compatible with the market mechanisms including spot markets and trading hubs, while being flexible and capable of adapting to evolving market circumstances; and

(c) be compatible with the network access systems of the Member States.'

The pre-litigation procedure

7 On 26 June 2009, the Commission sent a letter of formal notice to the Republic of Bulgaria, in which it stated that that Member State had, inter alia, failed to fulfil its obligations under Articles 4(1) and 5(1) and (2) of Regulation No 1775/2005 (now Articles 14(1) and 16(1) and (2)(b) of Regulation No 715/2009).

8 Finding that the Republic of Bulgaria's reply in its letter of 26 August 2009 was not satisfactory, the Commission addressed a reasoned opinion to the Republic of Bulgaria on 28 June 2010. The Republic of Bulgaria replied to that reasoned opinion on 27 August 2010 and provided complementary information to the Commission by letters of 24 August 2011, 28 December 2011 and 9 January 2012.

9 Taking the view that the response to the reasoned opinion was not satisfactory, the Commission brought the present action.

The action

Admissibility of the action

Arguments of the parties

10 As a preliminary point, the Republic of Bulgaria submits that the action brought by the Commission is inadmissible in view of the inconsistencies between the complaints made in the reasoned opinion and those made in the application.

11 The Republic of Bulgaria maintains that the letter of formal notice and the reasoned opinion refer on several occasions to the obligation to provide 'reverse flow transmission services on an interruptible basis', which can relate only to physical reverse flow gas transmission. However, in its reasoned opinion, the Commission submitted that Article 5(1) of Regulation No 1775/2005 imposes an obligation to ensure a physical capacity to transport gas in both directions, or, where such a technical possibility does not exist, to ensure a physical capacity to transport gas in the main direction and a virtual reverse flow capacity in the other.

12 The Republic of Bulgaria also observes that the Commission refers, in the body of the application, to a broader obligation to make reverse flow capacity available, irrespective of whether that capacity be physical or virtual. However, the Commission, in the form of order sought in the application, referred exclusively to the provision of services for virtual reverse flow gas transmission.

13 The Republic of Bulgaria considers that, on account of those inconsistencies, it has been unable to identify the alleged failure to fulfil obligations, and to avail itself of its right to defend itself against the objections formulated by the Commission, with the result that the present action must be dismissed as inadmissible.

14 The Commission submits that the reasoned opinion relates to reverse flow gas transmission services, both physical and virtual, since the provision of both types of transmission services is considered to arise from the obligation for the gas transmission system operator to provide maximum capacity to all market participants, which is expressly apparent from the reasoned opinion. In essence, the Commission stated, on several occasions, both in the reasoned opinion and in the letter of formal notice, that virtual reverse flow gas transmission meets the requirements set out in Articles 14(1) and 16(1) and (2)(b) of Regulation No 715/2009 where the transmission system operator is unable to provide physical reverse flow transmission services.

Findings of the Court

15 It is settled case-law that the letter of formal notice from the Commission to the Member State concerned and then the reasoned opinion issued by it delimit the subject-matter of the dispute, with the result that that subject-matter cannot subsequently be extended. Consequently, the reasoned opinion and the application must be based on the same complaints (see, inter alia, Case C-191/95 *Commission* v *Germany* EU:C:1998:441, paragraph 55, and Case C-67/12 *Commission* v *Spain* EU:C:2014:5, paragraph 52).

16 However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited (see, inter alia, *Commission* v *Germany* EU:C:1998:441, paragraph 56, and *Commission* v *Spain* EU:C:2014:5, paragraph 53).

17 It must be stated that, in the present case, the Commission has not extended the subject-matter of the proceedings as defined in the letter of formal notice and in the reasoned opinion, but rather restricted it to the obligation to provide virtual reverse flow transmission services. As the Advocate General has noted in point 28 of his Opinion, the Commission has referred to the obligation to offer a virtual gas transmission capacity in the letter of formal notice, the reasoned opinion and in the application.

18 In the light of the foregoing, the plea of inadmissibility raised by the Republic of Bulgaria must be rejected.

Substance

Arguments of the parties

19 The Commission considers that the Republic of Bulgaria has failed to fulfil its obligations under Articles 14(1) and 16(1) and (2)(b) of Regulation No 715/2009, on the ground that Bulgartransgaz EAD, the gas transmission system operator within the national territory, does not provide virtual reverse flow capacity at every entry and exit point of that network, namely, Negru Voda, where the Bulgarian system connects with the Romanian system, and Sikirokastrou, where it connects with the Greek system.

20 It is apparent from the Commission's application that a virtual gas transmission capacity is the consequence of the gas transmission system operator offsetting the demand to transport gas in both directions. That 'netting' mechanism offers, in addition to a physical capacity, a virtual gas transmission capacity, in the sense that the volumes of gas in question do not physically move within the gas transmission network.

21 In the first place, the Commission submits that, by not offering virtual reverse flow gas transmission services to the relevant points where its gas transmission system connects with other systems, the Republic of Bulgaria has failed to comply with its obligation to provide maximum capacity to all market participants in accordance with Article 16(1) of Regulation No 715/2009, read in conjunction with the obligation to offer services on a non-discriminatory basis to all network users, set out in Article 14(1)(a) of that regulation, and the obligation to provide both firm and interruptible third-party access services, set out in Article 14(1)(b) of that regulation.

22 The Commission observes that some pipeline systems offer physical gas transmission capacity in both directions, with the result that network users have access to physical reverse flow transmission services. Those systems offer bidirectional physical capacity. On the contrary, other systems of pipelines, such as those set up by the Republic of Bulgaria, ensure physical gas transmission in only one direction and therefore offer a unidirectional physical capacity. However, in that case, the obligation to provide maximum capacity in accordance with Article 16(1) of that regulation implies an obligation to offer virtual reverse flow transmission services.

23 According to the Commission, the provision of a virtual reverse flow transmission capacity enables the capacity of the network to be increased. The provision of a virtual reverse flow transmission capacity would therefore overcome the lack of physical reverse flow transmission capacity of the pipeline and would also increase transmission capacity in the main direction, in the sense that the demand for gas supply in the main direction would be offset by the demand for gas supply in the opposite direction.

24 The Commission submits that an interpretation of Article 16(1) of Regulation No 715/2009 as meaning that it introduces an obligation to offer market participants a virtual reverse flow transmission capacity is confirmed by Article 14(1)(b) of that regulation. In that regard, the Commission maintains that such a virtual capacity must be offered on an interruptible basis and that Article 14(1)(b) of Regulation No 715/2009 requires transmission system operators to provide both firm and interruptible services.

25 In the second place, the Commission maintains that the obligation to create a virtual reverse flow transmission capacity follows from the requirement to ensure 'efficient network operation' which also is set out in Article 16(1) of Regulation No 715/2009. That capacity enables the increase of gas transmission services offered without incurring additional costs, whereas the acquisition of a physical reverse flow capacity would require significant investment in infrastructure and the use of combustion gases for such transmission services.

26 In the third place, the Commission submits that the obligation to offer a virtual reverse flow capacity also arises from the obligation to allocate network capacity in accordance with market mechanisms pursuant to Article 16(2)(b) of Regulation No 715/2009. In that regard, the decision to limit pipeline capacity to only physical capacity would significantly decrease the provision of gas transmission services within the European Union, considerably impede the liquidity of gas trading between gas trading hubs and risk creating substantial price discrepancies within the Union.

27 In the fourth place, the Commission considers that any interpretation of Regulation No 715/2009 to the effect that it does not impose the obligation to offer a virtual reverse flow transmission capacity would be contrary to the aims of that regulation as set out in the first paragraph of Article 1 thereof. The provision of such a virtual capacity is a prerequisite for the development of the natural liquid gas market and for the integration of the internal market in natural gas.

28 The Republic of Bulgaria disputes the Commission's interpretation according to which Regulation No 715/2009 implies the obligation to provide a virtual reverse flow transmission capacity at every entry and exit point of its network.

29 First, the Republic of Bulgaria states that a literal interpretation of the wording of Articles 14(1) and 16(1) and (2) of Regulation No 715/2009 does not support the conclusion that there exists an obligation to offer bidirectional capacity on gas networks.

30 Secondly, the Republic of Bulgaria maintains that the Commission's interpretation is inconsistent with the broad logic of Regulation No 715/2009. The Commission's interpretation of the concept of 'maximum capacity', in the sense that it covers virtual transmission capacity, departs from the definitions of the concepts of 'transmission', 'capacity', 'congestion management', 'nomination', 'technical capacity', 'available capacity', 'contractual congestion' and 'physical congestion' appearing in Article 2(1) of that regulation, which all refer to the physical gas transmission capacity of the network.

31 Thirdly, the Republic of Bulgaria submits that a historical interpretation of Regulation No 715/2009 leads to the same conclusion. On the one hand, neither the travaux préparatoires for Regulation No 1775/2005 nor those for Regulation No 715/2009 contain indications supporting the Commission's interpretation that there exists an obligation to offer a virtual reverse flow transmission capacity.

32 On the other hand, the Republic of Bulgarian maintains that Articles 6 and 7 of Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ 2010 L 295, p. 1) require Member States to enable physical bidirectional capacity on all cross-border interconnections between Member States as early as possible and at the latest by 3 December 2013. If the EU legislature had intended to impose a similar obligation by adopting Regulation No 715/2009, it would therefore have done so expressly as it did when adopting Articles 6 and 7 of Regulation No 994/2010.

Findings of the Court

33 In support of its action, the Commission submits that Articles 14(1) and 16(1) and (2)(b) of Regulation No 715/2009 establish an obligation to offer a virtual reverse flow gas transmission capacity. It must be ascertained whether those provisions establish such an obligation.

34 The Court finds that none of those provisions expressly establishes an obligation to provide a virtual reverse flow gas transmission capacity.

35 Nevertheless, the Commission maintains that such an obligation is implied by those provisions. In that regard, it is necessary to bear in the mind the Court's case-law according to which, as the Advocate General has noted in point 46 of his Opinion, the Court may not, in the face of clear and precise wording of an EU legislative act, interpret the provision with the intention of correcting it and thereby extending the obligations of the Member States relating to it (see, to that effect, Case C-582/08 *Commission* v *United Kingdom* EU:C:2010:429, paragraph 51).

36 In the first place, under Article 14(1) of Regulation No 715/2009, transmission system operators are to ensure that they offer both long- and short-term services on a non-discriminatory basis to all network users and provide both firm and interruptible third-party access services.

37 However, it cannot be concluded on the basis of that provision that there is an obligation to provide a virtual reverse flow gas transmission capacity. In particular, as the Advocate General has noted in point 40 of his Opinion, the obligation to provide both firm and interruptible services, pursuant to

Article 14(1)(b) of Regulation No 715/2009, does not mean that transmission system operators must provide all network services that can be provided on an interruptible basis and, in particular, a virtual reverse flow transmission capacity. Moreover, the requirement of non-discrimination set out in Article 14(1)(a) of that regulation does not require those operators to provide new services but rather not to discriminate when providing existing services.

38 In the second place, Article 16(1) of Regulation No 715/2009 provides that maximum capacity at all relevant points referred to in Article 18(3) is to be made available to market participants, taking into account system integrity and efficient network operation.

39 In that regard, Article 2(1)(3) of Regulation No 715/2009 defines 'capacity' as 'the maximum flow, expressed in normal cubic meters [sic] per time unit or in energy unit per time unit, to which the network user is entitled in accordance with the provisions of the transport contract'.

40 Article 2(1)(1) of Regulation No 715/2009 defines 'transport' as 'the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply'.

41 In the light of those definitions, 'capacity' within the meaning of Article 16(1) of Regulation No 715/2009 refers to the physical capacity of gas transmission networks. Moreover, none of the provisions of Regulation No 715/2009 referring to 'capacity' indicates that the term is capable of covering virtual transmission services.

42 Consequently, as observed by the Republic of Bulgaria and by the Advocate General in point 34 of his Opinion, 'maximum capacity' in Article 16(1) of Regulation No 715/2009 covers only the physical capacity of gas transmission networks, excluding any virtual transmission capacity provided by the transmission system operator.

43 That interpretation is not contrary to the obligation laid down in Article 16(1) of Regulation No 715/2009 for transmission system operators to take account of 'efficient network operation' when ensuring that maximum capacity is made available to market participants. As the Advocate General has noted in point 41 of his Opinion, that obligation actually limits, rather than extends, the obligation to provide maximum capacity.

44 In addition, that interpretation is also supported by the other obligation, laid down in Article 16(1) of that regulation, to take 'into account system integrity'.

45 Article 2(1)(9) of Regulation No 715/2009 defines 'system integrity' as 'any situation in respect of a transmission network including necessary transmission facilities in which the pressure and the quality of the natural gas remain within the minimum and maximum limits laid down by the transmission system operator, so that the transmission of natural gas is guaranteed from a technical standpoint'.

46 As is apparent from paragraphs 20 and 23 above, the provision of a virtual gas transmission capacity is the consequence of a 'netting' mechanism to offset the demands for gas transmission which does not involve physical use of the network and which is not therefore such as to compromise system integrity within the meaning of Article 2(1)(9) of that regulation.

47 Consequently, the obligation to take 'into account system integrity' set out in Article 16(1) of Regulation No 715/2009 also applies to the physical capacity of gas transmission networks. That obligation does not therefore require transmission system operators to provide a virtual transmission capacity.

48 It is apparent from the foregoing that Article 16(1) of that regulation refers only to the physical capacity of gas transmission networks, with the result that an obligation to provide a virtual reverse flow gas capacity cannot be inferred from that provision.

49 In the third place, according to Article 16(2)(b) of Regulation No 715/2009, the transmission system operator is to implement and publish non-discriminatory and transparent capacity-allocation mechanisms, which are to be compatible with the market mechanisms including spot markets and trading hubs, while being flexible and capable of adapting to evolving market circumstances.

50 In that regard, it must be stated that that provision governs capacity-allocation mechanisms offered to market participants by transmission system operators pursuant to Article 16(1) of Regulation No 715/2009. Article 16(2)(b) of that regulation cannot therefore be interpreted as imposing an obligation to increase capacity beyond that required under Article 16(1) thereof. Since it has been established in paragraph 48 above that Article 16(1) of Regulation No 715/2009 does not require transmission system operators to offer market participants a virtual reverse flow gas capacity, Article 16(2)(b) cannot be interpreted as laying down such an obligation.

51 That interpretation of the wording and scheme of Articles 14(1) and 16(1) and (2)(b) of Regulation No 715/2009 is supported by the travaux préparatoires for Regulation No 1775/2005 and Regulation No 715/2009. As the Advocate General has noted in point 42 of his Opinion, there is no indication in the travaux préparatoires of such an obligation to provide a virtual reverse flow gas transmission capacity. It follows that such an obligation cannot be inferred from the objectives of either Regulation No 1775/2005 or Regulation No 715/2009.

52 It is apparent from the foregoing that Articles 14(1) and 16(1) and (2)(b) of Regulation No 715/2009 do not establish an obligation to provide a virtual reverse flow transmission capacity.

53 Therefore, the Commission's action must be dismissed.

Costs

54 Under Article 138(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. Since the Republic of Bulgaria has applied for costs against the Commission, and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]