Third Energy Package – security dilemmas

Vienna Forum on European Energy Law

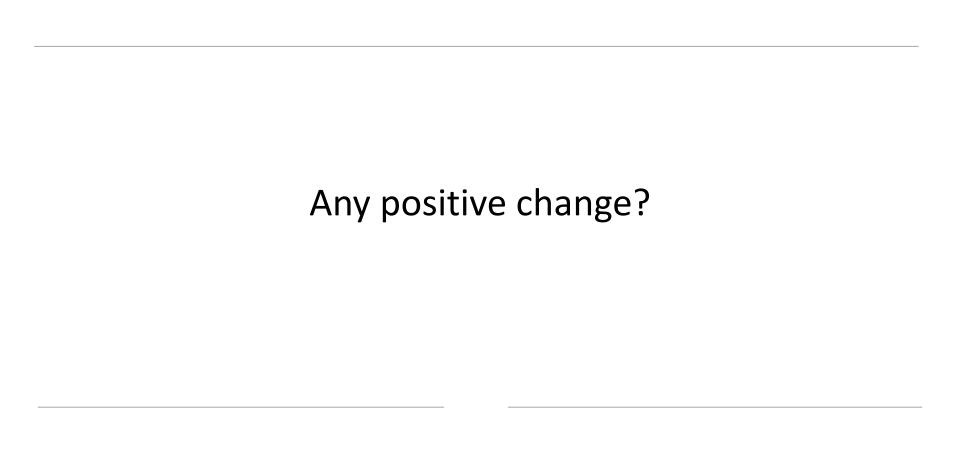
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Vienna, 20 September, 2019

Third Energy Package – security dilemma



- Third Energy Package introduced the idea of the balance of european gas hubs. It was later detailed in Gas Target Model. The balance was to guarantee the competition.
- Third Energy Package focused on competition within the Union. Regulations were silent on the competition of gas supplies to the Union.
- When Third Energy package in place political disruptions of gas supplies still occured. During winter 2014/2015 Poland did not receive part of its gas volumes from Russian supplier.
- Big political infrastructure projects continue to be built without european-wide political consensus and without its proper assessment on the security of energy supplies and security of EU
 - EU instutions issued decisions perpetuating position of dominant suppliers in CEE region.



Any positive change?



New SoS rules





2017 Regulation on security of gas supplies – solidarity principles

2017 New IGA decision

Amendment of gas directive - timeline



8 November 2017 the European Commission adopted a legislative proposal

April 2018 the European Parliament endorsed the project

2018 difficulty of the Member States to reach a common position

19 December 2018 Energy Ministers call to adopt the revision

8 February 2019 Council adopted a general approach under the RO PREZ

12 February 2019 Trilogue negotiations concluded with an agreement

April 2019 revision adopted by the co-legislators

Amendment of gas directive – revision details



Definition of an "interconnector" extended to ensure level playing field for all Rules on unbundling, transparency, TPA and regulated tariffs apply to all market players Consistency of the legal framework within the Union that helps avoiding distortion of competition

Security of supply as a new requirement for exemption of new infrastructure

No gas piplelines functioning in the legal void on the EU territory

To be implemented by 24 Feb 2020

Amendment of gas directive – Contesters





T-526/19 Nord Stream 2 AG vs Council and European Parliament

for the annulment of Directive 2019/692 (due to unequal treatment, unproportionality, legal uncertainty, misuse of power)



T-530/19 Nord Stream AG vs Council and European Parliament

for the partial annulment of Directive 2019/692 (term of derogations for existing pipelines)

EU Court rulling on the OPAL gas pipeline





Press and Information

General Court of the European Union PRESS RELEASE n° 107/19

Luxembourg, 10 September 2019

Judgment in Case T-883/16
Poland v Commission

The General Court annuls the Commission decision approving the modification of the exemption regime for the operation of the OPAL gas pipeline

That decision was adopted in breach of the principle of energy solidarity

2009 2016 16 December 2016 10 September 2019
First exemption BNetzA & EC decisions PL action for annulment Court's decision

EU Court rulling on the OPAL gas pipeline - Consequences



→ Court's first ever standpoint on what the energy solidarity principle – introduced into the Lisbon Treaty on Polish demand – actually is :

The principle imposes not only obligations of mutual assistance where, for example following natural disasters or acts of terrorism, a Member State is in a critical or emergency situation as regards its gas supply, but also requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures likely to affect the interests of the EU and other Member States as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity. (points 71-73)

→ Court introcuded an "energy solidarity test", which needs to be followed:

EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests both of the European Union and of the various Member States and to balance those interests where there is a conflict. (77)

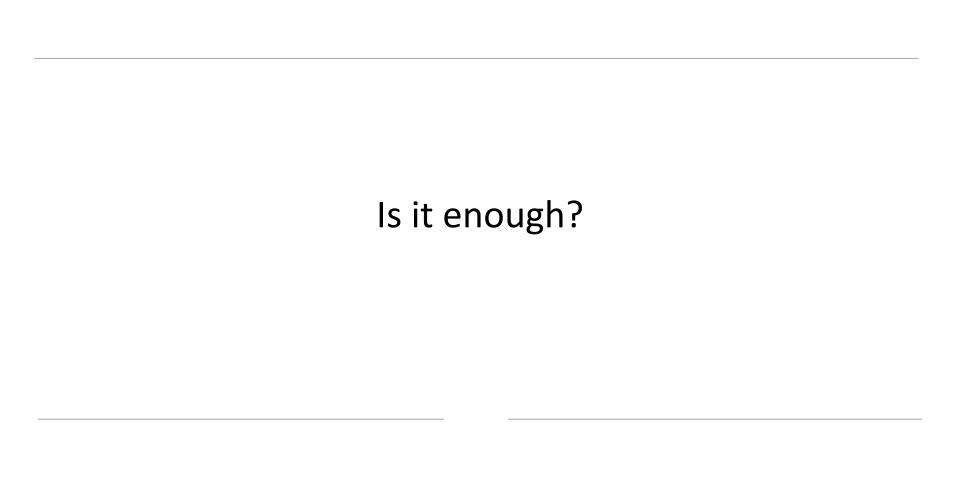
→ Court links energy solidarity with competition

by annulling a decision because the EC failed to analyse how its decision will influence the conditions of supply and use of transmission services on the pipelines competing with OPAL

EU Court rulling on the OPAL gas pipeline - Consequences



- → Comeback to the 2009 EC decision, following which Gazprom will be able to use only up to 50% of OPAL's capacity.
- → The Court's decision may still **be set aside by the Court of Justice** if the EC will lodge an appeal. No legal posibility to appeal by other entities.
- The Court is likely to **apply simmilar reasoning** in other pipeline cases and the Commission in potential future capacity allocations of f.e. NS2.
- → Member States should take into account when regulating gas market, that the energy solidarity test applies.



Is it enough?





It does not solve the security dilemma

It is implementation that matters!!!

It is time that matters!!!



We continue towards oligopoly on gas market in Europe

It is not the end of history for gas

Gas will remain as strategic energy source for decades



"Anticompetitive" infrastructure still being built, exemptions and "regulation leakage" occurring

Central Europe is builing its own "gas identity"