

## **The principle of solidarity and the geopolitics of energy: *Poland v. Commission (OPAL pipeline)***

Case T-883/16, *Republic of Poland v. Commission (OPAL pipeline)*, Judgment of the General Court (First Chamber, Extended Composition) of 10 September 2019, EU:T:2019:567.

### **1. Introduction**

The General Court judgment annotated here is the first decision to recognize that the principle of energy solidarity, established in Article 194(1) TFEU, is not simply a political notion but a legally enforceable principle that can be used as a ground for judicial review. The case contributes to defining the general principle of solidarity, which – although at the core of the Union system – has remained unclear in its content, scope, and legal force.<sup>1</sup> Solidarity requires the EU and the Member States to take into account other national and EU interests and balance these interests where they conflict.

The GC applied the principle of energy solidarity to the complex issue of access to gas pipelines and security of gas supply, in the sensitive geopolitical context of EU-Russian gas relations.<sup>2</sup> By authorizing the Russian gas company Gazprom and its affiliates to increase their use of a strategic pipeline without sufficiently considering the impact of this decision on Poland's energy security, the GC found that the Commission breached the principle of energy solidarity. Given the high geopolitical importance of the energy sector, unilateral energy decisions can serve the strategic interests of powerful external actors by creating divisions between Member States and undermining

1. Küçük, “Solidarity in EU law: An elusive political statement or a legal principle with substance” in Biondi, Dagilytė and Küçük (Eds.), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar, 2018), p. 38, at 40; Dagilytė, “Solidarity: A general principle of EU law? Two variations on the solidarity theme” in *ibid.*, p. 61, at 80. Judgment, para 69.

2. According to Henderson and Moe, *The Globalisation of Russian Gas: Political and Commercial Catalysts* (Cheltenham: Edward Elgar, 2019), at p. 5, “In recent years, the European gas market has become more politicized, due to general concerns over security of supply and also to a more specific desire by Western countries to support Ukraine in its continuing conflict with Russia.”

the integration of the EU energy market.<sup>3</sup> By requiring the Commission to examine the impact of its decision on Polish energy security and balance Poland's interests with EU and German energy security, the GC's ruling contributes, at least formally, to the coordination of energy policies.

At the centre of the case is the Ostsee-Pipeline-Anbindungs-Leitung or OPAL pipeline – the on-land section of the Nord Stream 1 pipeline, which directly connects the Russian gas system to the EU energy market through the Baltic Sea.<sup>4</sup> Direct supply of Russian gas to the EU reduces both EU and Russian dependence on gas transit through Ukraine, and thus limits the risk to EU energy security of a repetition of the 2006 and 2009 transit crises.<sup>5</sup> However, critics of the OPAL/Nord Stream pipeline perceive it as a geopolitical project aiming to increase Europe's dependence on Russian gas, undermine the diversification of import routes to Central and Eastern Europe, and weaken the Ukrainian economy.<sup>6</sup> In this geopolitical context, the claim brought by Poland against the decision of the Commission to authorize the increased use of the OPAL/Nord Stream pipeline can be understood as an attempt to limit Russia's influence in the EU energy market. *Poland v. Commission* illustrates the close interaction between energy law and the geopolitics of energy, and the role that EU law has to play in avoiding division in the face of geopolitical challenges.

3. On the importance of “speaking with one voice” in the energy sector, see e.g. Commission, “Speaking with one voice – The key to securing our energy interests abroad”, Press Release, 7 Sept. 2011, <[ec.europa.eu/commission/presscorner/detail/en/IP\\_11\\_1005](http://ec.europa.eu/commission/presscorner/detail/en/IP_11_1005)> (all sites last accessed 3 March 2020); 2014 European Energy Security Strategy (COM(2014)330 final), at 17.

4. Nord Stream AG, “The Pipeline”, <[www.nord-stream.com/the-project/pipeline/](http://www.nord-stream.com/the-project/pipeline/)>.

5. On the Ukrainian-Russian transit crises, see e.g. Pirani, Stern and Yafimava, “The Russo-Ukrainian gas dispute of January 2009: A comprehensive assessment”, Oxford Institute for Energy Studies (2009), available at <[www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/NG27-TheRussoUkrainianGasDisputeofJanuary2009AComprehensiveAssessment-JonathanSternSimonPiraniKatjaYafimava-2009.pdf](http://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/NG27-TheRussoUkrainianGasDisputeofJanuary2009AComprehensiveAssessment-JonathanSternSimonPiraniKatjaYafimava-2009.pdf)>; Pirani, “Russo-Ukrainian gas wars and the call on transit governance” in Kuzemko, *Dynamics of Energy Governance in Europe and Russia* (Palgrave, 2012), p. 169.

6. See the arguments made by Poland in Case T-883/16 R, *Poland v. Commission*, EU:T:2017:542, paras. 31–32. Similarly, see the debate on the security risks presented by the Nord Stream 2 pipeline, which follows the same route as Nord Stream 1. See e.g. Riley, “Nord Stream 2: Understanding the potential consequences”, Atlantic Council (2018), available at <[www.atlanticcouncil.org/in-depth-research-reports/report/nord-stream-2-understanding-the-potential-consequences/](http://www.atlanticcouncil.org/in-depth-research-reports/report/nord-stream-2-understanding-the-potential-consequences/)>; Goldthau, “Assessing Nord Stream 2: Regulation, geopolitics and energy security in the EU, Central Eastern Europe and the UK”, European Centre for Energy and Resource Security Strategy Paper 10/2016, at 19, available at <<https://eucers.com/wp-content/uploads/2019/03/strategy-paper-10.pdf>>.

## 2. Legal and factual background

### 2.1. *The internal gas market and security of gas supply*

The European gas market was opened to competition and organized on the basis of common rules in 1998.<sup>7</sup> Significant regulatory and institutional adjustments were made in 2003 and 2009, and most recently in 2019.<sup>8</sup> The adoption of common rules for the internal market in natural gas was based on the internal market provisions of the Treaty establishing the European Community (Art. 95 EC, now 114 TFEU), and their aim was to organize gas supply on a competitive basis. In 2009, an express legal basis for the EU energy policy was inserted into the Treaty on the Functioning of the European Union. According to Article 194(1) TFEU, Union policy on energy shall aim “in a spirit of solidarity” to ensure the functioning of the energy market and the security of energy supply in the Union.

The EU also adopted a specific Security of Gas Supply Regulation in 2010 and 2017, which aimed to reinforce cooperation between Member States on the basis of solidarity.<sup>9</sup> Furthermore, in order to facilitate the implementation of energy infrastructure projects that contribute to energy security and the diversification of energy supply, the EU adopted guidelines for trans-European energy infrastructure.<sup>10</sup>

7. 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, O.J. 2003, L 176/57.

8. 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, O.J. 2009, L 211/94, amended by Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019, amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, O.J. 2019, L 117/1 (hereafter: Internal Gas Market Directive). On the completion of the EU gas market, see e.g. Talus, *EU Energy Law and Policy: A Critical Account* (OUP, 2013); Vedder et al., “EU energy law” in Roggenkamp et al. (Eds.), *Energy Law in Europe* (OUP, 2016), p. 370; Hancher and Marhold, “A common EU framework regulating import pipelines for gas? Exploring the Commission’s proposal to amend the 2009 Gas Directive”, 37 *Journal of Energy & Natural Resources Law* (2019), 289.

9. Regulation (EU) 994/2010 of the European Parliament and of the Council of 20 Oct. 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, O.J. 2010, L 295/1; Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 Oct. 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) 994/2010, O.J. 2017, L 280/1 (hereafter: Security of Gas Supply Regulation).

10. Regulation (EU) 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision 1364/2006/EC and amending Regulations (EC) 713/2009, (EC) 714/2009 and (EC) 715/2009, O.J. 2013, L 115/39 (hereafter: Trans-European Energy Infrastructure Regulation).

## 2.2. Third party access and the exemption regime

The organization of gas supply on a competitive basis implies the right for consumers to select the supplier of their choice.<sup>11</sup> Because natural gas is a network-dependent industry, consumers' right to choose their suppliers is only meaningful if suppliers are able to access gas pipelines in a non-discriminatory way.<sup>12</sup> To ensure non-discrimination, access may only be refused on the basis of lack of capacity or where access to the system would prevent natural gas companies from carrying out their public service obligations.<sup>13</sup> Network tariffs have to be regulated in a transparent way and network companies have to be unbundled (i.e. separated) from suppliers.<sup>14</sup>

However, gas companies might be reluctant to realize major pipeline infrastructure projects if they have to provide access to competitors.<sup>15</sup> Open and non-discriminatory access to gas pipelines can thus jeopardize the realization of new infrastructure investments and so undermine the security of gas supply. To address this risk to energy security, the Internal Gas Market Directive establishes an exemption regime.<sup>16</sup> For a defined period of time, major new investments in gas infrastructure may be exempted from the requirements regarding third party access, unbundling and tariff regulation, provided that the investment in question enhances competition and security of gas supply and would not be made without such an exemption. In addition, the exemption must not undermine the effective functioning of the gas systems to which the infrastructure is connected or inhibit competition in these neighbouring markets.<sup>17</sup>

11. Art. 37, Internal Gas Market Directive. See also Case C-265/08, *Federutility and Others v. Autorità per l'energia elettrica e il gas*, EU:C:2010:205, para 17.

12. Art. 32, Internal Gas Market Directive. See also, in the electricity sector, Case C-239/07, *Julius Sabatauskas and Others*, EU:C:2008:551, para 31; and Talus, "Just what is the scope of the essential facilities doctrine in the energy sector: Third party access-friendly interpretation in the EU v. contractual freedom in the US", 48 CML Rev. (2011), 1571.

13. Art. 35, Internal Gas Market Directive.

14. Recitals 8, 9, 16, 24, 25, Internal Gas Market Directive; Regulation (EC) 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) 1775/2005, O.J. 2009, L 211/36.

15. Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law* (Kluwer Law International, 2011).

16. Art. 36, Internal Gas Market Directive. For a discussion of the exemption regime, see e.g. Van der Vijver, "Third party access exemption policy in the EU gas and electricity sectors: Finding the right balance between competition and investments" in Roggenkamp et al. (Eds.), *Energy networks and the law: Innovative solutions in changing markets* (OUP, 2012), p. 333.

17. The Directive also imposes corporate and financial conditions. The owner of the new infrastructure must be legally separated from the operators of the national gas systems and charges must be levied on users of the infrastructure, including affiliates of the infrastructure's owner.

Exemptions are granted on a case-by-case basis by the national regulatory authority of the Member State where the investment is made, and can be subject to certain conditions regarding their duration and the specific regime governing access to the pipeline. Exemptions must be notified to the Commission, and the Commission may require the national regulator to amend or withdraw the exemption decisions.

### 2.3. *The OPAL decision*

In February 2009, the German national regulatory authority (*Bundesnetzagentur*) exempted the entire cross-border capacity of the OPAL pipeline from the application of the rules on third party access and tariff regulation for a period of 22 years.<sup>18</sup> The pipeline is used both to supply natural gas to the German market and to export gas to the Czech Republic,<sup>19</sup> but the exemption only concerned its cross-border (or “transit”) capacity.<sup>20</sup> The OPAL pipeline is owned for 80 percent by WIGA Transport Beteiligungs-GmbH – a joint venture between the Russian State-owned enterprise Gazprom and the German industry giant BASF – and for 20 percent by the German energy concern Uniper (previously E.ON Ruhrgas).

The Commission requested major changes to the exemption decision in order to alleviate competition concerns respecting the Czech gas market. Dominant undertakings in the Czech gas market could not reserve, in a single year, more than 50 percent of the transport capacities of the OPAL pipeline at the Czech border. This limitation was mainly directed at Gazprom and the German energy company RWE, with whom Gazprom had concluded long-term contracts for the supply of gas in the Czech Republic. To exceed the 50 percent limit, the dominant undertaking seeking access to additional pipeline capacity had to offer for sale a certain volume of gas under an open, transparent, and non-discriminatory procedure, and guarantee the availability

18. The 2009 OPAL exemption was issued on the basis of the 2003 Internal Gas Market Directive.

19. OPAL connects Greifswald in Germany – the landfall point of the Nord Stream 1 pipeline – with Brandov at the German-Czech border. See OPAL, “Grid Information”, available at <[www.opal-gastransport.de/en/our-network/](http://www.opal-gastransport.de/en/our-network/)>.

20. The concept of “transit” is controversial in relation to the transportation of natural gas between EU Member States. Russia insists that the transportation of natural gas to an EU Member State through the territory of another EU Member State amounts to “transit” within the meaning of the Energy Charter Treaty and more generally international trade and transit law. However, for the EU, the transportation of gas through the territory of an EU Member State only qualifies as transit if the gas is ultimately directed to a non-EU Member State. See e.g. Konoplyanik, “Gas transit in Eurasia: Transit issues between Russia and the European Union and the role of the Energy Charter”, 27 *Journal of Energy & Natural Resources Law* (2009), 445.

of corresponding transport capacities. Gazprom never established such a programme for gas release and capacity release. In practice, therefore, the use of the OPAL pipeline remained limited to 50 percent of its capacity. This restriction significantly reduced the volume of Russian gas that could be transported through the Nord Stream pipeline. As a result, the pipeline remained underutilized, with implications both for EU energy security and for the diversification of Russian gas export routes.<sup>21</sup>

In 2016, the German regulator notified the Commission of its intention to vary the conditions of the exemption in order to increase utilization of the pipeline. Instead of restricting the access of dominant gas suppliers to OPAL, the regulator proposed to offer at least 50 percent of the pipeline's capacity by auction. Besides increasing the use of OPAL – and indirectly the import of Russian gas through Nord Stream – this arrangement was also expected to enhance competition in the Czech market by providing Czech gas suppliers with better access to imports of gas from Germany. Part of the auctions of OPAL capacity provided access to the German gas market (Gaspool), enabling Gazprom's competitors to develop their supply activities in the Czech Republic.

The Commission approved the revised exemption, subject to a number of technical adjustments concerning the type and volume of capacity to be auctioned.<sup>22</sup> In particular, it increased the auctioning share of “firm” OPAL capacity providing access to the Gaspool market.<sup>23</sup> Furthermore, to limit the risk that Gazprom and its affiliates would abuse the auction system to exclude competitors by overbidding for OPAL capacity, the Commission capped the price at which Gazprom could bid for OPAL capacity.

#### 2.4. *Action for annulment and request of stay of execution*

Several Eastern and Central European States, including Poland, strongly criticized the decision of the Commission to lift the 50 percent limit on the use of OPAL's cross-border capacities. Their objections were based mainly on

21. See e.g. Yafimava, “The OPAL exemption decision: Past, present, and future”, Oxford Institute for Energy Studies (2017), available at <[www.oxfordenergy.org/wpcms/wp-content/uploads/2017/01/The-OPAL-Exemption-Decision-past-present-and-future-NG-117.pdf](http://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/01/The-OPAL-Exemption-Decision-past-present-and-future-NG-117.pdf)>.

22. Commission Decision of 28 Oct. 2016 on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC, C(2016) 6950 final.

23. More specifically, “separately bookable, firm freely allocable exit capacities at the exit point Brandov which can be used without restrictions to transport gas from the virtual trading point of the market area of GASPOOL Balancing Services GmbH to the exit point Brandov”. Commission Decision cited previous note, at 32.

arguments relating to security of energy supply.<sup>24</sup> Besides the risk posed by higher European dependency on Russian gas, the main criticism was that a significant part of the natural gas transported through Ukraine and Poland via the Yamal-Europe and Brotherhood pipelines would be redirected to Nord Stream/OPAL. Reduced flows of gas to Poland through the Yamal-Europe and Brotherhood pipelines would increase the transport cost of gas to Poland and make it impossible to maintain gas supply on Polish territory via the existing Ukraine route, thus jeopardizing Polish energy security, particularly in the south-east of the country. This would also negatively affect the diversification of gas supply routes to Poland.

To avoid this shift in gas supplies, both Poland and the Polish State-owned gas company Polskie Górnictwo Naftowe i Gazownictwo SA (or PGNiG) brought actions for annulment of the Commission's decision before the General Court. Both parties also requested interim relief, arguing that the reduction in gas transports through Poland and the risk of politically motivated interruptions of gas supply from Russia posed a risk of "serious and irreparable harm" for Polish energy security.<sup>25</sup> By permitting Gazprom to use nearly the entire transport capacity of the OPAL pipeline for a period of 15 years, the Commission's decision would also significantly alter the character of the Polish natural gas distribution market.

In July 2017, the GC rejected the requests for stay of execution, citing a lack of urgency.<sup>26</sup> Existing transit agreements committed Gazprom to supply gas through the Ukrainian and Polish network until at least the end of 2019.<sup>27</sup> Poland had not provided sufficient evidence that interruptions of energy supply before the end of 2019 would last long enough to cause serious and irreparable harm to its domestic energy security.

24. See Case T-883/16 R, *Poland v. Commission*, paras. 31–32. More recently on the opposition of Central and East European countries to the Nord Stream 2 pipeline, see e.g. Sytas, "EU leaders sign letter objecting to Nord Stream-2 gas link", Reuters, 16 March 2016, available at <[www.reuters.com/article/uk-eu-energy-nordstream/eu-leaders-sign-letter-objecting-to-nord-stream-2-gas-link-idUKKCN0W11YV](http://www.reuters.com/article/uk-eu-energy-nordstream/eu-leaders-sign-letter-objecting-to-nord-stream-2-gas-link-idUKKCN0W11YV)>.

25. Case T-883/16 R, *Poland v. Commission*; Case T-130/17 R, *Polskie Górnictwo Naftowe i Gazownictwo S.A. v. Commission*, EU:T:2017:541.

26. Case T-883/16 R, *Poland v. Commission* and Case T-130/17 R, *Polskie Górnictwo Naftowe*. For a commentary, see Yafimava, "The OPAL exemption decision: A comment on the CJEU's ruling to reject suspension", Oxford Institute for Energy Studies (2017), available at <[www.oxfordenergy.org/publications/opal-exemption-decision-comment-cjeus-ruling-reject-suspension/?v=69e1aafec5](http://www.oxfordenergy.org/publications/opal-exemption-decision-comment-cjeus-ruling-reject-suspension/?v=69e1aafec5)>.

27. The new transit contract has been agreed and will be valid until 2025, with a possibility of renewal. On the existing Ukraine-Russia transit arrangements, see Mitrova, Pirani and Sharples, "Russia-Ukraine gas transit talks: Risks for all sides", Oxford Institute for Energy Studies (2019), available at <[www.oxfordenergy.org/wpcms/wp-content/uploads/2019/11/Russia-Ukraine-gas-transit-talks-risks-for-all-sides-Insight-60.pdf?v=69e1aafec5](http://www.oxfordenergy.org/wpcms/wp-content/uploads/2019/11/Russia-Ukraine-gas-transit-talks-risks-for-all-sides-Insight-60.pdf?v=69e1aafec5)>.



In March 2018, the GC declared that the action for annulment brought by PGNiG was inadmissible, due to lack of direct concern of the applicant.<sup>28</sup> Poland's application was examined, however, and in September 2019 the GC annulled the Commission decision.<sup>29</sup> In November 2019, Germany, which had supported the Commission in defending the legality of the 2016 decision, appealed against the GC judgment.<sup>30</sup>

### 3. The judgment of the General Court

The GC first examined whether the Commission had breached the exemption regime of the Internal Gas Market Directive, in particular the requirement of energy security, before going on to assess the alleged breach of the principle of energy solidarity.

#### 3.1. *The energy security condition of the Directive*

According to Poland, the 2016 Commission decision granted a new exemption from third-party access to the OPAL pipeline and therefore had to comply with the conditions governing exemptions under the Internal Gas Market Directive. By enabling gas flows to be redirected away from the Ukraine route, the Commission had weakened Poland's security of gas supply and therefore breached the condition of energy security which the Internal Gas Market Directive requires for exemptions to third party access.

The GC rejected Poland's argument that the exemption rules applied in the present case.<sup>31</sup> The 2016 Commission decision did not grant a new exemption to OPAL. Fifty percent of OPAL's cross-border capacity was already exempted in 2009. The regime that the German regulator proposed in 2016 maintained the 2009 exemption, while only varying the conditions attached to it. The GC also noted that the Commission did not vary its original decision. It was the German regulator that made the exemption decision of 2009 and that amended the conditions of that exemption in 2016. The Commission restricted itself to exercising its power of review by asking the German regulator to amend its

28. Case T-130/17, *Polskie Górnictwo Naftowe i Gazownictwo S.A. v. Commission*, EU:T:2018:155.

29. Poland relied on 5 pleas, of which only the first was examined: judgment paras. 48 and 86.

30. Case C-848/19 P, *Germany v. Poland*, pending, Appeal brought on 20 Nov. 2019 by Germany against the judgment of the GC, O.J. 2020, C 27/26. See also TASS, "Germany appealed decision of EU court on OPAL gas pipeline, says Economy Ministry", 29 Nov. 2019, available at <tass.com/economy/1093947>.

31. Judgment, paras. 52–60.



decisions. The original (2009) and contested (2016) decisions were thus two independent decisions that each ruled on a measure proposed by the German regulator.

Furthermore, it was not the exemption applied for, but the new infrastructure investment itself which must satisfy the conditions set out in the Directive.<sup>32</sup> In particular, it was not the exemption decision that had to improve energy security, but the pipeline investment. The conditions that the Commission imposed in its 2016 decision did not alter the OPAL pipeline as an infrastructure. Accordingly, it was sufficient for the Commission to assess whether the OPAL pipeline met the condition of energy security in 2009, when it first authorized the exemption.

### 3.2. *The principle of energy solidarity under the TFEU*

Poland claimed that by compromising its energy security, the Commission had breached the principle of energy solidarity, set out in Article 194(1) TFEU. According to Poland, the principle obliges both the Member States and the EU institutions to achieve EU energy policy objectives in a spirit of solidarity. Measures that compromise the energy security of certain Member States would violate this principle. On this basis, the Commission's decision to authorize more gas imports through the OPAL/Nord Stream pipeline was not taken in a spirit of solidarity because it limited, and might even entirely preclude, the use of alternative pipelines on which Polish energy security depended. According to Poland, a limitation or interruption in gas transmission through Ukraine would make it impossible to guarantee the continuity of gas supply on the Polish territory. It would jeopardize the effective functioning of the Polish gas system.

The Commission argued that energy solidarity is a "political notion", addressed to the legislative power and not the administration.<sup>33</sup> It only concerns situations of crisis in the supply of energy. Moreover, the condition of improved energy security is an expression of energy solidarity, and the latter was thus indirectly taken into account in the Commission's decision. Given that the Nord Stream pipeline was recognized as a priority project of EU interest, the increased use of this infrastructure was consistent with the energy security interests of the EU and did not have a negative impact on energy security in Central and Eastern Europe.

32. Ibid., para 58. Art. 36(1)(a) Internal Gas Market Directive provides that for major new gas infrastructure to be exempted from third party access, "the investment must . . . enhance security of supply".

33. Judgment, para 65.

The GC upheld Poland's plea, by first recognizing the binding nature of the principle of energy solidarity.<sup>34</sup> Energy solidarity is not a purely "political notion" and is not limited to a requirement of mutual assistance in cases of energy crises. It imposes a general obligation on both the EU and the Member States to take into account each other's interests. In particular, in the energy sector, the EU and the Member States must endeavour to avoid measures that can affect the energy security interests of the other stakeholders. When adopting the contested decision, the Commission was thus required to assess whether the new conditions governing the operation of the OPAL pipeline could affect the energy interests of Poland. If so, the Commission had to balance those interests with the benefits that increased gas flows through OPAL and Nord Stream brought for Germany and the EU.

Having defined the scope of the principle of energy solidarity, the GC proceeded to assess whether the Commission acted in breach of the principle. *In casu*, not only had the Commission not referred to solidarity in its decision, but it had also not disclosed how, as a matter of fact, it had considered the interests of Poland.<sup>35</sup> In its assessment of the increased use of the OPAL capacity, the Commission had only considered the impact on the security of energy supply of the EU in general. The Commission had also failed to demonstrate that it balanced the impact of its decision on Polish energy security against increased energy security at EU level.

#### 4. Comments

##### 4.1. *Solidarity as a legally enforceable principle*

Solidarity is omnipresent in the EU legal order.<sup>36</sup> It is one of the fundamental goals and values of the EU.<sup>37</sup> However, its legal contours have not been clearly delineated. Solidarity unquestionably wields an important normative power for EU integration<sup>38</sup> and helps to reinforce other legal concepts (e.g. loyal

34. *Ibid.*, para 72.

35. *Ibid.*, paras. 79–85.

36. See e.g. Ross, "Promoting solidarity: From public services to a European model of competition" 44 CML Rev. (2007), 1057, at 1069; de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP, 2015); Czuczai, "The principle of solidarity in the EU legal order: Some practical examples after Lisbon" in Czuczai and Naert (Eds.), *The EU as a Global Actor - Bridging Legal Theory and Practice* (Brill Nijhoff, 2017), p. 145.

37. See Opinion of A.G. Sharpston, Case C-715/17, *Commission v. Poland* (*Mécanisme temporaire de relocalisation de demandeurs de protection internationale*), para 253, EU:C:2019:917, stating that "Solidarity is the lifeblood of the European project" (in support of her interpretation of Member States' obligations in matters of asylum under Art. 80 TFEU).

38. See Arts. 2 and 3 TEU.

cooperation),<sup>39</sup> but the extent to which it can be legally enforced and the specific obligations it imposes on the EU and the Member States remained unclear.<sup>40</sup> *Poland v. Commission* makes an important contribution to defining the principle of solidarity. Although the focus is on energy, the judgment is relevant for an understanding of the general principle of solidarity, given that energy solidarity “is the specific expression in this [energy] field of the general principle of solidarity between the Member States”.<sup>41</sup> The judgment builds on the recognition that solidarity is “at the basis of the whole Union system”.<sup>42</sup> Besides energy security, solidarity is recognized in relation to external and security policy (Arts. 24(2) and (3) TEU), the common policy on asylum, immigration and external border controls (Arts. 67 and 80 TFEU), and responses to terrorist attacks and natural or man-made disasters (Art. 222 TFEU).

First, according to *Poland v. Commission*, solidarity is not merely a political concept, but a ground of judicial review. The ambiguous formulation of Article 194(1) TFEU, which provides that EU energy policy objectives shall be achieved “in a spirit of solidarity between Member States”, has previously been interpreted in the EU and energy law scholarship as offering policy guidance rather than imposing a clear solidarity obligation.<sup>43</sup> Talus, for instance, argues that the role of solidarity “would be primarily in policy-making and it would affect political negotiations rather than judicial proceedings”.<sup>44</sup> The GC rejected this narrow interpretation of energy solidarity by recognizing that the principle imposes constraints on the regulatory power of the EU institutions and the Member States. In particular, it creates an obligation to take into account the interests of the other stakeholders and balance these interests in cases of conflict.<sup>45</sup>

Second, the principle of energy solidarity can be invoked on its own, independently of a breach of secondary law. The Commission defended the

39. von Bogdandy, “Constitutional principles for Europe” in Riedel and Wolfrum (Eds.), *Recent Trends in German and European Constitutional Law* (Springer, 2006), p. 33.

40. Küçük, op. cit. *supra* note 1, at p. 40; Dagilytė, op. cit. *supra* note 1, at p. 80.

41. Judgment, para 69.

42. Ibid., para 69.

43. See Küçük, op. cit. *supra* note 1, at p. 47; Talus, op. cit. *supra* note 8, at p. 280; Huhta, “Too important to be entrusted to neighbours? The dynamics of security of electricity supply and mutual trust in EU law”, 43 *EL Rev.* (2018), 920, at 927. See, however, Pielow and Lewendel, “Beyond ‘Lisbon’: EU competences in the field of energy policy” in Delvaux, Hunt and Talus (Eds.), *EU Energy Law and Policy Issues* (Intersentia, 2011), p. 300.

44. Talus, op. cit. *supra* note 8, at p. 280.

45. Judgment, para 72. On the “obligations as well as benefits, duties as well as rights” associated with solidarity (in the context of asylum, Art. 80 TFEU), see Opinion of A.G. Sharpston, Case C-715/17, *Commission v. Poland (Mécanisme temporaire de relocalisation de demandeurs de protection internationale)*, para 253.

legality of its 2016 decision by arguing that it only had to satisfy the criteria explicitly laid down in the Internal Gas Market Directive. According to the Commission, the energy security condition set out in the Gas Directive reflects the notion of energy solidarity. The GC agreed that solidarity considerations were implied in the conditions that the Internal Gas Market Directive set for exemptions to third party access (e.g. in the concept of “effective functioning of the internal market in natural gas”), but were not necessarily restricted to these conditions.<sup>46</sup> To comply with the principle of solidarity, the Commission had to do more than merely demonstrate that it had examined the conditions laid down in the Directive. The GC, thus, added a substantive criterion on top of those set out in the exemption regime of the Internal Gas Market Directive. Although adding this requirement could be seen as creating a certain degree of legal uncertainty (at least for the decisions adopted prior to the GC’s judgment), the GC arguably merely confirmed a principle enshrined in the TFEU since 2009. In the energy sector, increasing interdependence between Member States, as a result of the integration of energy systems, as well as more acute geopolitical challenges require the clarification of the key principles of EU energy law.<sup>47</sup> A similar development is taking place in relation to the growing challenges the EU is facing in the field of asylum and immigration policy.<sup>48</sup>

Third, the principle of solidarity entails rights and obligations both for the EU and the Member States. Besides the question of social solidarity,<sup>49</sup> previous cases in which the principle was employed mainly concerned the solidarity of Member States (and their companies) towards the common interest of the internal market, e.g. in situations of economic difficulties.<sup>50</sup> Solidarity justified an equitable distribution of sacrifices by companies (and indirectly by the Member States) to restore market equilibrium and resolve a crisis.<sup>51</sup> In the context of the migration crisis, solidarity was interpreted as requiring Member States to “shoulder collective responsibilities and (yes)

46. Judgment, para 74.

47. See Huhta, *op. cit. supra* note 43, at 920 and 927, on the principles of mutual trust and solidarity in the shift from energy independence to interdependence.

48. See Opinion of A.G. Sharpston, Case C-715/17, *Commission v. Poland (Mécanisme temporaire de relocalisation de demandeurs de protection internationale)*.

49. See e.g. de Búrca (Ed.), *EU Law and the Welfare State: In Search of Solidarity* (OUP, 2005); Barnard, “EU citizenship and the principle of solidarity” in Spaventa and Dougan (Eds.), *Social Welfare and EU Law* (Hart Publishing, 2005).

50. Küçük, *op. cit. supra* note 1, at pp. 52–60.

51. E.g. the mandatory scaling back of production to restore market equilibrium in the steel or the milk sector. Case 263/82, *Klöckner-Werke AG v. Commission*, EU:C:1983:373; Case 179/84, *Piercarlo Bozzetti v. Invernizzi SpA and Ministero del Tesoro*, EU:C:1985:306; Case C-34/08, *Azienda Agricola Disarò Antonio and Others v. Cooperativa Milka 2000*, EU:C:2009:304.

burdens to further the common good.”<sup>52</sup> In *Poland v. Commission*, the GC confirmed that solidarity also binds the EU towards the Member States.<sup>53</sup> The application of the solidarity requirement to EU measures is logical given that Article 194(1) TFEU explicitly applies to “Union policy on energy”. Based on solidarity, the Commission had to take into account the interests of Poland when authorizing the revised exemption conditions of the OPAL pipeline. Solidarity is thus reciprocal.<sup>54</sup> It binds the EU just as it binds the Member States. Furthermore, Member States are bound by an obligation of solidarity between themselves, i.e. an obligation to take other national interests into account and balance them with domestic interests in case of conflict.

Fourth, solidarity is not limited to “fair burden sharing” or mutual assistance in crisis and emergency situations.<sup>55</sup> The Commission sought to narrow the scope of obligations under the principle of solidarity to situations of crisis in the supply of (energy) products. The GC rejected the Commission’s narrow interpretation of energy solidarity, by recognizing “a general obligation on the part of the EU and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders”.<sup>56</sup>

Fifth, the principle of solidarity is not absolute. The principle requires the EU and the Member States to “take into account the interests of the other stakeholders”,<sup>57</sup> but its application does not mean that EU decisions must never hurt the particular interests of a Member State. *In casu*, negative consequences for Poland’s energy security had to be balanced against increased energy security at EU level.<sup>58</sup> The Commission could thus have justified its 2016 decision by emphasizing the benefits of the OPAL pipeline for the security of energy supply of the EU. However, the extent to which the balance of interests itself is subject to judicial review, and the criteria (e.g. proportionality-like analysis) on which such a review would be based, remain unclear. In *Poland v. Commission*, the GC annulled the contested decision on a formal basis. Because there was no mention of solidarity in the

52. Opinion of A.G. Sharpston, Case C-715/17, *Commission v. Poland*, para 253.

53. Judgment, para 70.

54. Hilpold, “Understanding solidarity within EU law: An analysis of the ‘islands of solidarity’ with particular regard to Monetary Union”, 34 YEL (2015), 257.

55. For a recent example of solidarity and burden sharing in a crisis situation, see Opinion of A.G. Sharpston, Case C-715/17, *Commission v. Poland*.

56. Judgment, para 72.

57. *Ibid.*, para 77.

58. *Ibid.* para 82 (“it must be observed that the wider aspects of the principle of energy solidarity were not addressed in the contested decision. In particular, it does not appear that the Commission examined what the medium term consequences, *inter alia* for the energy policy of the Republic of Poland, might be ..., or that it balanced those effects against the increased security of supply that it had found at EU level”).

Commission's decision, and because there had been no explicit examination of Polish energy security, the GC did not have to assess whether or not the Commission's decision did in fact achieve a reasonable balance between EU and Polish energy security interests.

In its November 2019 appeal against the GC's judgment, Germany challenged the GC's interpretation of the principle of energy solidarity as a legal criterion that imposes verification obligations on executive bodies (e.g. the Commission) as part of their decision-making. Germany presented energy solidarity as a purely political notion that is not justiciable because it is just an abstract and indeterminable concept.<sup>59</sup>

The GC did indeed not determine how conflicting energy security interests have to be balanced with each other as part of the application of the principle of energy solidarity, e.g. whether there is a proportionality requirement for decisions that impact on the interests of others. However, contrary to what Germany alleges in its appeal, the GC did not leave the content of the principle abstract and undetermined. As examined above, the principle of energy solidarity, as interpreted by the GC, imposes an obligation to take into account the energy interests of other stakeholders and balance these interests when exercising regulatory powers. Solidarity must be respected beyond crisis and emergency situations. It requires a more general endeavour to avoid harming the energy security interests of others, without imposing an absolute obligation on the EU and the Member States. In addition to the GC's definition of the scope of the principle of energy solidarity, the legal nature of the principle appears from the binding language of Article 194(1) TFEU, according to which Union policy on energy "shall aim" to achieve energy objectives in a spirit of solidarity between Member States. The Court of Justice will now have the occasion to pronounce on this, as well as the effects which should ensue from any failure to respect the principle.

#### 4.2. *Energy solidarity and energy security*

At the heart of *Poland v. Commission* is the strategic concern of energy security, in relation to the highly sensitive question of pipeline investments and external energy relations with Russia. Energy security is the main goal of policy-makers in the energy sector.<sup>60</sup> It is therefore one of the main objectives

59. Case C-848/19 P, *Germany v. Poland*, pending.

60. Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries* (Hart Publishing, 2007); Kalicki and Goldwin (Eds.), *Energy and Security: Strategies for a World in Transition*, 2nd ed. (Johns Hopkins University Press, 2013).

of EU energy policy<sup>61</sup> and in previous cases has been recognized as an “overriding reason in the public interest” that can justify restrictions to the free movement of goods and capital.<sup>62</sup> However, energy security by itself does not provide an independent ground of judicial review. In contrast to its interpretation of energy solidarity, the GC did not recognize energy security as a principle of EU energy law. The failure to take into account the energy security interests of Poland did not, therefore, constitute a breach of energy security *per se*, but only had legal effects through the principle of energy solidarity. Energy security and solidarity are thus closely interrelated. The principle of energy solidarity is relevant mainly in relation to energy security issues. According to the GC, solidarity applies to “security of supply, its economic and political viability, the diversification of supply or of sources of supply”.<sup>63</sup>

Despite its central importance for EU energy policy, primary and secondary EU law does not provide a clear definition of the concept of security of gas supply. The Internal Gas Market Directive simply states that “security means both security of supply of natural gas and technical safety”.<sup>64</sup> The absence of a clear definition of security of gas supply in EU law creates uncertainty regarding the solidarity obligations associated with the concept of energy security.

Security of supply does not mean energy self-sufficiency, given the high economic cost of energy independence and, for most States, its technical

61. See Art. 194(1) TFEU. See also Recital 1, Internal Gas Market Directive: “The internal market in natural gas, which has been progressively implemented throughout the Community since 1999, aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.” On the energy security objective of the European Energy Union, see Regulation (EU) 2018/1999 of 11 Dec. 2018 on the Governance of the Energy Union and Climate Action, O.J. 2018, L 328/1.

62. Joined cases C-105, 106 & 107/12, *Staat der Nederlanden v. Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV*, EU:C:2013:677, para 59; Case 72/83, *Campus Oil Limited and others v. Minister for Industry and Energy and others*, EU:C:1984:256, paras. 34–35.

63. Judgment, para 73.

64. Art. 2(32), Internal Gas Market Directive. By contrast, in the electricity sector, the concept of “security of electricity supply” is more clearly defined as “the ability of an electricity system to guarantee the supply of electricity to customers with a clearly established level of performance, as determined by the Member States concerned”. Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, O.J. 2019, L 158/1.



impossibility in the absence of sufficient domestic resources.<sup>65</sup> Instead, energy security is commonly understood as the management of risks to energy supply.<sup>66</sup> In *Poland v. Commission*, the GC relates energy security and solidarity to the diversification of energy supply<sup>67</sup> – a key concept of risk management in the energy sector.<sup>68</sup> Within this meaning, the security of gas supply means the reduction of dependency on single supply sources or routes.<sup>69</sup> In integrated gas markets, it can also refer to the interoperability and appropriate interconnection of gas systems.<sup>70</sup> Potentially, there can also be security of supply issues arising from the control of gas transmission systems by foreign investors from countries on which the EU is highly dependent for energy supply.<sup>71</sup>

The link between energy solidarity and energy security is justified by the interdependence of Member States in the natural gas sector, resulting from the physical integration of gas systems and the harmonization of market rules. According to the GC, the EU and the Member States must endeavour not to harm their respective interests “in order to take account of their interdependence and de facto solidarity”.<sup>72</sup> In an integrated gas market, national measures can have “negative spill-over effects” on neighbouring countries.<sup>73</sup>

Following the same reasoning, it is reasonable to assume that the principle of energy solidarity also applies to the security of electricity supply (i.e. not only to the gas sector). The integration of electricity systems, as part of the creation of the internal electricity market, increased the interdependence of Member States in the electricity sector.<sup>74</sup> National and EU electricity policy

65. Haghighi, op. cit. *supra* note 60, at p. 26; Pascual, “The new geopolitics of energy”, Columbia Center on Global Energy Policy (2015), at 11–16, available at <energypolicy.columbia.edu/sites/default/files/The%20New%20Geopolitics%20of%20Energy\_September%202015.pdf>.

66. Commission, Green Paper, Towards a European strategy for the security of energy supply, COM(2000)769 final. See also Haghighi, op. cit. *supra* note 60, at p. 26; Eurelectric, “Security of electricity supply: Roles, responsibilities and experiences within the EU”, Eurelectric (2006), at 17.

67. Judgment, para 73.

68. The GC thereby follows the approach to security of supply adopted in Recital 4 and Art. 4(2)(b)(ii), Trans-European Energy Infrastructure Regulation.

69. Art. 4(2)(d)(i), Trans-European Energy Infrastructure Regulation.

70. Ibid., Art. 4a(iii).

71. Recital 22 and Art. 11, Internal Gas Market Directive.

72. Judgment, para 73.

73. Recital 11, Security of Gas Supply Regulation.

74. See Vedder, “Good neighbourliness in a sustainable European internal electricity market: A tale of communities and *uncommunautaire* thinking” in Kochenov and Basheska (Eds.), *The Principle of Good Neighbourliness in the European Legal Context* (Martinus Nijhoff, 2015), p. 94.

decisions can have significant consequences on the security and reliability of electricity supply in other Member States. For instance, the ambitious deployment of wind and solar energy sources in Germany is already impacting on neighbouring countries in the form of loop and transit flows, i.e. unscheduled flows of electricity resulting from surplus electricity production.<sup>75</sup> Solidarity would require both Member States and the EU to take into account the impact on neighbouring Member States of these energy imbalances, when making strategic policy decisions of this kind.<sup>76</sup>

In the gas sector, the link between energy solidarity and energy security is clearly made in the Internal Gas Market Directive and the Security of Gas Supply Regulation.<sup>77</sup> According to the Internal Gas Market Directive, “In order to safeguard a secure supply on the internal market in natural gas, Member States shall cooperate in order to promote regional and bilateral solidarity.”<sup>78</sup> Similarly, according to the Security of Gas Supply Regulation, “solidarity is needed to ensure the security of gas supply in the Union”.<sup>79</sup> Both the Directive and the Regulation focus on the mitigation of disruptions of gas supply, through both preventive and reactive measures, including a solidarity mechanism to assist States facing shortages of supply. Solidarity, within the meaning of the Security of Gas Supply Regulation, aims to spread the effects of a gas crisis more evenly, thereby limiting the degree of disruption visited upon more vulnerable States.<sup>80</sup>

The principle of energy solidarity, as set out in Article 194(1) TFEU and interpreted and applied by the GC in *Poland v. Commission*, applies more broadly than the concept of solidarity in the Internal Gas Market Directive and the Security of Gas Supply Regulation. According to the GC, the principle of energy solidarity cannot be restricted to mutual assistance in the context of gas supply crises (a situation specifically covered by Art. 122(1) TFEU). Instead, it imposes a broader obligation on the EU and the Member States “to

75. Thema Consulting Group, “Loop flows – Final advice”, Prepared for the European Commission (2013), at 2, available at <[ec.europa.eu/energy/sites/ener/files/documents/201310\\_loop-flows\\_study.pdf](http://ec.europa.eu/energy/sites/ener/files/documents/201310_loop-flows_study.pdf)>, defining “loop flows” as “unscheduled flows stemming from scheduled flows within a neighbouring bidding zone or control area”.

76. See Vedder, *op. cit. supra* note 74, at p. 94.

77. Art. 6, Internal Gas Market Directive; Recitals 6 and 38, Security of Gas Supply Regulation. See also Fleming, “A legal perspective on gas solidarity”, 124 *Energy Policy* (2019) 102.

78. Art. 6, Internal Gas Market Directive.

79. Recitals 6 and 38, Security of Gas Supply Regulation.

80. Recital 38, Security of Gas Supply Regulation. On solidarity to address energy emergencies, see 2014 European Energy Security Strategy (COM(2014)330 final), at 4.

endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures liable to affect the interests of the EU and the other Member States, as regards security of supply”.<sup>81</sup>

In its appeal against *Poland v. Commission*, Germany contested the GC’s finding that the Commission failed to take into account the effects of its decision on Polish energy security.<sup>82</sup> Germany’s argument is reasonable. In its 2016 OPAL decision, the Commission did in fact address the impact on alternative import routes that could result from larger import volumes through the OPAL/Nord Stream 1 pipeline, but without explicitly referring to Poland.

First, according to the Commission’s decision, the additional capacities to be shipped through Nord Stream/OPAL to the Czech Republic would enhance the security of gas supply of other Member States connected to the Czech gas system, given that natural gas imports may not be subject to any destination clause (i.e. to any contractual restriction as to the final destination of the gas).<sup>83</sup> Second, additional transmission capacities through OPAL would increase the possibility of arranging a flow of natural gas in case of an interruption of gas supply via other routes. More importantly, given Poland’s criticism that OPAL would replace alternative routes on which Polish energy security depends, “this additional capacity would not allow for a full replacement of Russian gas flowing through other routes to the EU. The main import route is still the one from Ukraine [to the] Slovak border. Therefore a higher utilization ratio of OPAL is not likely to dry out alternative routes”.<sup>84</sup> This conclusion builds on a previous analysis by the Commission according to which “increasing the capacity of the OPAL pipeline to 100% from its current 50% will not have an effect of reducing the missing gas volumes in the Eastern Member States due to existing infrastructure constraints towards the east”.<sup>85</sup> In addition to these arguments, it is important to note that Poland and the

81. Judgment, para 73.

82. Case C-848/19 P, *Germany v. Poland*, pending.

83. Commission Decision of 28 Oct. 2016, cited *supra* note 21, para 49.

84. *Ibid.*, para 50. See also Yafimava, *op. cit. supra* note 26, at 7. At the end of 2019, Ukraine and Russia agreed to renew the agreement governing the transit of Russian gas through Ukraine to Europe. Although this development is irrelevant for the validity of the 2016 Commission Decision, it supports the view that additional gas transmission through Nord Stream/OPAL would not lead to an interruption of gas supply through Ukraine and Poland.

85. Commission Communication on energy stress tests, COM(2014)654, at 4. According to the Commission, the effect of increasing the capacity of the OPAL pipeline to 100% would be limited to replacing LNG volumes in Western Europe. Following the interpretation of the GC, Western European countries could thus in principle also have challenged the 2016 OPAL decision on the basis of the principle of energy solidarity.

Polish State-owned gas company PGNiG have repeatedly stated that they would seek to minimize Polish dependence on Russian gas (e.g. by not renewing the long-term supply contract with Gazprom when it expires in 2022).<sup>86</sup>

However, according to the GC, these general assessments did not amount to a proper examination of the impact of the new exemption regime on the security of the gas supply in Poland, but it based this finding mainly on formal reasons.<sup>87</sup> The Commission did not mention the principle of energy solidarity in its 2016 OPAL decision, and did not disclose how it carried out an examination of that principle. Taking into account the fact that the Commission did actually engage in a substantive (albeit relatively general) analysis of the different energy security implications of its decision, the GC's judgment must be criticized for its excessively formalistic application of the principle of energy solidarity.

In its appeal before the ECJ, Germany argues that the Commission was not required to expressly refer to the principle of energy solidarity in its decision, as there are no procedural requirements specifying exactly to what extent the European administration must give reasons for its decisions.<sup>88</sup> If upheld by the ECJ, the GC's judgment in *Poland v. Commission* will have important formal implications for decision-making in the EU energy sector and the other fields that are bound by a solidarity requirement (i.e. external and security policy, asylum, immigration and external border controls). In the energy sector, decisions that impact on national or EU energy security interests can be annulled if they do not explicitly refer to the principle of energy solidarity and clearly outline how conflicting interests have been taken into account and balanced in the decision-making process. Decisions that take into account conflicting energy security interests might still be annulled, if the examination of these interests is not explicitly carried out based on the principle of energy solidarity. Simultaneously, in the absence of clear guidance on how conflicting energy security interests have to be balanced against each other (e.g. based on proportionality), there is a risk that EU and national decision-makers can largely pay lip service to the solidarity requirement set out by the GC.

86. See e.g. "Poland's PGNiG tells Gazprom it plans to end gas supply deal in 2022", Reuters (15 November 2019), available at <<https://www.reuters.com/article/pgnig-gazprom/update-1-polands-pgnig-tells-gazprom-it-plans-to-end-gas-supply-deal-in-2022-idUSL8N27V469>>; Yafimava, op. cit. *supra* note 26, at 5.

87. Judgment, para 81.

88. Case C-848/19 P, *Germany v. Poland*, pending.

#### 4.3. *Solidarity and the geopolitics of energy*

*Poland v. Commission* concerns the application of EU law to a project of high geopolitical sensitivity.<sup>89</sup> Member States, geopolitical analysts and energy lawyers are deeply divided on the merits and strategic risks of the Nord Stream pipeline and its on-land connection.<sup>90</sup> On the one hand, the supporters of Nord Stream – in particular Germany – see the pipeline as a commercial project and emphasize the benefits of additional gas transmission capacity.<sup>91</sup> By directly connecting the German gas system with Russia, the pipeline would provide protection against the risk of the interruption of gas supply via other routes (i.e. transit through Ukraine).<sup>92</sup>

On the other hand, the opponents of the pipeline – mainly Poland – argue that Nord Stream is a geopolitical investment that presents strategic risks as it increases Europe's energy import dependency on Russia.<sup>93</sup> The pipeline would increase Russia's strategic influence in the EU, particularly in Central and Eastern Europe, as Nord Stream would enable the supply of gas through Ukraine to be interrupted without undermining the gas supply to Western Europe. The bilateral deal between Russia and Germany would also undermine European unity and its ability to “speak with one voice” on the strategic issue of external energy security.<sup>94</sup> With the forthcoming commissioning of the Nord Stream 2 pipeline and deteriorating EU-Russian relations, the strategic implications of Russian gas supply to Europe continue to be a deeply controversial issue in the debate on the future of Europe's energy security.<sup>95</sup>

89. See e.g. Umbach, “The risks of German unilateralism on Nord Stream 2”, Geopolitical Intelligence Service (2017), available at <[www.gisreportsonline.com/the-risks-of-german-unilateralism-on-nord-stream-2,energy,2213.html](http://www.gisreportsonline.com/the-risks-of-german-unilateralism-on-nord-stream-2,energy,2213.html)>, arguing that “There is no more controversial energy project in the European Union.”

90. For an overview of the support and opposition to the Nord Stream 1 pipeline, see Cameron, “The Nord Stream gas pipeline project and its strategic implications”, European Parliament (2007), available at <[www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-PETI\\_NT\(2007\)393274](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-PETI_NT(2007)393274)>.

91. On the energy security benefits of Nord Stream, see e.g. Yafimava, *op. cit. supra* note 21, at 1 and 29.

92. The Commission recognized these energy security benefits in its exemption decisions of the OPAL pipeline (see Commission Decision of 28 Oct. 2016, cited *supra* note 22, paras. 49–50). The contribution of the Nord Stream 1 pipeline to European energy security was also recognized by its qualification as a project of common interest under the Trans-European Network Energy Guidelines.

93. Riley, *op. cit. supra* note 6.

94. On the risk of unilateralism relating to the implementation of Nord Stream, see Umbach, *op. cit. supra* note 87.

95. According to the 2014 European Energy Security Strategy (COM(2014)330 final), the EU aims to reduce its dependency on Russian gas, currently amounting to more than one third

In this geopolitical context, supporters and opponents of Nord Stream/OPAL have criticized or welcomed the application of EU law to the pipeline respectively on strategic grounds. The application of EU law has become a crucial factor in the debate on the geopolitics of EU-Russian energy relations in general, and on the geopolitics of this pipeline in particular.<sup>96</sup> On the one hand, the stringent exemption regime initially granted to OPAL – limiting Gazprom’s access to 50 percent of the pipeline’s capacity – was seen as discriminating against Gazprom on the basis of geopolitical considerations and “undermining [the] credibility of the EU legal and regulatory gas framework”.<sup>97</sup> The revised exemption decision, which removed the 50 percent limit, was seen as an important step towards restoring “rules-based regulatory decision-making” in the EU energy market. On the other hand, the Commission’s decision to approve the increased use of the pipeline was seen as “jeopardizing the EU’s plans to pursue a resilient Energy Union” by strengthening Gazprom’s dominance of the EU energy market and undermining alternative transit routes.<sup>98</sup> Similarly, Poland’s challenge to the Commission’s decision was either seen as creating a risk of “precedent in which political objections are allowed to override regulatory rules”<sup>99</sup> or as an opportunity to limit Gazprom’s influence in the EU energy market and ensure the integrity of the Energy Union.<sup>100</sup>

By imposing the obligation to take into account national and EU interests, energy solidarity to some extent helps to discipline the interaction of the Member States and the EU with external energy suppliers. The principle falls short of requiring the EU and the Member States to “speak with one voice,”

of EU natural gas imports. The irony is that “while the EU has been keen to diversify away from Russian gas the commercial reality has been that Gazprom has increased its market share by offering very competitive prices.” Henderson and Moe, op. cit. *supra* note 2, at p. 57.

96. On the politicization of EU law in the context of Nord Stream, see e.g. Grigorjeva, “Nord Stream 2: Opportunities and dilemmas of a new gas supply route for the EU” Jacques Delors Institute (2016), available at <[www.hertie-school.org/en/delorscentre/publications/detail/publication/nord-stream-2-opportunities-and-dilemmas/](http://www.hertie-school.org/en/delorscentre/publications/detail/publication/nord-stream-2-opportunities-and-dilemmas/)>. On the controversy surrounding the application of EU law to the Nord Stream 2 pipeline, see e.g. Talus, “Application of EU energy and certain national laws of Baltic sea countries to the Nord Stream 2 pipeline project”, 10 *The Journal of World Energy Law & Business* (2017), 30; Jeutner, “Amendments, annexations, alternatives: Nord Stream 2’s contemporary status under EU and international law”, *The Journal of World Energy Law & Business* (2019), 1.

97. Yafimava, op. cit. *supra* note 21, at 30; Goldthau, op. cit. *supra* note 6, at 19.

98. Riley, “Opal revisiting a questionable decision” Institute for Statecraft (2017), available at <[dralanriley.com/2019/09/12/opal-revisiting-a-questionable-decision/](http://dralanriley.com/2019/09/12/opal-revisiting-a-questionable-decision/)>.

99. Yafimava, op. cit. *supra* note 21, at 30.

100. Riley, “The ‘principle of solidarity’: OPAL, Nord Stream, and the shadow over Gazprom” Atlantic Council (2019), available at <[www.atlanticcouncil.org/blogs/energysource/the-principle-of-solidarity-opal-nord-stream-and-the-shadow-over-gazprom/](http://www.atlanticcouncil.org/blogs/energysource/the-principle-of-solidarity-opal-nord-stream-and-the-shadow-over-gazprom/)>. More generally, on the use of law by the EU to exert some control over the impact which Gazprom can have in Europe, see Henderson and Moe, op. cit. *supra* note 2, at pp. 57–64.

but it does integrate the interests of others in the decision-making process, at least formally.

The relevance of energy solidarity for the resolution of disputes concerning energy geopolitics, and in particular Russia's influence in the EU energy market, is unsurprising given the origins of the principle. The principle was included in the TFEU to reassure the Central and East European States in the aftermath of the 2006 and 2009 Ukraine-Russia gas crises.<sup>101</sup> The interruption of gas supply from Russia, in the context of disputes on gas and transit tariffs with Ukraine, significantly undermined the security of gas supply in Central and Eastern Europe, exposing the region's high dependence on Russian gas.<sup>102</sup> Based on solidarity, the EU intensified the integration of national gas networks so as to enable gas flows to be reversed in order to assist States experiencing sudden energy shortages. The judgment in *Poland v. Commission* extends the solidarity obligations of the EU and the Member States to all decisions that can potentially impact on the energy security of other Member States or the EU, and on the economic viability and diversification of their energy supply.

However, in the absence of clear guidance on how national interests have to be balanced with each other, and whether this balancing requirement imposes substantive limits on energy decisions, it is unclear whether energy solidarity can effectively protect the security interests of Member States, in particular smaller States, against the impact of geopolitical projects in the EU energy sector.

#### 4.4. *Conflict with world trade law*

The decision of the GC raises concerns about the compatibility of EU law with the law of the World Trade Organization, in particular the requirement to eliminate quantitative restrictions to trade under Article XI:1 of the General Agreement on Trade and Tariffs. In August 2018, a WTO panel decided that the 2009 Commission decision to limit the use of OPAL to 50 percent of its capacity, unless Gazprom organized a gas release programme, constituted a quantitative restriction to the importation of Russian gas to the EU, and was

101. Talus, *op. cit. supra* note 8, at p. 281; Pielow and Lewendel, *op. cit. supra* note 43, at p. 300, arguing that solidarity was introduced at the request of Poland to address concerns over the security of its gas supply from Russia. See also Braun, "EU energy policy under the Treaty of Lisbon rules", EPIN Working Paper No. 31 (2011), available at <[www.ceps.eu/wp-content/uploads/2011/02/EPIN%20WP31%20Braun%20on%20EU%20Energy%20Policy%20under%20Lisbon.pdf](http://www.ceps.eu/wp-content/uploads/2011/02/EPIN%20WP31%20Braun%20on%20EU%20Energy%20Policy%20under%20Lisbon.pdf)>.

102. Pirani, Stern and Yafimava, *op. cit. supra* note 5.



therefore inconsistent with Article XI:1 of GATT.<sup>103</sup> Although the Commission did not directly restrict the import of Russian gas to the EU market, its conditions on the allocation of pipeline transport capacity limited the competitive opportunities for the importation of Russian gas into the EU.<sup>104</sup> All gas transported through Nord Stream is Russian, and as an export monopoly for natural gas via pipelines is enshrined in Russian law, Gazprom is the only importer of gas from Russia via Nord Stream. By limiting the quantity of natural gas that Gazprom could transport through Nord Stream/OPAL, the 2009 exemption decision thus restricted market access for importers of Russian gas to the EU.<sup>105</sup>

The 2016 Commission decision largely eliminated the restrictions imposed by the 2009 exemption regime on the operation of the OPAL pipeline, thus addressing the conflict between EU law and the WTO regime. Gazprom could in principle reserve 90 percent of OPAL's total transport capacities. By annulling the 2016 Commission decision, the GC has again subjected the OPAL pipeline to the restrictions of the 2009 exemption regime.<sup>106</sup> The judgment thus conflicts with WTO law, as interpreted and applied by the panel in *European Union and its Member States – Certain Measures Relating to the Energy Sector*.

A new decision on the OPAL pipeline exemption regime will have to ensure compliance with both energy solidarity and WTO law. In the balancing of conflicting interests under the principle of energy solidarity, the WTO

103. Panel Decision, WT/DS476/R, *European Union and its Member States – Certain Measures Relating to the Energy Sector*, 10 Aug. 2018, paras. 7.987–7.991, available at <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds476\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds476_e.htm)>. See also Pogoretsky and Talus, “The WTO Panel Report in EU–Energy Package and its implications for the EU's gas market and energy security”, *World Trade Review* (2019) 1, doi:10.1017/S1474745619000260. Besides the EU–Russia energy dispute before the WTO, see the recent investment arbitration claim by Nord Stream 2 challenging the legality of the 2019 amendment of the Internal Gas Market Directive. Charlotin, “Russian-backed project investor, Nord Stream 2, files arbitration against European Union under the Energy Charter Treaty”, *Investment Arbitration Reporter*, Sept. 26, 2019, available at <[www.iareporter.com/articles/russian-backed-project-investor-nord-stream-2-files-arbitration-against-european-union-under-the-energy-charter-treaty/](http://www.iareporter.com/articles/russian-backed-project-investor-nord-stream-2-files-arbitration-against-european-union-under-the-energy-charter-treaty/)>.

104. WT/DS476/R, para 7.994 (“due to the fixed nature of pipeline infrastructure and the necessity for natural gas transported by pipeline to flow along predetermined paths and to be imported through a limited number of fixed entry points, an arrangement conditioning access to the transport capacity of such fixed infrastructure with a demonstrable and sufficiently direct link to an entry point for that product into the market of the importing Member may have an effect on the importation of the product in question”).

105. *Ibid.*, para 7.1001. The panel came to this decision regardless of the fact that, under the Commission's 2009 decision, the remaining capacities of the OPAL pipeline could in principle be booked by other companies than Gazprom.

106. Bundesnetzagentur, “Bundesnetzagentur orders immediate implementation of OPAL judgment of European Court”, 13 Sept. 2019, available at <[www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2019/20190913\\_Opal.html](http://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2019/20190913_Opal.html)>.

requirement to remove restrictions on the access of Russian gas to the EU market is undoubtedly a key consideration in support of the increased use of the OPAL pipeline.

## 5. Conclusion

With the interconnection with neighbour systems and the dependence on the same sources of external energy supply, national energy systems in the EU are de facto interdependent. Considerable progress has been made towards the integration of energy markets, but Member States remain sovereign in determining the general structure of their energy supply and selecting their preferred energy sources.<sup>107</sup> Energy decisions of one Member State can have serious consequences for the energy security of its neighbours. Unilateral strategic decisions on external energy security can also create divisions amongst Member States that can be exploited by external actors (e.g. Russia) for geopolitical purposes. In addition, with the creation of the EU energy market, EU energy decisions can significantly impact on the security of supply of Member States.

If upheld by the ECJ, the interpretation of the principle of energy solidarity in *Poland v. Commission* will contribute to a more integrated approach to decision-making in the EU energy sector. The EU and its Member States must endeavour to avoid adopting measures that can negatively affect EU and national interests in the areas of security of supply, diversification of supply, and the economic and political viability of energy supply. Therefore, the interests of the various Member States and the EU must be taken into account in the adoption and implementation of EU and national energy policies. Where there is a conflict, these interests must be balanced with each other. This solidarity requirement will be relevant for the regulation of new energy infrastructure investments in the EU, not least the highly controversial Nord Stream 2 pipeline and its on-land connection EUGAL. More generally, solidarity will be relevant for the numerous EU and national energy decisions that have cross-border implications, including the ambitious deployment of variable renewable energy sources and the imbalances this can cause for neighbouring electricity systems.

The principle of energy solidarity does not prohibit the EU and the Member States from implementing energy policy measures that negatively impact on EU or other national energy interests. It only requires the EU and the Member States to “endeavour” not to harm these interests. An alternative interpretation, according to which energy policies must never have negative

107. Art. 194(2) TFEU.

impacts for the particular interests of a Member State, would undermine the exercise by the EU and the Member States of their regulatory powers in the energy sector, and would jeopardize national energy sovereignty. Taking into account the interdependence of Member States in the gas sector, EU and national energy policies inevitably impact on each other. Energy interdependence thus not only justifies a solidarity requirement for States to take into account the interests of others when implementing energy policies, but also entails a certain degree of tolerance from those affected.

By recognizing the legally binding nature of the principle of energy solidarity and defining its general content, the GC's judgment in *Poland v. Commission* makes an important contribution to the development of EU energy law, and EU law more generally. However, the GC's application of the principle of energy solidarity to the 2016 OPAL decision must be criticized for its excessively formalistic approach. The Commission did take into account the potentially negative impact that the higher utilization of OPAL/Nord Stream pipelines could have on Poland, but did not explicitly frame its analysis under the solidarity principle. If confirmed, the GC's judgment will require the EU and its Member States to refer clearly to energy solidarity and the balancing of conflicting energy security interests in decisions that can affect the EU and other national energy systems. However, the absence of clear guidance on how conflicting energy security interests have to be balanced against each other, and the risk of conflict with WTO law, creates a certain degree of legal uncertainty for future decisions in the EU energy sector. This must be regretted taking into account the importance of stability and predictability for capital-intensive and long-term investments in the energy infrastructure.<sup>108</sup>

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108. See e.g. Boute, "The quest for regulatory stability in the EU energy market: An analysis through the prism of legal certainty", 37 *E.L. Rev.* (2012), 675; Boute, "Regulatory stability under Russian and EU energy law", 22 *Maastricht Journal of European & Comparative Law* (2015), 506.

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