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The principle of energy solidarity: *Germany* v. *Poland*

Case C-848/19 P, *Germany* v. *Poland*, Judgment of the Court of Justice (Grand Chamber) of 15 July 2021, EU:C:2021:598

1. Introduction

The integration of European energy law and policy has proved a difficult balancing exercise. On the one hand, ever since the establishment of the European Coal and Steel Community, energy law and policy in what is now the European Union has expanded into a (legally and physically) interconnected system in which no Member State can decide on its energy policy completely unencumbered by Union energy legislation. Almost any such decision has some effect on other Member States. On the other hand, Member States have been determined to hold on to some degree of "energy sovereignty", given how fundamental energy is to almost any economic activity. The increasingly pressing need to rapidly decarbonize the energy sector across the EU in order to mitigate the worst consequences of climate change and to follow through on the EU's ambitious international emissions reductions commitments, have added additional complexity to the question of how and to what degree the EU can coordinate the energy decisions of its Member States. Since the Treaty of Lisbon came into force, this tension between the need to collaborate to achieve Union-wide energy objectives and to confront the climate crisis on the one hand, and the reluctance of Member States to give more power to the European level on the other, has been encapsulated in the primary law foundation of European energy law. Article 194 TFEU guarantees each Member State's right to determine the sources and structure of its energy supply, but it also stipulates that overarching objectives of EU energy policy must be pursued in "a spirit of solidarity" between Member States.[1]

Germany v. *Poland* provided an opportunity for the Court of Justice to weigh in on the relationship between sovereignty and solidarity in the energy sphere. The ECJ confirmed a surprising 2019 ruling by the General Court (GC), according to which energy solidarity is a justiciable principle of Union primary law, a finding that could have profound consequences for EU energy and climate law. In this annotation, the structure of Article 194 TFEU will first

1. Art. 194 TFEU (introduced by Lisbon).

briefly be discussed, before the underlying facts are summarized as well as the judgment of the GC and the grounds of appeal. The annotation then proceeds to outline how Advocate General Campos Sánchez-Bordona engaged with the GC's ruling and subsequently explores the most consequential parts of the ruling by the ECJ. In the analysis, the implications are examined that energy solidarity as defined by the ECJ could have for the governance framework for EU energy policy and thus for the future style and pace of integration in this area. This is done by providing a conceptualization of energy solidarity as defined in the ECJ's judgment through the identification of three "axes" along which energy solidarity operates. In the conclusion it is argued that the full potential of energy solidarity is yet to be determined. While the Commission has so far only treated it as another procedural requirement in exemption-granting procedures, the broad version of energy solidarity endorsed by the ECJ leaves the door open for a much more muscular solidarity jurisprudence to emerge in what seems like inevitable future solidarity litigation.

2. Factual (and legal) background

2.1. *The Treaty foundation of energy law in the EU*

The case centred on the interpretation of Article 194 TFEU, which defines the energy competence of the EU. The first paragraph of this Article enumerates the four objectives of EU energy policy, namely to: "(a) ensure the functioning of the energy market; (b) ensure the security of energy supply in the Union; (c) promote energy efficiency and energy savings and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks".[2] It further specifies that these objectives are to be pursued in "a spirit of solidarity between Member States". The second paragraph, meanwhile, provides a sovereignty guarantee for Member States, enshrining the right of each Member State to "determine the conditions for exploiting its energy resources and the general structure of its energy supply".[3] While the latter provision may be seen as "a justiciable yardstick for overreaching EU legislation",[4] *Germany* v. *Poland* concerned the "spirit of solidarity", a provision which had mostly been discussed (if at all) as a mere political

2. Art. 194 TFEU.
3. Ibid.
4. Roeben, *Towards a European Energy Union: European Energy Strategy in International Law* (Cambridge University Press, 2018), pp. 117–118.

guiding principle that is not justiciable by itself but can, at most, find legal expression through secondary law.[5]

2.2. *The case before the General Court*

To understand the significance of this ruling, it is necessary to delve deeper into the reasoning provided and the scope afforded to energy solidarity by both the GC and the ECJ. The facts of the case at first instance, in *Poland* v. *Commission*,[6] have already been laid out in detail in this *Review*.[7] For the purposes of this annotation, it will therefore suffice to give a very brief overview. The case concerned the *Ostsee-Pipeline-Anbindungsleitung* (OPAL pipeline). The OPAL pipeline is one of the principal avenues through which gas from the Nord Stream pipeline, which runs from Vyborg near St Petersburg to Greifswald in Northern Germany, is distributed throughout Germany and Western Europe. A dispute arose when the European Commission approved a decision by the German Federal Network Agency (*Bundesnetzagentur*) amending a 2009 exemption of the OPAL pipeline from third-party access requirements under the Natural Gas Directive.[8] This amendment had the consequence of largely lifting the restrictions of the 2009 exemption on the capacity of the OPAL pipeline that could be used by Gazprom, a Russian supplier that is majority-owned by the Russian Government. Poland brought a case against the Commission before the GC, alleging, *inter alia*, that the Commission's decision granting further exemptions to third-party access rights to OPAL "infringes the principle of energy security and the principle of energy solidarity".[9] This is because the decision by the Commission would allow Gazprom to bypass alternative gas transit routes through Poland. This would make Poland more vulnerable to (artificial) gas supply shortages. Further, increasing the volume of Russian gas that can be imported through Nord Stream would undermine efforts to diversify gas imports of Poland and the Union more broadly by increasing dependence on one supplier. Specifically, Poland relied on the principle of energy solidarity as laid down in Article 194, when read together with the exemption provisions of the Natural Gas Directive. This, according to Poland,

5. Ibid., p. 122; for a discussion of the "judicial impact" of energy solidarity, see also Talus, *EU Energy Law and Policy: A Critical Account* (OUP, 2013), p. 280.

6. Case T-883/16, *Poland* v. *Commission*, EU:T:2019:567.

7. Boute, "The principle of solidarity and the geopolitics of energy: *Poland* v. *Commission (OPAL Pipeline)*", 57 CML Rev. (2020), 889–914.

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, O.J. 2019, L 117/1 (Natural Gas Directive).

9. Case T-883/16, *Poland* v. *Commission*, para 51.

created an obligation on the Commission to consider the implications of its decision for Member States other than those party to the exemption-granting procedure, and the Commission had failed to execute this assessment, thus breaching EU law.

In a surprising judgment, which contradicted the prevailing academic and political view of the solidarity provision of Article 194(1) TFEU, the GC on 10 September 2019 ruled in favour of Poland and annulled the Commission's decision, holding it in breach of the principle of energy solidarity. The GC held that the "spirit of solidarity" referred to in Article 194 TFEU constitutes the "specific expression in this field of the general principle of solidarity between Member States" also found elsewhere in the Treaties.[10] In the energy sphere, the GC held that this meant that both the EU and the Member States should:

> "avoid adopting measures liable to affect the interests of the European Union and the 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".[11]

This, according to the GC, means that the Union and Member States must take solidarity considerations into account when deciding on energy policy.[12] The GC further held that:

> "the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States, and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it."[13]

Germany, which had been an intervener in the GC case, supporting the Commission's position, appealed the GC judgment, adopting a line of argument that largely reflected the prevailing understanding of energy solidarity up to that point as a political rather than a legal principle.[14] Germany claimed that the judgment should be set aside, because energy solidarity was an "abstract and indeterminable" concept and, as such, "a purely political notion and not a legal criterion" that "cannot give rise to specific rights and

10. Ibid., para 69.
11. Ibid., para 73.
12. Ibid., para 77.
13. Ibid., para 70.
14. Appeal brought on 20 Nov. 2019 by the Federal Republic of Germany.

obligations for the European Union and/or for the Member States" (first ground of appeal).[15] Failing this, Germany argued that energy solidarity should be read more narrowly and only apply in exceptional cases as a contingency mechanism (second ground of appeal).[16] Germany also claimed that the Commission had, in fact, adhered to the principle of energy solidarity when examining, as it was required to do under Article 36(1)(a) of the Natural Gas Directive, whether the OPAL pipeline would enhance security of supply (third ground of appeal). The Commission, furthermore, should not be held in breach of EU law solely because the term "solidarity" was not expressly mentioned in the exemption decision (fourth ground of appeal). Finally, Germany claimed that the decision of the Commission should not be annulled merely because of a procedural error (fifth ground of appeal). The Commission itself, meanwhile, did not lodge an appeal and only intervened in the appeal "at the behest of the Court of Justice",[17] partially supporting the first ground of appeal at the hearing "in so far as the principle of energy solidarity is not an autonomous legal criterion that may be invoked in order to assess the legality of an act".[18]

3. Opinion of the Advocate General

On 18 March 2021, Advocate General Campos Sánchez-Bordona delivered his Opinion on the appeal.[19] In his submission, the Advocate General rejected all grounds of appeal and advised the ECJ to uphold the GC's ruling. While acknowledging that "the principle of energy solidarity entails some measure of abstraction making it difficult to apply",[20] the Advocate General confirmed the GC's view that energy solidarity is a justiciable principle of EU law that could be used as a criterion for judicial review. In his analysis of previous case law on solidarity, the Advocate General mainly relied on the ECJ's interpretation of Article 80 TFEU, which states that the "principle of solidarity" should govern Union policies in the area of immigration, asylum,

15. Ibid.
16. Ibid.
17. Opinion in Case C-848/19 P, *Germany* v. *Poland*, EU:C:2021:218, para 91.
18. Judgment, para 36.
19. For an earlier comment on the Opinion, see Münchmeyer, "Supercharging energy solidarity? The Advocate General's Opinion in Case C-848/19 P Germany v Poland", *European Law Blog*, 9 April 2021, available at <europeanlawblog.eu/2021/04/09/supercharging-energy-solidarity-the-advocate-generals-opinion-in-case-c-848-19-p-germany-v-poland/> (all websites last visited 21 March 2022).
20. Opinion, para 111.

and border control.[21] Based on his assessment of solidarity in the Treaties and in the ECJ case law, the Advocate General concluded that solidarity was a principle "significant enough to create legal consequences".[22] In a move that could have knock-on effects for other areas of EU primary law, the Advocate General also engaged with the question of whether the use of the phrase "spirit of solidarity" in Article 194 TFEU imbues that provision with a different (potentially softer) legal status than the "principle of solidarity" to which Article 80 TFEU refers. In his Opinion, the Advocate General did not find a difference to exist between these two modes of including solidarity in the Treaties. Both the "spirit" and the "principle" of solidarity, according to the Advocate General, were capable of forming the basis for judicial review.[23] Interestingly, while the GC had, in part, relied on the mention of solidarity in Article 24(2) and (3) TEU, concerning the Union's Common Foreign and Security Policy, to back up its finding of justiciability of solidarity in Article 194 TFEU,[24] the Advocate General seemed implicitly to reject this reliance, stating that the references in Article 24 TEU to mere "political solidarity" constituted a rare instance in which the Treaties expressly preclude solidarity from having any legal effect.[25]

The Advocate General also agreed with the GC's finding as to the applicability of solidarity both between Member States and between the Member States and the Union. In contrast to the more guarded phrasing of the GC, however, the Advocate General made this categorization explicit, stating that solidarity can "be linked to relations both horizontal (between Member States, between institutions, between peoples or generations and between Member States and third countries) and vertical (between the European Union and its Member States)".[26] Another remarkable aspect of the Advocate General's Opinion was his engagement with the implications of energy solidarity for the other priorities of EU energy policy laid down in Article 194 TFEU. While in its judgment, the GC had confined itself to interpreting the principle of solidarity only in the context of security of energy supply, the Advocate General expressly stated that "[t]he 'spirit of solidarity' must inform the objectives of the European Union's energy policy and further its development. From that point of view, energy solidarity cannot be regarded as

21. Ibid., para 68. The A.G. cited Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland, Hungary and Czech Republic*, EU:C:2020:257, paras. 80 and 181; and Joined Cases C-643 & 647/15, *Slovakia and Hungary* v. *Council*, EU:C:2017:631, para 291.
22. Opinion, para 70
23. Ibid., paras. 62, 63, 97 and 99.
24. Case T-883/16, *Poland* v. *Commission*, para 69.
25. Opinion, para 97.
26. Ibid., para 60.

being synonymous with mere energy security (or 'security of energy supply'), which is only one of its manifestations".[27]

4. Judgment of the Court of Justice

In its judgment of 15 July 2021, the ECJ followed the advice of its Advocate General and upheld the GC's ruling.[28] The analysis attached to the Court's assessment of the first ground of appeal brought by Germany, which questioned the very justiciability of energy solidarity, is the most consequential part of the judgment. The Court here endorsed the GC's phrasing, stating that "the spirit of solidarity between Member States, mentioned in [Article 194(1) TFEU], constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law".[29] Demonstrating this "fundamental" nature of the principle of solidarity, the Court followed the Advocate General in recounting all instances where solidarity appears in the TEU and TFEU.[30] Based on this assessment, the ECJ concluded that:

> "the principle of solidarity underpins the entire legal system of the European Union . . . and it is closely linked to the principle of sincere cooperation laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the Court has held, inter alia, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States."[31]

27. Ibid., para 76.

28. Judgment. A first short summary of the ECJ judgment, in blog form, is here: Münchmeyer, "Worth the wait? Energy solidarity before the Court of Justice in Case C-848/19 P – Germany v Poland", *EUI Florence School of Regulation*, 8 Sept. 2021, available at <fsr.eui.eu/worth-the-wait-energy-solidarity-before-the-court-of-justice-in-case-c-848-19-p-germany-v-poland/>.

29. Judgment, para 38.

30. Ibid., paras. 39, 40; Opinion, paras. 54–59. Specifically, in addition to Art. 194(1) TFEU, the A.G. and ECJ referred to the Preamble and Arts. 2, 3(3), 21(1), 24(2) and (3) TEU, as well as Arts. 67(2), 80, 122(1), 222 TFEU.

31. Judgment, para 41. To support its claim that solidarity underpins the entire legal system of the EU, the Court cited its judgments in Case 39/72, *Commission* v. *Italy*, EU:C:1973:13, para 25, and Case 128/78, *Commission* v. *United Kingdom*, EU:C:1979:32, para 12. Regarding the extension of the principle to EU institutions, the Court relied on Case C-514/19, *Union des industries de la protection des plantes* v. *Premier ministre and others*, EU:C:2020:803, para 49.

Having established that the principle of solidarity is deeply rooted within the EU legal order, the Court then rejected the argument put forward by Germany that solidarity was "too abstract" a notion to be the basis of judicial review. Again following the Advocate General, the Court cited its previous reliance on the principle of solidarity in the area of border checks, asylum and immigration under Article 80 TFEU.[32]

Returning to Article 194 TFEU, the Court ruled that there was "nothing that would permit the inference that the principle of solidarity referred to in Article 194(1) TFEU cannot, as such, produce binding legal effects on the Member States".[33] It further agreed with the Advocate General that solidarity, "as is apparent from the wording and structure of [Article 194(1) TFEU], forms the basis of all of the objectives of the European Union's energy policy, serving as the thread that brings them together and gives them coherence".[34] The Court reiterated this point and endorsed the phrasing of the Advocate General when stating that solidarity:

> "cannot, moreover, be regarded as being synonymous with or limited to the requirement to ensure security of supply, referred to in Article 36(1) of Directive 2009/73, which is merely one of the manifestations of the principle of energy solidarity, since Article 194(1) TFEU sets out, in points (a) to (d), four different objectives which, in a spirit of solidarity between Member States, EU energy policy aims to achieve".[35]

The Court considered it a necessary consequence of its conclusion that solidarity governs all of *Union* energy policy that it must also apply to "acts adopted by the EU institutions".[36] The fact that the Natural Gas Directive did not explicitly mention solidarity in the Court's view did not constitute an adequate reason for the Commission not to take solidarity into account.[37] The Court concluded that "the principle of energy solidarity, read in conjunction with the principle of sincere cooperation, requires that the Commission verify whether there is a danger for gas supply on the markets of the Member States, when adopting a decision on the basis of Article 36 of Directive 2009/73".[38]

Having pronounced on the justiciability and scope of obligation flowing from the "spirit of solidarity" in Article 194(1) TFEU, the Court then rejected

32. Judgment, para 42; Opinion, para 69. The Court cited the same cases as the A.G., see *supra* note 21.
33. Judgment, para 43.
34. Ibid., para 43.
35. Ibid., para 47.
36. Ibid., para 44.
37. Ibid., para 48.
38. Ibid., para 52.

the other four grounds of appeal brought by Germany in a relatively terse fashion, again following the reasoning and conclusions proposed by Advocate General Sánchez-Bordona. Regarding Germany's second claim that energy solidarity, if justiciable, should only apply in emergency situations, the Court stated that this would in essence make the principle of energy solidarity as per Article 194 TFEU a mere duplication of the emergency mechanisms anchored in Articles 122 and 222 TFEU. However, rather than just in emergency situations, the Court confirmed that solidarity must "inform any action relating to EU policy in that field".[39]

The ECJ pointed out that the allegation by Germany that such an interpretation would result in energy solidarity imposing a de facto obligation of "unconditional loyalty" is expressly contradicted by the GC judgment, which had stated that:

> "[t]he application of the principle of energy solidarity does not however mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict."[40]

The ECJ dismissed the third ground of appeal, partly because it did not relate to a point of law,[41] and partly because Germany, in the Court's view, had not disproven the finding that the Commission had not assessed the impact on the supply security of other Member States when examining the effect of the OPAL pipeline on security of supply under the Natural Gas Directive.[42] Similar to its dismissal of the second ground of appeal, the Court found that Germany had misread the GC judgment when putting forward its fourth ground of appeal: the GC did not annul the Commission Decision because the word "solidarity" was not expressly mentioned, but rather because, substantively, such a solidarity assessment had not taken place since "the decision itself does not disclose that the Commission adequately examined the impact of the extension of the exemption in relation to the OPAL pipeline on the Polish gas market and on the markets of the Member States other than the Republic of Poland, which could be geographically affected".[43] Because of this, the Court also dismissed part of the fifth ground of appeal. This was the

39. Ibid., para 67.
40. Case T-883/16, *Poland* v. *Commission*, para 77. See judgment, para 73.
41. Judgment, para 85.
42. Ibid., para 90.
43. Ibid., para 97.

claim that the Commission Decision had been annulled solely for procedural reasons, which according to Germany was not permissible under Article 263 TFEU.[44] The Court further rejected as unfounded the second part of Germany's fifth ground of appeal, which alleged that Poland should have brought an action against the original 2009 exemption decision rather than the 2016 decision which amended it. The Court here stated that the two decisions were "independent of one another" and thus Poland was correct in challenging the latter.[45]

5. Analysis

Many analyses of the *OPAL* saga have, so far, focused primarily on the immediate impact that the recognition of energy solidarity as a justiciable principle of European Union law will have on the exemption procedure for major gas import infrastructure.[46] This is, of course, a particularly pressing point, not least since the EU will now have to reconcile the Court of Justice's ruling with the fact that a panel of the World Trade Organization (WTO) found certain key provisions of the 2009 exemption decision, including the capacity cap, to be contrary to the provisions of the General Agreement on Tariffs and Trade (GATT).[47] While the European Union is currently appealing the WTO report, the Court's annulment of the 2016 exemption decision thus means reverting to an arrangement found to be in breach of WTO law.[48]

After the Advocate General's endorsement of the GC's view on energy solidarity, which made an eventual ruling by the ECJ in favour of the justiciability of the principle more likely, concerns were also raised about the vagueness of the version of energy solidarity that had been put forward by the GC and the Advocate General. Yafimava, for example, stated that it would be

44. Ibid., para 106.

45. Ibid., para 107.

46. See e.g. Yafimava, "The OPAL exemption decision: A comment on the Advocate General's Opinion on its annulment and its implications for the Court of Justice judgment and OPAL regulatory treatment", *Oxford Institute for Energy Studies*, 29 March 2021; Iakovenko, "Case C-848/19 P: Germany v Poland and its outcomes for EU energy sector: An extended case note on the European Court of Justice judgment in the *OPAL* case", (2021*) Journal of World Energy Law and Business*, 436–446, at 443–444.

47. Yafimava, op. cit. *supra* note 46, p. 8. WTO, *EU – Energy Package* (10 Aug. 2018) DS476.

48. Note that the A.G. highlighted this issue; at Opinion, para 46, he stated that "[i]t might therefore be necessary to assess the potential conflict between the ruling given and WTO law". However, the ECJ did not engage with the issue. See Opinion, paras. 42–46 for the entire discussion by the A.G. of the WTO incompatibility of the 2009 exemption decision.

imperative for the ECJ to lay down a methodology for conducting a solidarity assessment.[49] Talus, meanwhile, warned that the principle of energy solidarity could take on a "jack-in-the-box" effect if not clearly circumscribed and made subject to judicial review, meaning that it could be "evoked in a variety of situations and imposing different obligations" and "add a new unpredictable element to decision-making processes at both national and EU levels".[50] Based on the vagueness surrounding the GC's interpretation of energy solidarity, some of the scholarly commentary also touched upon the potentially more far-reaching implications for other areas of energy policy that might arise as a consequence of the recognition of energy solidarity as a binding principle of EU law. For example, Boute, in his analysis of the GC's judgment, commented that energy solidarity "will contribute to a more integrated approach to decision-making in the EU energy sector".[51]

The aim of this annotation is to pursue this latter nascent strand of inquiry further and thus to consider the consequences that the "new" character of Article 194 TFEU could have on European integration in the field of energy more broadly.[52] This is important since Article 194 TFEU serves as the primary law basis not just for the Union's energy security legislation, but for all of the Union's energy acquis. In this regard, an important indicator of whether a more muscular energy solidarity principle with wider ramifications for EU energy integration will emerge is the degree to which it will play a role in the overarching energy governance framework of the EU's so-called "Energy Union", an effort dating back to 2014 to develop an internally coherent EU energy policy.[53] The "interrelated, holistic approach" on the European level of energy policy has been called a "fundamental innovation of the Energy Union".[54] While a joined-up approach to energy policy is by no means a new development,[55] a main innovation of the Energy Union is that,

49. Yafimava, op. cit. *supra* note 46.

50. Talus, "The interpretation of the principle of energy solidarity – A critical comment on the Opinion of the Advocate General in *OPAL*", *Oxford Institute for Energy Studies*, 26 April 2021, p. 8.

51. Boute, op. cit. *supra* note 7, at 912.

52. For other recent analyses of the ECJ judgment that adopt this broader perspective, see Iakovenko op. cit. *supra* note 46, especially 444–446; Buschle, "Energy solidarity: Approaching a new constitutional principle", (2021) *European Energy & Climate Journal*, 66–70.

53. First announced in its current form by then-candidate Juncker in his 2014 speech to the European Parliament. Juncker, "A new start for Europe: My agenda for jobs, growth, fairness and democratic change: Political guidelines for the next European Commission", 15 July 2014, available at <ec.europa.eu/info/sites/info/files/juncker-political-guidelines-speech_en.pdf>.

54. Vandendriessche, "The road to the Energy Union", *EUI Florence School of Regulation*, 11 Dec. 2017, available at <fsr.eui.eu/road-energy-union/>.

55. See Knodt and Ringel, "European Union energy policy: A discourse perspective" in Knodt and Kemmerzell (Eds.), *Handbook of Energy Governance in Europe* (Springer, 2020).

rather than engaging in periodic, but piecemeal, revisions of EU energy law and policy in more or less discrete energy market or climate "packages", it pursues a contemporaneous overhaul of all Union energy policy in a cohesive and synergetic fashion. The Energy Union is also a cornerstone of the von der Leyen Commission's European Green Deal project, which, *inter alia,* has the objective of transforming the EU into the first carbon-neutral continent by 2050.[56]

This is in part due to the fact that achieving Green Deal objectives will hinge on a chief novelty of the Energy Union, the Regulation on the Governance of the Energy Union (Governance Regulation).[57] This Regulation has the goal of ensuring that Member States adopt coherent strategies and measures to meet the objectives and targets of the Energy Union. It sets out a process by which Member States must compile integrated National Energy and Climate Plans (NECPs) which span a decade. These plans set out targets, trajectories and policies across all five so-called dimensions of the Energy Union, which are: (i) decarbonization; (ii) energy efficiency; (iii) energy security; (iv) the internal energy market; and (v) research, innovation and competitiveness. Member States must submit biennial reports to the Commission, documenting their progress (or lack thereof) towards reaching their objectives, which collectively must deliver on the Energy Union's overarching numerical targets, chiefly situated in the decarbonization and energy efficiency dimensions, as well as on the overarching qualitative goal of delivering "secure, sustainable, competitive and affordable energy" to EU consumers.[58] The Governance Regulation contains an upward revision clause,[59] which asks Member States to update their NECPs to reflect increased national ambition across the five dimensions in draft form by June 2023, to be finalized in 2024. This will be a key juncture, as the Commission needs Member States to bring their plans in line with its recently updated 2030 decarbonization target, and likely also with revised pan-European targets for energy efficiency and renewable energy.[60] This Regulation, which is based on both Article 194 TFEU and on Article 192 TFEU (the Union's environmental competence) has

56. Commission Communication "The European Green Deal", COM(2019)640.

57. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 Dec. 2018 on the Governance of the Energy Union and Climate Action, O.J. 2018, L 328/1 (Governance Regulation).

58. COM(2015)80, "A framework strategy for a resilient Energy Union with a forward-looking climate change policy", 1.

59. Art. 14, Governance Regulation.

60. Proposals for the increase of these targets were part of the Commission's recent "Fit for 55" legislative package. See COM(2021)550, "'Fit for 55': Delivering the EU's 2030 climate target on the way to climate neutrality".

often been described (if not criticized[61]) as "soft" governance unlikely to achieve EU energy objectives in the absence of political will due to the Commission's inability to coerce Member States into increasing their contributions to pan-European targets for renewable energy, energy efficiency, and emissions reductions.[62]

To contemplate the potential of energy solidarity on the large-scale energy integration and governance project of the Energy Union, it is useful to envisage solidarity as operating bidirectionally along three "axes" as a result of the ECJ's ruling. First, as upheld by the ECJ and stated in Article 194(1) TFEU itself, energy solidarity applies between Member States. This is the *horizontal axis* of energy solidarity. Secondly, as confirmed by both the GC and the ECJ, an obligation of solidarity exists between Member States and the Union, which might be termed the *vertical axis* of solidarity. Thirdly, it emerges from the Opinion of the Advocate General, and particularly from the ruling of the ECJ, that solidarity not only applies *within* all four EU energy policy priorities enumerated in Article 194(1) TFEU, but also applies *between* them, constituting, as the Advocate General and ECJ phrased it, the "thread" that brings them together.[63] Borrowing from Herranz-Surralles' taxonomy of EU integration in energy,[64] this may be termed the *cross-sectoral axis* of energy solidarity.

The very expansiveness of the solidarity criterion means that how solidarity will manifest along all three axes is still to be determined. In the wake of the GC's ruling, some authors have already started to imagine what the effects of energy solidarity along the horizontal axis, that is between Member States, could look like. In their analysis, Buschle and Talus argue that in an increasingly interconnected European energy system, an expansive solidarity obligation could constrain almost all national policy decisions on energy policy, since they are likely, in some form, to impact the energy interests of a Member State's neighbours.[65] The NECP process, which obliges Member States to set out their short and long-term energy policies in one

61. Pellerin-Carlin and Vinois, "The governance of the Energy Union; A new relationship between European citizens and decision makers" in *Making the Energy Transition a European Success: Tackling the Democratic, Innovation, Financing and Social Challenges of the Energy Union* (Jacques Delors Institute, 2017), p. 31, an early assessment of Energy Union governance characterizing it as a "toothless administrative reporting". See also Fischer, "Energy Union: Delivery still pending", 5 *Policy Perspectives CCS* (2017).

62. Vandendriessche, Saz-Carranza and Glachant, "The governance of the EU's Energy Union: Bridging the gap?", EUI Working Papers 2017/51, 19.

63. Judgment, para 43.

64. Herranz-Surrallés, "Energy policy and European Union politics" in *Oxford Research Encyclopedia of Politics* (OUP, 2019).

65. Buschle and Talus, "One for all and all for one? The General Court ruling in the *OPAL* case", 5 *Oil, Gas & Energy Law* (2019).

comprehensive document, facilitates peer monitoring, and the solidarity principle could equip it with real legal bite. This is one way which could lead to solidarity debates extending beyond the energy security sphere. Hancher and Kehoe have stated that a justiciable principle of solidarity could open up the possibility of Member States seeking to bring other Member States before the ECJ for not contributing (enough) to overarching European climate and energy targets.[66] This is because a lack of ambition in energy sector decarbonization by one Member State would need to be compensated by an increase in such ambition by one or more other Member States to achieve pan-European targets for greenhouse gas reduction, renewable energy, and energy efficiency. This raises questions about fair burden sharing and "free riding". In this regard, a Member State that is considered by another Member State not to be "pulling its weight" in reaching overarching European targets could be accused of breaching the principle of energy solidarity. This could lead to action under Article 259 TFEU, which allows Member States to bring their peers before the ECJ for failure to fulfil a Treaty obligation.[67]

The greatest uncertainty about action along the horizontal axis is how great the adverse consequences for another Member State's energy policy would need to be to be considered a breach of solidarity. In rejecting Germany's second ground of appeal, the ECJ emphasized the GC's finding that the principle of energy solidarity does not mean that "EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy".[68] It seems reasonable to assume that the same would apply between Member States. Since the ECJ did not elaborate on the necessary balancing exercise between the interests of the Union and those of the Member States, future litigation seems the only way of gaining clarity on the possible scope of action that is open to Member States on the horizontal axis of energy solidarity.

On the vertical axis of energy solidarity, meanwhile, a justiciable principle of energy solidarity strengthens the tools available to the European Commission in coordinating Member States' energy policy to reach pan-European climate and energy targets. The ECJ agreed with the GC's definition of the content of energy solidarity as entailing an obligation on Member States to act in solidarity with "the common interest of the European Union and the policies pursued by it".[69] Thus, the Member States could be said

66. Kehoe and Hancher, "Governance of the Energy Union" in Nouicer et al., *The EU Clean Energy Package (ed.* 2020) (European University Institute, 2020), p. 24.

67. Art. 259 TFEU. Note that before proceeding to the ECJ, the matter must be brought before the Commission, which must issue a reasoned opinion based on the arguments of both Member States in question within 3 months.

68. Judgment, para 73.

69. Case T-883/16, *Poland* v. *Commission*, para 70.

to have an obligation to act in solidarity with the overarching targets of the European Green Deal, that is the target of achieving a 55 percent reduction in greenhouse gas emissions by 2030 compared to 1990 levels as well as the supporting targets in energy efficiency and renewable energy.[70] Solidarity could thus be used to reinforce the planning and monitoring governance mechanism of the Energy Union. The "spirit of solidarity" now being a legally binding Treaty principle could make it more difficult for Member States to justify not following a Commission recommendation if this has the potential to jeopardize the attainment of pan-European targets. Again, the NECP process is a key instrument in mobilizing energy solidarity in this way. Taking decarbonization measures as an example, when issuing country-specific recommendations on the draft revisions to the Member States' updated NECPs that must be delivered by 30 June 2023,[71] the Commission could expressly anchor its proposals in the principle of solidarity, stating that an increase in ambition is necessary to fulfil a given Member State's solidarity obligations. The Governance Regulation demands that Member States take due account of Commission recommendations and that they must publicly state their reasons if they choose not to follow these recommendations.[72] If recommendations were explicitly based on energy solidarity, this would entail the Member State in question having to explain that it has not breached a fundamental principle of EU primary law by showing that it has considered the impact of its proposed decarbonization policies and trajectories on its fellow Member States and on the objectives of the Union as a whole. A justiciable principle of energy solidarity could thus enhance the speed of integration in EU energy law and governance.

However, the very indeterminacy of the content of the solidarity principle also means that it could be used as a means of weakening the extent to which the EU can influence national energy policies. This is because, conversely, the Union is also bound by a solidarity obligation to the Member States, who could claim that their national renewable energy and decarbonization trajectories, for example, should be respected by the EU even if they do not align with Green Deal objectives. A Member State could claim that, while acknowledging pan-European energy and climate targets, the economic burden of meeting these targets is so high that it would be impossible for that Member State to increase its decarbonization commitments any further

70. For an overview of current pan-European climate and energy targets for 2030, see <ec.europa.eu/clima/eu-action/climate-strategies-targets/2030-climate-energy-framework_en>. Note that the Commission has proposed an upward revision of some of these targets, notably for energy efficiency and renewable energy, as part of the so-called "Fit for 55" legislative package; see report cited *supra* note 60.

71. Art. 14 Governance Regulation.

72. Arts. 9(3), 34(2), ibid.

without jeopardizing its energy security interests or adopting measures that lead to a rise in energy poverty, and that the Union would be in breach of its solidarity obligation if it insisted on such an increase. Solidarity could thus be used as a catalyst for, rather than a counterweight to, the energy sovereignty guarantee of Article 194(2) TFEU. A second option for Member States reluctant to adopt ambitious energy sector decarbonization measures, would be to rely on energy solidarity as a means to bolster claims for shares of the Union's financial mechanisms aimed at alleviating the socio-economic impact resulting from the energy transition necessary to meet decarbonization objectives, such as the Just Transition Fund or the proposed Social Climate Fund.[73] Whether the balancing of solidarity obligations will strengthen the Member States or the Commission on the vertical axis will also likely need to be clarified through further litigation before the ECJ.

A most interesting legal development, from a European integration perspective on energy law and policy, results from the implications of energy solidarity along the cross-sectoral axis. The ECJ made it clear that energy solidarity applies not just to all four objectives of Union energy policy enumerated in Article 194(1) TFEU, but indeed applies *between* them. Thus, energy solidarity as defined by the ECJ in the *OPAL* case might force a confrontation and integration of two conceptions of energy solidarity that have developed out of different geopolitical and EU-constitutional contexts, energy security and sustainability, reflected in Article 194(1)(b) and 194(1)(c) TFEU respectively.[74]

It is worth noting that the energy solidarity discourse in the EU has almost always centred on security of supply concerns. In fact, the very inclusion of a reference to solidarity in the Lisbon Treaty occurred at the behest of Member States, particularly Poland, concerned about security of supply as a result of politically-motivated Russian gas supply disruptions.[75] Donald Tusk, then Prime Minister of Poland, first conceived of the Energy Union as mechanism for increasing EU action in gas supply security.[76] This strong link between solidarity and security also manifests itself in legislation, with solidarity discourse featuring prominently in Energy Union legislation that addresses

73. Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund; COM(2021)568, Proposal for a Regulation of the European Parliament and of the Council establishing a Social Climate Fund.

74. In its judgment, the ECJ seems to treat the list of EU energy policy priorities in Art. 194(1) as exclusive, but does not make this explicit, potentially opening the door for energy solidarity to extend to other areas of energy policy.

75. See Roth, "Poland as a policy entrepreneur in European external energy policy: Towards greater energy solidarity vis-à-vis Russia?", 16 *Geopolitics* (2011), 600–625.

76. Tusk, "A united Europe can end Russia's energy stranglehold", *Financial Times*, 21 April 2014.

security of supply concerns directly, while legislation that primarily deals with the reduction of greenhouse gas emissions from the energy sector does not draw on solidarity, despite the presence of overarching targets that require Member State collaboration and coordination.

However, given the explicit rejection by the ECJ of an exclusive link between solidarity and security, and the statement by the Court that energy solidarity should act as the "thread" bringing the facets of energy policy together, energy solidarity could, on the cross-sectoral axis, act as a mechanism for greater coherence between decarbonization and security of supply policies. That is, solidarity considerations could have the potential not just to play a role internal to one of the Union's energy policy goals, but could potentially also be invoked when tensions arise *between* the priorities of EU energy policy. For example, it could be imaginable that a Member State's fossil fuel import policy might be challenged before the EU Courts not (just) because of its implications for solidarity with other Member States' energy security objectives, but because it breaches the obligation of solidarity with the Union's decarbonization objectives. This could take place either through action on the horizontal axis, i.e. Member States policing each other's conduct, or on the vertical axis, i.e. by the Commission operationalizing solidarity to ensure a more harmonized and synergetic relationship between energy security and sustainability through the Energy Union governance process. This would further the Energy Union's aim of overcoming the "silo mentality" prevalent in EU energy policy.[77]

6. Conclusion

This annotation discussed the recent recognition of the justiciability of the principle of energy solidarity by the ECJ in *Germany* v. *Poland*. The ECJ's decision to confirm the status of the "spirit of solidarity" in energy affairs as a binding principle of EU law is likely to change the way scholars and policymakers alike will engage with Article 194 TFEU. Beyond the sphere of energy, the Court's finding that a solidarity provision in the European Treaties can be considered a justiciable principle of EU primary law could lead to the emergence of more "specific expression[s] . . . of the general principle solidarity" in other fields of EU policy as bases for judicial review.[78] The Advocate General's Opinion in particular seems to hint at this possibility.[79]

77. Vandendriessche, op. cit. *supra* note 54.
78. Judgment, para 38.
79. *Supra*, section 3; Opinion, para 97.

This annotation has sought to go beyond considerations of the impact of this judgment for the future of EU gas imports, and to examine instead the potentially far-reaching consequences of a broad version of the principle of energy solidarity for EU-wide energy governance. It was argued that on all three "axes" of solidarity identified here, energy solidarity as defined by the Court has the potential to strengthen the governance processes of the Energy Union, a cornerstone of the European Green Deal. However, it was also argued that, conversely, energy solidarity could be harnessed by Member States to reinforce national energy priorities and demand greater accommodation for these at the European level.

This means that besides a criticism of the vagueness of the ECJ's definition of the substantive obligations and balancing exercises demanded by the principle of energy solidarity, it is difficult at this point to attempt a qualitative pronouncement on this judgment. This will only be possible with time. Whether energy solidarity will be a force for convergence or divergence in EU energy law will to a large degree depend on which actors are able to mobilize the principle first in an effective way. So far, as attested by its exemption decisions after the GC's judgment, the European Commission has applied the energy solidarity criterion in a rather conservative way, assessing mainly whether adequate opportunity for stakeholder consultation has been afforded.[80] It remains to be seen whether, following the ECJ ruling, and with the deadline for the crucial updates of NECPs pursuant to the Governance Regulation approaching, the principle will be operationalized in a more imaginative way. In this case, further energy solidarity litigation before the ECJ seems inevitable to uncover the full potential, as well as the boundaries, of this principle.

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80. See e.g. C(2021)3374, Commission Decision of 6 May 2021 on the exemption of Resia Interconnector S.r.l. under Art. 63 of Regulation (EU) 2019/943 for an electricity interconnector between Italy and Austria, para 50.

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