THE PRINCIPLE OF ENERGY SOLIDARITY CLARIFIED: A CERTAIN WAY TO UNCERTAINTY

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Abstract

The principle of energy solidarity has been elevated by the CJEU to a binding principle. The question remains how this binding principle will now be fitted into the legal order. Whilst it is commendable that the principle of solidarity has been introduced as a binding principle, it arguably raises more questions than it provides answers. How will the principle of solidarity be assessed in future cases? Is it transposable to other domains of law? …

The current annotation presents an overview of the C-848/19 case between Germany and Poland relating to the OPAL pipeline. Firstly, the context of the proceedings is set out, briefly explaining the path traveled to arrive at the CJEU. Secondly, a commentary of the decision, with a focus on the principle of energy solidarity will take place. The focal point of the commentary will be about the qualification by the CJEU of the principle of energy solidarity as being binding. Moreover, some criticism is made on the way the principle has been interpreted and clarified by the CJEU. Lastly, the annotation will discuss the consequences of the judgment as well. This part focuses not only on the legal aspects but also touches upon the political and practical consequences that the judgment will bring forward.

Keywords

Principle of energy solidarity; OPAL pipeline; review of the Commission exemption decision from third-party access and tariff regulation; Gas Directive; Germany v. Poland; principle of sincere cooperation.

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EL PRINCIPIO DE SOLIDARIDAD ENERGÉTICA ACLARADO: UN CIERTO CAMINO HACIA LA INCERTIDUMBRE

Resumen

El principio de solidaridad energética ha sido elevado por el TJUE a principio vinculante. La cuestión que se plantea es cómo se encajará ahora este principio vinculante en el ordenamiento jurídico. Aunque es encomiable que el principio de solidaridad se haya introducido como principio vinculante, podría decirse que plantea más preguntas que respuestas. ¿Cómo se evaluará el principio de solidaridad en casos futuros? ¿Es extrapolable a otros ámbitos del derecho?...

La presente anotación presenta una visión general del asunto C-848/19 entre Alemania y Polonia relativo al gasoducto OPAL. En primer lugar, se expone el contexto del procedimiento, explicando brevemente el camino recorrido para llegar al TJUE. En segundo lugar, se comentará la decisión, centrándose en el principio de solidaridad energética. El punto central del comentario será la calificación por parte del TJUE del principio de solidaridad energética como vinculante. Además, se criticará la forma en que el principio ha sido interpretado y aclarado por el TJUE. Por último, en la anotación se analizarán también las consecuencias de la sentencia. Esta parte no sólo se centra en los aspectos jurídicos, sino que también aborda las consecuencias políticas y prácticas que la sentencia traerá consigo.

Palabras Clave

Principio de solidaridad energética; el gasoducto OPAL; revisión de la decisión de exención de la Comisión del acceso de terceros y de la regulación de las tarifas; la Directiva del Gas; Alemania c. Polonia; principio de cooperación leal.

LE PRINCIPE DE SOLIDARITÉ ÉNERGÉTIQUE CLARIFIÉ: UN CHEMIN VERS L'INCERTITUDE

Résume

Le principe de solidarité énergétique a été élevé par la CJUE au rang de principe contraignant. Reste à savoir comment ce principe s'insérera désormais dans l'ordre juridique. S'il est louable que le principe de solidarité se soit vu conférer un caractère contraignant, cette évolution soulève sans doute plus de questions qu'elle n'apporte de réponses. Comment le principe de solidarité sera-t-il évalué dans les affaires futures ? Est-il transposable à d'autres domaines du droit ?...

La présente annotation expose une vue d'ensemble de l'affaire C-848/19 entre l'Allemagne et la Pologne concernant le pipeline OPAL. Tout d'abord, le contexte procédural est exposé, en expliquant brièvement le chemin parcouru pour arriver devant la CJUE. Ensuite, un commentaire de la décision, avec un accent mis sur le

principe de solidarité énergétique, est réalisé. Le point central de ce commentaire porte sur la qualification par la CJUE du principe de solidarité énergétique comme étant contraignant. En outre, certaines critiques sont formulées sur la manière dont le principe est interprété et clarifié par la CJUE. Enfin, la présente contribution aborde les conséquences de l'arrêt. Cette dernière partie porte non seulement sur les aspects juridiques, mais également sur les conséquences politiques et pratiques de l'arrêt.

Mots clés

Principe de solidarité énergétique; le gazoduc OPAL; examen de la décision d'exemption de la Commission concernant l'accès des tiers et la réglementation des tarifs; Directive sur le gaz; Allemagne c. la Pologne; principe de coopération loyale.

CONTENTS

I. INTRODUCTION

Solidarity is often seen as an ambiguous statement, a declaration of good will and not a binding endeavour. The present judgment *Germany v. Poland*[2] provides a shift in this mentality. From now on, Member States will think twice before inserting solidarity clauses in legal instruments.

The Court made it abundantly clear in the judgment that the principle of solidarity is a binding and actionable principle, therefore placing the principle of solidarity on a new level. Furthermore, the principle of energy solidarity must be taken account not only between Member States but also between Member States and the EU institutions. On top of that the CJEU provided a definition of the principle of energy solidarity. However, it did not create clear and concise criteria detailing the principle of energy solidarity that may be used further down the line.

[2] Judgment of the Court of 15 July 2021, Germany v Poland, C-848/19, EU:C:2021:598 [OPAL case].

The CJEU also addressed some of the concerns relating to the assessment made of the principle of energy solidarity by the European Commission.

Because the case at hand provides some new insights about the principle of energy solidarity, it will bring about different consequences. These consequences range from legal consequences to political consequences and economic consequences.

II. FACTS OF THE CASE

1. THE ORIGINAL EUROPEAN COMMISSION DECISION

The OPAL (Ostsee Pipeline Anbindungsleitung) Pipeline is one of the two existing connections to the Nord Stream I pipeline. The other existing connection is the NEL pipeline. The pipelines in essence circumvent Eastern European countries such as Poland by connecting Germany and Russia directly. The OPAL pipeline is located to the west of the Nord Stream I pipeline.

Before the OPAL pipeline was constructed, the German national regulatory (BNetzA) authority notified the Commission that it had taken two decisions to exempt the cross-border transport capacity of the OPAL pipeline from the third-party access rules as well as the tariffs regulation.

The Commission inspected the two decisions. Consequently, it rendered its own decision on the 12th of June 2009 whereby it requested that the two German decisions be amended by adding two criteria. In the first place the Commission imposed a criterion to guarantee the separation of the network activities from the supply and production activities (the gas release programme). Secondly, the Commission demanded that the use of the pipeline by Gazprom and its affiliated undertakings be curtailed to 50 % of its capacity.[3]

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[3] European Commission decision of 12 June 2009, 2009/462/EC stating:
"(a) Fully effective separation of network activities from supply and production activities should apply throughout the Community to both Community and non-Community undertakings. To ensure that network activities and supply and production activities throughout the Community remain independent from each other, regulatory authorities should be empowered to refuse certification to transmission system operators that do not comply with the unbundling rules. To ensure the consistent application of those rules across the Community, the regulatory authorities should take utmost account of the Commission's opinion when the former take decisions on certification. To ensure, in addition, respect for the international obligations

The BNetzA followed the reasoning of the Commission and adapted its reasoning. Consequently, OPAL Gastransport GmbH & Co. KG (henceforth: OGT) was only allowed to use 50 % of the capacity of the OPAL pipeline.

2. THE AMENDMENT OF 2016

The OPAL pipeline was completed in 2011 and in 2013, OGT petitioned the BNetzA to alter its original decisions and to grant OGT access to the full capacity of the OPAL pipeline. The BNetzA took into account the wishes of OGT and notified the Commission on the 28th of October 2016 that it intended to alter its decisions from 2009.

The new decision entailed that OGT would be able to utilise the OPAL pipeline to its full capacity. Under the new decision, OGT in principle still had a reserved capacity of 50 %, just as was the case in 2009. However, in addition to the reserved capacity OGT would also be able to partake in the auction for the remaining 50 % of the capacity. In sum, OGT would be able to utilize 100 % of the capacity of the OPAL pipeline.

The Commission again proposed certain amendments to the 2016 BNetzA decision, slightly curtailing the maximum capacity limit for the use of the OPAL pipeline by OGT. In summary, a larger amount of capacity had to be auctioned.[4]

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of the Community and solidarity and energy security within the Community, the Commission should have the right to give an opinion on certification in relation to a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries.

(b) The limit of 50 % of the capacities may be exceeded if the undertaking concerned releases to the market a volume of 3 billion m³ of gas on the OPAL pipeline under an open, transparent and non-discriminatory procedure ("Gas Release Programme"). The undertaking managing the pipeline or the undertaking required to carry out the programme must ensure the availability of corresponding transport capacities and the free choice of the exit point ("Capacity release programme"). The form of the Gas Release and Capacity Release programmes is subject to the approval of the BNetzA.

4 The proposed amendments were the following: (i)the initial offer of capacities to be auctioned was required to cover 3 200 000 kWh/h (approximately 2.48 billion m³/year) of FZK capacities and 12 664 532 kwh/h (approximately 9.83 billion m³/year) of DZK capacities; (ii) an increase in the volume of FZK capacities had to be offered at auction in the subsequent year, if, at an annual auction, demand exceeded 90 % of the capacities offered, and had to be made in tranches of 1 600 000 kWh/h (approximately 1.24 billion m³/year) up to a maximum of 6 400 000 kWh/h (approximately 4.97 billion m³/year) and (iii) an undertaking or group of undertakings with a dominant position

The results of the amendment meant that the initial capacity required to auction was raised from 15,864,532 kWh/h to a new total of 16,464,522 kWh/h.

This is the decision that was contested (henceforth: contested decision) firstly before the General Court and consequently in the current proceedings.

The difference between the decisions of 2009 and 2016 situates itself in the way the exemption is structured. In 2009 the dominant undertaking (OGT) was only allowed to use up to 50 % of the total capacity whilst the other 50 % was open to other distributors. There was no possibility for OGT to obtain an expanded use of the OPAL pipeline. The contested decision grants the possibility for OGT to partake in the auction and as such obtain more than 50 % capacity use of the OPAL pipeline. In essence the 2016 decision allowed the use of 80 % (Florence School of Regulation, 2021) (or 90 % (Boute, 2020)) of the capacity to OGT. Moreover, OGT was allowed to participate for the remaining 20 % of the capacity in open auction with other parties and if no third-party requests were present for the use of the pipeline, then OGT could make use of the full capacity of the OPAL pipeline.

It is against this decision that the Polish government initiated proceedings.

III. LEGAL ISSUES

1. PRECEDING ISSUES AT THE GENERAL COURT[5]

The Polish government has raised several arguments to defend its position before the General Court. However, the General Court only answered one of these arguments as the others were superfluous to the outcome of the case based on the answer of the first point of contention. The first argument presented by the Polish government hinged on the principle of solidarity enshrined in art. 194 TFEU read in conjunction with art. 36 of the Gas Directive. The main issue raised by Poland was that the granting of an exemption from third-party access requirements is only allowed if such an exemption enhances the competition in gas supply and security (Münchmeyer, 2021).

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in the Czech Republic or controlling more than 50 % of the gas arriving at Greifswald could bid for FZK capacities only at the base price, which was required to be set no higher than the average base price of regulated tariffs on transmission networks from the Gaspool area to the Czech Republic for comparable products in the same year.

5 Judgment of the General Court of 10 September 2019, *Poland v Commission*, T-883/16, EU:T:2019:567.

2. THE POINTS OF APPEAL BEFORE THE CJEU

Germany raised several grounds of appeal before the CJEU. Firstly, Germany argued that the principle of energy solidarity is merely *an abstract, purely political notion and not a legal criterion*.[6] As such, it has no binding effect.

The second argument presented by Germany states that the principle of energy solidarity is not applicable in the present case as this principle only entails a duty to assist in the event of a disaster or crisis.[7] Germany states that no such emergency event is present in the current circumstances.

The third argument raised by Germany focuses on a scenario where the principle of solidarity would be applicable and justiciable. In such an event, Germany states that the Commission did in fact take the principle of energy solidarity into account in its decision and assessed the consequences of said decision on the Polish gas market.[8]

Fourthly, Germany argues that there is no obligation for the Commission to explicitly mention the principle of energy solidarity in its decision.

IV. ASSESSMENT OF THE JUDGEMENT

1. PRECEDING PROCEDURAL ASPECTS

The CJEU predominantly follows the rationale presented by Advocate-General Campos Sanchez-Bordona,[9] who in his own right mainly concurs with the reasoning presented by the General Court in first instance.[10] Certain aspects presented by the Advocate-General have not been addressed by the Court of Justice.[11]

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6 OPAL case, para. 27.

7 OPAL case, para. 57.

8 OPAL case, para. 83.

9 Opinion of Advocate General Sánchez-Bordona delivered on 18 March 2021, *Federal Republic of Germany v. Republic of Poland*, 848/19, ECLI:EU:C:2021:218, (hereinafter, Opinion in OPAL).

10 Judgment of the General Court of 10 September 2019, *Republic of Poland v European Commission,* T-883/16, ECLI:EU:T:2019:567.

11 For example: the Court does not address the proposal of the Advocate-General for a limited judicial control (para. 114-116 of the OPAL opinion).

2. THE PRINCIPLE OF ENERGY SOLIDARITY AS A BINDING AND ACTIONABLE PRINCIPLE

2.1. The legal framework

2.2. Three aspects of solidarity

2.2.1. The applicability of the energy solidarity principle between the Member States and the European Union institutions

Firstly, the Court reiterates that the principle of solidarity is indeed applicable between the EU Member States, as is set out in art. 194, §1 TFEU. However, the CJEU also stresses the fact that the principle of energy solidarity is applicable to the European Union institutions.

The CJEU reaches this conclusion by linking the principle of energy solidarity with the principle of sincere cooperation stipulated in art. 4, (3) TEU. The principle of mutual cooperation entails that Member States as well as the European Union must "*assist each other in carrying out tasks which flow from the Treaties*".[12]

It has been established in previous case law that the principle of sincere cooperation is applicable in both the relationships between the Member States as well as the relationship between Member States and the European Union institutions:

> Furthermore, it should be noted that, under the principle of sincere cooperation enshrined in art. 4(3) TEU, the European Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which arise 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.[13]

The CJEU thus hinges the principle of energy solidarity on the principle of sincere cooperation. It argues that the principle of solidarity "underpins the entire legal system of the European Union".[14] The spirit of solidarity mentioned in art. 194 TFEU is considered as a specific expression of solidarity in

[12] OPAL case, para. 41.

[13] Judgment of the Court of 8 October 2020, *Union des industries de la protection des plantes v Premier ministre and Others*, C-514/19, EU:C:2020:803, para. 49.

[14] OPAL case, para. 41.

the field of energy law.[15] The CJEU infers that the principle of solidarity and the principle of sincere cooperation are closely linked to one another. What the Court does not do, is provide a clear reasoning as to why these two principles are linked to each other. Nevertheless, it is generally accepted that the principle of solidarity is enforceable through the principle of sincere cooperation laid down in art. 4, (3) TEU (Joppe, 2021).

2.2.2. The nature of the principle of energy solidarity

Secondly, the CJEU states that the principle of energy solidarity is indeed a binding and actionable principle. It bases its argumentation on the fact that the principle of solidarity had already been invoked in the past before the CJEU. More specifically the court depends on case law relating to asylum policy of the EU set out in art. 80 TFEU.[16]

The question remains whether the principle of solidarity as set out in art. 80 TFEU may be used as precedent to determine the binding nature of the principle of energy solidarity. The principle of solidarity does not have a clear-cut meaning. Its interpretation, meaning and value depend on the EU policy area in which it is applicable (Hippold, 2015). It also bears noticing that art. 80 TFEU makes a reference to the "principle of solidarity", whilst art. 194, (3) TFEU refers to the "spirit of solidarity".[17] In that aspect the CJEU seems to coincide the two terms. In my view, this approach seems to be the correct one, as splicing the nature of the solidarity depending on the wording used in the TFEU would be heavily focused on semantics rather than the rationale.

Consequently, the CJEU ruled that:

> It follows, in particular, that acts adopted by the EU institutions, including by the Commission under that policy, must be interpreted, and their legality assessed, in the light of the principle of energy solidarity.[18]

The CJEU clearly states that the principle of energy solidarity must therefore be taken into account. This needs to be done for the specific EU policy (here the EU energy policy). Consequently, the CJEU rules that the principle of energy solidarity is binding. In addition, it specifies that the principle of energy

[15] OPAL case, para. 38.
[16] OPAL case, para. 42.
[17] Art. 122 and 222 TFEU also refer to the "spirit of solidarity".
[18] OPAL case, para. 44.

solidarity "*constitutes a criterion for assessing the legality of measures adopted by the EU institutions*".[19]

2.2.3. The scope of the principle of solidarity

Thirdly, the CJEU focuses on the scope of the principle of energy solidarity. Defining the exact scope of a broad principle such as that of solidarity is no easy task. The first question is whether the principle of energy solidarity is limited to the security of supply requirement or if it is a broader principle encompassing other key components.

The Gas Directive mentions the principle of solidarity multiple times. In the present case art. 36 of the Gas Directive relating to new infrastructure is relevant. The article stipulates:

> 1. Major new gas infrastructure, i. e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of arts. 9, 32, 33 and 34 and art. 41(6), (8) and (10) under the following conditions:
>
> (a) the investment must enhance competition in gas supply and enhance security of supply; […].

Germany argues before the CJEU that art. 36 Gas Directive references the security of supply and that solidarity, in the view of the applicable legislation must be read as safeguarding the security of supply. The Court however is quick to dismiss the presented narrative. It states that the security of supply requirement is but one of the manifestations of the principle of energy solidarity.[20]

According to the CJEU the fact that art. 36 (1) of the Gas Directive only mentions the security of supply does not mean that in the present legislation the principle of energy solidarity is reduced to the security of supply. Art. 36 (1) does not limit the scope of the principle of energy solidarity in the Gas Directive to a mere security of supply, as the principle of energy solidarity governs the whole of EU energy policy.[21] By following this interpretation, the Court of Justice agrees with the reasoning of Advocate-General Sanchez-Bordona in his OPAL opinion.[22] It stems from the aforementioned

[19] OPAL case, para. 45.
[20] OPAL case, para. 47.
[21] OPAL case, para. 47.
[22] OPAL opinion, para. 76 and 104.

that the Commission must in fact take into account the principle of energy solidarity in conjunction with the principle of sincere cooperation when taking a decision based on art. 36 of the Gas Directive. Consequently, the Commission must assess if the gas supply of Member States is in danger when adopting a decision. This examination however does not entail an active role for the Member States. The Member States are not required to provide, out of their own volition and without being prompted to do so, information relating to the possible risk to the security to the supply of gas in that Member State. The Commission raised the argument that it indeed did not receive any such information from Poland.[23] In addition, the Commission inferred from this omission that it was justified to not take the principle of energy solidarity into account in said case. Nevertheless, the CJEU declared that the non-notification of information which has not been requested by the Commission does not liberate the Commission from the duty to apply the principle of energy solidarity and to investigate whether the decision taken under art. 36 of the Gas Directive could have a negative effect on the gas markets of the Member States.[24] The CJEU concludes by stating that *"the principle of energy solidarity requires that the EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole"*.

It must be noted that the Gas Directive did contain references to the notion of solidarity as well. In §21 of the preamble of the Gas Directive the following is stipulated:

> Fully effective separation of network activities from supply and production activities should apply throughout the Community to both Community and non-Community undertakings. To ensure that network activities and supply and production activities throughout the Community remain independent from each other, regulatory authorities should be empowered to refuse certification to transmission system operators that do not comply with the unbundling rules. To ensure the consistent application of those rules across the Community, the regulatory authorities should take utmost account of the Commission's opinion when the former take decisions on certification. To ensure, in addition, respect for the international obligations of the Community and solidarity and energy security within the Community, the Commission should have the right to give an opinion on certification in relation to a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries.

[23] OPAL case, para. 49.
[24] OPAL case, para. 51.

It stems from the preamble that energy security and solidarity are not one and the same as a clear distinction is made between the two. The Commission must take both into account. Therefore, in my opinion the CJEU decided correctly in judging that art. 36, (1) Gas Directive does not limit the scope of the principle of solidarity.

3. THE PRINCIPLE OF ENERGY SOLIDARITY, BEYOND A SOLIDARITY IN EMERGENCIES

In the present case, Germany raises the argument that the principle of energy solidarity is solely applicable in cases of emergency, as it is an emergency mechanism. This emergency mechanism is of such a nature that it entails an obligation of unconditional assistance or an unconditional loyalty. Germany is of the opinion that such an unconditional loyalty would lead to impasses on the European Union decision making as the views of the Member States differ and the reconciliation of all these views is rarely achieved.[25] Consequently, Germany states that in their opinion the principle of energy solidarity should be viewed as a duty to assist in the case of an emergency. This type of solidarity is also present in art. 222 TFEU.

The CJEU does not share this restrictive interpretation of the principle of energy solidarity. A clear distinction is made by the Court between the hypotheses in art. 222 TFEU and art. 194 TFEU. Whilst art. 222 TFEU is indeed an emergency mechanism and as such the spirit of solidarity only comes into play in emergency situations, art. 194 TFEU provides a spirit of solidarity in any action relating to the EU policy in the energy field. It is indeed, so that these two distinct articles cover different situations and have different objectives[26] as has been opined by Advocate-General Sanchez Bordona in his OPAL opinion.[27]

Art. 194 TFEU must be interpreted *"in the context of establishment and functioning of the internal market and in particular, the internal market in natural gas, by ensuring security of energy supply in the European Union*".[28] Therefore, unlike art. 222 TFEU, the spirit of solidarity entrenched in art. 194 TFEU means that Member States and EU institutions must not only act in cases of emergency but also in a preventative manner as to avoid emergency situations.

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25 OPAL case, para. 56.
26 OPAL case, para. 68.
27 OPAL opinion, para. 126 and 127.
28 OPAL case, para. 69.

In order to achieve this preventative effect an assessment of the risks on the energy interest (in particular the security of energy supply) of the European Union and Member States must be made. This idea has been presented by Advocate-General Sanchez-Bordona in his OPAL opinion.[29] The Court agrees with this reasoning. Once this analysis is made, a balancing act can be made between the interests of the different Member States as well as the European Union itself.

The CJEU agrees with the General Court and the Advocate-General that the principle of energy solidarity is a general obligation within the field of EU energy policy. This general obligation exists for the Member States as well as EU institutions and thus for the Commission. This general obligation entails that the interests of all the stakeholders that could be affected by a decision must be considered. The Member States and the European Union must therefore avoid adopting measures that might affect the interests of the stakeholders, as regards the security of supply itself, the economic or political viability of the security of supply and the diversification of the sources of supply. They must do so in order to take account of their interdependence and de facto solidarity. By adopting the reasoning of the General Court the CJEU created a solid definition of what the principle of energy solidarity within the context of art. 194 TFEU should be understood as. Nevertheless, the CJEU missed an opportunity to clarify the meaning of the principle of solidarity in the present case. Nonetheless, it provides an indication of its interpretation of the notion of solidarity by referencing the principle of sincere cooperation. More importantly, the CJEU does not provide specific criteria on how to interpret the principle of energy solidarity to create a coherent framework for further cases. Therefore, more case law detailing the exact requirements for the principle of energy solidarity will be needed.

In my view it may be argued that two types of solidarity have been created by the judgment. On the one had a solidarity based on a specific policy field such as art. 194 TFEU, which is an *ex ante* solidarity requiring a balancing act (Talus, 2021) between the interests of the Member States and the European Union. On the other hand, a solidarity, based on art. 222 TFEU which is an *ex post* solidarity requiring an unconditional loyalty in emergency situations such as terrorist attacks, natural disasters or man-made disasters.

[29] OPAL opinion, para. 116.

4. THE ASSESSMENT OF THE PRINCIPLE OF ENERGY SOLIDARITY: WAS IT DONE CORRECTLY AND MUST THE COMMISSION MENTION THE PRINCIPLE IN ITS DECISION

Germany is of the opinion that the Commission examined the principle of energy solidarity when making a decision relating to the exemptions granted to the pipeline. As such, the Commission also took account of the consequences of that decision for the Polish gas market.[30] The CJEU is not convinced by the arguments raised by Germany. It is in essence quite short in its response, stating that it does not review findings of a factual nature. However, the Court does elaborate on the matter. According to the CJEU the Commission did not examine the effects that the exemptions would have on the transfer from the Nord Stream I/Opal pipeline on the transport of natural gas through the Polish pipelines. Because the Commission did not examine those effects, it could not balance them against the increased security of supply at EU level granted by those exemptions.[31] The Commission only considered the interest of the EU in its decision (Krzykowski and Ziety, 2021).

Additionally, Germany reproaches the General Court that it reasoned that the Commission must mention in its decision that it has considered the principle of energy solidarity. The CJEU dismisses this argument. According to the CJEU, the General Court did not annul the decision because the Commission made no mention of the principle of energy solidarity. It did so because the Commission did not adequately examine the impact of the exemption. In the same vein, the CJEU found that the General Court did not annul the decision based on a failure to state reasons.

V. CONSEQUENCES OF THE DECISION

1. REINSTATEMENT OF THE 2009 DECISION

The judgment at hand annuls the 2016 decision. Consequently, the 2009 decision, and its effects, are reinstated. This means that the old decision which was deemed to breach the WTO rules[32] is now back in full effect.

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30 OPAL case, para. 83.

31 OPAL case, para. 90.

32 WTO Panel Report of 10 august 2018, European Union and its Member States - Certain Measures Relating to the Energy Sector, WT/DS476/R.

Russia argued that the two conditions[33] in the original (2009) decision effectively give rise to a quantitative restriction on the volume of imported gas. The WTO Panel found that those conditions cut competitive opportunities for the importation of natural gas into the European Union.

The Panel agreed and found the two conditions in the original (2009) decision, relating to the OPAL pipeline, to be incompatible with art. XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994.

The European Union is therefore in breach of WTO law due to the present judgment. An analysis of the whole situation, however interesting, fall outside the scope of the present annotation.

2. INFLUENCE ON THE CAPACITY OF PRESENT AND FUTURE PIPELINES

The case at hand will bring forward many changes. Not only will the case expand upon the legal questions, but it could also prove to have tangible effects for the supply of energy in Europe. It is clear that the present case is highly politicised (Talus, 2021: 1). This stems from the fact that energy solidarity, in all shapes and forms, has been addressed on the political level on multiple occasions (Roth, 2011: 600-625). Moreover, the rationale behind energy solidarity varies between the different Member States. The common theme throughout the Member States seems to be that they prefer to safeguard their national issues relating to energy aspects rather than work together on European level (Tomaszewski, 2018: 5-18).

The direct consequence of the judgment is that the extra capacity provided by the 2016 Commission decision for the use of the OPAL pipeline by OGT will no longer be applicable. Consequently, OGT will not be able to export as much natural gas to the European Union via the OPAL and the Nordstream I pipeline. Should the OPAL decision be understood in a broad manner and also be deemed applicable for other pipelines, Gazprom might lose some access to other pipelines, such as for example the EUGAL pipeline (Stein, 2019). Nevertheless, the OPAL capacity restriction would have no immediate effect on the utilization level of the Nordstream I pipeline. The gas would at the present state continue to flow through the first string of EUGAL. The limited capacity would become a hindrance once Nordstream II is completed and operational. When Nordstream II is completed both

[33] That is to say the 50 % capacity cap (which limits the allocation of transmission capacity to Gazprom and its affiliated undertakings), and the gas release programme compelling Gazprom and its affiliated undertakings to transfer 3 billion cubic metres of gas a year in order to exceed that cap.

strings of EUGAL will be needed to transport the gas from Nordstream II (Łoskot-Strachota, Formuszewicz and Kardaś, 2021). Consequently, the decision might have serious implications not only for the OPAL pipeline but also possibly for the Nordstream II pipeline and other pipelines.

As stated above the present judgment will limit the use of the OPAL pipeline by OGT back to 50% rather than the amount stipulated in the 2016 decision. Therefore, the question at hand is: will the new Nordstream II pipeline be able to utilize its full capacity? Firstly, due to the OPAL case future exemptions under art. 36 of the Gas Directive for different pipelines must also take into account the principle of energy solidarity. Art. 36 of the Gas Directive provides rules relating to competition issues as well as to the energy supply security. The rules will be harder to satisfy due to the use of the principle of energy solidarity. Secondly, it will also prove more difficult to obtain the certification described in art. 11 of the Gas Directive. For example, the criterion in subsection 3, (b) of art. 11 of the Gas Directive relating to the energy supply security will be harder to fulfil in light of the principle of energy solidarity (Riley, 2019).

3. *DIVIDE ET IMPERA,* NOW MORE CONTAINED?

More tangibly, certain implications and consequences will arise for Gazprom. As the name of the principle of solidarity suggests, the European Union Member States must now be more vigilant to take the needs of fellow Member States into account. This means that Gazprom will no longer be able to single out an individual member state to conclude a favourable agreement with it which could be detrimental to another Member State. In essence, it will be harder for Gazprom to use one Member State as leverage against another, which Gazprom has historically taken advantage of (Georgiou, 2016: 428-442). The flip side of the coin is that some of the agreements which could be very beneficial for certain individual Member States can no longer be concluded.

4. THE GENESIS OF THE ENERGY SOLIDARITY PRINCIPLE AND POLAND AS ITS DRIVING FORCE

Finally, Poland has achieved a legal foot in the right direction concerning the principle of energy solidarity. Whilst it is true that many questions still remain open and up to interpretation, the first step has already been made (Andoura, 2014). The energy solidarity principle has now become more than a mere political engagement driven by Poland.

The OPAL case is just a first in many to come. There are a number of cases pending before the CJEU which could prove to be instrumental in the further development of the energy solidarity principle (Faszcza, 2020: 90-99). An interesting journey still lies ahead.

5. HOW FAR DOES THE PRINCIPLE OF ENERGY SOLIDARITY STRETCH?

Another interesting consequence of the judgments will be its influence on other fields of law (Boute, 2020: 899). For example, the field of environmental law in the European Union and the decarbonisation efforts of the European Union. In this field the principle of solidarity could also play an important role. As interesting as this topic is, it falls outside the scope of an annotation of the present judgment.

VI. CONCLUSION

The principle of energy solidarity has grown and evolved into a full-fledged binding an actionable principle because of the present case law. Some of the finer details still need to be ironed out, but the evolution of the principle of energy solidarity is heading in the right direction. More well-defined criteria on how to correctly assess the principle of energy solidarity are welcome.

The effort of Poland to create a more harmonious and coherent EU energy policy is commendable. The EU as a whole would be in a much stronger position if it would make decisions considering the interests of all Member States as well as the EU institutions in the light of the principle of solidarity.

The road ahead is still long, but the foundations have been laid, to create a more coherent and inclusive EU energy policy. After all, solidarity is one of the key principles and a fundamental value of the European Union.

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