

Reassessing EU Energy Solidarity: Legal Implications and Challenges in the Aftermath of the CJEU's Final Decision in the OPAL Case C-848/19 P

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Summary: The CJEU's final ruling in the OPAL case underscores the evolution of the solidarity principle from a political guideline to an autonomous legal tenet, significantly impacting Member States' energy decisions. This paper critically examines the legal implications and challenges arising from the reinterpretation of the energy solidarity principle in the OPAL case, which concluded in the summer of 2021. Focused on Article 194 TFEU, the research delves into the question of balance between EU and Member States' authority in energy policymaking, especially amidst divergent views on external energy relations with Russia. Against the backdrop of geopolitical shifts and responses to the 2022 Russian invasion of Ukraine, this study sheds light on the legal repercussions for the Member States' energy decisions in the aftermath of the OPAL case, exploring nuanced challenges in fostering a cohesive energy policy within the EU.

Keywords: European Union, energy solidarity, OPAL case, legal implications, Member States, energy policy, geopolitical shifts, EU integration.

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1. Introduction

Energy has been considered one of the main elements of the European integration idea since the early efforts in the 1950s.¹ However, it was the Lisbon Treaty that addressed the EU's energy policy explicitly for the first time when it came into force in 2009. Under the structure of competencies established by Article 5 of the Treaty on the European Union (TEU) and Article 4 of the Treaty on the Functioning of the European Union (TFEU), the energy field is not altogether determined at the EU level but remains a shared competence. While Article 194 TFEU establishes that the Union's energy policy shall pursue, *inter alia*, energy security for the EU in a "spirit of solidarity between the Member States", paragraph (2) reserved for them the "conditions for exploiting its energy resources", and the "choice between different energy sources and the general structure of its energy supply". Therefore, the authority for energy policymaking remained with the Member States to a significant extent.

Given that the EU is a net energy importer, by recognising the right of MSs to choose their energy mix, Article 194 (2) endowed the Member States with the authority to regulate their external energy relations, and more specifically, gas relations. After the two gas conflicts between Russia and Ukraine in 2006 and 2009, it was not surprising to see differences of opinion among EU member states about the Union's external energy relations with Russia, even though they had to some extent agreed on a common internal energy policy. While some Central and Eastern European States (CEES), headed by Poland, urged for reducing dependence upon Russia, Germany sought to continue and even deepen gas relations with that supplier.² Despite relying on the authority of the Commission, CEEA's efforts to persuade Germany to halt the Nord Stream II project proved unsuccessful as Germany could always justify its plans based on MSs' rights Article 194 (2)³.

At the same time, to decrease the presence of Russian gas in the EU market, Poland aimed to overturn the European Commission's decision to give Gazprom 80% access to the OPAL pipeline, an extension of that time working Nord Stream

¹ TALUS, K, AALTO, P. Competences in EU energy policy. In: R. Leal-Arcas & J. Wouters (eds.) *Research Handbook on EU Energy Law and Policy*. Cheltenham, UK. Northampton, MA. USA: Edward Elgar, 2017, pp. 15–29.

² SIDDI, M. German foreign policy towards Russia in the aftermath of the Ukraine crisis: A new Ostpolitik? *Europe-Asia Studies*. 2016. vol. 68, pp. 665–677.

³ Yafimava has given a detailed description of these efforts: YAFIMAVA, K. *The Council Legal Service's assessment of the European Commission's negotiating mandate and what it means for Nord Stream 2*. [online]. Available at: <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/10/The-Council-Legal-Services-assessment-of-the-European-Commissions-negotiating-mandate-and-what-it-means-for-Nord-Stream-2.pdf>>

I pipeline, located in Germany. At the General Court (GC) of the Court of Justice of the European Union (ECJ), Poland argued that by granting such access to Gazprom, the EC had breached the EU's energy solidarity principle and its energy security, and its decision should be revoked.

It took four years for the ECJ to make its final decision in the OPAL case. In the summer of 2021, it ruled that the Commission had indeed breached the Union's energy security and endangered solidarity among the Members. In view of the decision, the solidarity principle, previously perceived as a general political principle enshrined in primary law to guide EU policymaking, was now recognized as having an additional autonomous legal nature under the TFEU.⁴ In the energy field, solidarity, as expressed in Article 194 TFEU, takes the form of the *energy solidarity principle*⁵, which according to the ECJ, applies to all energy objectives laid therein, including the renewable energy development and energy efficiency promotion that underpin the energy transition. The scope of the principle has also been expanded to apply equally to EU institutions rather than just to the Member States, all of which have to consider solidarity in their horizontal and vertical relations when they exercise their multilevel energy policymaking competencies in the light of Article 194(1) TFEU.⁶

The decisions pertaining to the OPAL, particularly the aspects concerning the emergence and interpretation of the solidarity principle, elicited tumultuous reactions within the scholarly community, fostering extensive discussions and substantial criticism directed at the ECJ.⁷ Despite the fervent debate following each update on the case, the prevailing consensus unequivocally converges on one key point: the final decision in the OPAL case does not appear to provide comprehensive clarity regarding the future application of this principle within

⁴ BOUTE, A. The Principle of Solidarity and the Geopolitics of Energy: Poland v. Commission (OPAL pipeline), *Common Market Law Review*. 2020, vol. 57, pp. 898–914

⁵ In the OPAL cases, despite the judgements' reference to Article 4(3) TEU to define the general principle as entailing a legal obligation (paras 69 and 41, respectively), given that it was interpreted in relation to a provision that expressly refers to solidarity, it is unclear whether it will have the force of a legal obligation when applied to sectors where solidarity is not mentioned, as is the case of EU environmental law. It is noteworthy, nonetheless, that even before the OPAL saga, a growing number of literary accounts had observed and defended the recognition of a more important role for solidarity, in the light of the increasing issues of a collective nature and their corresponding demand for collective action, see e.g. TURKSEN, U. *EU energy relations with Russia: Solidarity and the rule of law*. 1st Edition, London: Routledge, pp 17–19.

⁶ BUSCHLE, D. Energy Solidarity: approaching a new constitutional principle. *European Energy Environment*. 2021, vol. 10, no. 3, pp. 66–70.

⁷ Id; IAKOVENKO, M. 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: Judgment of the Court (Grand Chamber) of 15 July 2021, C-848/19 P, Germany v Poland, ECLI: EU: C: 2021: 598. *J. World Energy Law Bus.* 2021, vol. 14, no. 6, pp. 436–446.

the EU energy sector. This ambiguity assumes heightened significance when contextualized within the geopolitical landscape and its implications for the development of EU energy law, a matter of paramount concern in general and nowadays in particular.

It is widely acknowledged that Russia has strategically wielded energy as a potent geopolitical tool for several decades, seeking to weaponize it and enhance its influence within the EU by fostering dependency among Member States on Russian energy resources.⁸ The Russian invasion of Ukraine in 2022 became one of the apogees of the Russian attempts to destabilise Member States through its dominance in the EU energy market by manipulation of the markets through intentional disruptions of gas flows leading to skyrocketing energy prices in the Union, not only endangering the economy in the Union but also seriously threatening the security of supply⁹ which became a serious challenge for the EU in the attempts to maintain its energy security and security overall as well as a challenge for the Member States' solidarity.¹⁰

The European Union responded to this crisis by committing to sever dependence on Russian energy resources¹¹ by completely phasing out the fossil fuels imported from Russia by 2027.¹² However, not all EU Member States align with this stance; Hungary, for instance, opted to extend its energy contracts with Moscow¹³, diverging from the broader EU initiative to reduce energy ties with

⁸ See: RAPAĆ, S., NOVAKOVIĆ, M. *Dependence of EU energy market on Russian oil and gas*. Institute of International Politics and Economics, 2013, pp. 83–95; KOVAČOVSKÁ, L. European Union's Energy (In) security – *Dependence on Russia*, Obrana a strategije, 2007, vol. 7, no. 2, pp. 5–21; HOSSEINI, S. E. Transition away from fossil fuels toward renewables: lessons from Russia-Ukraine crisis. *Future Energy*. 2022, vol. 1, no. 1, pp. 2–5.

⁹ Regulation: Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, para 1. [online] Available at: <https://eur-lex.europa.eu/eli/reg/2022/2577/oj>

¹⁰ HUHTA, K., REINS, L. Foster Collaboration in European Union Legal Principles and Implement Them within the Energy Industry. *International & Comparative Law Quarterly*. 2023, vol. 72, no 3, pp. 771–791.

¹¹ Supra note 9, para 10; Also see: Communication from the Commission Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, REPowerEU Plan, 2022. [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A230%3AFIN>

¹² KARDAS, S. *Keeping the lights on: The EU's energy relationships since Russia's invasion of Ukraine*. [online].

Available at: <https://ecfr.eu/wp-content/uploads/2023/05/Keeping-the-lights-on-The-EUs-energy-relationships-since-Russias-invasion-of-Ukraine-01.pdf>

¹³ See: SPIKE, J. *Hungary forces new energy deals with Russia amid Ukraine war*. [online] Available at: <https://apnews.com/article/hungary-makes-new-energy-agreement-russia-c069d83bc748cb820c3958bbeef13f17>; SZÓKE, E. *Hungary strikes deal with Gazprom to ramp up gas*

Russia. In this complex reality, the OPAL case decision, assertedly promoting the harmonization of the EU's energy policies and advocating for states to act in the spirit of solidarity, assumes new dimensions and contexts, provoking inquiries into the extent to which the principle of solidarity permits intervention in states' energy decisions. This prompts an exploration of whether the court's interpretation can function as a legal instrument allowing the Commission and Member States to intrude into each other's energy policies under the guise of preserving solidarity.

Driven by the backdrop of evolving EU geopolitical realities, this study aims to critically evaluate the repercussions of the ECJ's interpretation of the energy solidarity principle in the OPAL case on Member States' energy decisions.

The structure of the paper is delineated as follows: after elaboration on the factual background of the case, it provides a legal analysis of the OPAL Saga and assesses the legal repercussions of the new interpretation of the concept of solidarity in part three. Part four addresses the possibilities of applying the solidarity principle established under Article 194(1) to states' energy decisions, considering the implications of Article 194(2). Finally, part five draws conclusions and offers recommendations regarding the challenges and opportunities for a genuinely common energy policy in the EU.

2. The OPAL Saga Overview

2.1. Procedural background surrounding the exemption grant

The OPAL saga is intricately tied to the exemption decision made by the German national regulatory authority in 2009 under the Internal Gas Market Directive, subsequently endorsed by the Commission. The core idea of the exemption procedure lies in providing the major new investments with a defined grace period exempt from the common requirements of third-party access, unbundling, and tariff regulation, aiming to enhance competition and gas supply security.¹⁴ The requirements for the investments in question, in turn, include enhancing the competition and security of gas supply to the extent that would not be achieved without such an exemption pursuing an overreaching to incentivize the investments, which are often accompanied by a certain degree of reluctance due to

deliveries. [online] Available at: <<https://ceenergynews.com/oil-gas/hungary-strikes-deal-with-gazprom-to-ramp-up-gas-deliveries/>>

¹⁴ Supra note 4 at p. 892.

the non-discrimination principle¹⁵ with regard to the right of access underlying the EU gas market.¹⁶

Germany's 2009 exemption, particularly for Russian Gazprom and German energy company RWE, intended for 22 years, garnered Commission approval with conditions aimed to restrict dominant players, like Gazprom and RWE, from reserving over 50% of OPAL pipeline capacities at the Czech border in a single year, preventing market dominance from Gazprom's contracts with RWE. To exceed the 50% limit, dominant entities had to transparently offer gas for sale, ensuring open access. Gazprom's non-compliance in this regard capped OPAL pipeline use at 50%, reducing Russian gas transported through Nord Stream and impacting EU energy security and Russian gas export route diversification.¹⁷

In 2016, the German regulator sought to enhance pipeline utilization by proposing a shift from restricting access to a dominant gas supplier to offering at least 50% of the pipeline's capacity through auctions.¹⁸ This innovative approach arguably aimed not only to boost OPAL's usage, indirectly influencing the import of Russian gas through Nord Stream but also to stimulate competition in the Czech market.¹⁹

Commission approval of the exemption decision faced strong opposition from Eastern and Central European states, including Poland. Their objections centered on energy supply security concerns, particularly the anticipated redirection of a significant portion of gas from Ukraine and Poland to Nord Stream/OPAL, which raised transport costs for Poland, challenging gas supply via the existing route and jeopardizing energy security in the southeast and arguably contradicted efforts to diversify gas supply routes.²⁰

To counteract this perceived threat, Poland and Polish gas company, Polskie Górnictwo Naftowe i Gazownictwo SA (PGNiG) pursued legal action before the General Court to annul the Commission's decision, seeking interim relief

¹⁵ See: Articles 13 (2) (c), 32 and 33 of the 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. [online] Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0073-20220623>>

¹⁶ Supra, note 4, at p. 893; Also see: TALUS, K. *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts, and EU Competition Law*. Alphen aan den Rijn: Wolters Kluwer, 2011, p. 18.

¹⁷ Republic of Poland v European Commission. Judgment of the General Court (First Chamber, Extended Composition), 10 September 2019. Case T-883/16. [online] Available at: <<https://curia.europa.eu/juris/liste.jsf?language=en&num=T-883/16>>

¹⁸ Id, para 13–14.

¹⁹ See, for instance: SZYDLO, M. Disputes Over the Pipelines Importing Russian Gas to the EU: How to Ensure Consistency in EU Energy Law and Policy?, *Baltic Journal of Law & Politics*. vol. 11, no. 2, 2018, pp. 95–126.

²⁰ Supra note 17, paras. 50–52.

due to potential harm to Polish energy security. The decision, allowing Gazprom almost exclusive use of OPAL for 15 years, was seen as transformative for the Polish gas distribution market. Poland's application underwent examination in 2019, resulting in the General Court's annulment of the Commission's decision in September 2019.

2.2. The General Court

Poland's challenge to the 2016 Commission decision, originally comprised of 6 pleas, rests on two main arguments: the energy security condition of the Directive and the principle of energy solidarity under the TFEU.

Within its first argument, Poland contended that the Commission had breached the energy security condition of the Internal Gas Market Directive by allowing gas flows to be redirected away from the Ukraine route, thereby weakening Poland's gas supply security.²¹ The GC rejected Poland's argument, emphasizing that the 2016 decision did not grant a new exemption but varied existing conditions. The GC clarified that the Commission's role was a review, and the original (2009) and contested (2016) decisions were independent.²² The conditions imposed in 2016 did not alter the OPAL pipeline as an infrastructure, and the assessment of energy security pertained to 2009, when the exemption was initially authorized.²³

Within its second plea, Poland had argued that the Commission's decision violated the principle of energy solidarity under Article 194(1) TFEU by compromising its energy security.²⁴ The essence of the argument derived from an interpretation resulting in a consideration that the principle mandates both Member States and EU institutions to pursue EU energy policy objectives collaboratively. In turn, the actions which jeopardize the energy security of specific Member States run counter to this principle. Therefore, Poland contended that the Commission's approval of increased gas imports via the OPAL/Nord Stream pipeline did not align with the spirit of solidarity, as it restricted and potentially obstructed the utilization of alternative pipelines crucial for Polish energy security.²⁵

Rejecting Commission contentions categorising energy solidarity as a "political notion" and instrument limited to crises, the General Court upheld Poland's second plea, affirming the binding nature of the principle of energy solidarity, emphasizing a general obligation of both the Member States and the EU to

²¹ Ibid.

²² Supra note 17, para. 57.

²³ Ibid.

²⁴ Supra note 17, paras. 61–64.

²⁵ Ibid.

consider each other's interests, particularly in the energy sector, where measures must be taken to avoid adversely affecting the energy security interests of other stakeholders.²⁶ Consequently, the Commission's failure to evaluate the impact of the new OPAL conditions on Poland's energy interests and weigh those interests against the benefits of the OPAL in the balancing test was declared to be a violation of the solidarity principle.

2.3. The European Court of Justice

Dissatisfied with the decision, Germany approached the ECJ, seeking to overturn the ruling and presented several grounds for appeal. Within its first plea, Germany contended once again that the principle of energy solidarity holds the status of an abstract, purely political notion, lacking legally binding effect and, thus, does not carry legal obligations as such.²⁷

The second argument put forth by Germany asserted that the principle of energy solidarity does not apply in the given context of the Member States' decisions and disagreements derived from those decisions, emphasizing its relevance only in cases of disasters or crises.²⁸ Following those stipulations, the absence of such emergency circumstances renders the principle inapplicable.

The third plea revolved around a hypothetical scenario where the principle of solidarity would be applicable and justiciable. In this situation, Germany claimed that the Commission did, in fact, consider the principle of energy solidarity in its decision-making process, evaluating the implications of the decision on the Polish gas market.²⁹

Lastly, Germany posited that there exists no mandatory requirement for the Commission to explicitly mention the principle of energy solidarity in its decision, forming the fourth argument in its appeal.³⁰

All of the German pleas were dismissed. In addressing the aspect pertaining to the "political nature" of the principle, the Court reaffirmed the General Chamber's stipulations, providing a more in-depth interpretation of the principle's nature by drawing comparisons with the principle of *sincere cooperation* and expounding on the principle's applicability to relationships between states and institutions, emphasizing its versatility in this regard.³¹ It was further contended that the legitimacy and efficacy of the energy solidarity principle could be discerned

²⁶ Supra note 17, paras. 69–76.

²⁷ Supra note 17, para. 27.

²⁸ Supra note 17, paras. 56–57.

²⁹ Supra note 17, para. 83.

³⁰ Supra note 17, para. 92.

³¹ Supra note 17, paras. 41–51.

from its historical application, particularly in the context of asylum matters under Article 80 TFEU, along with its explicit reference in Article 194(3) TFEU.³²

Moreover, the ECJ clarified that constraining the principle of energy solidarity solely to the security of supply concerns is unwarranted and unreasonable. While acknowledging that the security of supply is one manifestation of the principle³³, it emphasized the broader scope of energy solidarity.

In addition to the aforementioned points, the Court further extended its elaboration on what constitutes compliance with the principle of energy solidarity, by delineating the responsibilities of the actors involved. In particular, it becomes evident that the initiators of the energy decision with potential encroach on other Member States' and institutions' interests bear all the responsibility for carefully proactively analyzing the potential repercussions, and may not justify the lack of action by the inaction or the absence of objections from the actors, whose interest may be affected.³⁴ Furthermore, the Court asserted that explicit reference to the principle is imperative, manifestly refuting Germany's argument that the Commission had adequately considered the energy implications for Poland's energy security.

3. Discussion

The OPAL case court assessment suggests that Member States have the authority to invoke the energy solidarity principle to counter decisions that undermine the energy security objectives of Member States and the European Union. However, in procedural terms, the exercise principle necessitates not the establishment of measures to safeguard specific Member States' interests as such, but rather a balancing act—a solidarity test. This test requires a Member State or EU institution to rigorously evaluate its proposed measures and policies for conflicts with the interests of other Member States or the common objectives of the Union.³⁵ When conflicts arise, due consideration must be given to these interests. Hence, it is crucial to emphasize that the principle of energy solidarity entails an obligation of conduct rather than the one of result, as it may be evident from the fact that the Court of Justice convicted the Commission and Germany, not for their lapse in preventing negative impacts on Poland's energy security, but for their failure

³² Ibid.

³³ Ibid.

³⁴ Republic of Poland v Germany. Judgment of the Court (Grand Chamber), 15 July 2021. C-848/19 P, [online], Available at: <<https://curia.europa.eu/juris/liste.jsf?num=C-848/19>>, paras 97-98

³⁵ Supra note 20, paras. 74–77; BUSCHLE, D.; TALUS, K. One for all and all for one?: the general court ruling in the OPAL case, *Oil, gas & energy law intelligence*. 2019, vol. 17, no. 5, pp. 1–5.

to **assess** whether there were risks to the energy interests of the Member States and the European Union, particularly concerning the security of energy supply.³⁶

This logical progression naturally directs our attention toward a contemplation of the solidarity principle in the context of a tightly defined procedural criterion,³⁷ as opposed to the broader conceptualization typically associated with principles within the framework of EU law. This criterion essentially mandates two critical elements: firstly, the consideration of the repercussions of an energy-related decision concerning conflicting interests among Member States and European Union policy objectives,³⁸ and secondly, the explicit reference to the solidarity principle to substantiate that the assessment adhered to the principles of energy solidarity.³⁹

The procedural and inherently purely formal nature of the solidarity principle is further underscored by the court's observation that despite the significance of solidarity and balance manifested by the guidance to "avoid the adoption of measures that might affect other Members States or the EU interests"⁴⁰, the principle of energy solidarity "does not imply that EU energy policy must never, under any circumstances, adversely affect the specific interests of a Member State in that domain."⁴¹ This unequivocal stance prompts us to view the solidarity principle as a procedural criterion endowed with disproportionate influence. While the principle of energy solidarity may lack the legal authority to shape energy decisions directly, considering the wide interpretation, it can potentially provide a platform for countries to challenge, and, as demonstrated in the OPAL case, even annul the energy decisions of other countries on bureaucratic grounds. Kehoe and Hancher rightly warn about the far-reaching consequences for energy governance and the potential jeopardizing of the achievement of Union-wide targets which such an approach may provoke.⁴²

Simultaneously, while the aspiration of embedding solidarity within Member States' energy decisions appears commendable, the principle, in reality, introduces ambiguity and substantial uncertainty into the current energy decision-making process.⁴³ The solidarity principle mandates an assessment of the decision's impact on the gas market and the interests of the "member state liable to be

³⁶ Supra note 34, para. 69.

³⁷ Supra note 4, p. 912.

³⁸ Supra note 17, para. 77.

³⁹ Supra note 17, para. 79.

⁴⁰ Supra note 17, para. 73.

⁴¹ Supra note 17, para. 77.

⁴² NOUCER, A., KEHOE, A. M., NYSTEN, J., FOUQUET, D., HANCHER, L., MEEUS, L. [online] Available at: <<https://hdl.handle.net/1814/68899>>

⁴³ RYŚ, M. D. The principle of energy solidarity clarified: a certain way to uncertainty. *Revista de Derecho Comunitario Europeo*. 2022, vol. 26, no. 71, pp. 149–167.

affected”.⁴⁴ However, a conspicuous absence of criteria for defining the affected states renders this requirement practically unenforceable, particularly within the context of a highly integrated EU energy market, where the energy systems possess a considerable degree of interrelation and interdependence. Does this interdependence, thus, under the principle of energy solidarity inevitably grant the Member States an authority to intrude into the other Member States’ energy decisions?⁴⁵ And if the answer is positive, how and where is the line drawn between this authority and the Member States’ rights to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply guaranteed by the Article 194(2) TFEU?⁴⁶

The principle, introduces ambiguity and substantial uncertainty into the current energy decision-making process in essence, as rightly noted by Talus, potentially opening a Pandora’s box of new interpretations.⁴⁷ The requirement to assess the “interests of other Member States” combined with a fear of regulatory repercussions places an onerous burden and “regulatory fear” on the Member States initiating any changes in energy supply, in essence, promoting nothing, but inaction.

The abovementioned is further aggravated by the lack of a procedure for Member States to contribute to the process of the “risk for the interests” considerations, which places the entirety of the responsibility of the assessment on the Commission. This conclusion naturally stems from the fact that the Court did not deem the Commission’s consideration with regard to the submission of written comments by the Republic of Poland as sufficient to meet the criteria of “an examination of the impact ... on the security of supply in the Polish gas market.”⁴⁸ Instead, it imposed an excessively specific requirement on the Commission to examine the “medium-term consequences” independently.⁴⁹

This distribution of responsibilities further erodes certainty within the procedure, as the definitions of “interest” and “policy” for affected states are solely and entirely at the discretion of the Commission. Inevitably, this raises concerns about the repercussions of an inadequate assessment of a Member State’s policy objectives by the Commission. Given the facts of the case, where Germany

⁴⁴ Supra note 34, para 51.

⁴⁵ TALUS, K. Interpretation of the principle of energy solidarity: A critical comment on the opinion of the Advocate General in OPAL. [online] Available at: < <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2021/04/Insight-89-The-interpretation-of-the-principle-of-energy-solidarity-.pdf>>

⁴⁶ Supra note 42 at p. 24; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Article 194(2).

⁴⁷ Supra note 1 at p. 5.

⁴⁸ Supra note 34, para. 81, 97–98

⁴⁹ Supra note 34, para. 82.

attempted to challenge the decision by arguing that the operations of the OPAL pipeline by Russia, in fact, aligned with the energy policy of the Republic of Poland,⁵⁰ it is evident that disputes over the interpretation of “interests” and “policy,” which lack clear definitions, are as an inevitable outcome persistent issue capable of causing significant harm to the consistency and coherence of the procedure. The scrutiny of factual elements within the case is entirely entrusted to the Commission’s discretion, and it remains uncertain whether the consideration of “incorrect” facts or an incorrectly held balancing procedure could lead to a judicial review of the decision on the grounds of a presumed violation of the solidarity principle.⁵¹

The next pressing issue pertains to the criteria governing the balancing test itself. While it is evident that the solidarity principle lacks the proactive capacity to prevent adverse impacts on EU Member States, the question of whether neglect of the EU interest for the sake of Member States’ energy interests may potentially fall within the definition of balance. While the interpretation of energy solidarity in this regard is yet to be received, the general considerations of solidarity within the EU practice, as Iakovenko suggests, imply the solidarity principle cannot be utilized to prioritize the interests of the particular Member State without reference to the overall common goals of the EU.⁵² In this regard, when balancing the conflicting interests of two Member States, the considerations of the repercussions of the energy decisions for the EU energy policy may become decisive.

Thus, the balancing test is aggravated by the challenge of ambiguity, and the lack of criteria compounded by the absence of a legally binding EU definition for the components of the EU energy policy, in particular, of the concept of energy security, either within or outside EU documents. This issue is particularly pertinent because the OPAL case addressed the solidarity principle in the context of the security of the energy supply. Despite the complexities surrounding the OPAL cases, the Court assigned greater weight to solidarity, potentially influencing the Commission’s future interpretation of the concept. However, in the absence of a shared EU definition of energy security, solidarity may lead to divergent outcomes.⁵³ The principle clearly requires a clear definition of its scope and of

⁵⁰ Supra note 34, para. 79. Also see: Supra note 10, pp.442–443.

⁵¹ Supra note 4, p. 898.

⁵² IAKOVENKO, M. A need for clarification of the energy solidarity principle: what can be learned from the General Court’s judgment in the OPAL case?, *The Journal of World Energy Law & Business*. 2021, vol. 14, no. 1, pp. 38–48; Also see Alexios Anagnostakis v European Commission. Judgment of the Court (Grand Chamber), 12 September 2017. C-589/15 P. [online] Available at: <<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-589/15>>

⁵³ Supra, note 1 at p. 17.

the threshold for the balancing of interests so that it can serve as a “benchmark” in the assessment of individual interests and EU common goals.⁵⁴

Furthermore, the concept of energy policy and its principles, despite their establishment and elaboration, remain highly contextual and susceptible to interpretation.⁵⁵ They appear inseparable from the prevailing political realities, particularly when intertwined with the European Strategy goals, such as the security of supply.⁵⁶ This is evident when examining the latest Commission assessments concerning security of supply in decisions similar to OPAL, which are closely associated with and manifestly refer to the geopolitical context, by, for instance, emphasising the unreliability of Russia as an energy supplier based on the fact of the Russian invasion of Ukraine, and the objectives of policies like RePowerEU.⁵⁷ The interconnectivity of the highly interpretative political events inherently politicises the concept of energy solidarity assessed in conjunction with the objective of the security of supply. The latter implies that in the context of the possibility of judicial review, the court may have to bear the interpretation of political aspects and rule of their impacts on the country’s energy decisions.

Speculating in terms of the broader EU context, even more questions remain open. For instance, it is not clear how does the solidarity principle applies in areas other than the security of supply and whether the weight of this principle is similar in other areas of energy policy.⁵⁸

The same concerns the question of the implications the requirement of balancing the interest may have on the Member States and EU decisions in environmental and sustainability areas, where conflicts with other Member States’ energy interests or security arise⁵⁹. During the summer of 2023, Poland initiated legal proceedings against the European Parliament and the Council of the European Union, seeking the annulment of numerous legal instruments, including directives and regulations

⁵⁴ IAKOVENKO, M. *supra* note 7, at p. 40.

⁵⁵ *Supra*, note 1 at p. 17.

⁵⁶ *Ibid.*

⁵⁷ Decision: Commission Decision of 20.12.2022 on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal bid.in Lubmin (Germany) from certain provisions of Directive 2009/73/EC pursuant to Article 36 of that Directive. [online] Available at: <https://energy.ec.europa.eu/system/files/2023-06/2023_german_lng_decision_en.pdf>

⁵⁸ *Supra* note 35, BUSCHLE, D., TALUS, K.

⁵⁹ Palle has discussed the case of how Germany’s decision to develop its wind energy capacity in the early 2010s threatened the stability of the power network, and therefore, the energy security in Poland and the Czech Republic even though it was not considered by Germany prior to implementation. Such a case may happen in other renewable development projects in the future. See: PALLE, A. *Regional dimension to Europe’s energy integration*. [online] Available at: <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2013/11/SP-29.pdf>

associated with the European Green Deal.⁶⁰ Central to these legal actions was the contention that the adoption and/or amendment of these instruments occurred without due consideration for the interests of the Member States, including Poland.⁶¹ The argument posited that this lack of consideration and the failure to appropriately weigh Member States' interests against those of the European Union constituted a violation of Article 194(1) of the Treaty on the Functioning of the European Union (TFEU), specifically, the principle of energy solidarity.

4. Prognosing OPAL's impact on the Member States' ability to make their own energy decisions

As delineated in the preceding chapter, the boundaries of the application of energy solidarity principles remain considerably ambiguous. While the responsibility for conducting the balancing test is explicitly assigned to EU bodies, the Court introduces a legal instrument perspective to the principle, asserting that Member States' conduct is also implicated:

“Thus, the EU institutions **and the Member States** must take into account the principle of energy solidarity, referred to in Article 194 TFEU, in the context of the establishment and functioning of the internal market and, in particular, the internal market in natural gas, by ensuring security of energy supply in

⁶⁰ In particular, Directive: Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system; Regulation: Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999; Decision: Decision (EU) 2023/852 of the European Parliament and of the Council of 19 April 2023 amending Decision (EU) 2015/1814 as regards the number of allowances to be placed in the market stability reserve for the Union greenhouse gas emission trading system until 2030; Regulation: Regulation (EU) 2023/851 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2019/631 as regards strengthening the CO₂ emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition;

⁶¹ See: Action brought on 8 August 2023 – Republic of Poland v European Parliament and Council of the European Union, Case C-505/23; Action brought on 18 July 2023 – Republic of Poland v European Parliament and Council of the European Union, Case C-451/23; Action brought on 17 July 2023 – Republic of Poland v European Parliament and Council of the European Union, Case C-445/23; Action brought on 17 July 2023 – Republic of Poland v European Parliament and Council of the European Union, Case C-444/23.

the European Union, which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations.”⁶²

However, there is an evident lack of clarity on how the principle is to be applied concerning the internal energy decisions of Member States, and it shall be balanced with the rights granted to each Member State by Article 194(2) TFEU, in particular, the right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. One of the aspects of the OPAL decision and the emergence of the principle of energy solidarity in the form of a powerful legal instrument has been suggested to be the objective of this decision to promote the harmonisation of the energy policies of the European Union.⁶³ Article 194 TFEU is fundamental for the energy market and is the one designating energy as a shared competence, which is explicitly evident from the exemption contained in 194(2) TFEU.⁶⁴ The query about whether the energy decisions of Member States, inherently safeguarded by Article 194(2) TFEU, can be subject to challenge or reversal based on the application of the solidarity principle, in essence, introduces an idea of reconsiderations regarding the degree of integration in energy policy and its classification as a shared or exclusive competence. A positive response to the question of whether the principle of energy solidarity can exert influence over Member States’ internal energy decisions implies an inclination toward establishing an exclusive competence, thereby attempting to recalibrate the currently existing equilibrium in favour of such exclusivity.

Following this, it seems unlikely that Hungary’s aforementioned energy decisions aimed at enhancing energy trade with Russia, emanating from the internal decision-making procedures of the state, would encounter hindrances stemming from the repercussions of the OPAL case. As aptly underscored by the ECJ in a *Republic of Austria v European Commission*, Article 194(2) serves as a natural delineation of exceptions flowing from Article 194(1), particularly encompassing any measures adopted on the basis of Article 194(1).⁶⁵ The safeguarding of Member States’ rights to autonomously determine energy decisions, thus, does not inherently appear susceptible to challenge by considerations or instruments falling under Article 194(1), which fundamentally is the one embodying the principle of energy solidarity.

⁶² Supra note 18, para. 69.

⁶³ Supra note 6, at p. 66; MENDOZZI, P. Common rules for the internal market in natural gas and the principle of energy solidarity. *Número actual*. 2022, vol. 14, pp. 405–421.

⁶⁴ OSIČKA, J., ČERNOCH, F. European energy politics after Ukraine: The road ahead. *Energy Research & Social Science*. 2022, vol. 91, p. 102–757.

⁶⁵ Republic of Austria v European Commission. Judgment of the Court (Grand Chamber), 22 September 2020. Case C-594/18 P. [online] Available at: <https://curia.europa.eu/juris/liste.jsf?num=C-594/18P>, paras. 48–49, 20.

At present, it seems reasonable to assert that only energy decisions subject to Commission assessment have a clearly defined procedural pathway to be challenged. Consequently, it is plausible to consider the potential application of energy solidarity within assessments and decisions related to, for instance, market design and regulations⁶⁶, network codes and guidelines⁶⁷, cross-border projects⁶⁸, state aid⁶⁹, exemptions⁷⁰, and derogations in terms of energy. Thus, if Hungary's decision to expand energy relations with Russia were subject to a procedure requiring Commission approval, akin to the OPAL exemption application, the impact of the solidarity principle would become pertinent.

As was already noted, the balancing test encompasses an evaluation of the energy decision's repercussions, considering both its alignment with the objectives of the EU energy policy and its impact on the objectives of the Member States. Concrete instances illustrate that declarative alterations in certain policy aspects, such as the introduction of RePowerEU subsequent to the Russian invasion of Ukraine, bear significance in shaping the Commission's considerations concerning energy solidarity and balance. A case in point is the Commission's rationale for approving the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany) from specific provisions of Directive 2009/73/EC, as articulated under Article 36 of the Directive. This justification prominently featured the goal of reducing dependence on Russian Gas, thereby safeguarding the security of supply. Notably, the concept of security of supply within this context is interpreted through the aforementioned RePowerEU policy framework, explicitly referencing it and characterizing Russia as an unreliable supplier. Consequently, in accordance with the EU's interpretative stance, steps are taken to avoid reliance on Russia in the interest of upholding the stated objectives.

Therefore, it is plausible that the balancing test within the application of the solidarity principle, if used to assess the benefit of an exemption in the context

⁶⁶ See, for instance, the Clean Energy for All Europeans Package, which includes various directives and regulations and addresses market design and regulation. For example: Directive (EU) 2019/944, which covers common rules for the internal market in electricity and Regulation (EU) 2019/943.

⁶⁷ Ibid.

⁶⁸ See for instance: Regulation (EU) 347/2013: Establishes guidelines for trans-European energy infrastructure, including provisions for cross-border projects.

⁶⁹ See, for instance, Articles 107 and 108 of the TFEU. Still, the application of the solidarity principle, as emphasized in Case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo S.A. v European Commission*, is limited.

⁷⁰ See Gas Directive 2009/73/EC: Article 49, which deals with exemptions from certain regulatory obligations and the conditions under which member states can grant exemptions, subject to approval by the European Commission.

of a Russian supplier, may reveal a decision conflicting with the energy security objectives of the EU and certain Member States. In light of the general considerations of solidarity discussed earlier, this could potentially provide a basis to reject the exemption or decision on solidarity grounds.

5. Conclusions

Following the ECJ interpretation in the OPAL case, the energy solidarity principle, previously regarded as a general moral obligation to cooperate, gained an energy-related expression of a legal and autonomously justiciable principle and broadened its scope as well as institutional implications, as it applies not only to the horizontal relations between Member States but also to the vertical relations between EU institutions and Member States.

This nuanced interpretation of the solidarity principle carries profound implications for the institutional framework of the EU. However, the inherent ambiguity and uncertainty surrounding the practical application of energy solidarity raise more questions than they provide answers. One of the intentions of this paper was to address some of these inquiries, particularly the ones related to the implications of the novel interpretation of energy solidarity for the energy decisions of EU Member States. In particular, the article focused its investigation on a specific decision – Hungary’s choice to extend its energy contracts with Russia post the Russian invasion of Ukraine and the subsequent EU policy decision to gradually diminish its energy ties with Russia.

While ostensibly designed to promote cooperation and coherence, the current state of the principle of energy solidarity arguably lacks the legal attributes necessary to challenge or reverse Hungary’s decision for a number of reasons. The very first of them lies in a purely procedural nature of all of the instances of the principle implying the requirement of conduct rather than result: there is no stipulation for “abiding” or “acting in line” with EU and Member States’ energy interests; rather, the emphasis lies on taking these interests into consideration, framing it as a sufficient measure to “act in the spirit of solidarity”. Deriving from this consideration, any actor in general, and Hungary in our case in particular, may satisfy the solidarity test requirement by simply mentioning the principle of solidarity within the decision, claiming that the interest of the Member States involved as well as the ones of the European Union, were in fact taken into account within the decision-making procedure.

Secondly, the Member States’ internal energy decisions concerning such questions as conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply are by

default protected by Article 194(2) TFEU, which is functions as a general exception to article 194(1) TFEU and its derivatives, which the principle of energy solidarity is in its essence.

Simultaneously, although the principle of energy solidarity appears to exert minimal influence on a state's internal energy determinations, its impact is notably pronounced on decisions within the energy sector that necessitate approval from the European Commission. This influence holds the potential to significantly mould practices within this domain, contingent upon subsequent court rulings and interpretations. Presently, the inherent ambiguity surrounding the definition of the principle of solidarity, coupled with the indeterminate criteria and the absence of a clear delineation for energy security, renders its invocation impractical for facilitating it or fostering coherence in the European Union's energy policy.

The likelihood persists that the principle of energy solidarity will remain a nebulous concept with limited application, formalized in criteria unless a state, akin to Poland, decides to wield it as a legal notion on the geopolitical stage – either as a measure of last resort or as a form of leverage, thereby intensifying interpretative repercussions. Considering Poland's attempts to undermine certain EU instruments, including directives and regulations related to the European Green Deal, such a scenario may unfold in the near future.

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