



**According to Advocate General Campos Sánchez-Bordona, the principle of energy solidarity can be used to review the lawfulness of acts of the EU institutions in energy-related matters**

*The appeal brought by Germany against the judgment of the General Court which annulled the 2016 Commission Decision amending the conditions for access to the OPAL pipeline must therefore be dismissed*

The Ostseepipeline-Anbindungsleitung (OPAL) gas pipeline is the terrestrial section, to the west, of the Nord Stream gas pipeline. <sup>1</sup> Its entry point is in Germany and its exit point is in the Czech Republic. In 2009, the Bundesnetzagentur (Federal Network Agency; 'BNetzA') decided to exempt that gas pipeline, for twenty-two years, from the rules on third-party access and tariffs which are currently set out in the directive on the common rules for the internal market in natural gas. <sup>2</sup> The Commission imposed specific conditions for that exemption, <sup>3</sup> in particular that a dominant undertaking such as Gazprom could use only 50% of the cross-border capacities of the OPAL gas pipeline unless it implemented a programme for releasing gas to third parties. That programme was not put in place and, therefore, only 50% of the transport capacity of the OPAL gas pipeline was used.

In 2016, following a request made by various companies of the Gazprom group, BNetzA notified the Commission of its intention to amend the exemption granted in 2009. The Commission adopted a decision <sup>4</sup> by which it amended the exemption conditions, allowing Gazprom to use almost all of the capacity of the OPAL gas pipeline. That caused a reduction in the gas flows through the Yamal and Brotherhood pipelines which channel Russian gas to the European Union through Belarus and Ukraine, and strengthened the Russian group's position on the gas markets of the countries of Central and Eastern Europe.

Poland then brought an action before the General Court which, by judgment of 10 September 2019, annulled the Commission decision of 2016 on the ground that it infringed the principle of energy solidarity under Article 194 TFEU. <sup>5</sup> That judgment re-established the exemption rules set out in the Commission decision of 2009 which had been declared partially incompatible with WTO law by a report of 10 August 2018 of the WTO Panel in Case WT/DS476/R, European Union and its Member States – Certain measures relating to the energy sector.

Germany has brought an appeal before the Court of Justice against the judgment of the General Court arguing, in essence, that energy solidarity is merely a political concept rather a legal criterion directly supporting the inference of rights and obligations on the part of the European Union or the Member States. Germany also submits that energy solidarity triggers an obligation of mutual assistance only in crisis situations, and that the Commission took that into account when adopting

<sup>1</sup> The Nord Stream gas pipeline transports gas from Russian fields across the Baltic Sea to Germany.

<sup>2</sup> 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 (OJ 2009 L 211, p. 94).

<sup>3</sup> Decision C(2009) 4694 of 12 June 2009.

<sup>4</sup> Commission Decision C(2016) 6950 final of 28 October 2016 on the review of the conditions for exemption of the OPAL pipeline, granted under Directive 2003/55/EC, from the rules on third party access and tariff regulation.

<sup>5</sup> Judgment of 10 September 2019, *Poland v Commission* (Case [T-883/16](#), see [Press Release 107/19](#)).

the decision of 2016 on the OPAL gas pipeline. Poland, supported by Latvia and Lithuania, argues that the General Court's interpretation was correct.

Before stating his views on the grounds of appeal, Advocate General Campos Sánchez-Bordona analyses **how the principle of energy solidarity is set out in the Treaties on which the European Union is founded**, concluding that, in primary EU law, solidarity is a value (Article 2 TEU) and an objective (Article 3 TEU) which are increasingly drawn on to inform political and economic decisions by the European Union itself. Nevertheless, **it is not possible to infer from that set of provisions a full and all-encompassing definition of solidarity in EU law**, because it is a notion which appears to 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), in a variety of contexts.

The question raised by the Advocate General is **whether solidarity has a purely symbolic value, with no legislative force, or whether, on the contrary, it has the status of a legal principle**. The case-law of the Court of Justice has referred to the principle of solidarity, but without providing a general definition of its features. However, in some areas such as the policies of immigration, asylum and border control (Article 80 TFEU), the Court of Justice has explicitly invoked the principle of solidarity, for example when it was required to adjudicate on the distribution between the Member States of quotas of applicants for international protection.<sup>6</sup> According to the Advocate General, there is nothing to preclude the use of the principle of solidarity in the context of EU energy policy. Article 194(1) TFEU refers to the principle of solidarity as an element that informs all the objectives of EU energy policy and, in that context, many provisions of secondary law incorporating the principle of solidarity have been adopted.

On that basis, the Advocate General does not accept the first ground of appeal and concludes that **'the General Court rightly took the view that the principle of energy solidarity 'entails rights and obligations both for the European Union and for the Member States'**. He states that **the principle of energy solidarity under Article 194 TFEU produces effects that are legal, and not merely political**, for the interpretation of provisions of secondary law adopted in implementation of the European Union's powers in energy matters, to fill gaps identified in those provisions and to carry out judicial review of those provisions or of decisions of bodies of the European Union in that field.

The Advocate General adds that, where the Treaties have sought to emphasise the purely political component of solidarity, they have done so expressly, but that is not true of the principle of solidarity applicable in the context of asylum policy or in the context of energy. In the interests of consistency, if the context of asylum policy enabled the Court of Justice to recognise the normative value of the principle of solidarity for the inference of certain consequences, the same should be true concerning the principle of solidarity in the field of energy.

According to the Advocate General, and in agreement with the General Court, **the principle of energy solidarity requires the body putting that principle into practice** — in this case, the Commission when adopting its exemption decisions — **to assess the interests involved on a case-by-case basis, both the interests of the Member States and the interests of the European Union as a whole. If that analysis manifestly overlooks one or more Member States, the Commission decision will fail to comply with the requirements of that principle**. The review which the Court of Justice may carry out of Commission decisions such as that at issue here, in the light of the principle of energy solidarity, must be limited, since these are decisions on complex technical matters in which the Commission's capacity for analysis is much more extensive than that of the courts.

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<sup>6</sup> Judgments of the Court of Justice of 2 April 2020, *Commission v Poland, Hungary and the Czech Republic (Temporary mechanism for the relocation of applicants for international protection)* (Joined Cases [C-715/17](#), [C-718/17](#) and [C-719/17](#); see [Press Release 40/20](#)) and of 6 September 2017, *Slovakia and Hungary v Council* (Joined Cases [C-643/15](#) and [C-647/15](#); see [Press Release 91/17](#)).

The Advocate General, who disagrees with the position taken by Germany and does not accept the second ground of appeal, does agree with the General Court that **the principle of energy solidarity is capable of producing legal effects in situations other than the supply crisis situations referred to in the TFEU.**

The Advocate General takes the view that the third ground of appeal is inadmissible because Germany has not claimed that there has been a distortion of the facts which the General Court had declared to be established, according to which the Commission had not assessed, as required under the principle of solidarity, the impact of the variation of the regime governing the operation of the OPAL gas pipeline on the security of supply in Poland, on the other Member States and on the European Union as a whole. The Advocate General also takes the view that the fourth ground of appeal is ineffective because the General Court did not annul the Commission decision on the ground that it did not expressly refer to the principle of energy solidarity, but because the Commission had not carried out a proper analysis of the requirements imposed by that principle.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion in Case C-848/19 is published on the CURIA website on the day of delivery.

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