Provisional text

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 18 March 2021 (1)

Case C-848/19 P

Federal Republic of Germany

v

Republic of Poland,

European Commission

(Appeal – Internal market in natural gas – Article 194(1) TFEU – Directive 2009/73/EC – Application by the German authority (Bundesnetzagentur) to vary the conditions for derogation from the EU rules relating to the operation of the OPAL pipeline – Commission decision on varying the conditions for derogation from the EU rules – Principle of energy solidarity)

1. The Federal Republic of Germany has brought an appeal against the judgment of the General Court of 10 September 2019 (2) annulling a European Commission decision of 28 October 2016 varying the conditions (laid down in a previous decision) under which the OPAL (3) pipeline qualified for exemption from the rules on third-party access and tariffs. (4)

2. The General Court annulled the contested decision on the ground that it had been adopted 'in breach of the principle of energy solidarity, as provided for in Article 194(1) TFEU'.

3. The Commission, defendant before the General Court, has not brought an appeal against the judgment, despite the fact that its decision was annulled. The Federal Republic of Germany *has* brought an appeal, on the ground, principally, that energy solidarity is merely a political concept rather than a legal criterion directly supporting the inference of rights and obligations on the part of the European Union or the Member States.

4. Poland, Latvia and Lithuania support the General Court's interpretation. In their view, energy solidarity is a principle which may serve as a parameter for the judicial review of provisions of secondary law and decisions in energy matters.

5. The appeal therefore requires the Court of Justice to rule on the existence of the principle of energy solidarity and, if appropriate, on its nature and scope. (5)

I. Legal framework

A. EU law

6. Article 194(1) TFUE provides:

> ‘In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
>
> (a) ensure the functioning of the energy market;
>
> (b) ensure security of energy supply in the Union;
>
> (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
>
> (d) promote the interconnection of energy networks’.

7. The common rules on the market in gas and electricity are found in Directive 2009/73/EC. (6) Article 32 thereof, which is identical to Article 18 of Directive 2003/55, concerns third-party access and states:

> ‘1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and [liquefied natural gas, ‘LNG’] facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs – and the methodologies, where only methodologies are approved – are published prior to their entry into force.
>
> 2. Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.
>
> 3. The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules’.

8. Article 36 of Directive 2009/73, concerning new infrastructure, which replaced Article 22 of Directive 2003/55, provides:

> ‘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 Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:
>
> (a) the investment must enhance competition in gas supply and enhance security of supply;
>
> (b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;
>
> (c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
>
> (d) charges must be levied on users of that infrastructure; and
>
> (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.
>
> …

3. The regulatory authority referred to in Chapter VIII may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2.

…

6. An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

…

8. The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. That information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision. In particular, the information shall contain:

(a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted or refused the exemption together with a reference to paragraph 1 including the relevant point or points of that paragraph on which such decision is based, including the financial information justifying the need for the exemption;

(b) the analysis undertaken of the effect on competition and the effective functioning of the internal market in natural gas resulting from the grant of the exemption;

(c) the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;

(d) in case the exemption relates to an interconnector, the result of the consultation with the regulatory authorities concerned; and

(e) the contribution of the infrastructure to the diversification of gas supply.

9. Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where further information is sought by the Commission. That additional period shall begin on the day following the receipt of the complete information. The initial two-month period may also be extended with the consent of both the Commission and the regulatory authority.

…

The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

…’

9. Subsequent to the facts of the dispute, Directive 2009/73 was amended by Directive (EU) 2019/692. (7)

B. German law

10. Paragraph 28a(1) of the Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) of 7 July 2005, (8) in the version applicable to the facts, allows the Bundesnetzagentur (Federal Network Agency, Germany; 'BNetzA'), in particular, to exempt interconnectors between the Federal Republic of Germany and other States from the rules on third-party access. The conditions for the application of that paragraph are, in essence, the same as those of Article 36(1) of Directive 2009/73.

II. Background to the contested decision

11. The background to the dispute, up to the adoption of the contested decision, is described in paragraphs 5 to 15 of the judgment under appeal, which I do not think it necessary to reproduce in full. I shall confine myself to mentioning the paragraphs I consider to be most significant.

12. On 13 March 2009, the BNetzA notified the Commission of two decisions of 25 February which excluded the capacities for cross-border transmission of the planned gas pipeline OPAL from the application of the rules on third-party access laid down in Article 18 of Directive 2003/55 and tariff regulation laid down in Article 25(2) to (4) of that directive. (9)

13. By decision C(2009) 4694 ('the original decision') of 12 June 2009, the Commission asked the BNetzA, pursuant to Article 22(4), third subparagraph, of Directive 2003/55 (now Article 36(9) of Directive 2009/73) to vary its decisions of 25 February 2009 by adding certain conditions.

14. On 7 July 2009, the BNetzA amended its decisions of 25 February 2009 by incorporating the conditions referred to in the preceding point. The BNetzA granted the exemption from the rules on third-party access and tariffs for a period of 22 years.

15. The OPAL pipeline entered into service on 13 July 2011. (10)

16. By virtue of the original decision and the decisions of the BNetzA of 25 February 2009, as amended by those of 7 July 2009, the capacities of the OPAL pipeline were exempted, subject to certain conditions, from the application of the common rules (on regulated third-party access and tariffs) laid down in Directive 2003/55.

17. In the current technical configuration, natural gas is supplied at the pipeline entry point close to Greifswald by the Nord Stream pipeline, used by the Gazprom group to transport gas from Russian gas fields. As Gazprom did not implement the gas release programme referred to in the original decision, (11) the non-reserved 50% of the capacity of that pipeline was not used, with the result that only 50% of its transmission capacity was used.

18. On 12 April 2013, OGT, OAO Gazprom and Gazprom Eksport LLC requested the BNetzA to vary certain provisions of the exemption granted in 2009, but did not receive a favourable response. In September 2015 and 2016, Gazprom organised auctions that failed to attract any competitors, on which grounds it made a further request for the original decision to be amended. (12)

19. On 13 May 2016, the BNetzA notified the Commission, on the basis of Article 36 of Directive 2009/73, of its intention, following the request submitted by OGT, OAO Gazprom and Gazprom Eksport, to amend the exemption granted in 2009, in relation to the share of the OPAL pipeline operated by OGT. (13)

III. Contested decision

20. On 28 October 2016, the Commission adopted, on the basis of Article 36(9) of Directive 2009/73, the contested decision, which is addressed to the BNetzA.

21. The General Court (paragraphs 16 and 17 of the judgment under appeal) summarised as follows the conditions laid down in the contested decision:

‘… As to the substantial conditions that such a variation was required to satisfy, the Commission considered that, in the absence of specific review clauses, changes to the scope of an exemption granted previously or to the conditions attached to that exemption had to be justified and that, in that respect, new factual developments that had occurred since the original exemption decision could constitute a valid reason for review of the original decision.

As to the substance, by the contested decision the Commission approved the variations to the exemption regime proposed by the BNetzA, subject to certain amendments, namely, in particular:

– The initial offer of capacity to be auctioned was required to cover 3 200 000 kWh/h (approximately 2.48 billion m^3/year) of FZK capacities and 12 664 532 kWh/h (approximately 9.83 billion m^3/year) of DZK capacities;

– 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 m^3/year), up to a maximum of 6 400 000 kWh/h (approximately 4.97 billion m^3/year);

– An undertaking or group of undertakings with a dominant position 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’.

22. The General Court went on to say (paragraph 18 of the judgment under appeal) that, ‘on 28 November 2016, the BNetzA amended the exemption granted by its decision of 25 February 2009 concerning the share of the OPAL pipeline operated by OGT, in accordance with the contested decision, by entering into a new public-law contract with OGT which, under German law, is equivalent to an administrative decision’.

23. In practice, the contested decision paved the way for Gazprom to control flows along the OPAL pipeline and, by the same token, for gas flows through the Yamal and Brotherhood pipelines (14) potentially to be reduced and for Gazprom’s position to be strengthened on the gas markets in the countries of Central and Eastern Europe. (15)

IV. Litigation relating to the OPAL pipeline

24. The contested decision increased fears among certain gas operators and governments in the countries of Central and Eastern Europe that Gazprom would exercise greater dominance on the gas market, and this explains their interest in bringing actions for the annulment of that decision.

25. Such actions were brought, unsuccessfully, by the Polish gas operator Polskie Górnictwo Naftowe i Gazownictwo, co-owner of the Polish section of the Yamal-Europa pipeline, (16) and a German subsidiary (PGNiG Supply & Trading GmbH) of the Polish gas operator. (17)

26. The Court of Justice confirmed on appeal the orders made by the General Court as to the inadmissibility of those actions. (18)

27. The Republic of Poland also brought before the General Court an action for the annulment of the contested decision which gave rise to the judgment that is now under appeal.

V. Action brought by the Republic of Poland against the contested decision and the judgment under appeal

28. The Republic of Poland put forward six pleas in law in support of the claim that the contested decision should be annulled. Those pleas alleged, first, infringement of Article 36(1)(a) of Directive 2009/73 in conjunction with Article 194(1)(b) TFEU and the principle of solidarity; secondly, lack of competence on the part of the Commission and infringement of Article 36(1) of Directive 2009/73; thirdly, infringement of Article 36(1)(b) of Directive 2009/73; fourthly, infringement of Article 36(1)(a) and (e) of Directive 2009/73; fifthly, infringement of the international agreements to which the European Union is a party; and, sixthly, infringement of the principle of legal certainty.

29. The General Court upheld the first plea in law raised in that action, without ruling on the others, and annulled the contested decision.

30. In its analysis of the 'scope of the principle of energy solidarity', the General Court held that that principle is not restricted to extraordinary situations, but '… entails a general obligation on the part of the European Union and the Member States …', with the result that the former and the latter must 'endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures liable to affect the interests of the European Union and the other Member States, as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity'. (19)

31. The General Court qualified the foregoing assertions by noting that 'the application of the principle of energy solidarity does not however mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict'. (20)

32. When assessing 'whether the contested decision infringes the principle of energy policy', the General court found that that decision does not mention that principle and that the Commission infringed it, since:

– '[It] did not … carry out an examination of the impact of the variation of the regime governing the operation of the OPAL pipeline on the security of supply in Poland'. (21)

– 'It does not appear that the Commission examined what the medium term consequences, inter alia for the energy policy of the Republic of Poland, might be of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported via the Yamal and Braterstwo pipelines, or that it balanced those effects against the increased security of supply that it had found at EU level'. (22)

33. The General Court inferred from those premises that 'the contested decision was adopted in breach of the principle of energy solidarity, as provided for in Article 194(1) TFEU'. (23)

VI. Events subsequent to the judgment under appeal and the impact of Directive (EU) 2019/692

34. Even though they are not directly relevant to the outcome of the appeal, it is appropriate to note certain events subsequent to the judgment of the General Court which might affect its implementation.

35. On 13 September 2019, the BNetzA implemented the judgment under appeal, (24) meaning that it reverted to the restrictions laid down in the original 2009 decision and eliminated the situation established by the contested decision.

36. The immediate impact of that measure appears to have been that Gazprom has stopped using some 12 or 13 billion cubic metres of annual capacity on the OPAL pipeline, a shortfall which it is offsetting by increasing flow through the pipelines across Ukraine. (25)

37. The case-law established in the judgment under appeal might also have an impact on the circumstances of other pipelines, such as Nord Stream 2 and its EUGAL onshore extension, (26) and the Turk Stream II pipeline. (27) If the General Court's position on the principle of energy supply is confirmed, Gazprom and its affiliated undertakings might find it more difficult to obtain a temporary exemption from the application of the EU rules (requiring full liberalisation of gas flows) to the Nord Stream 2 pipeline, which is also the subject of litigation pending before the Court of Justice. (28)

38. It should further be recalled that Directive 2019/692 amended Directive 2009/73 in order (according to recital 3 thereof) to 'address obstacles to the completion of the internal market in natural gas which result from the non-application of Union market rules to gas transmission lines to and from third countries. The amendments introduced by this Directive are intended to ensure that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the Union, to gas transmission lines to and from third countries'. (29)

39. Nonetheless, by way of exception to that liberalisation, Directive 2019/692 incorporated into Directive 2009/73 Article 49a(1), which allows exemption to be granted in respect of gas transmission lines between a Member State and a third country which are completed before 23 May 2019. (30)

40. The companies Nord Stream and Nord Stream 2 each brought an action for the annulment of Directive 2019/692 but the General Court declared their actions inadmissible for lack of standing, on the ground that that directive is not of direct and individual concern to them, since it requires national transposing measures. (31)

41. On 15 May 2020, the BNetzA refused Nord Stream 2's application for an exemption under (the new) Article 49a of Directive 2009/73. That refusal was based on the fact that the physical construction of the pipeline had not been completed before 23 May 2019, and, moreover, on the fact that the EU legislature wished to exclude the applicant from the exemption regime provided for in Article 49a. (32)

42. Another factor having a bearing on the OPAL pipeline litigation is the World Trade Organisation ('WTO') Panel Report of 10 August 2018, (33) issued in a dispute in which Russia had challenged the compatibility with WTO law of various elements of the EU legislation on the marketing of natural gas. Those elements included the application of the exemption regime provided for in Article 36 of Directive 2009/73 to the OPAL pipeline.

43. Most of Russia's complaints were dismissed by the WTO Panel. The Panel nonetheless found the two conditions relating to the OPAL pipeline that were contained in the original (2009) decision, 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, to be incompatible with Article XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994.

44. Russia argued that those conditions 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. (34)

45. On 21 September 2018, the European Union notified the WTO Dispute Settlement Body of its decision to appeal on certain points of law and certain legal interpretations dealt with in the Panel's report. (35) The impasse at the WTO Appellate Body brought about by the failure to renew its members has for the time being prevented a ruling from being given in the aforementioned case.

46. The contested decision might mean the almost complete elimination of any elements of incompatibility with WTO law within the regime applied to the Nord Stream/OPAL pipeline. However, as that decision has been annulled by the General Court, the exemption regime provided for in the original (2009) decision, which was declared incompatible with Article XI: 1 of the GATT 1994, is now applicable again. It might therefore be necessary to assess the potential conflict between the ruling given and WTO law.

VII. Procedure before the Court of Justice

47. In its appeal, the Federal Republic of Germany claims that the Court should:

– set aside the judgment of the General Court of 10 September 2019 in Case T−883/16.

– refer Case T−883/16 back to the General Court;

– order that costs be reserved.

48. The Republic of Poland contends that the Court should:

– dismiss the appeal in its entirety, on the ground that it is unfounded, and declare the third ground of appeal to be inadmissible.

– order the Federal Republic of Germany to pay the costs.

49. The Republic of Latvia and the Republic of Lithuania contend that the Court should dismiss the appeal.

50. At the hearing, the Commission stated that, in its view, the first ground of appeal should be upheld.

51. In support of its appeal, the Federal Republic of Germany relies on five grounds, the first and second of which relate, in essence, to the principle of energy solidarity and its non-application in the contested decision. The third, fourth and fifth grounds (which are raised in the event that the Court finds that that principle is applicable) criticise the General Court for having taken the view that the Commission did not take into account the principle of energy solidarity.

VIII. First ground of appeal: non-justiciability of the principle of energy solidarity

A. Preliminary points

52. Before commenting on this ground of appeal, I think it appropriate to examine the expression given to solidarity in EU law and its reflection in the rules on energy policy.

1. Solidarity in EU primary law

53. References to solidarity can be found not only in Article 194 TFEU but also in other provisions of EU primary law, in both the Treaty on European Union and in the FEU Treaty.

54. The Treaty on European Union mentions that concept in its preamble ('Desiring to deepen the *solidarity* between their peoples while respecting their history, their culture and their traditions'). It also mentions it in Article 2, as being one of the characteristics of a society that shares values common to the Member States of the European Union, (36) and in Article 3, when providing that '[the Union] shall promote economic, social and territorial cohesion, and *solidarity* among Member States' (paragraph 3). (37)

55. Article 21(1) TEU enshrines solidarity as one of the guiding principles of the Union's external action. Among the specific provisions on the common foreign and security policy, Article 24(2) and (3) speaks of 'mutual political solidarity' among Member States. (38)

56. As regards the FEU Treaty, Article 67(2) links the common policy on asylum, immigration and external border control to *solidarity* between Member States, an approach endorsed by Article 80 TFEU. (39)

57. In the context of economic policy, Article 122(1) and (2) TFEU also include an explicit reference to the *spirit of solidarity* between the Member States. (40) The *spirit of solidarity* is likewise invoked by Article 194(1) TFEU, with which this dispute is concerned, and Article 222 TFEU. (41)

58. Title IV of the Charter of Fundamental Rights of the European Union brings together, under the heading *solidarity*, a number of rights in the context of social and labour matters (Articles 27 to 34), health protection, access to services of general economic interest, environmental protection and consumer protection (Articles 35 to 38).

59. In addition to the foregoing, there are other provisions of primary law which are founded on solidarity. These include the financial assistance mechanism for countries outside the euro zone (Article 143 TFEU) and the provisions on economic, social and territorial cohesion (Articles 174 to 178 TFEU).

60. It is difficult, however, to infer from the foregoing collection of provisions a full and all-encompassing definition of solidarity in EU law. 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. (42)

61. It *can*, on the other hand, be stated that, in EU primary law, solidarity, having a status that might be classified as materially constitutional, presents itself as a *value* (Article 2 TEU) and as an *objective* (Article 3 TEU) which the European Union must promote. By the same token, it is increasingly drawn on to inform political and economic decisions by the European Union itself. (43)

62. Some provisions of the FEU Treaty, reproduced above, refer to the 'spirit of solidarity', while others make direct use of the expression 'principle of solidarity' (Article 80 TFEU).

63. The key question is whether solidarity has the status of a legal principle and, if it does, what its nature and scope are. The alternative would be for that concept to have a purely symbolic value with no prescriptive force.

64. So far as academic opinion is concerned, the debate lies between those who refuse to recognise solidarity as having the status of a legal principle (or, at least, as a general principle of law) (44) and those who advocate its status as a constitutional or structural principle, (45) or a general principle of law, closely linked to loyal cooperation, (46) the features of which have been more clearly defined.

2. Solidarity in the case-law of the Court of Justice

65. The Court of Justice has used the principle of solidarity in its case-law but without providing a general definition of its features. It has usually done so in the course of disputes concerning State measures contrary to that principle.

66. The first such occasions were a State aid case disposed of by the judgment in *Commission* v *France*, (47) and a later case disposed of by the judgment in *Commission* v *Italy*, (48) concerning non-compliance with the EU rules on agricultural policy. In the latter judgment, the Court stated that the 'failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order'.

67. In one judgment, the Court also referred to solidarity between producers in order to justify the distribution of burdens and benefits required under rules of EU law, but stopped short of identifying solidarity as a general principle of law, (49) and it has mentioned solidarity in other judgments concerning citizenship of the Union and social measures, albeit to a limited extent. It did not rely on that concept, at least not expressly, in the judgments on the financial assistance measures adopted following the economic crisis of 2008. (50)

68. The subject area in which the Court has made notable use of the concept of solidarity as a key component in the interpretation of an article from the FEU Treaty is that relating to the policies of immigration, asylum and border control (Article 80 TFEU).

69. Thus, the Court has explicitly invoked the principle of solidarity in cases where it has had to adjudicate on the distribution between the Member States of quotas of applicants for international protection. (51) After stating that, in accordance with Article 80 TFEU, [the principle of solidarity] governs the Union's asylum policy', (52)

it has relied on that principle in order to draw appropriate legal consequences, including the upholding of actions brought by the Commission against Member States which had failed to fulfil their obligations in that regard.

70. This brief case-law analysis shows that, even though the principle of solidarity is multifaceted and deployed at different levels, its importance in primary law as a value and an objective in the process of European integration (53) is such that it may be regarded as significant enough to create legal consequences.

71. Central to the approach thus taken by the Court is a particular conception of the normative value of the Treaties: their provisions serve the same purpose as any provision having constitutional status and it falls to the body required to interpret them (ultimately, the Court of Justice) to determine the prescriptiveness of their content.

72. It is true that the variety of forms in which the principle of solidarity manifests itself makes it difficult for that principle to be applied in the same way and to the same extent in all areas of EU competence. I would emphasise, however, that there is no reason not to regard solidarity, in some of those areas of competence, as having the capacity to operate as a 'guiding principle' for the actions of the European Union in those fields, in which cases this has an impact on its effects in law.

73. This is true of the principle of solidarity in the context of asylum policy and must, by analogy, also be true in the context of energy policy.

3. Principle of energy solidarity

74. Article 194(1) TFEU states that:

'… Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks'.

75. Article 194 TFEU was introduced by the Treaty of Lisbon as the legal basis for the exercise of the European Union's powers in energy matters. (54)

76. The 'spirit of solidarity' must inform the objectives of the European Union's energy policy and further its development. From that point of view, energy solidarity cannot be regarded as being synonymous with mere energy security (or 'security of energy supply'), which is only one of its manifestations. (55)

77. Solidarity forms the basis of all the other objectives of the European Union's energy policy, inasmuch as it is the thread that brings them together and gives them coherence. In particular:

– the 'functioning of the energy market', which must contribute towards a more competitive system of supply in the Member States;

– the promotion of the 'interconnection of energy networks', which is crucial to the achievement of an internal energy market; and

– 'energy efficiency and energy saving' and the 'development of new and renewable forms of energy', which make for a greater degree of energy solidarity between the Member States, itself consistent with improved environmental protection.

78. The inclusion of the spirit of solidarity in a primary law text was qualified by Declaration No 35 annexed to the Treaty on European Union and the FEU Treaty, according to which 'the Conference believes that Article 194 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article 347'. That declaration effectively protected the sovereignty of States in energy matters, which sat alongside the sovereignty they derived from the second subparagraph of Article 194(2) TFEU. (56)

79. The inclusion of those safeguards for State sovereignty in opposition to the development of the European Union's powers in energy matters, through provisions of primary law, is best understood in the light of the establishment of an EU energy policy based on the principle of solidarity, also specifically provided for in primary law. To my mind, the justiciability of that principle is as indisputable as that of the safeguards for State sovereignty which have been introduced to modulate it.

80. The Court had previously recognised that the security of a country's energy supply was an overriding reason in the general interest (57) falling within the scope of national security (an exclusive competence of the Member States under Article 4(2) TEU).

81. Notwithstanding those safeguards for State sovereignty in energy matters, the European Union has gradually developed its energy policy through provisions of secondary law in which energy solidarity has been an increasingly prominent feature. That policy has also been driven by the Commission's Energy Union Strategy, (58) which forms the basis for the adoption of the recent EU provisions on the market in natural gas.

82. Given the characteristics, modes of operation and economies of those markets, the assertion of the principle of solidarity is key to ensuring that the European Union's energy policy is able to achieve its objectives, now increasingly interlinked with environmental protection. (59)

83. In particular, the development of gas infrastructures at transnational level and with third countries may be said to be essential to the feasibility of energy solidarity between the Member States, and it is for this reason that the European Union has actively promoted such infrastructures. (60)

84. Reflections of the principle of solidarity in legislative provisions, in the service of this purpose and others, can be found, inter alia, in:

– Regulation (EU) 2017/1938, (61) which replaced Regulation (EU) No 994/2010. (62) The latter provided for a mechanism for responding to the natural gas supply crisis that was based on exceptional measures ultimate responsibility for which lay with the States. (63) Regulation 2017/1938 improved that mechanism, (64) thus increasing the effectiveness of the principle of energy solidarity. (65)

– Regulation (EU) 2019/452, (66) which introduces between the Member States, and between the Member States and the Commission, a system of cooperation enabling States to submit observations and the Commission to issue reports on the impact of direct foreign investment and the possibility of limiting such investment into their respective territories or into the European Union as a whole. The system is used in connection with investments affecting, inter alia, 'critical infrastructure, whether physical or virtual, including energy … infrastructure' and the 'supply of critical inputs, including energy …'.

85. The foregoing confirms that the EU legislature has not hesitated to adopt energy solidarity as a guiding principle for its policy in that field. It remains to be determined whether, in addition to performing this function, that principle, on which Advocate General Mengozzi had already conferred 'constitutional' status, (67) may produce effects beyond the legislative sphere.

86. It is on the basis of those considerations that I shall now turn to analysing the first ground of appeal.

B. Arguments of the parties

87. In its first ground of appeal, the Federal Republic of Germany accuses the General Court of having erred in law in finding that energy solidarity, as mentioned in Article 194(1) TFEU, is a legal principle that creates rights and obligations both for the European Union and for the Member States.

88. According to the appellant, energy solidarity is no more than a 'purely political notion' and not a legal criterion capable of supporting the inference of rights and obligations for the European Union or the Member States. In the appellant's view, owing to its abstract and indeterminate nature, solidarity in the energy sector cannot be 'relied on before the courts'. (68)

89. The Federal Republic of Germany submits that the Commission, in its capacity as executive body of the European Union, was obliged to apply only the secondary legislation (in particular, Article 36(1) of Directive 2009/73). That article is the only parameter against which the legality of the contested decision may be reviewed. Other aspects of the principle of energy solidarity 'must not be examined and are not criteria for Commission decisions'.

90. In any event, according to the Federal Republic of Germany, that principle is binding, 'at most, on the EU legislature alone'. The Commission, the Federal Republic of Germany emphasises, 'is not bound by Article 194 TFEU or by the principle of energy solidarity' when it comes to adopting decisions on exemption under Article 36 of Directive 2009/73.

91. The Commission, which did not lodge an appeal against the judgment of the General Court and intervened at the hearing at the behest of the Court of Justice, contended that energy solidarity is a guiding principle of the European Union's energy policy which is binding on the EU legislature when it adopts provisions of secondary law.

92. Nonetheless, the Commission submits, the solidarity provided for in Article 194 TFEU is too general and abstract a concept to be capable of being used in reviewing the legality of its acts. The contested decision was to be confined to applying Article 36 of Directive 2009/73, and any additional assessment based exclusively on the principle of solidarity is therefore ruled out.

93. The Commission recognised, however, that the legality of its decisions could be reviewed 'in the light of the principle of energy solidarity' in its capacity as a criterion for the interpretation of provisions of secondary law.

94. The Republics of Poland, Latvia and Lithuania disputed the arguments put forward by the Federal Republic of Germany and the Commission.

C. Assessment

95. In my view, the General Court rightly took the view, without erring, that the principle of energy solidarity 'entails rights and obligations both for the European Union and for the Member States'. (69)

96. To my mind, the principle of energy solidarity under Article 194(1) TFEU produces effects which are not merely political but legal: a) as a criterion for interpreting provisions of secondary law adopted in implementation of the European Union's powers in energy matters; b) as a means of filling any gaps identified in those provisions; and c) as a parameter for judicial review, either of the legality of the aforementioned provisions of secondary law, or of decisions adopted by the bodies of the European Union in that field.

97. Where the Treaties have sought to emphasise the purely *political* component of solidarity, they have done so expressly. This can be seen in the specific provisions on the common foreign and security policy, among which Article 24(2) and (3) TEU refers to the 'mutual political solidarity' of the Member States.

98. The same is not true of the principle of solidarity applicable in the context of asylum policy (Article 67 TFEU) or in the context of energy (Article 194 TFEU). If, as I have also recalled, the former context enabled the

Court of Justice to recognise the normative value of that principle as support for the inference of certain consequences, the same should be true of the latter context. (70)

99. I therefore concur with the General Court that the principle of energy solidarity is justiciable and, accordingly, capable of legal application. As such, that principle, unlike mere rules, may produce effects – depending on its nature – not only where it has been enshrined in a provision of secondary law but also, in some instances, in the absence of such a provision, and, of course, in the judicial review of decisions adopted in the subject area for which it was established.

100. I do not therefore support the proposition put forward by the Federal Republic of Germany and the Commission at the hearing to the effect that the principle of energy solidarity is too abstract to be used as the basis for reviewing the legality of the Commission's acts.

101. At the hearing, the Commission recognised that the principle of energy solidarity could be relied on in order to challenge the legality of Article 36 of Directive 2009/73, in the context of a plea of illegality, and in order to interpret, in the light of that article, the acts in which that provision is applied. That being the case, I can see no reason to reject the notion that that principle is capable of operating as an autonomous parameter for reviewing legality in direct actions against Commission decisions.

102. The judgment under appeal states that the principle of energy solidarity is binding on the European Union and the Member States, which, in the exercise of their respective competences, must take into account the interests of other stakeholders. (71) As the present dispute is confined to the judicial review of a Commission decision, it is not necessary, in order to settle it, to analyse the implications of that principle in relation to the (unilateral or mutual) actions of the Member States but only in relation to its binding force on the Commission.

103. The argument that that principle is binding, where appropriate, only on the EU legislature (the Council of the European Union and the European Parliament in the adoption of provisions of secondary law), but not on the Commission, seems to me to be without foundation. I am of the view, conversely, that that principle, in its aforementioned 'constitutional' capacity, is binding on all institutions and bodies of the European Union, unless primary law makes express provision to the contrary, which it does not in energy matters.

104. The principle of energy solidarity, as I have already submitted, does not *stop* at ensuring security of supply, as referred to in Article 36(1)(a) of Directive 2009/73. Increased gas supply will not necessarily mean increased solidarity in the internal market in gas: if the increase in supply is concentrated in a few States and remains in the hands of a dominant undertaking able to distort competition on that market, it may operate to the detriment of the interests of one or more Member States in an unjustified (non-solidary) fashion.

105. It is true that Article 36 of Directive 2009/73 does not expressly mention energy solidarity among the factors that must be taken into account when granting an exemption (from the rules on third-party access and tariffs) to new gas pipelines in order to promote investment in their construction. Nonetheless, the absence of an express reference to the principle of energy solidarity did not relieve the Commission of its duty to assess the impact of that principle in its exemption decisions, because observance of that principle is a requirement of Article 194 TFEU. (72)

106. In fact, as the Republic of Poland noted at the hearing, in the Commission's administrative practice subsequent to the judgment under appeal, it has managed, without too much difficulty, to incorporate the application of the principle of energy solidarity in other exemption decisions similar to that at issue here. (73)

107. The necessary evaluation of the consequences of the principle of energy solidarity in the Commission's decisions was facilitated by the amendment which Directive 2019/692 made to Article 36(1)(e) of Directive 2009/73.

108. That amendment makes explicit what, in my opinion, could be inferred from the previous text, *read in the light of the principle of energy solidarity*: the exemption must not be detrimental 'to competition in the relevant markets which are likely to be affected by the investment, to the effective functioning of the internal market in

natural gas, to the efficient functioning of the regulated systems concerned, or to security of supply of natural gas in the Union'.

109. This takes into account the principle of energy solidarity and, moreover, facilitates its application following consultation of the authorities of the Member States or of third countries affected by the exemption. (74)

110. The lack of information which the Commission cited at the hearing as justification for not assessing the principle of energy solidarity in the contested decision does not strike me as a sound argument. In a matter as impactful on the internal market in gas as the exemption of the OPAL pipeline, the Commission cannot plead a lack of information from the Member States in order to excuse itself from the obligation to assess the effect of the principle of energy solidarity.

111. I am not unaware that, in common with the majority of legal principles, the principle of energy solidarity entails some measure of abstraction making it difficult to apply.

112. Its relatively abstract nature necessarily means that it will not always be easy to infer clear solutions from the principle of energy solidarity, given that its application in practice will entail both areas of certainty and other *greyer* areas which the interpreter will have to analyse carefully.

113. What that principle requires, in my opinion (which, once again, I share with the General Court), is that the body called upon to put it into practice – in this case, the Commission – should carry out an assessment of the interests involved on a case-by-case basis. This is not about adopting an approach which disregards the uniqueness of each situation, that is to say which pre-empts a particular outcome in every case. (75)

114. Although I am in no doubt that this ground of appeal should be dismissed, I recognise the need for a careful assessment of the scope of the review which the General Court (or, where appropriate, 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.

115. Any such review must be limited, since these are decisions on complex technical matters in which the Commission, more so than the courts, has extensive capacity for both technical and economic analysis. For that reason, the Commission must, as the judgment under appeal requires, assess all the consequences, economic and otherwise, inherent in the conditions attaching to, and level of use of, a pipeline, as well as their impact on the European and national markets in gas.

116. A judicial review of such decisions must, first and foremost, establish whether the EU institutions have conducted an analysis of the interests involved which is compatible with energy solidarity and takes into account, as I have said, the interests of both the Member States and the European Union as a whole. Should that analysis of the situation manifestly overlook one or more Member States, the Commission decision in question will fail to comply with the requirements attendant upon that principle.

117. As has been the case with other principles of EU law, that assessment of interests in the light of energy solidarity will necessarily be defined over time, inasmuch as it is subject to the scrutiny of the Court of Justice, and dynamic in character, further influenced as this will be by the future development of the European Union's energy policy. (76)

118. In the light of the foregoing lines of reasoning, I propose that the first ground of appeal be dismissed.

IX. Second ground of appeal: limitation of the principle of solidarity to crisis situations

A. Arguments of the parties

119. The Federal Republic of Germany submits that the principle of solidarity in the energy sector was not applicable in the contested decision. In its view, that principle applies only in supply crisis situations and cannot be construed as requiring 'unconditional loyalty' to the interests of all the Member States. Energy policy decisions would otherwise become blocked.

120. It also submits that, inasmuch as the references to solidarity in Article 194(1) TFEU require that the substance of that concept be determined in the light of Article 222 TFEU, energy solidarity triggers an obligation of mutual assistance only in crisis situations. In its view, that is confirmed by Article 13 of Regulation 2017/1938.

121. The Republics of Poland, Latvia and Lithuania dispute those assertions.

B. Assessment

122. I do not agree with the Federal Republic of Germany's argument. I do, on the other hand, agree with the General Court that the principle of energy solidarity is capable of producing legal effects in situations other than the crisis situations referred to in Article 222 TFEU.

123. The General Court did not err in law in stating, in the judgment under appeal, that 'the principle of energy solidarity cannot be restricted to such extraordinary situations which would exclusively involve the competence of the EU legislature' and that that principle 'also entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders' (paragraphs 71 and 72).

124. Article 222 TFEU is one (but not the only) expression of the principle of solidarity in EU primary law. That article provides for mutual assistance between Member States in the event of terrorist attacks or natural or man-made disasters.I do not, however, see any convincing reason why the reference to energy solidarity in Article 194(1) TFEU must be confined to the *critical* situations provided for in Article 222 TFEU.

125. First, a terrorist attack or a natural or man-made disaster will not necessarily lead to an energy crisis affecting the vital interests of a Member State.

126. Secondly, energy solidarity between the Member States may be essential in situations other than the attacks or disasters referred to in Article 222 TFEU.

127. This would be the case not least in a serious economic situation (in which event the reference to energy-related difficulties in Article 122 TFEU comes into play) or if there were a significant reduction in supply on account of a dispute between a third-country gas exporter and a third-country transit State (such as the crisis between Ukraine and Russia in 2006, for example).

128. I have already explained that, in my view, energy solidarity goes beyond mere security of supply. Even if it were so limited, however, that principle helps States to avoid supply crises, as Poland suggests in its observations, which is why most of the mechanisms provided for in Regulation 2017/1938 are precautionary. It is better for energy solidarity to work in such a way as to prevent crises than to be reflected only in the mechanisms for responding to them.

129. Nor do I concur with the argument whereby the Federal Republic of Germany criticises the General Court for having taken the view that the principle of energy solidarity expresses an obligation of *unconditional loyalty*, that is to say to consider the interests of all the Member States.

130. That argument is not consistent with a proper reading of the judgment under appeal, paragraph 77 of which states that 'the application of the principle of energy solidarity does not mean … that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy'.

131. Thus, contrary to what the Federal Republic of Germany argues, the General Court has not said that the principle of energy solidarity must entail *unconditional loyalty* that respects the interests of all the Member States.

132. What the judgment under appeal maintains (and this is an assessment which I endorse) is that that principle requires the relevant interests of the various Member States and of the European Union to be taken into account in the adoption of decisions in energy matters.

133. Consequently, the second ground of appeal must be dismissed.

X. Third ground of appeal: error on the part of the General Court in finding that the Commission failed to comply with the principle of energy solidarity

A. Arguments of the parties

134. In the view of the Federal Republic of Germany, the General Court erred in finding that the Commission did not consider the consequences which the principle of energy solidarity and the contested decision would have for the Polish gas market.

135. In the Federal Republic of Germany's opinion, the Commission did assess that impact, and submits that that is demonstrated by the following evidence:

– the fact that, in 2013, Poland submitted observations in the consultation procedure prior to the adoption of the contested decision;

– the fact that a work group comprising representatives from the Ministry of Energy of the Russian Federation, the Commission, BNetzA and Gazprom studied the most efficient form of operation for the OPAL pipeline;

– the content of the Commission's press release on the contested decision;

– the gas supply situation in Poland and the content of its transit contract with Gazprom until 2022;

– the impact of the increased use of the OPAL pipeline on use of the Yamal pipeline;

– the percentage of Russian gas imports into Poland and the growing use of liquefied natural gas, whereby Poland aims to be independent of Russian gas by 2022/2023; and

– the benefits of the contested decision for the Polish gas market, cross-border trade and security of supply.

136. On the basis of those facts, the Federal Republic of Germany considers that the Commission took adequate account, in the contested decision, of the situation on the Polish gas market, there having been no need to analyse that situation in depth.

137. The Republic of Poland takes the view that this ground of appeal is inadmissible, since it concerns mere findings of fact by the General Court, and that, if held to be admissible, it should be dismissed, in which regard it concurs with the Republic of Latvia.

138. The Republic of Lithuania addresses this ground of appeal in conjunction with the fourth and also proposes that it be dismissed.

B. Assessment

139. In the judgment under appeal, the General Court held that, pursuant to the principle of solidarity, 'the Commission was required, in the context of the contested decision, to assess whether the variation to the regime governing the operation of the OPAL pipeline, as proposed by the German regulatory authority, could affect the interests in the field of energy of other Member States and, if so, to balance those interests with the interests that that variation had for the Federal Republic of Germany and, if relevant, the European Union'. (77)

140. According to the General Court, the contested decision does not contain any such analysis: ‘the principle of energy solidarity was not only not mentioned in the contested decision, but also the decision itself does not disclose that the Commission did, as a matter of fact, carry out an examination of that principle’. (78)

141. The General Court recognises that, ‘in paragraph 4.2 of the contested decision (recitals 48 to 53), the Commission made observations on the criterion of … security of supply’ in the European Union in general. (79) It states, however, that that analysis did not assess ‘the impact of the variation of the regime governing the operation of the OPAL pipeline on the security of supply in Poland’.

142. The General Court went on to say, as I have already commented, (80) that, in the contested decision, ‘it does not appear that the Commission examined what the medium term consequences, inter alia for the energy policy of the Republic of Poland, might be of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported via the Yamal and Braterstwo pipelines, or that it balanced those effects against the increased security of supply that it had found at EU level’. (81)

143. Notwithstanding that it is the direct addressee of the criticisms made in this regard in the judgment of the General Court, the Commission has not challenged them.

144. It follows from Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that an appeal [to the Court of Justice] is limited to points of law.

145. It is settled case-law that the General Court has exclusive jurisdiction to find and assess the facts and to examine the evidence it accepts in support of those facts. Provided that that evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. Save where the clear sense of the evidence has been distorted, that evidence does not constitute a point of law which is subject as such to review by the Court of Justice. (82)

146. In order to be considered unlawful by the Court of Justice, such distortion of the evidence must be obvious from the documents in the case, without it being necessary to undertake a fresh assessment of the facts and evidence. (83)

147. Now, what strikes one first about this ground of appeal is that the Federal Republic of Germany has not claimed that there has been a distortion of the clear sense of the facts and evidence assessed by the General Court.

148. This ground of appeal is confined to presenting the version of the facts which the appellant considers to be established as support for the inference that the contested decision ‘did not jeopardise the security of supply of the Republic of Poland’.

149. In the appellant’s view, once security of supply in Poland had been demonstrated, ‘there was no need to carry out a more in-depth examination of the consequences [of the contested decision] for the Republic of Poland, that is to say to an extent similar to that of the examination carried out in relation to the Czech Republic’.

150. This starting point (paragraphs 38 and 39 of the appeal) hampers the further development of the ground of appeal, inasmuch as it fails to note:

– first, that the General Court explicitly found that the Commission had not assessed, in its examination, ‘the impact of the variation of the regime governing the operation of the OPAL pipeline on the security of supply in Poland’; and

– secondly, that the General Court’s criticism of the contested decision went beyond security of energy supply in Poland. The General Court censured in this regard the fact that the Commission had not addressed the ‘wider aspects of the principle of energy policy’.

151. The third ground of appeal, inasmuch as it takes issue with those assertions in the judgment under appeal but does not claim that the facts assessed by the General Court have been distorted, is inadmissible.

XI. Fourth ground of appeal: the Commission was not obliged to make express reference to the principle of energy solidarity in the contested decision

A. Arguments of the parties

152. The Federal Republic of Germany submits that the General Court erred in law in stating, in paragraph 79 of the judgment under appeal, that 'the principle of energy solidarity was not only not mentioned in the contested decision, but also the decision itself does not disclose that the Commission did, as a matter of fact, carry out an examination of that principle'.

153. In the appellant's view, the Commission cannot be required to make express reference to the principle of energy solidarity. When adopting its decisions, the Commission is under no obligation to give an exhaustive statement of the grounds on which they are based; it is sufficient for it to set out the fundamental legal considerations that will provide an understanding of the reasoning behind the decision.

154. The Republics of Poland and Lithuania oppose those assertions.

B. Assessment

155. The fourth ground of appeal is ineffective, in so far as it is directed against an assertion by the General Court which does not constitute the rationale on which its decision was based.

156. The General Court – which, it is true, noted the failure to mention the principle of energy solidarity in the contested decision – did not annul the decision on account of that omission, but because the Commission had not carried out a proper analysis of the requirements attendant upon that principle.

157. The General Court took the view, as I have already said, that that analysis compelled the Commission to take into account the impact of full use of the OPAL pipeline on the Polish gas market, on other Member States and on the European Union as a whole.

158. The important point, therefore, was not the mere *reference* to that principle, (84) but the proper assessment of its implications for the relevant interests in the exemption of the OPAL pipeline. The General Court considers that that analysis was not carried out, regardless of whether or not, if it had been, it might have led to the full liberalisation of the OPAL pipeline in favour of Gazprom and its affiliated undertakings.

159. The fourth ground of appeal is thus based on a misunderstanding of the judgment under appeal, which, as I have said, does not annul the contested decision because it fails to make express reference to the principle of energy solidarity.

160. The judgment would have been open to the accusation of formalism (85) if the failure to mention that principle had been the decisive factor in the annulment, and if, moreover, that omission had been offset by content in the decision making it clear that that principle *had* been taken into consideration in relation to all of the stakeholders involved. It is, in actual fact, the latter scenario which the General Court finds to be lacking.

161. Thus, the General Court notes that the Commission carried out a basic analysis of the impact of extending the exemption of the OPAL pipeline on the Czech gas market, but, crucially, neglected to analyse its impact on the Polish gas market and on the markets in other Central and Eastern European States. (86)

162. The fourth ground of appeal must therefore be dismissed.

XII. Fifth ground of appeal: alleged formal defects

A. Arguments of the parties

163. The Federal Republic of Germany submits, in the first place, that, even if the statement of reasons for the contested decision were considered to be insufficient, that error had no bearing on the decision on the substance. Consequently, the decision should not have been annulled by the General Court. (87)

164. In the second place, it submits that the claim for annulment should have been directed against the original (2009) decision. It argues that the General Court made an error of procedure in taking into account the Republic of Poland's argument – regarded by Germany as being out of time – alleging that the contested decision infringed the principle of energy solidarity.

165. The Republics of Poland and Lithuania oppose those assertions.

B. Assessments

166. The first argument under the fifth ground of appeal must be rejected, since the General Court did not annul the contested decision on grounds of an inadequate statement of reasons but because it infringes the principle of energy solidarity as set out in Article 194(1) TFEU.

167. The second argument must also be rejected, inasmuch as it claims, without foundation, that Poland was not entitled to seek the annulment of the contested decision within the prescribed time limit because it did not challenge the original (2009) decision when it could have.

168. Such an argument presupposes, at least, that Poland had an interest in the annulment of the original decision and, above all, that the contested decision reproduced the content of its predecessor.

169. That argument cannot be endorsed, since, on the contrary, the 2016 decision (the contested decision) amended the exemption conditions laid down in the original decision, and is therefore amenable to a judicial review independent of that which could have been carried out in respect of the 2009 decision.

170. The fifth ground of appeal must therefore be dismissed.

XIII. Costs

171. In accordance with Article 138(1) in conjunction with Article 184(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

172. In this case, the Republic of Poland has applied for costs against the appellant.

XIV. Conclusion

173. In the light of the foregoing, I suggest that the Court:

(1) Dismiss the first, second, fourth and fifth grounds of the appeal brought by the Federal Republic of Germany.

(2) Declare the third ground of the appeal brought by the Federal Republic of Germany to be inadmissible.

(3) Order the Federal Republic of Germany to bear its own costs, as well as those incurred by the Republic of Poland.

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1 Original language: Spanish.

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2 Judgment in *Poland* v *Commission* (T−883/16, EU:T:2019:567; 'the judgment under appeal').

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3 OPAL stands for Ostseepipeline-Anbindungsleitung. The OPAL pipeline is the onshore section, to the west, of the Nord Stream gas pipeline, the point of entry to which is located close to the municipality of Lubmin, near Greifswald, in Germany, and the point of exit from which is in the municipality of Brandov in the Czech Republic. The Nord Stream pipeline transports gas from Russian fields across the Baltic Sea to Germany. Nord Stream has another onshore extension, the NEL (Nordeuropäische Erdgasleitung) pipeline, which has a capacity of 20 million cubic metres and runs from Greifswald to the Netherlands and the rest of North-West Europe.

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4 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 ('the contested decision'). The German version is authentic and English is the only other version available. It was published on the Commission's website on 3 January 2017.

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5 Confirmation that energy solidarity is a valid principle might have repercussions for the development of EU energy policy, increasingly interconnected as it is with EU climate policy, as well as other implications, whether geopolitical (in terms of the supply of gas to Europe by Russia and its State undertaking Gazprom), or economic (in terms of the use of the gas pipelines that supply Europe and the undertakings that operate those pipelines).

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6 Directive 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; 'Directive 2009/73'), which repealed and replaced Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

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7 Directive of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73 concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1).

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8 Law on the supply of electricity and gas (BGBl. 2005 I, p. 1970, 3621).

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9 Both decisions concerned the respective shares held by the two owners of the OPAL pipeline, 80% of which is owned by WIGA Transport Beteiligungs-GmbH & Co. ('WIGA'; previously W & G Beteiligungs-GmbH & Co. KG; previously Wingas GmbH & Co. KG), and 20% by E.ON Ruhrgas AG. WIGA is jointly controlled by OAO Gazprom and BASF SE. The company operating the share of the OPAL pipeline belonging to WIGA is OPAL Gastransport GmbH & Co. KG ('OGT').

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10 The OPAL pipeline has a capacity of 36.5 billion m^3/year in its northern section between Greifswald and the entry point of Groß-Köris to the south of Berlin (Germany). The southern section, between Groß-Köris and the exit point at Brandov, has a capacity of 32 billion m^3/year. The difference of 4.5 billion m^3/year was intended to be sold in the Gaspool market area, which comprises the north and east of Germany.

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11 According to Ridley, A., 'Gazprom refused to provide a gas release programme because it would have resulted in an open auction for gas with third parties. In such an auction, the prices set at market could have been

used against Gazprom. For example, customers with long term supply contracts with Gazprom, with price review clauses, could have been incentivised to use the evidence of those auctions to take Gazprom to arbitration to force a reduction in the price they themselves paid for gas. Therefore, Gazprom and its German ally were limited to using no more than half of the pipeline capacity' (Ridley, A.: 'The "principle of solidarity": OPAL, Nord Stream, and the shadow over Gazprom', Atlantic Council, 17 October 2019, https://www.atlanticcouncil.org/blogs/energysource/the-principle-of-solidarity-opal-nord-stream-and-the-shadow-over-gazprom/).

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12 Yafimava, K.: 'The OPAL Exemption Decision: past, present, and future', Oxford Institute for Energy Studies, 2017, pp. 10 to 13, available at https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/01/The-OPAL-Exemption-Decision-past-present-and-future-NG-117.pdf.

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13 In essence, the variation proposed by the BNetzA consisted of replacing the restriction imposed by the original decision on the capacity that could be reserved by dominant undertakings with the obligation, for OGT, to offer, by auction, at least 50% of the capacity operated by it, namely, 15 864 532 kWh/h (approximately 12.3 billion m^3/year), of which 14 064 532 kWh/h (approximately 10.98 billion m^3/year) was to take the form of fixed dynamically attributable capacities (*feste dynamisch zuordenbare Kapazitäten*; 'DZK') and 1 800 000 kWh/h (approximately 1.38 billion m^3/year) was to take the form of fixed freely attributable capacities (*feste frei zuordenbare Kapazitäten*; 'FZK') at the exit point of Brandov. If, for two consecutive years, the demand for FZK capacities exceeded the initial offer of 1 800 000 kWh/h, OGT would be required, under certain conditions, to increase the offer of such capacities up to a ceiling of 3 600 000 kWh/h (approximately 2.8 billion m^3/year).

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14 The Brotherhood pipeline leaves Russia, passes through Ukraine and Slovakia and enters the Czech Republic, from where the gas is routed, via connected pipelines, to other Member States. Gazprom also supplies gas via the Yamal pipeline, which crosses Belarus, enters the Baltic countries, passes through Poland, enters Germany and continues beyond.

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15 According to Ridley, A., 'In December 2016, Gazprom —with the assistance and approval of the German energy regulator— was able to obtain an amendment to the 2009 OPAL exemption from the European Commission. In essence, the cap was lifted. 50 percent of OPAL's capacity would be exempt from third party access and tariff regulation. The rest of the pipeline's capacity would be subject to two auction regimes. However, as Gazprom was dominant in the marketplace, the reality was that Gazprom or Gazprom's allies would take up all the auctioned capacity. In essence, Gazprom was gifted the rest of the capacity by the Commission. The actual operation of the pipeline after December 2016 demonstrated that this is exactly what happened. OPAL wholly became a route for flooding Gazprom-controlled gas from Nord Stream 1, while gas flows through the Ukrainian transit route along the Brotherhood pipeline network fell' (Ridley, A.: 'The "principle of solidarity": OPAL, Nord Stream, and the shadow over Gazprom', Atlantic Council, 17 October 2019, https://www.atlanticcouncil.org/blogs/energysource/the-principle-of-solidarity-opal-nord-stream-and-the-shadow-over-gazprom/).

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16 The General Court declared the action for the annulment of the contested decision brought by that undertaking to be inadmissible for lack of standing, on the ground that that decision was not of direct or individual concern to it and did not constitute a regulatory act. Order of the General Court of 15 March 2018, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission* (T−130/17, not published, EU:T:2018:155).

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17 The General Court declared its action inadmissible, also on the ground of lack of standing, by order of 14 December 2017, *PGNiG Supply & Trading* v *Commission* (T−849/16, EU:T:2017:924).

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18 Judgments of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission* (C−342/18 P, not published, EU:C:2019:1043); and of 4 December 2019, *PGNiG Supply & Trading* v *Commission* (C−117/18 P, not published, EU:C:2019:1042); and order of 4 December 2019, *Poland* v *Commission* (C−181/18 P, not published, EU:C:2019:1041).

19 Judgment under appeal, paragraphs 71 to 73.

20 *Ibidem*, paragraph 77.

21 *Ibidem*, paragraph 81.

22 *Ibidem*, paragraph 82.

23 *Ibidem*, paragraph 83.

24 'Bundesnetzagentur orders immediate implementation of OPAL judgment of European Court', www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2019/20190913_Opal.html.

25 In particular, on 30 December 2019, Gazprom and Naftogaz Ukrainy signed agreements on the transit of Russian gas through Ukraine during the period 2020-2024, at volumes of 65 bcm in 2020, and 40 bcm/year in the period 2021-2024 (a total of 225 bcm), with provision for the shipment of additional volumes if necessary. See in this regard Pirani, S., and Sharples, J.: 'The Russia-Ukraine gas transit deal: opening a new chapter', *Energy Insight: 64*, Oxford Institute for Energy Studies, February 2020, available at https://www.oxfordenergy.org/wpcms/wp-content/uploads/2020/02/The-Russia-Ukraine-gas-transit-deal-Insight-64.pdf.

26 The Nord Stream 2 pipeline comprises two pipelines and will carry gas from Vyborg (Russia) to Lubmin (Germany), near Greifswald (Germany). Once it reaches German territory, the gas piped by Nord Stream 2 would be transported along the ENEL onshore pipeline and the newly built EUGAL onshore pipeline, both of which are also regulated in Germany in accordance with Directive 2009/73.

27 See the analysis of Pirani, S., Sharples, J., Yafimava, K., and Yermakov, V.: 'Implications of the Russia-Ukraine Gas Transit Deal for Alternative Pipeline Routes and the Ukrainian and European markets', *Energy Insight: 65*, Oxford Institute for Energy Studies, March 2020, available at https://www.oxfordenergy.org/wpcms/wp-content/uploads/2020/03/Insight-65-Implications-of-the-Russia-Ukraine-gas-transit-deal-for-alternative-pipeline-routes-and-the-Ukrainian-and-European-markets.pdf.

28 See footnote 31 to this Opinion.

29 Article 2(17) of Directive 2009/73, as amended, now provides that the concept of 'interconnector' refers not only to '[any] transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those Member States', but also '[any] transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of that Member State'.

30 In particular, Article 49a(1) of Directive 2019/692 provides that, 'in respect of gas transmission lines between a Member State and a third country completed before 23 May 2019, the Member State where the first connection point of such a transmission line with [that] Member State's network is located may decide to derogate from [certain provisions of Directive 2009/73] for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas or to security of supply in the Union'. Article 49a(1) also states, on the one hand, that that derogation 'shall be limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above conditions', and, on the other hand, that 'such derogations shall not apply to transmission lines between a Member State and a third country which has the obligation to transpose [Directive 2009/73] and which … implements [Directive 2009/73, as amended] in its legal order under an agreement concluded with the Union'.

Furthermore, Directive 2019/692 amended Article 36 of Directive 2009/73 so that paragraph 1(e) thereof provides that the exemption granted under that article to existing new infrastructures must not be detrimental, in particular, to 'security of supply of natural gas in the Union'.

31 Orders of the General Court of 20 May 2020, *Nord Stream* v *Parliament and Council* (T−530/19, EU:T:2020:213); and *Nord Stream 2* v *Parliament and Council* (T−526/19, EU:T:2020:210); an appeal has been brought against the latter order in Case C−348/20 P, *Nord Stream 2* v *Parliament and Council*, still pending.

32 Decision BK7-20-004 of the BNetzA of 15 May 2020, available at: https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2020/BK7-20-0004/BK7-20-0004_Beschluss_EN_download.pdf?__blob=publicationFile&v= 3).

33 Case WT/DS476/R, European Union and its Member States – Certain measures relating to the energy sector. Information on this dispute can be found on the WTO website.

34 Cited above, in particular paragraphs 7.1000 to 7.1003. See the analysis of Pogoretsky, V., and Talus, K.: 'The WTO Panel Report in EU-Energy Package and its implications for the EU's gas market and energy security', *World Trade Review*, 2020, No 4, pp. 531 to 549.

35 The WTO Panel's decision leaves out of account the fact that the OPAL pipeline capacity release programme would have allowed Gazprom to use the pipeline's full capacity, although, in order to do so, it would have had to auction almost half of the natural gas transmitted, something which it avoided doing because, it would seem, this was not in its commercial interests, as I have already explained.

36 The values on which the Union is founded 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, *solidarity* and equality between men and women prevail' (no emphasis in the original).

37 No emphasis in the original. Article 3 TEU also includes 'solidarity between generations' (paragraph 3) and 'solidarity and mutual respect among peoples' (paragraph 5).

38 According to Article 24(2), 'the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States'. Article 24(3) provides that 'the Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity …. The Member States shall work together to enhance and develop their mutual political solidarity'.

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39 These policies and their implementation 'shall be governed by the principle of *solidarity* and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle'.

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40 Article 122(1) allows the Council to 'decide, in a spirit of *solidarity* between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply chain of certain products, notably in the area of energy'. In accordance with Article 122(2), the Council may grant financial assistance to a Member State which is 'in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional circumstances beyond its control'.

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41 'The Union and its Member States shall act jointly in a spirit of *solidarity* if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster'.

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42 For an interdisciplinary overview of solidarity in EU law, see the work by Coman, R., Fromont, L., and Weyembergh, A. (eds.): *Les solidarités européennes. Entre enjeux, tensions et reconfigurations*, Bruylant, Brussels, 2019.

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43 The adoption at the European Council of 10 and 11 December 2020 of the Multiannual Financial Framework 2021-2027 and the European Union Recovery Facility (Next Generation EU) is arguably the biggest step forward in terms of solidarity which the European Union has taken in its history. For the first time, the European Union is going to borrow by raising money on the capital markets in order to finance, through large-scale grants and loans, the economic recovery of the Member States, depending on how badly they have been affected by COVID-19.

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44 Van Cleynenbreugel, P., refers to solidarity as 'a background inspirational value for EU law and policy initiatives, without, however, being fundamentally guiding as a legal principle …' (Van Cleynenbreugel, P.: 'Typologies of solidarity in EU law: a non-shifting landscape in the wake of economic crisis', in Biondi, E., Dagilyté, E. and Küçük, E. (eds.): *Solidarity in EU Law. Legal principle in the making*, Edward Elgar, Cheltenham, 2018, pp. 25 and 36. Dagilyté, E.: 'Solidarity: a general principle of EU law? Two variations on the solidarity theme', in Biondi, E., Dagilyté, E. and Küçük, E. (eds.): cited above, p. 62, states that, 'although solidarity is inherent in the EU legal order as a foundational value, it cannot (yet) be defined as a general principle of EU law'.

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45 Levade, A.: 'La valeur constitutionnelle du principe de solidarité', in Boutayeb, C. (dir.): *La solidarité dans l'Union européenne: éléments constitutionnels et matériels*, Dalloz, París, 2011, p. 41 et seq.; Ross, M.: 'Solidarity: A new constitutional paradigm for the EU?', in Ross, M., and Borgmann-Prebil, Y. (eds.): *Promoting Solidarity in the European Union*, Oxford University Press, Oxford, 2010, pp. 23 to 45.

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46 Berrandane, A.: 'Solidarité, loyauté dans le droit de l'Union européenne', in Boutayeb, C. (dir.): *La solidarité dans l'Union européenne: éléments constitutionnels et matériels*, Dalloz, París, 2011, p. 55 et seq..

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47 Judgment of 10 December 1969 (6/69 and 11/69, not published, EU:C:1969:68, paragraph 16).

48 Judgment of 7 February 1973 (39/72, EU:C:1973:13, paragraph 25).

49 Judgments of 22 January 1986, *Eridania zuccherifici nazionali and Others* (250/84, EU:C:1986:22, paragraph 20); of 29 September 1987, *Fabrique de fer de Charleroi and Dillinger Hüttenwerke* v *Commission* (351/85 and 360/85, EU:C:1987:392, paragraph 21); and of 11 May 2000, *Gascogne Limousin viandes* (C−56/99, EU:C:2000:236, paragraphs 40 and 42).

50 I refer to the analysis of Küçük, E.: 'Solidarity in EU law: an elusive political statement or a legal principle with substance?', in Biondi, A., Dagilyté, E., and Küçük, E. (eds.): *Solidarity in EU Law. Legal principle in the making*, Edward Elgar, Cheltenham, 2018, pp. 56 to 60.

51 Judgment of 2 April 2020, *Commission* v *Poland, Hungry and Czech Republic* (Temporary mechanism for the relocation of applicants for international protection) (C−715/17, C−718/17 and C−719/17, EU:C:2020:257, paragraphs 80 and 181). See also the judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C−643/15 and C−647/15, EU:C:2017:631, paragraph 291).

52 Paragraphs 80 and 181 of the judgment of 2 April 2020, *Commission* v *Poland*, *Hungary and Czech Republic* (Temporary mechanism for the relocation of applicants for international protection) (C−715/17, C−718/17 and C−719/17, EU:C:2020:257): '… the burdens entailed by the provisional measures provided for in Decisions 2015/1523 and 2015/1601, since they were adopted under Article 78(3) TFEU for the purpose of helping the Hellenic Republic and the Italian Republic to better cope with an emergency situation characterised by a sudden influx of third-country nationals on their territory, must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs the Union's asylum policy'.

53 In her Opinion of 31 October 2019 in the joined cases *Commission* v *Poland, Hungary and Czech Republic* (Temporary mechanism for the relocation of applicants for international protection) (C−715/17, C−718/17 and C−719/17, EU:C:2019:917, point 253), Advocate General Sharpston stated that 'solidarity is the lifeblood of the European project'.

54 Apparently, the Baltic countries and those of Central and Eastern Europe pushed for the inclusion of the reference to solidarity, following the risk of gas shortages that emerged as a result of the crisis between Russia and Ukraine in 2006. See Andoura, S.: 'La solidarité énergétique en Europe: de l'indépendance à l'interdépendance', *Notre Europe*, July 2013, pp. 33 to 35.

55 At the hearing, the Federal Republic of Germany and the Commission described it as such.

56 According to that provision, the rules of EU law 'shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)'. In the judgment of 22 September 2020, *Austria* v *Commission* (C−594/18 P, EU:C:2020:742, paragraphs 48 and 49), the Court considers that, on the basis of that provision, the choice of nuclear energy is a matter for the Member States.

57 Judgments of 10 July 1984, *Campus Oil and Others* (72/83, EU:C:1984:256, paragraphs 34 and 35), and of 4 June 2002, *Commission* v *Belgium* (C−503/99, EU:C:2002:328, paragraph 46).

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58 COM(2015) 080 final of 25 February 2015, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and the European Investment Bank on a Framework Strategy for a Resilient Energy Union with a Forward-looking Climate Change Policy. In that Strategy, the Commission expresses the view that 'the spirit of solidarity in energy matters is explicitly mentioned in the Treaty and is at the heart of the Energy Union' (p. 4).

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59 See Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ 2018 L 328, p. 1), and documents COM(2020) 80 final of 4 March 2020, Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation 2018/1999 ('European Climate Law') and COM(2019) 640 final of 11 December 2019, 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 on the European Green Deal.

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60 Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and No 715/2009 (OJ 2013 L 115, p. 39).

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61 Regulation of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (OJ 2017 L 280, p. 1).

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62 Regulation of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ 2010 L 295, p. 1).

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63 On this mechanism, see the judgment of 20 December 2017, *Eni and Others* (C−226/16, EU:C:2017:1005).

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64 Article 13 governs a solidarity mechanism that protects a Member State which finds itself in a crisis situation because it does not have enough gas to supply its protected customers. In those circumstances, the Member State(s) to which the State affected by the crisis is connected is obliged to provide that State with gas to supply its protected customers, including by reducing supply to non-protected customers in its territory. The mechanism is activated only in the case where the State in crisis has not been able to address the crisis by applying the measures contained in its national emergency plan. In addition, it must pay fair compensation to the Member State providing it with gas.

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65 A parallel mechanism, for the provision of assistance in the event of an electricity supply crisis, was created by Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC (OJ 2019 L 158, p. 1).

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66 Regulation of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ 2019 L 79, p. 1).

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67 In his Opinion in *Eni and Others* (C−226/16, EU:C:2017:616, points 33 and 34), he stated: 'This reference to solidarity between Member States [in Article 194(1) TFEU], which was added into the wording of the text of the Treaty of Lisbon, is made in a context in which the principle of solidarity between Member States has taken on a character that could be defined as a "constitutional principle". … [T]he principle of solidarity between Member States has particular relevance with regard to supply in the area of energy'.

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68 At the hearing, the Federal Republic of Germany qualified that assertion and recognised that energy solidarity is a legal principle, but stated that the General Court had misapplied it in the judgment under appeal.

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69 Judgment under appeal, paragraph 70.

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70 It would not be easy to explain to States which have rightly been accused of disregarding the legal requirements of the principle of solidarity in relation to the relocation of applicants for international protection that that principle does not have legal effects in the context of energy solidarity.

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71 *Ibidem*, paragraphs 70 to 72.

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72 The Court has held, in the context of State aid, that aid which contravenes the general principles of EU law cannot be declared to be compatible with the internal market. See, to that effect, the judgments of 15 April, *Nuova Agricast* (C−390/06, EU:C:2008:224, paragraphs 50 and 51), and of 22 September 2020, *Austria* v *Commission* (C−594/18 P, EU:C:2020:742, paragraph 44). In the latter judgment, concerning State aid for the Hinkley Point nuclear power station (United Kingdom), the Court (paragraph 49) considered the possibility of annulling the Commission decision authorising that aid pursuant to the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability. It took the view, however, that those principles do not generally preclude, in all circumstances, the grant of State aid for the construction or operation of a nuclear power station, for which the Euratom Treaty provides.

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73 Commission Decision C(2020) 8377 final of 25 November 2020 on exemption from the rules on third-party access and tariff regulation of the Alexandroupolis Independent Natural Gas System LNG Terminal (paragraphs 29 to 32); and Commission Decision C(2020) 8948 final of 8 December 2020 on exemption from the rules on third-party access and tariff regulation of the South Hook LNG Terminal pursuant to Article 36 of Directive 2009/73/EC (paragraphs 43 to 46).

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74 Following its amendment, the second subparagraph of the new Article 36(3) of Directive 2009/73 provides:

'Before the adoption of the decision on the exemption, the national regulatory authority, or where appropriate another competent authority of that Member State, shall consult:

(a) the national regulatory authorities of the Member States the markets of which are likely to be affected by the new infrastructure; and

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(b) the relevant authorities of the third countries, where the infrastructure in question is connected with the Union network under the jurisdiction of a Member State, and originates from or ends in one or more third countries'.

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75 See Buschle, D., and Talus, K.: 'One for All and All for One? The General Court Ruling in the OPAL Case', *Oil, Gas & Energy Law Intelligence*, 2019, No 5, p. 8.

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76 Boute, A.: 'The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline)', *Common Market Law Review*, No 3, 2020, pp. 889 to 914, in particular p. 912.

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77 Judgment under appeal, paragraph 78.

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78 *Ibidem*, paragraph 79.

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79 *Ibidem*, paragraphs 80 and 81.

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80 Point 32 of this Opinion.

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81 Judgment under appeal, paragraph 82.

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82 Judgments of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission* (C−617/13 P, EU:C:2016:416, paragraph 63); and of 26 March 2020, *Larko* v *Commission* (C−244/18 P, EU:C:2020:238, paragraph 25).

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83 Judgment of 20 January 2016, *Toshiba Corporation* v *Commission* (C−373/14 P, EU:C:2016:26, paragraph 41).

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84 The contested decision is a text of nine articles but containing a very extensive, almost exhaustive, statement of grounds comprising 170 recitals. It is striking that such a statement of grounds does not contain a single reference to the principle of energy solidarity and its repercussions on the measures adopted.

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85 A criticism levelled at the judgment under appeal by Boute, A.: 'The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL Pipeline)', *Common Market Law Review*, 2020, p. 913.

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86 See in this regard the criticisms levelled at the Commission's assessment by Szydło 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*, 2018, No 11, pp. 95 to 126.

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87 It refers in particular to the judgment of 7 November 2013, *Gemeinde Altrip and Others* (C−72/12, EU:C:2013:712, paragraph 51).