



www.ogel.org

ISSN : 1875-418X
Issue : Vol. 17 - issue 5
Published : November 2019

This paper is part of the OGEL Special Issue on "Natural Gas Pipeline Construction and Regulation" edited by:



T.J. Dimitroff

*Roland Berger GmbH;
Infrastructure
Development
Partnership LLP*

[View profile](#)



K. Talus

*Tulane Center for
Energy Law,
Tulane Law School;
UEF Law School;
University of Helsinki*

[View profile](#)

Terms & Conditions

Registered OGEL users are authorised to download and print one copy of the articles in the OGEL Website for personal, non-commercial use provided all printouts clearly include the name of the author and of OGEL. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of OGEL is strictly prohibited. Should the user contravene these conditions OGEL reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.ogel.org

© Copyright OGEL 2019
OGEL Cover v4.0

Oil, Gas & Energy Law Intelligence

One for All and All for One? The General Court Ruling in the OPAL Case by D. Buschle and K. Talus

About OGEL

OGEL (Oil, Gas & Energy Law Intelligence): Focusing on recent developments in the area of oil-gas-energy law, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including the oil-gas-energy geopolitics.

For full Terms & Conditions and subscription rates, please visit our website at www.ogel.org.

Open to all to read and to contribute

OGEL has become the hub of a global professional and academic network. Therefore we invite all those with an interest in oil-gas-energy law and regulation to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact us at info@ogel.org if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an OGEL-focused republication), but rather concise comments from the author's professional 'workshop'.

OGEL is linked to **OGELFORUM**, a place for discussion, sharing of insights and intelligence, of relevant issues related in a significant way to oil, gas and energy issues: Policy, legislation, contracting, security strategy, climate change related to energy.

One for All and All for One? The General Court Ruling in the OPAL Case

Dirk Buschle and Kim Talus¹

Introduction

With its judgment of 10 September 2019, the General Court (the “Court”) annulled an earlier Commission decision to modify the exemption regime for the OPAL pipeline.² The Court based its judgment on the principle of energy solidarity introduced by Article 194(1) of the Treaty on the Functioning of the European Union (“TFEU”). The ruling goes against the old adage that only small cases make great law, as the OPAL pipeline exemption has been a major bone of contention in EU energy policy for many years. Given the role and history of legal principles in European Union (“EU”) law, the judgment may have far reaching impact on the interpretation and application of the rules of EU energy law.

This article will focus on one aspect of the *OPAL* case: the principle of energy solidarity.

The Facts

The gas pipeline Ostseepipeline-Anbindungsleitung (“OPAL”) is the onshore extension of the Nord Stream 1 gas pipeline, which brings Russian gas to the shores of Germany. The OPAL pipeline starts onshore after the landing terminal for Nord Stream 1 in Germany and runs southwards through the country to Czech Republic where the exit point for the pipeline is located.

In order to secure the full or almost full utilization rights for the pipeline, OPAL applied for an exemption under Article 22 of Directive 2003/55/EC in 2009. Directive 2003/55/EC has since been replaced by Directive 2009/73/EC, and the former Article 22 was upgraded in some respects. What is now Article 36 of Directive 2009/73/EC provides that:

1. Major new gas infrastructures, 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;

¹ Dirk Buschle is Professor and Chairholder of the Iberdrola Manuel Marin European Energy Policy Chair at the College of Europe in Bruges and Deputy Director of the Energy Community Secretariat, Vienna. All views expressed are strictly personal. Kim Talus is the James McCulloch Chair in Energy Law and founding Director of the Tulane Center for Energy Law (Tulane Law School). He is also a Professor of European Energy Law at UEF Law School (University of Eastern Finland) and a Professor of Energy Law at Helsinki University. Kim Talus is also the Editor-in-Chief for OGEL (www.ogel.org). The authors would like to thank Ivo Gross, lawyer-linguist at the EU Court of Justice and former Referendaire at the General Court, for valuable comments on an earlier version of the present article.

² Case T-883/16, Poland v Commission, ECLI:EU:T:2019:567.

(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.

An exemption is available for “major” new gas infrastructures. This criterion is balanced against the size of the markets concerned and relates to the costs for the connected systems.³ Moreover, the notion of what constitutes an interconnector was recently changed through amendments to the Gas Directive. Finally, the exemption is granted only on a case-by-case basis. Even if all conditions are met, an exemption is not automatically granted⁴ and a partial exemption covering only part of the capacity of the new infrastructure or of the new additional capacity is possible and has become the standard.

The procedural scheme for the exemption primarily relies on national decision-making but grants the ultimate control over the exemption to the European Commission. The national exemption decisions must be notified to the Commission who will then decide to reject, to accept or return to the national regulators for amendments. In the Energy Community, the Secretariat assumes the role of the Commission, albeit not with decision-making powers. This has affected homogeneity in the pan-European energy market, most notably in the recent exemption granted to the Serbian section of the so-called TurkStream II pipeline.⁵

In the OPAL case, the original decision by the national authority, the Bundesnetzagentur (BNetzA, the German regulatory authority) was taken in 2009 and notified to the Commission. The same year, the Commission adopted a decision requesting the BNetzA to modify its decisions by adding certain conditions.⁶ On 7 July 2009, the BNetzA amended its decisions by incorporating the conditions required by the Commission. The exemption from the rules was granted by the BNetzA for a period of 22 years. Under the exemption conditions Gazprom, the only company that could supply gas to OPAL pipeline through its entry point, could reserve only 50% of the cross-border capacities of the OPAL pipeline, unless it released onto the market a volume of gas of 3 billion m³/year on that pipeline.⁷ This gas release program was

³ Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity (SEC/2009/642 final), 6 May 2009, para. 23.

⁴ Note of the DG Energy & Transport on Directives 2003/54-55 and Regulation 1228/03 in the Electricity and Gas Internal Market, Exemptions from certain provisions of the third party access regime. 30.1.2004, p. 4.

⁵ Opinion 1/2019 of 1 February 2019, see also Dirk Buschle, Russia’s Influence in the Energy Sectors of Southeast Europe – the Case of the “South Stream Lite” Pipeline in Serbia, in: Johanna Deimel (Ed.). South East Europe in Focus - External Actor Series: Russia.

⁶ Decision C(2009) 4694 of 12 June 2009 (‘the 2009 decision’).

⁷ The requirements from the Commission were:

‘(a) Without prejudice to the requirement in (b), an undertaking dominant on one or several large markets in natural gas upstream or downstream covering the Czech Republic shall not be authorised to reserve, in a single year, more than 50% of the transport capacities of the OPAL pipeline at the Czech border. Reservations from undertakings belonging to the same group, such as Gazprom and Wingas, shall be examined together. Reservations from dominant undertakings/groups of dominant undertakings which have concluded significant long-term contracts for the supply of gas shall be examined on an aggregated basis ...

never implemented, resulting in 50% capacity utilization by Gazprom. The remaining 50% of OPAL pipeline capacity was unused since it took up operations in 2011.

A new decision⁸ was taken in 2016 by BNetzA allowing Gazprom to use 80 per cent of the OPAL transmission capacity, and, with no third-party demand for capacity, Gazprom could potentially use the full capacity of the pipeline. These modifications were approved by the Commission, subject to minor changes (“the 2016 Commission Decision”).⁹ That second decision was based on Article 36 of Directive 2009/73/EC, which had replaced Article 22 of the 2003 Directive as the legislative foundation for exemptions.

In its action before the Court, Poland challenged, inter alia, the Commission interpretation and application of the second condition of Article 36 (1) (a) “the investment must enhance competition in gas supply and enhance security of supply;”. According to Poland, the 2016 Commission Decision violated that criterion. The Court dismissed that claim as Article 36 (1) (a) refers to the “investment” as such, and not the exemption. The Court did not deem it necessary to deal with other grounds put forward by Poland, namely Article 36 (1) (e) of Directive 2009/73/EC (i.e. the exemption may not be detrimental to competition) and the violation of international agreements concluded by the European Union, namely the Energy Charter and the Energy Community Treaties, as well as the EU-Ukraine Association Agreement). Instead, Poland’s claim alleging violation by the 2016 Commission Decision of the solidarity principle referred to in Article 194 TFEU was successful.

The Polish case was essentially motivated by fear of Russian market abuses and money lost from transit, though history and geopolitics certainly have their role as well. In the first area the key issues is the purpose behind Nord Stream and its onshore extension OPAL, namely to bypass the established gas transit routes through Poland, and more importantly: Ukraine. In particular, the country suspects that once Russia will have gained independence from those countries for gas transit towards western Europe, it could (ab)use its power over customers without supply alternatives in order to achieve political goals. In the second area, Poland – as

(b) The limit of 50% of the capacities may be exceeded if the undertaking concerned releases to the market a volume of 3 billion m³ of gas on the OPAL pipeline under an open, transparent and non-discriminatory procedure (“Gas Release Programme”). The undertaking managing the pipeline or the undertaking required to carry out the programme must ensure the availability of corresponding transport capacities and the free choice of the exit point (“Capacity release programme”). The form of the Gas Release and Capacity Release programmes is subject to the approval of the BNetzA.⁷

⁸ Technically speaking, the BNetzA concluded a contract under public law with Gazprom, which was suspended pending Commission approval.

⁹ Commission Decision C(2016) 6950 final on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation. The changes were, in particular:

- the initial offer of capacities to be auctioned was required to cover 3 200 000 kWh/h (approximately 2.48 billion m³/year) of freely allocable (FZK) capacities and 12 664 532 kwh/h (approximately 9.83 billion m³/year) of dynamically allocable (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 m³/year) up to a maximum of 6 400 000 kWh/h (approximately 4.97 billion m³/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.

The Commission’s decision was put into effect by concluding an amendment to the public law contract between BNetzA and Gazprom.

does Ukraine – worries about the revenues from transit fees on the existing routes (the Yamal pipeline and the Ukrainian Braterstwo) becoming obsolete.

In Luxembourg, Poland indeed argued that Nord Stream 1 and OPAL pipelines allowed Gazprom to redirect gas flows to the EU market without using its traditional supply routes through Eastern Europe. This would, according to Poland, have a negative impact on the conditions of supply and the utilization of transmission services in pipelines in Eastern Europe. It specifically argued that by using Nord Stream 1, Gazprom could reduce or interrupt the supply through Braterstwo and Yamal pipelines and this would result in

- the impossibility, for the companies responsible for it, of meeting their obligation to guarantee the supply of gas to protected clients;
- the impossibility of the gas system functioning effectively and of assigning commercial operating opportunities for gas storage facilities;
- the likelihood of a considerable increase in the cost of obtaining gas;
- the availability of importation capacities into Poland from Germany and the Czech Republic;
- the level of transport tariffs from those two countries;
- the diversification of the sources of gas supply in Poland and in other central and eastern European Member States.

The Commission disputed these arguments. In its view energy solidarity is a political notion that appears in its communications and documents, whereas the contested decision was to be based on the legal criteria laid down in Article 36(1) of Directive 2009/73. It also argued that the principle of solidarity between the Member States set out in Article 194(1) TFEU, first, is addressed to the legislator and not to the administration applying the legislation and, second, only concerns situations of crisis in the supply or functioning of the internal gas market, whereas Directive 2009/73 lays down principles relating to the normal functioning of that market.

The Commission also argued that in any event, the criterion of enhancement of security of supply, set out in Article 36(1) of the Directive, which it examined in the contested decision, may be regarded as taking into account the notion of energy solidarity. Finally, the Commission observed that the Nord Stream 1 pipeline is a project that is recognised as being in the common interest as it constitutes the realisation of a priority project of European interest provided for by Decision No 1364/2006/EC¹⁰ and that the fact that the contested decision could enable the increased use of such an infrastructure is consistent with the common and European interests.

Assessment of the Court

In considering the arguments raised by Poland in relation to energy solidarity, the Court finds that the principle of energy solidarity does not only impose obligations of mutual assistance in cases of emergencies such as natural disasters or acts of terrorism were a Member State is in a critical or emergency situation as regards its gas supply.¹¹

¹⁰ Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC (OJ 2006 L 262, p. 1)

¹¹ Judgment, para 72.

Importantly, the Court noted that

As regards, more specifically, the energy policy of the European Union, that policy requires the European Union and the Member States to 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.¹²

The Court emphasized 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.¹³

The principle thus requires a balancing exercise where the interest sought by the measure and the negative impact it may have on a specific Member State must be evaluated and balanced against each other.

The absence of this balancing exercise in the context of the 2016 decision meant that the Commission had breached the requirements of the principle of energy solidarity. According to the Court, the Commission should have examined the impact of its 2016 decision and modification of the exemption regime to the energy security and policy in Poland. The court also emphasized that the principle of solidarity was not referred to in the 2016 decision:

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.¹⁴

According to the Court, the Commission should have examined what impact the potential re-routing of gas flows through Nord Stream 1 and OPAL pipelines would have on Poland and the Yamal and Braterstwo pipelines. It should have also weighed those effects against the increased security of supply at the EU level:

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.¹⁵

¹² Judgment, para 73.

¹³ Judgment, para 77.

¹⁴ Judgment, para 79.

¹⁵ Judgment, para 82.

Analysis and Remarks

The OPAL judgment from the General Court is an important judgment with potentially far reaching implications. While all the effects of the judgment are still not clear, it is already possible to highlight various potential implications and consequences.

The “birth” or “activation”, depending on how one wants to see the situation, of a comprehensive principle of energy solidarity is among the clear consequences of the judgment. This goes beyond the principle’s link with energy supply crisis situations, as established in particular by secondary legislation. It will thus have a number of competence related effects, reframing the old discussion on EU speaking with “one voice” in energy policy issues, and affecting national sovereignty over energy, a very sensitive issue. It can furthermore provide smaller Member States with better possibilities to have their voices heard in the EU energy context. It may also have an impact on the vertical division of competences in the EU and provide the Commission with an additional tool for its effort to lead EU energy policy.

Beyond the potential competence-related impacts of the judgment related to future policy and law-making, it also suggests that the interpretation of existing provisions of EU energy law will have to change, considering the principle of energy solidarity as an integral part of reading of various regulatory provisions.

These potential impacts will be examined next.

The Principle of Energy Solidarity and Crisis Management

One of the new elements under the Lisbon Treaty is that energy solidarity appears prominently in the language of the TFEU. The Treaty invokes the principle twice. It makes its first appearance in Article 122 TFEU. Under this provision, the Council may take emergency measures ‘in a spirit of solidarity between Member States’, notably in cases where the supply with energy is in jeopardy. Solidarity in reaction to crisis is a topos at the center of European energy and law for already some time. A first energy solidarity mechanism was introduced in EU law already in 2005 by the Energy Community Treaty, to which the EU is a party, as is Ukraine. In its Articles 44-46, the Treaty sets up a mechanism of mutual assistance between the parties in the event of disruptions. It has so far not been used.

In secondary European energy law, Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply¹⁶, adopted under Article 194(2) TFEU, built further on the principle of energy solidarity. It reflects a stronger role for the state and public sector in ensuring security of supply. For example, Article 3 specifies that security of gas supply is shared between the State and the markets, and Articles 9-12 place responsibility for security of supply on the State.

The legal act succeeding the 2010 Regulation, Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply, takes the principle of solidarity in crises to a new and higher level. Regulation 2017/1938 was adopted under the umbrella of the Energy Union, a policy priority of the Juncker Commission. In the Commission’s Energy Union

¹⁶ Regulation (EU) No 994/2010 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 (*OJL 295, 12.11.2010, p. 1–22.*)

Strategy of February 2015, the solidarity principle took center stage by devoting one of five dimensions to ‘energy security, solidarity and trust’: ‘*Our vision is of an Energy Union where Member States see that they depend on each other to deliver secure energy to their citizens, based on true solidarity and trust, and of an Energy Union that speaks with one voice in global affairs*’. Yet also in the Energy Union energy solidarity remained essentially confined to the domain of crisis management: ‘*Joint approaches in the field of energy can make all parts of the European Union stronger, for instance in case of supply shortages or disruptions. The spirit of solidarity in energy matters is explicitly mentioned in the Treaty and is at the heart of the Energy Union. Solidarity among Member States, in particular in times of supply crisis, has to be strengthened.*’ Regulation 2017/1938 was the first measure proposed by the Commission under the Energy Union label.

The true achievement of Regulation 2017/1938 in the context of energy solidarity is making the abstract principle operational. Its Article 13 essentially requires that Member States will prioritise gas supplies to (solidarity protected) customers¹⁷ in connected neighbouring states over their own (non-protected) customers in case of supply disruptions and market failure. At the same time, the Member States insisted on tightening significantly the safeguards already envisaged by the Commission’s proposal: narrowing the notion of (solidarity-)protected customers, favouring a Member State’s own protected customers and emphasizing the importance of system security, limiting solidarity as a last resort measure to cases where the providing Member State is (also) in a state of emergency, and non-protected customers in the receiving Member States were already curtailed, and most importantly insisting on mandatory compensation as a matter of principle, with compensation also extending to costs associated with disruptions in the providing Member State as well as payment commitments being made upfront. The adopted version of the solidarity mechanism is thus clearly a measure of last resort,¹⁸ and is as much about discouraging free-riding as on the principle itself. Yet taking solidarity from an abstract to an operational level makes the Regulation a milestone in European energy policy and law.

The Principle of Energy Solidarity as a General Principle of European Energy Law

The solidarity principle makes its second and more general appearance in the Lisbon Treaty in Article 194 TFEU, the primary law foundation for establishing the Union’s competences and objectives in the area of energy policy. The wording introducing the solidarity (‘Union policy on energy shall aim, in a spirit of solidarity between Member States, to: [...]’) may not at first sight lend itself to the legal effect given to it now by the General Court. In fact, it is the only change in this Article in comparison to the (failed) Constitutional Treaty, introduced late in the negotiations in response to requests made by the Polish Government related to concerns over the security of gas supply from Russia.¹⁹ For the ten exiting years in European energy policy,

¹⁷ Solidarity-protected customers are essentially defined as households, but may also include district heating and essential social services such as hospitals.

¹⁸ See also Article 2 and Recitals 38 et seq. of Regulation 2017/1938.

¹⁹ J.-P. Pielow and B. J. Lewendel, ‘Beyond “Lisbon”: EU Competences in the Field of Energy Policy’, in B. Delvaux, M. Hunt and K. Talus (eds), *EU energy law and policy issues* (Intersentia 2011), p. 300. For the reasons and background to these disputes, see J. Stern, ‘The Russia-Ukrainian Gas Crisis of January 2006’, 4(1) *OGEL* (2006) and S. Pirani, J. Stern and K. Yafimava, *The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment*, NG 27 (Institute for Energy Studies, February 2009).

the principle of solidarity was a sleeping beauty. Prince Charming turned out to come from Luxembourg.

In *OPAL*, the Court explicitly found that a reading where energy solidarity requirement is restricted to crises and emergencies is wrong. Instead, the Court's reasoning suggests that the principle of energy solidarity requires that interests of other Member States must always be taken into consideration when legislating in this area or when applying existing energy laws, be it by the Union or the Member States. As part of European law, it is subject to the Union's constitutional principles of direct effect, supremacy and state liability. Like the principle of proportionality, and to lesser extent, the principle of subsidiarity, the principle of energy solidarity does not create an obligation for a certain result, but calls for the performance of a balancing test of which the features are still largely unknown and subject to future clarification. Understood in this way, as a generally applicable principle, the principle of energy solidarity can be seen as a logical continuation of the building of a common EU energy market and common energy policy with a gradual shift of competences from national to EU level.²⁰ It is also a recognition of the new interdependencies between previously separate national markets, as the Court explicitly mentions²¹. With an increasing interconnection and integration of markets, the actions and policies of one country will have effects on the other Member States. An illustration of this is the sudden increase of renewable energy in German markets and the negative effects on its neighbors through periodical surges of power (loop flows). Another example is the impact of natural gas pipelines, which will have an influence on the flows through other pipelines. In line with the *OPAL* judgment, the negative impacts of such policies or specific energy related measures on other Member States have to be considered, even in the absence of a specific provision to this effect.

Impact on Competences of the EU and its Member States

The new reading of the principle of energy solidarity also appears to have an impact on the division of competences between Member States and the EU Commission. In this respect, the judgment notes that the principle of solidarity includes a general obligation for the EU and its Member States to consider the interest of other actors (at least other Member States and the EU as a whole) when exercising their respective competences. In – implicitly – combining the “spirit of solidarity” with the traditional European law trump card of the *effet utile*, the judgment enters into new legal territory.

The energy related competences in the EU are divided between the EU level and the Member States. Under Article 194 TFEU,

“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;

²⁰ This is discussed in K Talus ‘Decades of EU energy policy: Towards politically driven markets’, *Journal of World Energy Law & Business* 10 (2017) 4, 380-388.

²¹ At paragraph 73 of the *OPAL* judgment (cited before footnote 12 above).

- (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.

Under the same article, such EU level measures

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).

The judgment appears to impact these national energy rights. In this respect, the judgment can be read in two ways. In the first, more expansive reading, it would appear that the OPAL judgment would impact these Member State energy rights and entail that the exercise of these national rights would have to take the interests of other Member States and the EU into consideration. This would be of relevance to most energy policy decisions Member States take, including for example a significant increase of renewable energy or rapid decrease of nuclear based power generation, which has or may have an impact on neighboring Member States. This reading of the judgment affecting national energy sovereignty is based on the literal interpretation of the judgment. The relevant sections of the judgment state:

“70 As regards its content, it should be emphasised that the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.

72 On the contrary, the principle of solidarity 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.”

In this respect, one should note, however, that in an increasingly integrated and liquid internal energy market energy sovereignty in an absolute and exclusive sense has ceased to exist already some time ago. Moreover, EU mechanisms such as the emissions trading system further narrowed down the Member States’ room for maneuver. This is even more true under the conditions of the latest generation of EU legislation, as epitomized by the Clean Energy Package’s Governance Regulation. This approach combines target-setting at EU level with their achievement on national level, and thus effectively replaces the concept of sovereignty by the recognition of mutual interdependence and the principle of subsidiarity.

In a second, more restricted reading, the judgment would entail that when Member States take measures that relate to exercising rights that have their origin in EU energy law and policy, they would have to consider the interests of other Member States and the EU as a whole. This more narrow interpretation would be based on the circumstances of the OPAL case, which concerned the decision of an EU institution applying EU law, not a national measure. Yet, that type of decision was adopted in the particular dialectic procedure established by Article 36 of Directive 2009/73/EC. It thus concerns decisions by national authorities as much as it concerns the European Commission’s. The fact that both decisions were taken in the framework of an exception to EU-level regulation, on the other hand, may support a more restrictive

interpretation of the judgment. The German measure in question was not one of (pure) national energy policy but was taken in application of EU law adopted within EU energy policy.

While both alternatives appear to increase the role and powers of the Commission, the first, more expansive, reading would move more decision-making rights to the EU level in general, and allow Commission and other Member States to initiate infringement proceedings against Member States when it considers that national decisions have been taken without due consideration of the interest of other EU actors.

Even in the more restricted reading of the judgment, it provides the EU Commission with an additional power (and obligation) to scrutinize national decision-making. This impact follows from the need to incorporate energy solidarity into all application of EU energy law and the availability of the above mentioned infringement proceedings. This issue will be examined next.

A Need to Re-interpret Provisions of EU Energy Law?

The OPAL judgment concerns the exemption condition under Article 36 (1) (a) of Directive 2009/73/EC. While the solidarity principle from now on will have to be applied far beyond that provision and concerns all aspects of EU energy policy, comparing decisions under Article 36 before and after OPAL may give a first clue as to the principle's impact. A literal reading of Article 36 suggests that the check-list of criteria listed there is exhaustive. It would have been possible to associate that principle within the scope of existing criteria, e.g. the requirement that the investment must enhance security of supply. In this respect, the assessment so far has focused on the overall security aspects of the investment and the approach taken by in the exemption practice has already been holistic. For example, in case of the Poseidon pipeline decision²² the Commission assessed the effect of security of supply both at national and EU level.²³ The same goes for the criterion that the investment must enhance competition, and the exemption be not detrimental to the functioning of the internal market.. The Secretariat of the Energy Community, for instance, in the Gastrans (TurkStream II) exemption case not only considered the (negative) impacts of the project on competition on the Serbian gas markets, but also those on the connected markets in Bulgaria, Hungary and Bosnia.²⁴ How precisely the solidarity test can add further value to decisions under Article 36 thus remains to be determined on a case-by-case basis.

Similarly to the exemption regime, the third country certification under Article 11 of Directive 2009/73/EC also makes references to security of supply impact of certification and requires that "granting certification will not put at risk the security of energy supply of the member state and the community". The OPAL judgment may imply that risk on security of energy supply needs to be assessed wider than before. Another example of possible reinterpretation of the legislative requirements relating to security of supply is the new Article 49a of Directive 2009/73/EC. It makes a reference to security of supply, but does not provide for any details in this respect.

In these constellations one crucial question, among others, still open after the OPAL ruling concerns the notion of what is the "interest of Member States" to be considered and included

²² http://ec.europa.eu/energy/gas/infrastructure/doc/2007_05_22_poseidon_en.pdf.

²³ *Ibid.*

²⁴

in the balance. While the impact on competition and security of supply are well, or at least reasonably well-defined by precedents or secondary legislation, what is in a state's interest is less obvious. Interests could be of an economic (reduction in transit income) or political nature (security of supply); in its case law on free movement the Court has been reluctant to accept the former as legitimate. In which level of details does the balancing of interest need to go? And which institutions or stakeholders, and by which procedures are legitimated to define this interest in pluralistic societies of the 21st century – government, parliament, or civil society? Definitive legal certainty, however, will only be provided once the courts will have the opportunity to further shape the precise contents of the principle of energy solidarity.

Going beyond EU energy law, *stricto sensu*, Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the union provides for a cooperation mechanism in relation to foreign direct investments (screened or not) to assess whether it affects security or public order. Under the scheme created by this Regulation, the final decision by the member state undertaking the screening, but must give "due consideration" to comments and concerns from other Member States. In taking a decision on security impact of an investment, member states must consider potential impact on critical energy infrastructure and supply of energy. Here, the OPAL judgement may imply that when dealing with energy investments (1) a Member State must *ex officio* consider whether a decision is likely to affect other Member States and (2) might set the threshold higher than "give due consideration". While it is of course uncertain whether this was the consequence sought by the Court, this interpretative effect of the new principle appears to follow the judgment in *OPAL*.

Similarly, the energy solidarity principle is likely to play a greater role in decarbonization policy. Already today, the mechanisms of how to share the burden of the transition are spelt out by legislation taking into account (not only) the classic polluter-pays principle, but also the economic capability of individual Member States and the gap between rich and poor countries within the EU.²⁵ Inspired again by the Republic of Poland, the new Commission endorsed the approach of a 'just transition', a context in which the newly-established principle of energy solidarity could see itself extended and transformed into a principle of climate solidarity. Even though there may be no explicit foundation for that in the Treaties, it would be out of touch with the ongoing recalibration of classic EU energy policy to assume that it does not affect the reading of Article 194 TFEU and its newborn principle of energy solidarity.

Conclusion

The judgment in *OPAL* appears to have far-reaching consequences in several dimensions. It appears to further transform Member State energy sovereignty. It also seems to require that solidarity considerations are incorporated in the reading of various energy related EU law instruments. While the notion of energy solidarity was already incorporated into the Lisbon Treaty in 2009, it is fair to say that its understanding as a new legal principle of EU energy law by the Court took the EU energy law community by surprise. As the implications of the judgment are still uncertain, further guidance from the European courts would be welcome, and perhaps even necessary.

At a more abstract level, solidarity responds to a fear deeply rooted in humans and their societies, the fear that the invisible hand of the market may not be strong, or interested enough

25

to hold us when things get rough. As such, it is a common denominator between Catholicism and socialism, which traditionally have been attributing great importance to that principle.

One should of course not ignore that a (common) market under the rule of law helps creating solidarity, by putting limits on the egoistic behaviour of individuals and corporations. In the energy sphere, applying competition rules to traditional instruments of ensuring supply security such as long-term contracts is an example. Energy, however, is also the area where the fear of being cut off supplies goes to deeper layers than what our liberal market order covers. This is particular true for Eastern Europe.

The first step in turning the solidarity principle from an often soft political claim to hard law was its operationalization in Regulation 2017/1938. In this dimension, solidarity becomes an instrument of managing crises by allocating scarce resources complementary, but not completely outside the market logic. As we saw above, the Member States in their negotiations emphasized the price tag of solidarity as much as the principle itself, thus adding a Calvinist flavor to the catholic core of the principle.

Going beyond that logic, The Court in OPAL anchored energy solidarity as a general and binding legal principle high above such political compromises in the sphere of primary EU law. As discussed above, it entails a general duty for finding fair and balanced solutions before taking unilateral actions by individual Member States as well as sharing the burden of the commitments which the EU has taken upon itself. While the question of whether this applies (extensively) for all areas of energy policy or (narrowly) only those falling within the scope of EU energy policy may still be open on a conceptual level, in practice these two categories can hardly be separated.

The future will also show how systematically, consistently and successfully the newly discovered tool will be applied. The risk that reality falls short of the expectations is significant. In this context, one may remember that the principle of solidarity already was endorsed by the Court of Justice once, in a judgment of September 2017 rendered in the case of Slovakia and Hungary against the Council. This case concerned a Council Decision ordering the emergency relocation of 40,000 asylum seekers from Italy and Greece. The Court considered the principle of solidarity between Member States as a valid legal reason for requiring a fair burden sharing in accommodating these migrants. In the aftermath of the judgment, however, the Member States concerned decided to ignore the judgment and thus put the rule of EU law in general to the test.

In a follow-up procedure against, inter alia and ironically: Poland, the Court's Advocate General Eleanor Sharpston recently had the opportunity to account the importance of the principle of solidarity in jurisprudence, a principle which she referred to as "the lifeblood of the European project".²⁶ The OPAL judgment made sure it is the lifeblood of European energy policy as well.

²⁶ Opinion of the Advocate General in Cases C-715/17, C-718/17, C-719/17 Commission v Poland, Hungary and Czech Republic of 31 October 2019.

OGEL 5 (2019) - Natural Gas Pipeline Construction and Regulation

This issue is targeted to provide insights into the most current developments within the three most important gas pipeline markets (the US, China and the EU) as well as by providing insights into the regulation of pipeline development in frontier markets. You can find the table of contents below and download a free excerpt of the issue via the OGEL website here: <https://www.ogel.org/journal-browse-issues-toc.asp?key=83>

Introduction - OGEL Special Issue on Natural Gas Pipeline Construction and Regulation

T.J. Dimitroff (Infrastructure Development Partnership LLP)

The Intersection of Natural Gas Pipeline Infrastructure, Federal Permitting, and Supply Considerations for US LNG Exports

M. Lewis and K. Morgan (Bracewell LLP)

The Impact of the Interface of Regulatory Jurisdictional issues on the Life Cycle of Natural Gas Pipelines in the United States of America

B.B. Pollett (School of Energy, Collins College of Business, The University of Tulsa)

The Journey or the Destination?: Reconsidering the Proper Role of Greenhouse Gas Emissions Impacts in NEPA Review of Natural Gas Pipeline Projects

D.G. Duncan and C. Ellis (Hunton Andrews Kurth LLP)

The Reform and Regulation of China's Oil and Gas Pipeline Network

P. Andrews-Speed and L. YAO (Energy Studies Institute, National University of Singapore)

One for All and All for One? The General Court Ruling in the OPAL Case

D. Buschle (Energy Community Secretariat) and K. Talus (Tulane Center for Energy Law, Tulane University)

The EU-Energy Package WTO Panel Report: Systemic Implications for EU Energy Policy on Pipelines Transportation of Natural Gas

M. Wüstenberg (UEF Law School)

Legal and Economic Challenges to the Future of Natural Gas Export Infrastructure in the EU in the Light of its Policy on the Energy Transition

G. Mete and S.V. Vinogradov (CEPMLP, University of Dundee)

Need for Long-term Commitments in Cross-border Gas Pipeline in Europe

P. Hébréard (FTI Consulting)

The IGB Project - Contribution to the Energy Market Evolution in South East Europe

V. Hristova and S. Cherkesov

A Legal Overview of The Construction, Operation and Regulation of Gas Transmission Grids in Germany

A. Brauner (Open Grid Europe GmbH) and D.A. Benrath (Ruhr-Universität Bochum)

Accessibility to Gas Pipelines in Emerging Markets

M. White, N. Markanday, and K. Whitaker (King & Spalding LLP)

EU Gas Market Regulation of Offshore Transmission Lines: The Derogation for Completed Projects (Art. 49a of Directive 2009/73)

M. Nettesheim and S. Thomas (Eberhard Karls University of Tübingen)

Heading Towards a New Era of Natural Gas Market Regulation in Greece: Licensing Framework in a Transitional Period for the Natural Gas Market

O. Omran (DLA Piper)



About OGEL (**ISSN 1875-418X**) - **Oil, Gas & Energy Law (OGEL)** is a peer-reviewed academic journal covering all aspects of law pertaining to oil, gas, and energy in general. Since the first issue was published in 2003 it has gained popularity with a large number of (international) energy companies, governmental organisations, law firms, international agencies, academic and think-tank institutions in the field of energy policy and various NGOs.

2020

- OGEL 1 (2020) – Social Licence to operate (SLO) in the Extractive and Energy Sectors

2019

- OGEL 5 (2019) – Natural Gas Pipeline Construction and Regulation
- OGEL 4 (2019) – African Extractive Sector (FDI)
- OGEL 3 (2019) – The Energy Union in the Next Decade
- OGEL 2 (2019) – Regular issue
- OGEL 1 (2019) – Energy Law and Regulation in Low-carbon and Transitional Energy Markets

2018

- OGEL 5 (2018) – Strategic Considerations in Energy Disputes
- OGEL 4 (2018) – Regular issue
- OGEL 3 (2018) – International Energy Law

- OGEL 2 (2018) – Decommissioning
- OGEL 1 (2018) – Regular issue

2017

- OGEL 4 (2017) – Liquefied Natural Gas (LNG)
- OGEL 3 (2017) – Energy Law and Policy in the Middle East and North Africa (MENA)
- OGEL 2 (2017) – Brexit
- OGEL 1 (2017) – Oil and Gas Law and Policy in West Africa

2016

- OGEL 4 (2016) – Regular issue
- OGEL 3 (2016) – Waste-to-Energy (WtE)
- OGEL 2 (2016) – Emerging Issues in Polar Energy Law and Governance
- OGEL 1 (2016) – Mexico's Oil and Gas Sector Reform

2015

- OGEL 1 (2015) – Regular issue
- OGEL 5 (2015) – Yukos Special
- OGEL 4 (2015) – International Taxation in the Energy Sector
- OGEL 3 (2015) – Renewable Energy Disputes
- OGEL 2 (2015) – Laws Regulating the Polish Energy Sector – Transition
- OGEL 1 (2015) – Natural Gas Developments: An International and Challenging Legal Framework

2014

- OGEL 4 (2014) – Regular issue
- OGEL 3 (2014) – OGEL Special: Governance of Unconventional Gas outside the United States of America
- OGEL 2 (2014) – Energy Community
- OGEL 1 (2014) – Special: Offshore Petroleum Exploration and Production: Challenges and Responses

2013

- OGEL 5 (2013) - Regular issue
- OGEL 4 (2013) - Joint Operating Agreements & National Oil Companies: Challenges and Dynamics
- OGEL 3 (2013) - Eastern Mediterranean Oil and Gas
- OGEL 2 (2013) - Risks and Responses to Risk in the Energy Sector
- OGEL 1 (2013) - Nuclear Law and Policy

2012

- OGEL 5 (2012) - Regular issue
- OGEL 4 (2012) - The Interface between EU Energy, Environmental and Competition Law - A Survey
- OGEL 3 (2012) - OGEL Ten Years Special Issue: Internationalisation of Energy Law
- OGEL 2 (2012) - Arctic Region: Boundaries, Resources and the Promise of Co-operation
- OGEL 1 (2012) - A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought

2011

- OGEL 6 (2011) - Regular issue
- OGEL 5 (2011) - Regular issue
- OGEL 4 (2011) - Indigenous People and Resources Development
- OGEL 3 (2011) - Cross-Border Pipelines
- OGEL 2 (2011) - Comparative Energy Law
- OGEL 1 (2011) - Regular issue

2010

- OGEL 4 (2010) - Host Government Contracts in the Upstream Oil and Gas Sector
- OGEL 3 (2010) - Oil Spills
- OGEL 2 (2010) - Kazakhstan
- OGEL 1 (2010) - Antitrust in the Energy Sector

2009

- OGEL 4 (2009) - Regular issue
- OGEL 3 (2009) - Student special
- OGEL 2 (2009) - EU - Russia relations
- OGEL 1 (2009) - Middle East With a Focus on Buy Back Contracts

2008

- OGEL 3 (2008) - Eurasian Energy
- OGEL 2 (2008) - Venezuela: The battle of Contract Sanctity vs. Resource Sovereignty
- OGEL 1 (2008) - China's Energy and Environmental Challenges

2007

- OGEL 4 (2007) - Energy Security
- OGEL 3 (2007) - Energy Litigation and Arbitration - Expert Perspectives
- OGEL 2 (2007) - Unisitation
- OGEL 1 (2007) - Electricity Interconnectors (2nd special) - Regular issue

2006

- OGEL 4 (2006) - Pipelines
- OGEL 3 (2006) - Africa
- OGEL 2 (2006) - Electricity Interconnectors
- OGEL 1 (2006) - Liquefied Natural Gas (LNG) - Regular issue

2005

- OGEL 4 (2005) - Asian Energy Law and Policy
- OGEL 3 (2005) - Coal
- OGEL 2 (2005) - Windpower
- OGEL 1 (2005) - Production Sharing Contracts

2004

- OGEL 5 (2004) - Energy Charter Treaty
- OGEL 4 (2004) - Corporate Social Responsibility (CSR) - Regular issue
- OGEL 3 (2004) - Taxation / Latin America
- OGEL 2 (2004) - Renewable Energy
- OGEL 1 (2004) - Climate Change

2003

- OGEL 5 (2003) - Corruption / Geopolitics of Oil and Gas
- OGEL 4 (2003) - Natural Gas
- OGEL 3 (2003) - Energy and Electricity Regulation
- OGEL 2 (2003) - Dispute Management in the Oil, Gas and Energy Industries
- OGEL 1 (2003) - Regular issue