



Press and Information

Court of Justice of the European Union  
**PRESS RELEASE No 129/21**  
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Judgment in Case C-848/19 P  
Germany v Poland

## **The legality of any act of the EU institutions falling within the European Union's energy policy must be assessed in the light of the principle of energy solidarity**

*The Court of Justice dismisses the appeal brought by Germany against the judgment of the General Court, which, in application of that principle, had annulled a 2016 Commission decision by which the conditions for access to the OPAL gas pipeline had been amended*

The Baltic Sea Pipeline Connector ('the OPAL pipeline') is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, which transports gas from Russia into Europe, circumventing the 'traditional' transit countries such as Ukraine, Poland and Slovakia. In 2009, the European Commission had approved, subject to conditions, the decision of the German Federal Network Agency to exempt the OPAL pipeline from the rules under Directive 2003/55<sup>1</sup> (later replaced by Directive 2009/73<sup>2</sup>) on third-party access to the gas pipeline network<sup>3</sup> and on tariff regulation.<sup>4</sup> As Gazprom, the dominant undertaking on the market for the supply of gas, had never complied with one of the conditions imposed by the Commission, it was able to operate the OPAL pipeline only up to 50% of its capacity since it was put into service in 2011.

In 2016, at the request in particular of Gazprom, the German Federal Network Agency notified the Commission of its intention to vary certain provisions of the exemption granted in 2009. In essence, the variation proposed was to enable the OPAL pipeline to be operated at its full capacity, on condition that at least 50% of that capacity would be sold by way of auction. By decision of 28 October 2016, the Commission approved that variation subject to certain conditions<sup>5</sup> ('the decision at issue').

Taking the view that the decision at issue threatened the security of Poland's gas supply because of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported through the States of the central European region, including Poland, via pipelines competing with OPAL, the Republic of Poland brought an action for annulment of that decision before the General Court. The General Court upheld the action and annulled the decision at issue for breach of the principle of energy solidarity laid down in Article 194(1) TFEU.<sup>6</sup> According to the General Court, the Commission should have examined the impact of the variation of the regime governing the operation of the OPAL pipeline on Poland's security of supply and energy policy.

In the appeal brought by the Federal Republic of Germany, the Grand Chamber of the Court of Justice upholds the judgment of the General Court, ruling on the nature and scope of the principle of energy solidarity.

<sup>1</sup> 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).

<sup>2</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

<sup>3</sup> Article 18 of Directive 2003/55 and Article 32 of Directive 2009/73.

<sup>4</sup> Article 25(2) to (4) of Directive 2003/55.

<sup>5</sup> Commission Decision C(2016) 6950 final of 28 October 2016 on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation granted under Directive 2003/55.

<sup>6</sup> Judgment of 10 September 2019, *Poland v Commission* ((T-883/16)), (see also Press release No [107/19](#)).

## Findings of the Court

The Court recalls, in the first place, that, according to Article 194(1) TFEU, European Union policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market and security of energy supply in the European Union, and to promote energy efficiency and energy saving, the development of new and renewable forms of energy and the interconnection of energy networks.

In that regard, the Court notes that the principle of solidarity is a fundamental principle of EU law, which is mentioned in several provisions of the EU and FEU Treaties and which finds specific expression in Article 194(1) TFEU. That principle is closely linked to the principle of sincere cooperation,<sup>7</sup> which requires the European Union and the Member States, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In so far as the principle of solidarity forms the basis of all of the objectives of the European Union's energy policy, it cannot be ruled out that that principle produces binding legal effects. On the contrary, the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union having an obligation of solidarity towards the Member States and the Member States having the same obligation between themselves and with regard to the common interest of the European Union.

The Court concludes that, contrary to the arguments advanced by the Federal Republic of Germany, the legality of any act of the EU institutions falling within the European Union's policy on energy must be assessed in the light of the principle of energy solidarity, even if there is no express reference to that principle in the secondary legislation applicable, in this case, Directive 2009/73.<sup>8</sup> It is apparent, therefore, from the principle of energy solidarity in conjunction with the principle of sincere cooperation that, when adopting a decision amending an exemption regime that is taken pursuant to Directive 2009/73,<sup>9</sup> the Commission is required to examine the possible risks for security of gas supply on the markets of the Member States.

In the second place, the Court states that the wording of Article 194 TFEU does not restrict the application of the principle of energy solidarity to the situations involving terrorist attacks or natural or man-made disasters referred to in Article 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU extends to any action falling within the European Union's energy policy.

Thus, the duty, for the EU institutions and the Member States, to take the principle of energy solidarity into account when adopting acts relating to the internal market in natural gas, ensuring in particular security of energy supply in the European Union, entails the adoption of measures to deal with emergencies as well as of preventive measures. The European Union and the Member States must, in the exercise of their respective competences in that field, balance the energy interests involved, avoiding the adoption of measures that might affect the interests of stakeholders liable to be affected, as regards security of supply, its economic and political viability and the diversification of sources of supply, and do so in order to take account of their interdependence and de facto solidarity.

Thus, the Court of Justice confirms that the General Court did not err in law in ruling that the decision at issue should be annulled for breach of the principle of energy solidarity.

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

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<sup>7</sup> Article 4(3) TEU.

<sup>8</sup> Article 36(1) of Directive 2009/73.

<sup>9</sup> Article 36 of Directive 2009/73.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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