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The OPAL Exemption Decision: a comment on the Advocate General's Opinion on its annulment and its implications for the Court of Justice judgement and OPAL regulatory treatment

1. Adoption of the 2016 OPAL exemption decision by the EC: correcting the wrongs[1]

In October 2016 the European Commission (EC) adopted an exemption decision ('The 2016 exemption decision'), which exempted 50% of the ~25.4 bcma transit capacity of OPAL (one of the onshore pipelines connecting to Nord Stream 1) from third party access and prescribed non-discriminatory access to the other 50% of capacity via auctions where both Gazprom and third parties would be able to participate while guaranteeing that the latter would have access to 20% of capacity.[2] The first auctions were held in December 2016.[3] The decision also allowed the EC significant room for manoeuvre, both in respect of judging whether conditions for a further increase of capacity offered to third parties are met as well as in respect of certifying OPAL's operator.

The October 2016 exemption decision replaced the original June 2009 exemption decision ('The 2009 exemption decision'), which prevented Gazprom from being able to use more than 50% of OPAL capacity unless it conducted a 3 bcma gas release programme.[4] This led to a situation where capacity in OPAL (and Nord Stream 1) had remained underutilised during the period when the 2009 exemption decision was in force, due to a continuous lack of demand from third parties.

2. Annulment of the 2016 OPAL exemption decision by the General Court of the EU: elevating the principle of energy solidarity

Although the 2016 exemption decision established a fine balance between the interests of all parties involved, in line with the EU acquis, it was met with criticism from several central and eastern European countries – most vocally, Poland, which argued that Gazprom's increased access to OPAL capacity would undermine Poland's national energy security as well as threaten the security of supply 'in the European Union, in particular, in central Europe'.[5] In December 2016 – March 2017 Poland together with its 100% state-owned gas company, PGNiG, and its German subsidiary filed several complaints against the decision in the Court of Justice (CJ) of the EU, calling for the 2016 exemption decision to be suspended and annulled.[6] In March 2017, Poland's call for annulment was joined by Latvia and

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[2] EC (2016), The 2016 exemption decision.
[3] For detailed analysis of the 2016 OPAL exemption decision, see Yafimava, (2017a).
[4] EC (2009), The 2009 exemption decision.
[5] 'GC Judgement', 10 September 2019.
[6] PGNiG's German subsidiary (PGNiG Supply & Trading GmbH) vs EC (4 December 2016, case T849/16); Poland vs EC (16 December 2016, case T-883/16); PGNiG vs EC (1 March 2017, case T-130/17).

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Lithuania;[7] neither Latvia nor Lithuania made any claims as to whether the 2016 exemption decision threatened their national/regional energy security or that of the EU. In March 2017 the Ukrainian 100% state-owned gas company, Naftogaz, also requested an annulment of the 2016 exemption decision;[8] Naftogaz claimed that the decision 'will not enhance security of supply in Central and Eastern European countries of the EU and the Energy Community'.

In December 2016 the General Court (GC) of the EU provisionally suspended the decision, thus halting the auctions for non-exempt capacity. In July 2017, the President of the GC lifted the suspension until final rulings had been made, thus re-starting the auctions.[9]

In September 2019, the GC ruled to annul the 2016 exemption decision on the grounds of it being in 'breach of the principle of energy solidarity, as provided for in Article 194(1) TFEU'.[10] This judgement was met with much surprise – if not disbelief – by the energy and law communities alike, as energy solidarity has previously been understood (including by this author) largely as a policy guidance rather than a legal principle.[11] By annulling the 2016 exemption decision, the GC re-instated the 2009 exemption decision under which Gazprom cannot have access to more than 50% of OPAL capacity. Subsequently, the German national regulatory authority (NRA) implemented the GC judgment. Notably, utilisation of Nord Stream 1 capacity has not suffered, as from January 2020 the gas which was unable to flow through OPAL due to re-instated capacity restrictions, has instead started to flow through the first string of EUGAL (one of Nord Stream 2's connecting pipelines onshore) thus ensuring full utilisation of Nord Stream 1.[12]

3. The AG Opinion: crowning the principle of energy solidarity

In November 2019 Germany appealed the GC ruling to annul the 2016 exemption decision at the CJ. On the 18th March 2021, one of the Advocates General of the CJ, Campos Sánchez-Bordona, delivered an Opinion on Germany's appeal ('The Opinion').[13] The Opinion has fully concurred with the GC ruling and recommended rejection of the appeal.

Although the CJ is not bound by the Opinions of its Advocates General, they are considered influential and serve as an important – albeit not definitive – indicator of how the CJ might decide on the cases in respect of which the Opinions are sought. Therefore, it is important to understand the line of reasoning of the Opinion in the OPAL case. In seeking such understanding this author does not aim at assessing the merits of the Opinion's legal arguments but rather at summarising its relevant conclusions, with a view to understanding their impact on the future regulatory treatment of the OPAL pipeline.

The AG Opinion: the principle of energy solidarity is justiciable

Germany has presented five grounds for the appeal. Firstly, it argued that the principle of energy solidarity, which has allegedly been breached by the EC while deciding on the 2016 OPAL exemption, is 'not a legal criterion' and 'cannot give rise to specific rights and obligations' for the EU and/or for the Member States, such as verification obligations on the EC. Therefore, Art. 36 of the Gas Directive – which lists several criteria for granting an exemption but makes no reference to the principle of energy

[7] Latvia and Lithuania joined the Polish complaint on OPAL, 31 March 2017.
[8] Naftogaz vs EC (27 March 2017, case T-196/17). Naftogaz argued that the 2016 exemption decision 'will not enhance competition in gas supply and will not enhance security of supply in Central and Eastern European countries of the EU and the Energy Community' and 'is detrimental to competition, and to the effective functioning of the internal market in the EU and the Energy Community, as it is liable to increase the dominant position enjoyed by PJSC Gazprom and its affiliates in the relevant geographic market and to contribute to the portioning of the internal market along national lines'.
[9] The President's Order. See Yafimava (2017b).
[10] 'GC Judgement', 10 September 2019. Art. 194(1) TFEU reads 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'.
[11] For analysis of the judgement see Buschle and Talus (2019) and Boute (2020).
[12] The second string of EUGAL is planned to be built by April 2021.
[13] AG Opinion, 18 March 2021.

solidarity – is 'the only parameter' against which the legality of the 2016 OPAL decision may be assessed, and the EC has done such an assessment.

The Opinion disagreed and contended that 'the principle of energy solidarity … 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'. Furthermore, it disagreed with the German and EC assertion thar the principle of energy solidarity is 'too abstract' to be used as the basis for reviewing the legality of the latter's acts and referred to it as 'capable of operating as an autonomous parameter for reviewing legality in direct actions' against the EC decisions. It further stated that 'the absence of an express reference to the principle of energy solidarity' in Art. 36 did not relieve the EC of 'its duty to assess the impact of that principle in its exemption decisions'.

While the Opinion has (rather combatively) asserted that the principle of energy solidarity is 'justiciable and, accordingly, capable of legal application', it is significantly more reserved on how *exactly* the assessment of the impact of that principle is to be made. The Opinion does not define any criteria for making the assessment in anything other than the most general terms. The Opinion acknowledges that 'the principle of energy solidarity entails some measure of abstraction making it difficult to apply', which 'necessarily means that it will not always be easy to infer clear solutions' from that principle, 'given that its application in practice will entail both areas of certainty and other *greyer* areas which the interpreter will have to analyse carefully'. The Opinion does not offer any blue-print methodology for assessing the impact of the principle of energy solidarity, but rather calls for a bespoke approach that would not disregard 'the uniqueness of each situation' and not pre-empt 'a particular outcome in every case'. It therefore suggests that the EC 'should carry out an assessment of the interests involved on a case-by-case basis'. The Opinion recognises 'the need for a careful assessment of the scope of the review', which the GC or the CJ may carry out in respect of the EC decisions, and argues that 'any such review must be limited, since these are decisions on complex technical matters in which the [European] Commission, more so than the courts, has extensive capacity for both technical and economic analysis', and therefore the EC 'must… 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.'

The Opinion largely limits the role of the judicial review to establishing 'whether the EU institutions have conducted an analysis of the interests involved which is compatible with energy solidarity and takes into account … the interests of both the Member States and the European Union as a whole'. It stresses that should an analysis conducted by the EC as part of its exemption decision 'manifestly overlook one or more Member States', the decision will 'fail to comply with the requirements' attendant upon the principle of energy solidarity. This would suggest that if any Member State claims that any decision goes against its solidarity interests then that decision should be rejected. However, the proposition that any exemption should be approved unanimously by all Member States is flawed as an exemption should be judged on how it impacts the EU as a whole or a region thereof, and a decision needs to be taken on the balance of the arguments of different Member States and the pros and cons for each Member State impacted by the decision. Therefore, it would be reasonable if the CJ judgement were to define the criteria for assessing the impact of energy solidarity and then request the EC – which, as recognized by the Opinion, 'more so than the courts, has extensive capacity for both technical and economic analysis' – to conduct an assessment and make a balanced decision in line with that criteria. Such decision could then be challenged in the courts in respect of its compliance with the aforementioned criteria.

The AG Opinion: the principle of energy solidarity is not limited to crisis situations

Germany's second ground of appeal was that the principle of energy solidarity was not applicable while the EC was deciding on the 2016 OPAL exemption as its application is only limited to crisis situations.

The Opinion disagreed and contended that 'the principle of energy solidarity is capable of producing legal effects in situations other than the crisis situations', adding that it does not see 'any convincing reason' why the reference to energy solidarity must be 'confined to the *critical* situations' as 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'.

At the same time, the Opinion concurred with the GC ruling 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', only contending that the principle of energy solidarity '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.'

The AG Opinion: the EC failed to observe the principle of energy solidarity in the 2016 OPAL exemption

Germany's third ground of appeal was that to the extent that the principle of energy solidarity is applicable to the 2016 OPAL exemption decision (which Germany alleges it is not), the EC observed the principle of energy solidarity while making its 2019 OPAL exemption decision. Germany argues that the EC took into account the effects on both the Polish gas market and the European gas market as a whole and has provided evidence to that effect. This evidence includes inter alia 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 (LNG), whereby Poland aims to be independent of Russian gas by 2022/2023; as well as the benefits of the 2016 exemption decision for the Polish gas market, cross-border trade and security of supply. On this basis Germany contends that the GC was wrong to conclude that the EC did not consider the consequences, which the principle of energy solidarity and the 2016 exemption decision would have for the Polish gas market.

The AG Opinion disagreed and contended that the EC was required to assess 'whether the variation to the regime governing the operation of the OPAL pipeline [i.e. the change in regulatory conditions made by the 2016 exemption decision compared to the 2009 exemption decision] … 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'. The Opinion states that 'it does not appear' that the EC 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[14] [sic] pipelines, or that it balanced those effects against the increased security of supply that it had found at EU level'. This could be interpreted as the requirement for the EC to analyse the consequences of any decision either just for the Member State(s) making a complaint i.e. Poland, Latvia and Lithuania in the OPAL case (which would be reasonable and should be doable), or else for each of the 27 Member States and the Union as a whole (which, if done exhaustively, would be a Herculean task, and an unnecessary one at that). Therefore, it would be reasonable if the CJ judgement were to clarify this requirement as part of its definition of the energy solidarity assessment criteria.

The AG Opinion: the EC had not carried out a proper analysis of the requirements attendant upon the principle of energy solidarity

Germany's fourth ground for appeal is that it was not necessary for the principle of energy solidarity to be referred to expressly in the 2016 OPAL exemption decision and that such an omission should not have been used as a reason for annulling the decision.

The AG Opinion dismissed this and contended that the GC did not annul the decision because the principle of energy solidarity was not mentioned in the 2016 OPAL exemption decision, but because the EC had not carried out 'a proper analysis of the requirements attendant upon that principle.' The Opinion further states that such analysis 'compelled' the EC '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.' The Opinion reiterates that the 2009 exemption decision was annulled by the GC because of the lack of 'the proper assessment of its implications for the relevant interests' in the exemption. As

[14] The English language name of this pipeline is Brotherhood.

noted earlier, the Opinion is open to interpretation whether its requirement of 'a proper analysis' means the EC should analyse consequences of the exemption decision just for the Member State(s) lodging a complaint or for each of the 27 Member States and the Union as a whole.

The AG Opinion: the 2016 exemption decision was annulled because of its infringement of the principle of energy solidarity

Germany's fifth ground of appeal is that the 2016 exemption decision should not have been annulled because of an alleged procedural error and that in any event the claim for annulment could have only been directed against the original 2006 exemption decision.

The AG Opinion dismissed this argument as, in its view, the GC annulled the 2016 exemption decision because of its infringement of the principle of energy solidarity rather than because of procedural error, and that Poland's claim for annulment was rightly made in respect of the 2016 rather than the 2009 exemption decision as the change in the regulatory treatment of the OPAL pipeline was made by the former, which is therefore a subject for a judicial review, separate and independent from that which could have been carried out in respect of the latter, and subsequent annulment.

4. Implications of the AG Opinion for the CJ judgement and the future regulatory treatment of the OPAL pipeline

Assessment of the impact of the energy solidarity principle is likely to become an integral part of the EC exemption decision-making process but will the CJ define its criteria?

As noted earlier, although the Advocates General Opinions are not binding on the CJ, they may influence – to various extents – the CJ judgement. Therefore, the main conclusions, as distilled from the Opinion in the previous section and summarised below, provide an insight into the future judgement of the CJ on Germany's appeal to cancel the annulment of the 2016 exemption decision (expected in the coming months) and on the future regulatory treatment of the OPAL pipeline.

The Opinion contends that the principle of energy solidarity is justiciable and creates legal obligations for the EU and its Member States. It also contends that it is the EC's 'duty' to assess the impact of the principle of energy solidarity in its exemption decisions and conduct 'a proper analysis' of the requirements attendant upon that principle. The Opinion suggests that the EC 'should carry out an assessment of the interests involved on a case-by-case basis'. It does not offer any methodology for carrying out such an assessment apart from saying that the EC 'must… 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'. The Opinion envisages only a limited role for the courts in conducting a judicial review of the EC decisions in respect of impact assessment of the principle of energy solidarity, stating that the EC 'more so than the courts, has extensive capacity for both technical and economic analysis'.

This suggests that, should the CJ concur with the Opinion in its judgement, the EC would be obliged to assess the principle of energy solidarity as part of its future exemption decision-making process, but that it would also have a significant leeway in respect of scope and depth of any such assessment. As, according to the Opinion, energy solidarity 'cannot be regarded as being synonymous with mere energy security' and 'forms the basis of all the other objectives' of the EU's energy policy, an assessment of the principle of energy solidarity is bound to be open to different interpretations. However, any future court challenge against the EC on the grounds of its alleged breach of the principle of energy solidarity made during an exemption decision making process (or during any other process where an assessment of that principle is required) would be unlikely to succeed due to the limited nature and scope of a judicial review recommended by the Opinion, especially if the CJ fails to define the criteria for energy solidary assessment, against which any exemption decision should be judged and on the basis of which any future legal challenge to it could be made.

As noted earlier, prior to the GC judgement the principle of energy solidarity has largely been interpreted as policy guidance rather than a legal principle. It is argued here that should the CJ agree with the GC

judgement (and with the Opinion) and confirm that energy solidarity is indeed a legal principle, then it must define the criteria on which decisions and judgements, respecting that principle in exemption decisions, must be made. Should the CJ be able to define such criteria, it could then either conduct its own assessment of the exemption decision's compliance with the energy solidarity principle, or else request the EC to conduct an assessment in accordance with these criteria and subsequently accept its view. However, should the CJ (as the Opinion) be unable to define the criteria for assessing the impact of energy solidarity, it would be dubious to request the EC to define the criteria itself. In this author's view, the CJ's inability to define the criteria for assessing the impact of energy solidarity would suggest a failure to demonstrate that energy solidarity is a legal principle rather than a policy guidance.

The future regulatory treatment of the OPAL pipeline: 'Annulment' and 'Revision' Scenarios

As far as the 2019 OPAL exemption decision is concerned, should the CJ align with the Opinion's view that the EC was obliged to assess the impact of the principle of energy solidarity but failed to do so as part of its 2016 exemption decision making – which appears likely albeit not definite – the CJ judgement could either leave the 2016 exemption decision annulled ('Annulment Scenario'), or else order the EC to revise the 2016 exemption decision ('Revision Scenario'). Should the CJ disagree with the Opinion's view, its judgement could cancel annulment of the 2016 exemption decision ('Restoration Scenario'). In this author's view, Revision Scenario is the most likely scenario, followed by Annulment Scenario, whereas Restoration Scenario is the least likely of all. The implications of the first two scenarios are analysed below.

'Revision Scenario'

Under the Revision Scenario, the CJ would require the EC to assess the impact of the principle of energy solidarity in the 2016 exemption decision and – depending on the results of such assessment – preserve or amend the exemption decision. Meanwhile, while such assessment is ongoing, the CJ could either temporarily re-instate the 2016 exemption decision or else keep the 2009 exemption decision in force, with a view to replacing them with the revised decision.

As argued by this author in an earlier OIES paper,[15] the 2016 exemption decision manifested a recognition on the part of the EC that there was no rationale, rooted in either the energy or completion acquis, for not allowing Gazprom to utilise more than 50% of OPAL's capacity (as stipulated by the 2009 exemption decision). Capacity at OPAL's entry point, Greifswald, was of no interest for third parties which did not – and could not – have the gas available at OPAL's entry point at Greifswald, whereas competition between Gazprom and third parties, shipping their gas from GASPOOL to OPAL's exit point at Brandov, was precluded because, even had Gazprom priced its gas at the same level as GASPOOL (or below), it would not be able to compete with the traders due to its access to capacity at Brandov being artificially constrained.

Ultimately, this led to a situation where European buyers were getting their gas at prices potentially higher than might have been the case had it not been for the OPAL cap, thus going against the original raison d'être of preserving and enhancing competition. Therefore, maintaining the OPAL cap had become increasingly illogical, unjustifiable on the grounds of the acquis, and prone to criticisms of being imposed on political grounds. The 2016 exemption decision rectified this situation by striking a fine balance between the interests of all parties involved, in line with the acquis. While this decision allowed Gazprom to have access to capacity in OPAL in excess of 80%, it effectively guaranteed that third parties will have access to 20% of capacity.

In this author's view, an assessment by the EC of the impact of the principle of energy solidarity – as suggested in the Opinion and if ordered by the CJ judgement – would be unlikely to result in a conclusion that the 2016 exemption decision affected 'the interests in the field of energy' of Member States in such a way that it would warrant a significant change in the exemption decision's conditions, if only the

[15] Yafimava (2017a).

consequences of the increased utilisation of OPAL are assessed. Indeed, as the legal/regulatory logic of the 2016 exemption decision still holds, the revised exemption would likely be similar to the 2016 decision (allowing Gazprom's access to non-exempt capacity via auctions) rather than to the 2009 decision (disallowing Gazprom's access to non-exempt capacity).

The Nord Stream 2 Factor

However, while conducting its assessment, the EC would likely examine not only the consequences of the increased utilisation of OPAL, but also those of the future start of operations of Nord Stream 2 and the subsequent utilisation of both EUGAL pipelines. The Opinion says that if the CJ confirms that solidarity has the status of a legal principle, Gazprom 'might find it more difficult to obtain a temporary exemption from the application of the EU rules' to Nord Stream 2. (The German section of Nord Stream 2 must comply with the amended Gas Directive). This suggests that should Nord Stream 2 apply for an exemption under Art. 36 of the Gas Directive, the EC might use the Opinion as a guidance to attach more stringent conditions to its use or even deny an exemption. (Notably, the Nord Stream 2 application for a derogation under Art. 49a has already been rejected by the German NRA in May 2020.) In so doing the Opinion appears to suggest that there will be some capacity restrictions on the utilisation of Nord Stream 2 by Gazprom, particularly if an exemption will be sought.

Even if Nord Stream 2 will not apply for an exemption, its capacity could still be partly restricted as part of the certification process by the German NRA. As this author observed elsewhere, an exemption (and/or derogation) is not the only way for Nord Stream 2 to be compliant with the amended Gas Directive, and its certification by the German NRA (subject to certain ownership/operatorship changes) presents another possibility.[16] The German NRA would be able to impose a restriction on the utilisation of Nord Stream 2 capacity as a certification condition aimed at ensuring compliance with the third party access requirement, up to the amount of the short- and mid-term reservation quotas applied in respect of EUGAL capacity (20%), thus resulting in 80% utilisation of Nord Stream 2. Any higher cap would be in conflict with EUGAL capacity contracts (where 80% of capacity has been booked long term in March 2017) and would constitute an extremely awkward development both for the EC and the German NRA, neither of which publicly raised any objections to the 'more capacity' procedure, under which EUGAL capacity was allocated, and which was broadly consistent with the EU Capacity Allocation Mechanisms Network Code (CAM NC) adopted in the same year.[17] It would be extremely difficult for the German NRA to impose conditions on Nord Stream 2 that would result in the holders of capacity in EUGAL being unable to utilise their contracted capacity. It is debatable – and highly speculative – whether either the German NRA or the EC would be willing and able to use the principle of energy solidarity to impose capacity restrictions on Nord Stream 2, such that would be in conflict with the EUGAL capacity contracts, and if they did, the result might be litigation.

As the ability of the German NRA and the EC to impose capacity restrictions on Nord Stream 2 and EUGAL higher than 20% is highly uncertain, the EC might want to provide itself with additional flexibility in respect of imposing capacity restrictions on OPAL, particularly in respect of judging whether the conditions for a further increase of capacity beyond 20% offered to third parties are met. The result could be a *fluctuating* cap on OPAL capacity in the range of 20-50%. In other words, the re-assessed 2016 exemption decision could be a hybrid between the 2009 and the 2016 decisions.

'Annulment Scenario'

Under the Annulment Scenario, the 2006 exemption decision (re-instated by the GC judgement in September 2019) would continue to remain in force, with Gazprom unable to use more than 50% of OPAL capacity. Gazprom could subsequently make an application for a new exemption to the German NRA, which could grant the exemption. On its part, the EC, while assessing that exemption, would be required to analyse the impact of the principle of energy solidarity as part of its exemption decision-

[16] Yafimava (2019).
[17] For explanation and analysis of 'more capacity' procedure see Yafimava (2018).

making process, and amend the exemption accordingly. OPAL capacity restrictions would remain in place until and unless amended by the exemption decision.

The Annulment Scenario appears to be less likely than the Revision Scenario, not least because Annulment would mean that the CJ would *knowingly* rule to re-instate a legal act, which has already been found in breach of WTO law.[18] Notably, the Opinion has chosen to bring the issue of the 2006 exemption decision incompatibility with WTO law to the CJ's attention, despite the lack of reference to it in the GC judgement. Specifically, the Opinion stated that the two conditions present in the 2006 exemption decision and relating to the OPAL cap (the 50% capacity cap and the gas release programme) were found to be incompatible with Art. XI:1 GATT, reducing competitive opportunities for importing the Russian gas into the EU. It has further stated that, by contrast, the 2016 exemption decision 'might mean the almost complete elimination of any elements of incompatibility with WTO law within the regime applied to the Nord Stream [1] / OPAL pipeline'. The Opinion concludes that as the GC has annulled the 2016 and re-instated the 2009 exemption decision, the exemption regime which was declared incompatible with the WTO law is now applicable again and it 'might therefore be necessary to assess the potential conflict' between the GC ruling and WTO law.

While under the Annulment Scenario the existing OPAL 50% capacity restriction would remain in place, it would have no immediate impact on the level of utilisation of Nord Stream 1 pipelines as the gas would instead continue flowing through the first string of EUGAL, particularly as Nord Stream 2 is still under construction and no other gas is available to flow through EUGAL. However, once Nord Stream 2 is completed, the OPAL restriction would become a constraint, as both strings of EUGAL would be needed for transporting Nord Stream 2 gas. Therefore, it would be in the interest of Gazprom to pursue the cancellation of the restriction through the application for a new exemption, thus reverting to the Revision Scenario, analysed above.

[18] WTO Panel Report, 10 August 2018. For analysis of the WTO Panel Report see Pogoretskyy and Talus (2019).

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