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The interpretation of the principle of energy solidarity - A critical comment on the Opinion of the Advocate General in OPAL

1. Introduction

The regulatory and judicial developments concerning the Ostseepipeline-Anbindungsleitung (OPAL) pipeline have raised criticism from many of the main academic expert commentators on EU energy law[1] from the first Commission OPAL decision[2] to the judgment of the General Court[3] and the Opinion of the Advocate General.[4] The Opinion of Advocate General Campos Sánchez-Bordona was delivered on 18 March 2021 and rather than taking the concerns expressed by academic commentators on board, the Opinion raises more questions and concerns.

Many of the problematic aspects of this case, including the regulatory regime for the OPAL pipeline and the principle of energy solidarity, seem to be connected to the political aspects of both the pipeline and, if the Court of Justice concurs with the Opinion, the principle of energy solidarity.

First, the OPAL dispute is fundamentally about transit of gas through Ukraine and, to an even greater extent, Poland.[5] While Poland has indicated that it will cease to rely on Russian gas and switch to Norwegian pipeline gas and LNG from a variety of sources, it appears to be fighting to retain the transit and the related transit revenues from Russian gas flows through its pipeline system. This is a potential motivation behind the Polish efforts to stop the Nord Stream 2 project and minimize Gazprom's ability to use the Nord Stream pipeline and its onshore connection, the OPAL pipeline.

Second, the principle of energy solidarity itself has a strong political background. The reference to 'energy solidarity' in Article 194 of the Treaty on the Functioning of the European Union (TFEU) appears to have been introduced at Treaty level in response to requests made by the Polish government and

[1] For example, Anne-Marie Kehoe and Leigh Hancher, 'Chapter 1: Governance of the Energy Union' in Athir Nouicer and others (eds), 'The EU Clean Energy Package' (November 2020) 24, available at https://cadmus.eui.eu/bitstream/handle/1814/68899/QM-01-20-700-EN-N.pdf?sequence=1 accessed 10 April 2021; Dirk Buschle and Kim Talus, 'One for All and All for One? The General Court Ruling in the OPAL Case' (2019) *OGEL* 5; Anatole Boute, 'The principle of solidarity and the geopolitics of energy: *Poland v Commission (OPAL pipeline)* (2020) 57 Common Market Law Review 889-914; and Katja Yafimava, 'The OPAL Exemption Decision: Past, Present, and Future' (2017) NG 117, Oxford Institute for Energy Studies.

[2] Decision C(2009) 4694 of 12 June 2009.

[3] T-883/16, *Poland v Commission*, ECLI:EU:T:2019:567.

[4] Opinion of Advocate General Campos Sánchez-Bordona in Case C-848/19 P, *Germany v Poland*, ECLI:EU:C:2021:218.

[5] It is noteworthy that, beyond this case, the development of the Nord Stream–OPAL pipeline route has faced political opposition from opponents both within and outside the EU, with Polish State company PGNiG, as well as Ukraine's national oil and gas company, Naftogaz, unsuccessfully challenging the 2016 OPAL Exemption Decision. T-849/16, *PGNiG Supply & Trading v Commission*, ECLI:EU:T:2017:924; T-849/16 R, ECLI:EU:T:2017:544; C-117/18 P, *PGNiG Supply & Trading v Commission* ECLI:EU:C:2019:1042; and T-196/17, *Naftogaz of Ukraine v Commission*, ECLI:EU:T:2018:140.

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relate primarily to concerns over the security of the gas supply from Russia.[6] It also appears that Poland, the Baltic countries and certain other Central and Eastern European countries then threatened to use their veto rights if this addition to Article 194 TFEU was not accepted.[7] In the OPAL case, Poland now had an opportunity to use the principle to defend its position.

This note will focus on the legal and practical aspects of the case rather than on political or economic issues. It will not engage in a detailed examination of the facts of the case.[8] Instead it will briefly explain the basic aspects of the original Commission OPAL decision from 2009 and then examine the judgment of the General Court and the Opinion of the Advocate General in the appeal case before the Court of Justice of the European Union (CJEU). The intention of this note is to focus on the problematic legal aspects of the Opinion, rather than engaging in a general discussion of the case and its EU law aspects.[9] It will review the criticism presented over the course of the OPAL developments from the 2009 decision to the Opinion of the Advocate General and provide a critical analysis of the Opinion.

2. The OPAL pipeline and the Commission's decisions of 2009 and 2016

OPAL is part of 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 the Czech Republic where the exit point for the pipeline is located.

In order to secure full or almost full utilization rights for the pipeline, OPAL applied to the Commission for an exemption under Article 22 of Directive 2003/55/EC[10] in 2009. The original exemption decision allowed Gazprom to utilize only 50% of the OPAL pipeline capacity and the remaining 50% of OPAL capacity had been unused when operations began in 2011.

In order to rectify this situation a new decision was taken in 2016 by the German regulator allowing Gazprom to use 80% of the OPAL transmission capacity, and, in the event that there was no third-party demand for capacity, Gazprom could potentially use the full capacity of the pipeline. These modifications were approved by the Commission later in 2016, subject to minor changes. That second decision was based on Article 36 of Directive 2009/73/EC,[11] which had replaced Article 22 of Directive 2003/55/EC as the legislative foundation for exemptions.

The peculiar treatment of the OPAL pipeline and the capacity caps imposed by the Commission's 2009 decision have been seen as being connected to political issues rather than as a proper application of EU energy market rules. The OPAL pipeline was built as an inland transportation route to deliver Russian gas to Western Europe, in particular the German/Czech border, through an entry point in Greifswald on the German coast. Russian gas reaches that point via the offshore pipeline Nord Stream 1, which was promoted by Russia to ease its reliance on the transit routes via Ukraine and Belarus. Hence and as explained in the introduction, this project has a strong political background.[12]

Yafimava provides the most detailed examination in this context and concludes as follows:

[6] Johann-Christian Pielow and Britta Janina Lewendel, 'The EU Energy Policy After the Lisbon Treaty' in André Dorsman and others (eds), *Financial Aspects in Energy: A European Perspective* (Springer 2011) 152.
[7] Sami Andoura, 'La solidarité énergétique en Europe: de l'indépendance à l'interdépendance' (July 2013) *Notre Europe* 34.
[8] The underlying facts of the case are discussed, for example, in Buschle and Talus (n 1); Boute (n 1) 889-914; and Yafimava (n 1).
[9] This has been done in Buschle and Talus (n 1); and Boute (n 1) 889-914.
[10] 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 [2003] OJ L176/57.
[11] 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 [2009] OJ L211/94.
[12] Vitaliy Pogoretskyy and Kim Talus, 'The WTO Panel Report in EU–Energy Package and Its Implications for the EU's Gas Market and Energy Security' 19 (2019) 4, World Trade Review 531-549.

> 'The main goal of the Polish political and legal "warfare" appears to be a curtailment of Gazprom's ability to transport gas to Europe by any route other than the existing Ukrainian and Belarusian/Polish (Yamal) corridors. In addition to the political rationale of preserving transit across Ukraine, the apparent commercial rationale is the preservation of Poland's status as a transit country for Russian gas, whereby such status is viewed as providing a transit revenue as well as bargaining power for securing Russian gas supplies. In so doing, Poland is defending its own national gas security – as it understands it – with little consideration for overall European gas security.'[13]

She adds:

> '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 its original raison d'être of preserving and enhancing competition. Therefore, maintaining the OPAL cap has become increasingly illogical, unjustifiable on the grounds of the acquis, and vulnerable to criticism that it had been imposed on political grounds.'[14]

The peculiar regulatory treatment that led to 50% of the OPAL capacity being unused was central in the WTO dispute in *EU–Energy Package*.[15] As explained elsewhere,[16] the Panel's overall analysis of the WTO-consistency of the Commission's OPAL decision may also have been informed by its apparent understanding that this measure was largely a political tool to artificially limit Gazprom's dominant position in the EU's gas market and to force Gazprom to utilize the existing gas transit routes through Belarus, Poland and Ukraine. Given that, due to the geographical location of the OPAL pipeline, no third parties could effectively utilize the remaining 50% of its capacity, the measure did not objectively have a strong economic or market liberalizing rationale.[17]

Given the well-known position of Poland and certain other Eastern European States *vis-à-vis* Russia and Gazprom,[18] it was hardly surprising when Poland initiated its appeal against the 2016 Commission decision which allowed the OPAL pipeline transportation capacity to be used more efficiently. In its action before the General Court, Poland challenged this new decision on the basis, inter alia, of violation of the energy solidarity principle referred to in Article 194 TFEU.

3. Proceedings before the CJEU

3.1 Judgment of the General Court

In considering the arguments raised by Poland in relation to energy solidarity, the General Court held that the principle of energy solidarity does not only impose mutual assistance obligations in cases of emergency, such as natural disasters or acts of terrorism where a Member State is in a critical or emergency situation as regards its gas supply, but is more general in its scope.[19]

Significantly, the General Court noted as follows:

> '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

[13] Katja Yafimava, 'The OPAL Exemption Decision: Past, Present, and Future' (2017) NG 117, Oxford Institute for Energy Studies, 28.
[14] ibid 29-30.
[15] Panel Report, European Union and Its Member States – Certain Measures Relating to the Energy Sector (EU–Energy Package), WR/DS476/R.15, page 283 and footnote 1687 in particular.
[16] Pogoretskyy and Talus (n 12) 531-549.
[17] Panel report in *EU–Energy Package*, footnote 1687.
[18] As vividly demonstrated in the context of the Nord Stream 2 project.
[19] T-883/16, *Poland v Commission*, ECLI:EU:T:2019:567, para 72.

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.'[20]

The Court General emphasized as follows:

> '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.'[21]

The principle thus requires a balancing exercise where the safeguarding of 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 an explicit balancing exercise in the context of the 2016 decision meant that in the Court's view the Commission had breached the requirements of the principle of energy solidarity. The Court took the view that the Commission should have examined the impact of its 2016 decision and its modification of the exemption regime on Poland's energy security and policy. The General 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.'[22]

The Court held that the Commission should have examined what impact the potential rerouting of gas flows through the Nord Stream 1 and OPAL pipelines would have on Poland and the Yamal and Braterstwo[23] pipelines. It should have also weighed those effects against increased security of supply at 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.'[24]

Based on these considerations, the General Court decided in favour of Poland and held that the contested exemption decision was adopted in breach of the principle of energy solidarity. This approach seems to contrast with the recent CJEU case law where it has refrained from using solidarity arguments as a basis of its judgments.[25]

The General Court's judgment in the OPAL case sparked intense academic debate that focused on various of its problematic aspects. Most expert commentators have taken a critical view of the judgment. The main issues raised have related to lack of clarity in the way in which the principle of energy solidarity was applied in the judgment. [26]

In addition to caution about the judgment's impact on the vertical division of competences between the member states and the EU and the transfer of additional powers to the Commission, Buschle and

[20] ibid para 73.
[21] ibid para 77.
[22] ibid para 79.
[23] Brotherhood pipeline in English.
[24] ibid para 82.
[25] Esin Küçük, 'Solidarity in EU law: an elusive political statement or a legal principle with substance?' in Andrea Biondi, Egle Dagilyte and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018) 40. Küçük argues that this is mainly due to the political connotations of the solidarity principle.
[26] T-883/16, *Poland v Commission*, ECLI:EU:T:2019:567.

Talus[27] also point to the potential wide impact of the judgment: it will not only influence the reading of Article 36(1)(a) of Directive 2009/73/EC – which was key to the judgment – but could also influence a wide range of other situations and the reading of other energy-related provisions of EU law. They illustrate this point by reference to the sudden increase in renewable energy on German markets and the negative effects this has on the country's neighbours due to periodical power surges (loop flows).[28]

Does the principle of solidarity now require that countries must restrict increases in renewable energy-based power generation on account of its potentially negative effects on neighbouring states? Or will they have to take other measures to deal with this negative impact? A consequence of the OPAL judgment is that 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 legal provision to this effect.[29] It is also worth pointing out that any new pipelines will also always have an influence on the flows through other pipelines. Does this mean that other member states can always intervene in development of new pipeline capacities in a member state? In this case, the German regulator did examine the consequences of the 2009 decision to gas flows in different pipelines under various supply and demand scenarios. This reading offers another example of a problematic consequence of the judgment.

The judgment has the clear potential to open up a Pandora's box of situations where the principle of energy solidarity may suddenly come into play and require new interpretation of existing rules and practices. Buschle and Talus therefore argue that further details should be provided by CJEU in order to balance the principle with the requirements of legal certainty.[30]

Kehoe and Hancher recognize another type of problem and warn that a wide interpretation of the principle of energy solidarity 'could have far-reaching consequences for energy governance, paving the way for Member States and the EU to take legal action against fellow Member States for failure to act in the spirit of solidarity, for example by jeopardizing the achievement of Union-wide targets'. [31]

They note that this type of interpretation 'also casts doubt on the rights of Member States to determine their own energy mix, as in Art. 194(2) TFEU, should their own interests conflict with those of other Member States and the European Union as a whole. Does such an interpretation of the principle jeopardize these rights? Could the pursuit of 'solidarity' supersede the sovereign rights of Member States?'[32]

The concerns expressed are indeed serious and without further elaboration and specific guidance, the 'new' principle may have unintended consequences.

In addition to the uncertainty created by the OPAL judgment, the General Court's application of the principle of energy solidarity in the case has been criticized. In his assessment of the judgment, Boute argues that the most significant negative aspect of the General Court's reasoning and its reading of the principle of energy solidarity is its excessively formalistic approach:[33]

> 'However, according to the GC, these general assessments did not amount to a proper examination of the impact of the new exemption regime on the security of the gas supply in Poland, but it based this finding mainly on formal reasons. The Commission did not mention the principle of energy solidarity in its 2016 OPAL decision, and did not disclose how it carried out an examination of that principle. Taking into account the fact that the Commission did actually engage in a substantive (albeit relatively general) analysis of the different energy

[27] Buschle and Talus (n 1).
[28] ibid 8.
[29] ibid 8.
[30] ibid 10-11. Similarly, Mykola Iakovenko cautions against 'ambiguity of interpretation of the 'energy solidarity principle' in the GC's judgment and possible problems in identifying the scope of interests of each of the Member States in such 'solidarity tests' in the future.' Mykola Iakovenko, 'A need for clarification of the energy solidarity principle: what can be learned from the General Court's judgment in the OPAL case?' *The Journal of World Energy Law & Business*, 14 (2021) 1: 38–48.
[31] Kehoe and Hancher (n 1) 24.
[32] ibid 24.
[33] Boute (n 1) 913.

> security implications of its decision, the GC's judgment must be criticized for its excessively formalistic application of the principle of energy solidarity.'[34]

It is also worth pointing out that Poland participated in the proceedings that led to the adoption of the contested 2016 decision by submitting written observations in the consultation procedure prior to the decision.[35] It is somewhat difficult to imagine that the Commission did not consider these observations.

Building on the overwhelmingly critical views expressed in academic writings and energy expert views, the next section examines the Advocate General's Opinion and focuses on its problematic areas. These include uncertainty and conflict with the principle of legal certainty, the proposal as to limited judicial control over the application of the principle of energy solidarity and its conflict with the right to effective judicial protection, the formalistic approach taken by the Advocate General as well as the conflict with the WTO Panel Report in EU-Energy Package.

3.2 The Opinion of Advocate General Campos Sánchez-Bordona

Unsurprisingly, the General Court's judgment was appealed by Germany on 20 November 2019.[36] The Opinion of Advocate General Campos Sánchez-Bordona was delivered on 18 March 2021.[37] In his Opinion, the Advocate General largely concurs with the General Court:

> 'In my view, the General Court rightly took the view, without erring, that the principle of energy solidarity 'entails rights and obligations both for the European Union and for the Member States'.[38]

> 'To my mind, the principle of energy solidarity under Article 194(1) TFEU produces effects which are not merely political but legal: a) as a criterion for interpreting provisions of secondary law adopted in implementation of the European Union's powers in energy matters; b) as a means of filling any gaps identified in those provisions; and c) as a parameter for judicial review, either of the legality of the aforementioned provisions of secondary law, or of decisions adopted by the bodies of the European Union in that field.'[39]

However, he went further than the General Court in his argumentation. For instance, while the General Court examined the principle of energy solidarity in the context of security of energy supply[40], the Advocate General sought to broaden the scope of that principle:

> 'The "spirit of solidarity" must inform the objectives of the European Union's energy policy and further its development. From that point of view, energy solidarity cannot be regarded as being synonymous with mere energy security (or "security of energy supply"), which is only one of its manifestations.'[41]

The Advocate General did, however, make the following admission:

> 'Its relatively abstract nature necessarily means that it will not always be easy to infer clear solutions from the principle of energy solidarity, given that its application in practice will entail both areas of certainty and other *greyer* areas which the interpreter will have to analyse carefully.'[42]

[34] ibid 907.
[35] As noted in the Opinion of Advocate General Campos Sánchez-Bordona in Case C 848/19 P, *Germany v Poland*, ECLI:EU:C:2021:218, para 135.
[36] C-848/19 P, *Germany v Poland*.
[37] Opinion of Advocate General Campos Sánchez-Bordona (n 34).
[38] ibid para 95.
[39] ibid para 96.
[40] Judgment in T-883/16, *Poland v Commission*, para 73.
[41] Opinion of Advocate General Campos Sánchez-Bordona (n 34), para 76.
[42] ibid para 112.

He argued that a case-by-case analysis and application of the principle would alleviate these types of concerns.[43] However, interestingly and importantly he argued in favour of a very limited scope of judicial review for cases involving the principle of energy solidarity:

> 'I recognise the need for a careful assessment of the scope of the review which the General Court (or, where appropriate, the Court of Justice) may carry out of Commission decisions such as that at issue here, in the light of the principle of energy solidarity.'[44]
>
> 'Any such review must be limited, since these are decisions on complex technical matters in which the Commission, more so than the courts, has extensive capacity for both technical and economic analysis. For that reason, the Commission must, as the judgment under appeal requires, assess all the consequences, economic and otherwise, inherent in the conditions attaching to, and level of use of, a pipeline, as well as their impact on the European and national markets in gas.'[45]
>
> 'A judicial review of such decisions must, first and foremost, establish whether the EU institutions have conducted an analysis of the interests involved which is compatible with energy solidarity and takes into account, as I have said, the interests of both the Member States and the European Union as a whole. Should that analysis of the situation manifestly overlook one or more Member States, the Commission decision in question will fail to comply with the requirements attendant upon that principle.'[46]

The Opinion rejected all grounds of appeal put forward by Germany and proposed that the CJEU should reject the appeal.

4. Opinion of the Advocate General – Critical Reflections

4.1 Uncertainties in the application of the principle of energy solidarity

First and foremost, the uncertainties raised by the Opinion are significant. It is difficult to see how Member States and their regulatory authorities, and the EU institutions including the Commission could apply (and comply with) an extremely abstract principle of energy solidarity.

What is more, this open-ended solidarity principle leaves many significant questions open. In addition to issues raised by Kehoe and Hancher and Buschle and Talus, there are many other questions that the Opinion remains silent on: how does the solidarity principle apply in other areas than security of supply and is the weight of this principle the same in other areas of energy policy (such as energy efficiency)? What obligations does the energy solidarity principle entail for Member States in relation to each other?[47] It must be emphasized here that compared, for example, to the principle of environmental solidarity in EU law,[48] the potential content and impact of the energy solidarity principle are much less clear and, as can be seen in the academic discussion on the General Court's judgment, countless alternative interpretations and effects exist.

Clearly, if the CJEU accepts that the principle of energy solidarity is capable of legal application and creates obligations for Member States and their regulatory authorities as well as the Commission in

[43] ibid para 113.
[44] ibid para 114.
[45] ibid paras 115.
[46] ibid para 116.
[47] These questions were raised in Max Münchmeyer, 'Supercharging Energy Solidarity? The Advocate General's Opinion in Case C-848/19 P, Germany v Poland' (9 April 2021) available at https://europeanlawblog.eu/2021/04/09/supercharging-energy-solidarity-the-advocate-generals-opinion-in-case-c-848-19-p-germany-v-poland/ accessed 11 April 2021.
[48] For environmental solidarity, see Irina Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach' Journal of European Integration 35 (2012)4, 459-475. Various EU principles of environmental law and their role in the EU internal market have been examined in detail in Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014).

relation to their application of the detailed rules of EU energy law, then it is necessary to provide detailed guidance on its application. A situation where the principle of energy solidarity functions like a jack-in-the-box,[49] suddenly being evoked in a variety of situations and imposing different obligations is clearly unsatisfactory. It would add a new unpredictable element to decision-making processes at both national and EU levels. It would also add new substantive requirements to legal proceedings that involve private persons without clarity what these requirements are. Here it must be recalled that legal certainty, which is recognized as a general principle of EU law, requires that rules applicable to individuals must be clear and precise and that their application must be foreseeable by those subject to them.[50] Subjecting private entities to rules and principles that are not predictable and whose impact is unforeseeable would violate these requirements of EU law. It is worth noting that even if the EU principles of environmental law are much more predictable than energy solidarity, legal certainty in relation to their effects on private parties has been questioned.[51]

In line with this, Yafimava has argued that in the event that the CJEU was to follow the Opinion of its Advocate General (and the General Court), it would then be imperative for it to define the exact criteria for application of the principle. She also suggests that the Court'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 mere policy guidance.[52]

Finally, it is important to recognize that insofar as the principle of energy solidarity connects with security of supply, this is already a very open-ended concept and can easily be (mis)used in a variety of ways. As I first argued many years ago, energy security can be taken to mean anything and everything depending on the context and on the viewpoint of the person evoking it.[53] Its use may mask other considerations and provide questionable arguments with acceptable cover. This is in stark contrast to, for example, the nature of environmental law principles where the application of these principles is grounded on scientific evidence.[54]

4.2 Limited judicial control

The Advocate General argued in favour of a very limited judicial review of the application of the principle of energy solidarity.[55] If the CJEU was to follow his approach, it would seem to largely exclude meaningful judicial control of decisions by the Commission or by Member State authorities. This is especially problematic where there are no clear criteria for the application of the energy solidarity principle. While the idea of limited judicial control of decisions by regulators that possess the detailed knowhow that courts lack has some appeal at first sight, it conflicts with the right of private persons, whether natural or corporate, to effective judicial protection. At minimum, even if the CJEU confirms that the principle of energy solidarity can have legal consequences, private litigants challenging the application of the principle should have the right to ask a court to examine the substance of their cases.

[49] Thomas Wilhelmsson, 'Jack-in-the-box theory of European Community law' in *Law and Diffuse Interests in the European Legal Order: Liber Amicorum Norbert Reich (Nomos 1997)* 177-194. He uses the concept to explain how EU law questions suddenly appear in the national context. Juha Raitio has connected this concept to legal certainty. Juha Raitio, *The Principle of Legal Certainty in EC Law* (Springer 2003) 383.

[50] For example, C-201/08, *Plantanol*, ECLI:EU:C:2009:539, para 46; C-63/93, *Duff and Others*, ECLI:EU:C:1996:51, para 20; C-107/97 *Rombi and Arkopharma*, EU:C:2000:253, para 66; and C-17/03, *VEMW and Others*, ECLI:EU:C:2005:362, para 80.

[51] Nicolas de Sadeleer, *Environmental Principles – From Slogans to Legal Rules* (OUP 2020, 2nd edition) 416.

[52] Katja Yafimava, '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', Energy Insight 87, Oxford Institute for Energy Studies, March 2021.

[53] Kim Talus, 'Security of Supply – An Increasingly Political Notion' in Bram Delvaux, Michael Hunt and Kim Talus (eds), *EU Energy Law and Policy Issues* (Brussels: Euroconfidentiel 2008).

[54] Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014), 89 - 90.

[55] Opinion of Advocate General Campos Sánchez-Bordona, paras 114-116.

After all, this right to effective judicial protection is enshrined in Article 47 of the EU Charter of Fundamental Rights and both EU and national courts have a duty to ensure that it is protected.[56]

Given the well-founded criticism of the potentially far-reaching political and practical implications of the principle of energy solidarity, the Advocate General's proposal for a limited (technical) review appears unsatisfactory and problematic. The approach of the Advocate General would mean that these implications would not be subject to a substantive review by the courts.

The proposed limited review bears a certain similarity to the CJEU's approach to the principle of subsidiarity under Article 5 of the Treaty on the European Union. The case-law in this area indicates that the judicial review is 'light' and largely restricted to ensuring that a legislative instrument of EU law makes reference to the principle or that it is otherwise clear that the EU institutions believed that a legislative act complied with that principle.[57] Subsidiarity, however, is a principle that guides the EU legislator. Contrary to this, the energy solidarity principle, as interpreted by the General Court and the Advocate General, also concerns the application of law and has direct consequences for private persons. For this reason, the limited review approach appears entirely unsatisfactory.

4.3 A formalistic approach in the OPAL case

As suggested by Boute in relation to the General Court's judgment, the approach taken in the OPAL case is highly formalistic. In this case the General Court and the Advocate General, despite arguments to the contrary, seem to suggest a mechanical application of the principle of energy solidarity. The fact that there was no reference to the principle in the Commission decision was the point of concern. The Commission did examine the security of supply consequences (which were at stake in the OPAL case) for other Member States, and Poland specifically participated in the decision-making to ensure that its situation was considered. There is nothing to suggest that this was not the case. It seems that the real issue in the case was the absence of the notion of the 'principle of energy solidarity'.

The Advocate General argued against this by stating that it was not clear from the decision that the principle *had* been taken into consideration in relation to all of the stakeholders involved.[58] Given that security of supply appears to be at the heart of this case and that Germany seems to have provided evidence that the security implications of the OPAL pipeline had been considered,[59] this statement by the Advocate General appears somewhat problematic. In the Opinion the new arguments brought forward by Germany in the appeal were declared as inadmissible essentially due to procedural issues.

4.4 Conflict with the WTO Panel Report in EU-Energy Package

Finally, it is important to note that the Opinion also refers[60] to the WTO Panel Report in EU-Energy Package[61] and correctly argues that the consequence of the General Court's judgment and the rejection of the appeal as proposed by the Advocate General would be contrary to the findings of the Panel Report. The Advocate General notes that if the Commission decision of 2016 was not annulled, this would lead to an 'almost complete elimination of any elements of incompatibility with WTO law'.[62] In other words, if the Commission exemption decision of 2016 was in place again, the EU would not violate its WTO obligations.

The Opinion refers to this problem but thereafter appears to disregard it based on the circumstance that the Panel Report has been appealed and is pending at the time of writing. A failure of the appeal on the

[56] The wide applicability of the principle is confirmed in Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in **Christophe Paulussen and others (eds),** *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press 2016) 43-157.
[57] See, for example, P Craig, *EU Administrative Law* (OUP 2018) 431-434.
[58] Opinion of Advocate General Campos Sánchez-Bordona (n 34), para 160.
[59] ibid para 135.
[60] ibid paras 42-46.
[61] Panel Report, European Union and Its Member States – Certain Measures Relating to the Energy Sector (EU–Energy Package), WR/DS476/R.15.
[62] Opinion of Advocate General Campos Sánchez-Bordona (n 34), para 46.

OPAL measure would, however, lead to a highly problematic outcome if the Court of Justice follows the Opinion of its Advocate General, as it would contradict the multilateral rules of the WTO.

The fundamental violation of the multilateral trading rules with measures such as the OPAL limitation arises from the circumstance that measures that limit the volume of pipeline (or other) natural gas exports will lead to a cut in competitive opportunities for exporters of gas of certain origin to Europe. The equality of such competitive opportunities in WTO Member State markets would usually be the key benchmark against which a possible violation is measured.[63]

Technically, for undersea pipelines, such as Nord Stream 1 and Nord Stream 2, there is only a single entry point. Hence only imports from that entry point are restricted, even if the restrictions occur further downstream, such as in the OPAL case. Therefore, the Panel in EU-Energy package found that due to the specific nature of pipelines, measures beyond the actual border crossing can also be found to be prohibited export restrictions where there is a 'a demonstrable and sufficiently direct link to an entry point for that product into the market of the importation'.[64] Consequently no such measures should be maintained or implemented.

5. Concluding remarks

In stark contrast to the recent case-law on the general solidarity principle, where the CJEU has been less and less ready to use solidarity arguments,[65] in the case under consideration the General Court and the Advocate General argued in favour of an interpretation that turns what had widely been held to be a political principle into one that has legal consequences for the Member States, for the EU institutions and for private parties.

There has been significant pushback from the academic expert community towards the CJEU's decision in the OPAL case. Significant practical and legal problems have been identified and explained. Despite this, the Opinion of the Advocate General endorses the General Court's judgment and, at the same time, opens up new and problematic issues in relation to the principle of energy solidarity and its interpretation and application. It remains to be seen whether the CJEU continues down this path or whether much-needed guidance on the practical application of this principle will be forthcoming.

[63] Kim Talus and Moritz Wüstenberg, WTO Panel Report in the *EU-Energy Package* dispute and the European Commission Proposal to amend the 2009 Gas Market Directive, *Journal of Energy & Natural Resources Law*, 37 (2019) 3, 327-339.
[64] Panel Report, European Union and Its Member States – Certain Measures Relating to the Energy Sector (EU–Energy Package), WR/DS476/R, para 7.994.
[65] Esin Küçük, 'Solidarity in EU law: an elusive political statement or a legal principle with substance?' in Andrea Biondi, Egle Dagilyte and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018) 40. Küçük argues that this is mainly due to the political connotations of the solidarity principle.