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Energy solidarity: how the European Union law general principles are developed

Енергетична солідарність: як розвиваються загальні принципи права Європейського Союзу

Outlines

European Union (hereinafter – EU) energy solidarity has become particularly relevant for both the EU and EU Member States, including regional aspects and third neighbour countries. This was the reason for putting some observations on the subject matter in this article. Solidarity in European Union law, in general, shall be considered first, then solidarity in energy law, especially after the Judgement of the EU General Court delivered on 10 September 2019 on the OPAL gas pipeline case¹. This judgement, for the first time before EU courts, revealed and enshrined the principle of energy solidarity and acknowledged its breach. Major media reacted immediately². It also gave some basis for legal thinking. Not only does *Opal* undoubtedly open the door to the wider debates over the assessment of the internal energy market but also probably to further EU energy integration.

Is EU energy exclusively concerned with reconciling political and economic interests? Is the law doomed to stay out of this important sector? If not, in what cases and to what extent is legal intervention possible and/or tolerated? What does solidarity mean for EU energy? Who should provide answers to these and other questions that are not and cannot be rhetorical?

¹ Judgement of the General Court of 10 September 2019 *Poland vs. Commission (Opal)*, T-883/16, EU:T:2019:567. Judgement of the General Court in Polish. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=217543&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1&cid=16686829>

It should be noted that in *Opal*, the General Court was confronted with a constitutional issue at European Union level. Questions of this level are usually placed on the table of judges of the EU Court of Justice, usually during the preliminary ruling procedure, when the Court has to assess the compatibility of national law with EU law. For the General Court, which acts as a court of first instance, such legal tasks are indeed rare.

² See, e.g. URL: <https://www.bloomberg.com/news/articles/2019-09-10/poland-wins-bid-to-reduce-russian-dominance-in-gas-transit-to-eu>;

<https://uk.reuters.com/article/uk-pgnig-gazprom-opal/eus-top-court-curtails-gazprom-access-to-nord-stream-pipeline-link-idUK-KCN1VV0VH?feedType=RSS&feedName=businessNews>;

<https://www.nytimes.com/reuters/2019/09/10/business/10reuters-pgnig-gazprom-opal-ukraine.html>

The present contribution shows how the gradual consolidation of the principle of solidarity in the EU energy sector from declarative provisions in the origins of EU primary law takes on more tangible forms in the last decade. The growing position of energy solidarity is also visible in the regulatory environment, in particular, with regard to the wording of Article 194 TFEU following the Treaty of Lisbon. Finally, *Opal* reveals the content, nature and impact of the principle of energy solidarity, which gives EU energy solidarity a practical significance.

Although EU law does not ignore the principle of solidarity, rather the opposite – it is a cornerstone of that law – solidarity has not been directly enshrined or conceptualised in the general principles of law.

The drafters of the Treaty of Rome³ intended to “confirm the solidarity which binds Europe and the overseas countries” and to “ensure the development of their prosperity”. In this way, solidarity was seemingly limited geography-wise.

Common energy rules have deep roots in EU law. From the ECSC Treaty⁴ that entered into force in 1952 and expired in 2002, it is obvious that “Europe can only be united by concrete works that create solidarity”. This solidarity may have taken the form of production quotas allocated to individual steel companies during a crisis⁵.

It was only after the Lisbon Treaty that the new Gas Directive 2009/73⁶ was last adopted with Article 6, on “Regional Solidarity”, added, providing that “in order to safeguard a secure supply on the internal market in natural gas, Member States shall cooperate in order to promote regional and bilateral solidarity”, and this secure supply must be implemented through *solidarity*.

The Treaty of Lisbon introduced a new Article 194 TFEU on energy. It gave for the first time the Union’s energy policy an autonomous legal basis, without though fundamentally changing the traditional approach. Indeed, Article 194 TFEU seemed to be a sensible compromise between national sovereignty to regulate the three essential components of energy policy, i.e., combinations of energy types, the use of natural resources and energy taxation, and the EU’s shared competences in other areas.

Opal case. This case directly concerns a large region of the EU and indirectly Ukraine.

The Extended Composition of the General Court of the EU in its judgement of 10 September 2019 *Poland vs. Commission (Opal)* upheld the action brought by the Republic of Poland for annulment of a Commission Decision approving the variation of the conditions for the exemption from EU requirements of the rules governing the operation of the OPAL pipeline proposed by the German regulatory authority (Bundesnetzagentur).

³ The Treaty establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3.

⁴ The Treaty establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140.

⁵ See Judgement of the Court of Justice of 29 September 1987. *Fabrique de fer de Charleroi and Dillinger Hüttenwerke vs. Commission*, 351/85 and 360/85, EU:C:1987:392, paragraphs 3-21. Although one of the Member States invoked the principle of solidarity, the Court did not pay much attention to it.

⁶ 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 L 211, p. 94).

In *Opal*, the General Court examined the principle of energy solidarity enshrined in Article 194(1) TFEU, which, according to the Republic of Poland, was not complied with. The General Court ruled, first, that the principle, as a concrete expression of the general principle of solidarity between Member States in the field of energy, entails rights and obligations for both the Union and the Member States.

Furthermore, and this is a novelty the General Court stressed, contrary to the Commission's position, "the principle of energy solidarity cannot be restricted to such extraordinary situations which would exclusively involve the competence of the EU legislature – a competence implemented by secondary law, by the adoption of Regulation No 994/2010 (replaced by Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation No 994/2010"⁷, which essentially addresses solidarity as a "principle" intended to ensure security of gas supply in the Union⁸.

The impact of the principle of energy solidarity can neither be overestimated nor underestimated. In any event, that effect can be assessed only in the light of the scope of the content of the principle. In that regard, the General Court ruled 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"⁹.

After analysing different aspects of energy solidarity, it is concluded that:

1. In *Opal*, the General Court emphasised, in essence, that the principle of solidarity does not mean one-way traffic in terms of reconciling energy interests between the EU institutions and the EU Member States or between different EU Member States. Otherwise, the principle of solidarity would simply be a declaration; its content would become worthless or simply hollow.

2. *Opal* states, in essence, that this principle is a general principle of law or even a fundamental right, which significantly increases its potential effects, both on an institutional level and on a contentious level.

3. Following *Opal*, it is clear that, contrary to the Commission's contention before the General Court and contrary to what Germany claims in its appeal, the principle of energy solidarity is not a mere political concept addressed to the legislature only in supply crisis situations.

4. The principle of energy solidarity certainly helps, albeit in part, i.e., within the limits set by EU law, to coordinate Member States' energy policies. This principle, as a general

⁷ 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 L 211, p. 94).

⁸ Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010, (OJ L 280, p. 1), which mentions "solidarity" more than a hundred times, and Article 13 of which is named "Solidarity".

⁹ *Opal*, paragraph 70.

principle of direct application, is likely to be relied on in legal proceedings. This would have a serious impact on its assessment in court by applying the principle of effective judicial protection.

5. As soon as the Court of Justice confirmed the General Court's findings the energy solidarity in the European Union changed its status from purely declarative, as it was considered, in principle, until 2019, to legally binding.