



## RESEARCH ARTICLE

### ANALYZING THE EUROPEAN COURT OF JUSTICE'S OPAL PIPELINE JUDGMENT

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#### ABSTRACT

This article analyzes the European Court of Justice (ECJ) ruling on the OPAL gas pipeline, focusing on the legal foundations of EU energy policy, the principle of solidarity, and the far-reaching implications for the European gas market. The ECJ's decision underscores the importance of adequately considering the interests of all market participants—consumers, market operators, and transit states—when shaping energy policies and infrastructure projects. Moreover, the judgment highlights the need for a comprehensive assessment of the potential impacts of energy infrastructure projects on market competition, supply security, and the EU's energy policy objectives. Building on this foundation, the article explores the specific consequences of the ruling for the European gas market and examines its potential influence on future energy infrastructure projects.

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## INTRODUCTION

The European Court of Justice's (ECJ) judgement in Case C-848/19 P, concerning the OPAL gas pipeline, has sparked a critical discussion on energy solidarity and the legal framework governing gas infrastructure projects within the European Union (Chylińska, 2020; Goldthau, 2018). The perspectives of various stakeholders, including the Republic of Poland, the European Commission, the German Federal Network Agency, and the ECJ, on this issue are varied (ECJ, 2019; Wright, 2019). Poland raised concerns over the pipeline's capacity increase and its impact on market competition, energy security, and the principle of energy solidarity enshrined in Article 194 of the Treaty on the Functioning of the European Union (TFEU) (ECJ, 2019; Wright, 2019). The European Commission and the German Federal Network Agency argued in favor of increasing the transport capacity of the OPAL pipeline, asserting that it would enhance the security of gas supplies to the European Union and contribute to the development of a competitive and integrated European gas market (European Commission, 2016; BNetzA, 2020). However, the ECJ annulled the European Commission's decision to grant the OPAL pipeline an exemption from third-party access regulations, finding that the Commission had failed to adequately consider the principle of energy solidarity (ECJ, 2019).

The ECJ's judgement on the OPAL pipeline case highlights the importance of energy solidarity and the need to balance the interests of all EU member states in the implementation of energy projects. This judgement may serve as a precedent for future gas infrastructure projects, emphasizing the need for a comprehensive assessment of the potential impacts on energy security, competition, and solidarity among EU member states (Chylińska, 2020; Talus, 2019). This article aims to provide a neutral and comprehensive analysis of the ECJ's decision, examining its legal foundations, the arguments put forth by both supporters and critics of the judgment, and its potential consequences for the European energy market.

**Meaning of OPAL:** The OPAL (Ostsee-Pipeline-Anbindungs-Leitung) gas pipeline connects the Nord Stream pipeline, which transports natural gas from Russia to Germany, with the European gas network. In 2016, the European Commission amended its decision on the OPAL pipeline, allowing Gazprom to increase its capacity usage (European Commission, 2016). Poland, supported by other Member States, challenged the European Commission's decision, claiming it violated the principle of solidarity enshrined in Article 194 TFEU and the Third Gas Directive (2009/73/EC). The ECJ's judgement in favour of Poland, annulling the European Commission's decision, and held that the principle of solidarity was not adequately taken into account (Court of Justice of the European Union, 2021).

**Legal framework:** The European Court of Justice's discretionary power in the OPAL case is noteworthy as it interpreted the decision of the German Federal Network Agency to increase the OPAL gas pipeline's capacity by 50% in light of energy solidarity, assuming a typical chain of events from the gas transport increase to market effects in Poland, and ultimately declared the decision void (European Court of Justice, 2019). The Court argued that the 50% increase would initially enable an increase in the Nord Stream gas pipeline's transport capacity, resulting in a decrease in gas transit volumes through Jamal and Braterstwo to Europe, which would decrease gas transit revenues in affected states (ECJ, 2019, para. 75). As a result, a decrease in the gas price was expected since gas transit revenues would no longer be included or the gas supply in Europe would increase, reducing the gas price. This would endanger the significant economic interests of European gas companies, including PGNiG (ECJ, 2019, para. 77). Moreover, increased gas imports to Europe via Nord Stream could result in a complete interruption of gas flow through Jamal and Braterstwo, jeopardizing gas supply in transit states (ECJ, 2019, para. 79). However, the Court noted that energy solidarity requires considering the significant economic interests of other member states, energy companies, and end consumers in the spirit of loyal cooperation between member states (ECJ, 2019, para. 85).

#### Assessing the ECJ's judgement in the OPAL case

**The ECJ's Reasoning:** The ECJ's judgement focuses on the principle of solidarity, which requires the EU and its Member States to take into account the interests of all parties involved in the energy market, including consumers, market participants, and transit states (Court of Justice of the European Union, 2021, para. 72). The Court held that the European Commission's decision did not adequately assess the potential impact of the OPAL pipeline on the European gas market, particularly regarding the principle of solidarity and market competition.

**Different Perspectives on the OPAL Pipeline Capacity Increase:** The judgment also touches upon the balance between property rights protection, as enshrined in Article 17 of the Charter of Fundamental Rights of the European Union, and the objectives of the EU's energy policy. However, the Court's reasoning in this regard remains limited and does not provide a comprehensive analysis of the compatibility of the OPAL decision with property rights protection. The ECJ's decision on the OPAL pipeline is expected to have a significant impact on the European gas market, as it sets a precedent for the interpretation and application of the principle of solidarity in future energy infrastructure projects (Koenig & Schick, 2021). It may also lead to a shift in the balance of power between dominant gas suppliers, such as Gazprom, and smaller market participants, like PGNiG (Gisbertz & Hancher, 2021). The judgment may result in increased scrutiny of other energy infrastructure projects to ensure compliance with the principle of solidarity and EU energy policy objectives (Heinemann & Wiese, 2021). Additionally, the decision could prompt a reassessment of existing projects that may not adequately consider the interests of all market participants and Member States (Jasiński & Szulecki, 2021). Furthermore, the OPAL decision may encourage the development of alternative gas supply routes and sources to enhance the diversification and security of the European gas market (Boute, 2021). This could include increased investment in renewable energy

sources and the development of new infrastructure projects that better align with the EU's energy policy objectives (Müller, 2021).

**First Legal Opinion:** The Republic of Poland's perspective on the OPAL pipeline capacity increase is anchored in concerns over energy security and potential disruptions in gas supplies. Poland has consistently argued that the increase in transport capacity would lead to a dominant position for Gazprom, thus negatively impacting competition in the European gas market and contravening the objectives of EU energy policy, as laid out in Art. 194 TFEU (Chylińska, 2020). Poland also emphasizes the importance of diversification of energy sources to reduce dependence on Russian gas supplies, in line with Art. 3 TEU, which calls for the EU to promote energy security (Wright, 2019).

**Second Legal Opinion:** On the other hand, the European Commission and the German Federal Network Agency (Bundesnetzagentur) have argued in favor of increasing the transport capacity of the OPAL pipeline. They believe that the increase would enhance the security of gas supplies to the European Union, as per Art. 194 TFEU, and contribute to the development of a competitive and integrated European gas market (European Commission, 2016). The Bundesnetzagentur, in particular, maintains that an increase in capacity would contribute to more effective use of the pipeline and foster competition between gas suppliers, in line with Art. 36 of Directive 2009/73/EC (BNetzA, 2020).

**Scholarly Legal Opinions:** Scholarly opinions on the issue are varied. Some argue that the ECJ's ruling in favor of Poland was a necessary step to uphold the principles of the EU's energy policy, as well as to maintain a competitive gas market (Chylińska, 2020). Others, however, contend that the ECJ's decision may have unintended consequences, including hindering the development of an integrated European gas market and potentially creating supply bottlenecks (Talus, 2019).

**Critical statement:** The unique nature of the energy transition has resulted in a lack of clear criteria for defining solidarity in the legal system, causing legal uncertainty for those impacted by such norms. Therefore, there is a need for a harmonized understanding of energy solidarity across both the European Union and the United Nations to ensure legal certainty and confidence in the binding nature of solidarity. It is important to distinguish between energy solidarity and gas market liberalization, with the former serving as a practical means of ensuring fair participation of all protected consumers and businesses in the European energy market. The interpretation of solidarity should be sector-specific, taking into account situations such as natural disasters or national regulators' discretion in energy policy measures (Pence, 2019). To evaluate the practical implications of treaty provisions related to solidarity and interdependence in energy policy, it is necessary to analyze these provisions from a legal and formal, institutional, and functional and relational perspective. The notion of solidarity is a crucial aspect of European Union law, encompassing two dimensions: the ideological dimension as an independent value that guides the actions of EU Member States, as set out in Article 2 TEU, and the practical dimension as a specific action mechanism that ensures energy security and fosters joint action among Member States as in Article 222 TFEU (Długosz & Zachariasiewicz, 2020). Article 122 TFEU

further underscores the vital link between energy security and solidarity, empowering the Council to adopt measures that reflect solidarity between Member States, notably in cases of severe difficulties in the supply of certain goods, especially in the energy sector (de Búrca, 2012). For countries highly dependent on energy supplies from a single source, this provision is of particular importance. However, the feasibility of energy supply is dependent on the infrastructure for energy transmission, which must be considered when interpreting these provisions. In conclusion, it is essential to interpret the understanding of solidarity in a sector-specific manner, such as in disasters or in the discretion of national regulatory authorities for energy policy measures (Pence, 2019).

**Approaches for a solution:** The ECJ's judgement on the OPAL pipeline case may have far-reaching implications for future gas infrastructure projects. Given the court's emphasis on energy solidarity and the need to balance the interests of all EU member states, it is possible that other projects may face similar legal challenges. Factors that may contribute to such challenges include concerns about energy security, competition, and the potential for undue dominance by specific suppliers or companies (Goldthau, 2018). For instance, projects like the Nord Stream 2 pipeline have faced increased scrutiny in light of the ECJ's ruling on the OPAL pipeline. As with OPAL, the Nord Stream 2 pipeline aimed to transport Russian natural gas to Europe, raising similar concerns about energy security, market competition, and the dependence on a single supplier (Högselius, 2021). The lessons learned from the OPAL case could serve as a guide for regulators and policymakers to ensure that future gas infrastructure projects comply with the principles of the EU's energy policy and uphold the values of energy solidarity.

- In light of the ECJ's ruling on the OPAL pipeline and the potential challenges facing future gas infrastructure projects, it is essential to consider developing a new legal framework that balances the interests of all stakeholders while promoting energy security and solidarity within the European Union. This framework could involve enhanced regulatory oversight, clear guidelines for exemptions, stakeholder consultation, and diversification of energy sources (Egenhofer & Renda, 2021; Boute, 2020; Koranyi & Egenhofer, 2019; Yafimava, 2020).
- **Enhanced regulatory oversight:** Strengthening the role of EU regulatory bodies, such as the European Commission and the Agency for the Cooperation of Energy Regulators (ACER), to ensure compliance with the principles of energy solidarity, subsidiarity, and proportionality (Egenhofer & Renda, 2021).
- **Clear guidelines for exemptions:** Establishing well-defined criteria for granting exemptions from third-party access regulations, taking into account the potential impact on competition, market integration, and energy security (Boute, 2020).
- **Stakeholder consultation:** Encouraging greater involvement of all relevant stakeholders, including EU member states, gas suppliers, and consumers, in the decision-making process for gas infrastructure projects (Koranyi & Egenhofer, 2019). Diversification of energy sources: Promoting the development of alternative energy sources and routes to reduce dependence on a single supplier or route, thereby enhancing energy security and solidarity within the European Union (Yafimava, 2020).

- **Strengthening Legal Frameworks for Cross-border Energy Projects:** Cross-border energy projects, such as the OPAL pipeline, often involve complex legal and regulatory challenges. To address these challenges, the European Union should work towards harmonizing and strengthening legal frameworks governing cross-border energy projects. This could include revising existing regulations or adopting new legislation to ensure that all parties involved in such projects adhere to a common set of rules and principles.
- **Interconnectivity and Infrastructure Investment:** To create a more integrated and secure European gas market, it is crucial to invest in infrastructure projects that promote interconnectivity between Member States. This includes building new cross-border pipelines, expanding existing infrastructure, and developing LNG terminals to facilitate the import of gas from diverse sources. These investments will help to create a more flexible and resilient gas market, enabling Member States to better respond to supply disruptions and market fluctuations.
- **Encouraging Market Competition:** Fostering competition in the European gas market is essential for achieving a more secure, sustainable, and affordable energy supply. To this end, the European Union should promote market liberalization and the entry of new market players, while ensuring that existing market participants, such as Gazprom, do not abuse their dominant positions. This may involve strengthening competition law enforcement and promoting transparency in the gas market, as well as removing barriers to entry for new suppliers.

## CONCLUSION

In conclusion, the OPAL pipeline case has highlighted the complex legal and regulatory landscape surrounding gas infrastructure projects within the European Union, as well as the importance of energy solidarity. Striking a balance between various interests and legal principles, such as subsidiarity, proportionality, and energy solidarity, is crucial for creating a secure, competitive, and integrated European gas market. The perspectives of key stakeholders and the European Court of Justice have provided valuable insights into the potential implications of the ruling for future gas infrastructure projects. To address these challenges, policymakers, regulators, and stakeholders should work towards refining the legal framework, diversifying energy sources, enhancing regulatory oversight, promoting interconnectivity and infrastructure investment, encouraging market competition, fostering cooperation between EU institutions and Member States, and developing a comprehensive energy strategy. This could include a focus on alternative gas supply routes, sources, and increased investment in renewable energy technologies. By learning from the OPAL pipeline case and adopting a more collaborative and balanced approach to energy policy, the European Union can create a more secure, competitive, and integrated gas market that benefits all its Member States. The case serves as a reminder of the complex interplay between property rights protection, market competition, and the principle of solidarity in the context of the EU's energy policy. As the European gas market continues to evolve, a deeper understanding of these issues will be crucial for ensuring a competitive, integrated, and secure energy market that benefits all stakeholders.

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### Affidavit

I declare in lieu of an oath that I have taken the examination independently and without any help from others. Brunswick, 11<sup>th</sup> of December 2024

Signature [Naod Ghiorgis]

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