Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

15 July 2021 *

(Appeal – Article 194(1) TFEU – Principle of energy solidarity – Directive 2009/73/EC – Internal market in natural gas – Article 36(1) – Decision of the European Commission on review of the exemption of the OPAL pipeline from the requirements on third-party access and tariff regulation following a request by the German regulatory authority – Action for annulment)

In Case C-848/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 November 2019,

Federal Republic of Germany, represented by J. Möller and D. Klebs, acting as Agents, and by H. Haller, T. Heitling, L. Reiser and V. Vacha, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

Republic of Poland, represented by B. Majczyna, M. Kawnik and M. Nowacki, acting as Agents,

applicant at first instance,

European Commission, represented by O. Beynet and K. Herrmann, acting as Agents,

defendant at first instance,

Republic of Latvia, represented initially by K. Pommere, V. Soņeca and E. Bārdiņš, and subsequently by K. Pommere, V. Kalniņa and E. Bārdiņš, acting as Agents,

Republic of Lithuania, represented by R. Dzikovič and K. Dieninis, acting as Agents,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, N. Piçarra and A. Kumin, Presidents of Chambers, C. Toader (Rapporteur), D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges,

* Language of the case: Polish.

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 13 January 2021,

after hearing the Opinion of the Advocate General at the sitting on 18 March 2021,

gives the following

Judgment

1 By its appeal, the Federal Republic of Germany seeks to have set aside the judgment of the General Court of the European Union of 10 September 2019, *Poland* v *Commission* (T-883/16, EU:T:2019:567, 'the judgment under appeal'), by which the General Court annulled Commission Decision C(2016) 6950 final of 28 October 2016 ('the decision at issue') on review of the exemption of the Baltic Sea Pipeline Connector ('the OPAL pipeline') from the requirements on third-party access and tariff regulation granted under Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

Legal context

European Union law

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

3 Article 32 of Directive 2009/73, entitled 'Third-party access', which is identical to Article 18 of Directive 2003/55, provides:

'1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and [liquefied natural gas (LNG)] facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs – and the methodologies, where only methodologies are approved – are published prior to their entry into force.

2. Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.

3. The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules.'

4 Article 36 of Directive 2009/73, entitled ‘New infrastructure’, which replaced Article 22 of Directive 2003/55, reads as follows:

‘1. Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:

(a) the investment must enhance competition in gas supply and enhance security of supply;

(b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;

(c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;

(d) charges must be levied on users of that infrastructure; and

(e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

…

3. The [national regulatory authority] may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2.

…

6. An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

…

8. The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect

to the decision. That information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision. In particular, the information shall contain:

(a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted or refused the exemption together with a reference to paragraph 1 including the relevant point or points of that paragraph on which such decision is based, including the financial information justifying the need for the exemption;

(b) the analysis undertaken of the effect on competition and the effective functioning of the internal market in natural gas resulting from the grant of the exemption;

(c) the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;

(d) in case the exemption relates to an interconnector, the result of the consultation with the regulatory authorities concerned; and

(e) the contribution of the infrastructure to the diversification of gas supply.

9. Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where further information is sought by the Commission. That additional period shall begin on the day following the receipt of the complete information. The initial two-month period may also be extended with the consent of both the Commission and the regulatory authority.

…

The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

…'

German law

5 Paragraph 28a(1) of the Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) (Law on the supply of electricity and gas) of 7 July 2005 (BGBl. 2005 I, p. 1970), in the version applicable to the facts of the present case, allows the Bundesnetzagentur (Federal Network Agency, Germany), in particular, to exempt interconnectors between Germany and other States from the application of the provisions governing third-party access. The conditions for the application of Paragraph 28a are the same, in essence, as those of Article 36(1) of Directive 2009/73.

Background to the dispute and the decision at issue

6 For the purposes of these proceedings, the background to the dispute, as set out in paragraphs 5 to 18 of the judgment under appeal, may be summarised as follows.

7 On 13 March 2009, the Federal Network Agency notified the Commission of two decisions of 25 February 2009 which excluded, for a period of 22 years, the capacities for cross-border transmission of the planned OPAL pipeline, which is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, from the application of the rules on third-party access laid down in Article 18 of Directive 2003/55, reproduced in Article 32 of Directive 2009/73, and tariff regulation laid down in Article 25(2) to (4) of Directive 2003/55. The two decisions concerned the shares held by the two owners of the OPAL pipeline. The company operating the 80% share of the OPAL pipeline belonging to one of those two owners is OPAL Gastransport GmbH & Co. KG ('OGT').

8 By Decision C(2009) 4694 of 12 June 2009, the Commission asked the Federal Network Agency, pursuant to the third subparagraph of Article 22(4) of Directive 2003/55, now Article 36(9) of Directive 2009/73, to vary its decisions of 25 February 2009 by adding two conditions. The first of these concerned a prohibition against an undertaking that is dominant on one or several large markets in natural gas reserving, in a single year, more than 50% of the transport capacities of the OPAL pipeline at the Czech border. The second condition introduced an exception to that limit, which could be exceeded in the event of a release to the market, by the undertaking concerned, of an annual volume of 3 billion m^3 of gas on the OPAL pipeline under an open, transparent and non-discriminatory procedure, in so far as, first, the undertaking managing the pipeline or the undertaking required to carry out the programme ensured the availability of corresponding transport capacities and the free choice of the exit point and, second, the form of the gas release and capacity release programmes was subject to the approval of the Federal Network Agency.

9 On 7 July 2009, the Federal Network Agency amended its decisions of 25 February 2009 by incorporating those conditions, and granted the exemption from the rules on third-party access and tariff regulation for a period of 22 years on the basis of Directive 2003/55.

10 In the technical configuration of the OPAL pipeline, which was put into service as from 13 July 2011, natural gas can be supplied at the pipeline entry point close to Greifswald (Germany) only by the Nord Stream 1 pipeline, used by the Gazprom group to transport gas from Russian gas fields. As Gazprom did not implement the gas release programme referred to in Decision C(2009) 4694, the non-reserved 50% of the capacity of the OPAL pipeline has never been used.

11 On 12 April 2013, OGT, OAO Gazprom and Gazprom Export OOO formally requested the Federal Network Agency to vary certain provisions of the exemption granted by its decisions of 25 February 2009.

12 Following that request, on 13 May 2016 the Federal Network Agency notified the Commission, on the basis of Article 36 of Directive 2009/73, of its intention to vary certain provisions of the exemption granted by its decisions of 25 February 2009 regarding the share of the OPAL pipeline operated by OGT. The variation proposed by the Federal Network Agency consisted, in essence, in replacing the restriction imposed by Decision C(2009) 4694 on the capacity that could be reserved by dominant undertakings with the obligation, for OGT, to offer, by auction, at least 50% of its operating capacity at the exit point of Brandov (Czech Republic).

13 On 28 October 2016, the Commission adopted, on the basis of Article 36(9) of Directive 2009/73, the decision at issue, which is addressed to the Federal Network Agency and was published on the Commission website on 3 January 2017.

14 In that decision, the Commission approved the amendments to the exemption regime proposed by the Federal Network Agency, subject to certain conditions, concerning, in particular (i) restriction of the initial offer of capacities to be auctioned to 3 200 000 kWh/h (approximately 2.48 billion m^3/year) of fixed freely allocable capacities and to 12 664 532 kWh/h (approximately 9.83 billion m^3/year) of fixed dynamically allocable capacities; (ii) an increase in the volume of fixed freely allocable capacities which had to be offered at auction in the subsequent year, if, at an annual auction, demand exceeded 90% of the capacities offered, and which had to be made in tranches of 1 600 000 kWh/h (approximately 1.24 billion m^3/year) up to a maximum of 6 400 000 kWh/h (approximately 4.97 billion m^3/year); and (iii) the fact that an undertaking or a group of undertakings with a dominant position in the Czech Republic or controlling more than 50% of the gas arriving at Greifswald could bid for fixed freely allocable capacities only at the base price, which was required to be set no higher than the average base price of regulated tariffs on transmission networks from the Gaspool area, comprising the north and east of Germany, to the Czech Republic for comparable products in the same year.

15 On 28 November 2016, the Federal Network Agency amended the exemption granted by its decision of 25 February 2009 concerning the share of the OPAL pipeline operated by OGT, in accordance with the decision at issue, by entering into a public-law contract with OGT which, under German law, is equivalent to an administrative decision.

The procedure before the General Court and the judgment under appeal

16 By application lodged at the General Court Registry on 16 December 2016, the Republic of Poland brought an action for annulment of the decision at issue.

17 In support of its action, the Republic of Poland relied on six pleas in law, alleging, first, infringement of Article 36(1)(a) of Directive 2009/73, read in conjunction with Article 194(1)(b) TFEU and the principle of solidarity; second, the lack of competence of the Commission and infringement of Article 36(1) of that directive; third, infringement of Article 36(1)(b) of that directive; fourth, infringement of Article 36(1)(a) and (e) of that directive; fifth, infringement of international conventions to which the European Union is a party; and, sixth, breach of the principle of legal certainty.

18 The General Court granted the Federal Republic of Germany leave to intervene in support of the form of order sought by the Commission, and granted the Republic of Latvia and the Republic of Lithuania leave to intervene in support of the form of order sought by the Republic of Poland.

19 By the judgment under appeal, the General Court annulled the decision at issue on the basis of the first plea in law, without ruling on the other pleas put forward, and ordered the Commission to bear its own costs and to pay those incurred by the Republic of Poland.

20 In the context of the examination of the first plea in law, after having rejected that plea, in paragraph 60 of the judgment under appeal, as being ineffective to the extent that it was based on Article 36(1)(a) of Directive 2009/73, the General Court held that the decision at issue had been adopted in breach of the principle of energy solidarity, as provided for in Article 194(1) TFEU. As regards the scope of that principle, the General Court stated, in paragraphs 72 and 73 of the judgment under appeal, that that principle entails a general obligation, for the European Union and the Member States, to take into account the interests of all stakeholders liable to be affected, and that the European Union and the Member States must therefore endeavour, in the exercise of

their powers in the field of the energy policy of the European Union, to avoid adopting measures that might affect those interests, as regards security of supply, its economic and political viability and the diversification of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.

21 In its assessment as to whether the decision at issue breached the principle of energy solidarity, the General Court found, in paragraphs 81 and 82 of the judgment under appeal, that that decision undermined it, in so far as, first, the Commission did not carry out an examination of the impact of the variation of the regime governing the operation of the OPAL pipeline on the security of supply in Poland and, second, 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 observed at EU level.

Forms of order sought

22 The Federal Republic of Germany claims that the Court should:

– set aside the judgment under appeal;

– refer the case back to the General Court; and

– reserve the costs.

23 The Republic of Poland contends that the Court should:

– dismiss the appeal in its entirety as unfounded and, as regards the third ground of appeal, as inadmissible; and

– order the Federal Republic of Germany to pay the costs.

24 The Republic of Latvia and the Republic of Lithuania, interveners at first instance, contend that the Court should dismiss the appeal.

25 The Commission, which did not submit a response pursuant to Article 172 of the Rules of Procedure of the Court of Justice, requested the Court, during the oral part of the procedure before the Court, to uphold the first ground of appeal.

The appeal

26 The Federal Republic of Germany relies on five grounds of appeal.

First ground of appeal: incorrect legal assessment of the principle of energy solidarity

Arguments of the parties

27 By its first ground of appeal, the appellant submits that, contrary to the General Court's finding in paragraph 70 of the judgment under appeal, the principle of energy solidarity as set out in Article 194(1) TFEU does not have binding effect, in the sense that it does not entail rights and obligations for the European Union and the Member States. According to the Federal Republic of Germany, it is an abstract, purely political notion, and not a legal criterion for the assessment of the validity of an act of an EU institution. It is only by the adoption of more specific rules in secondary legislation that such a principle could become a legal criterion to be implemented and applied by the executive. This follows from the fact that it is not the purpose of primary law to establish legal criteria that might be relied on before the courts, but to define in political terms the general framework within which the European Union is to develop and the European Union's objectives, the latter being pursued and more closely defined by regulations and directives.

28 According to the appellant, the Commission did not err in examining the requirements of Article 36(1) of Directive 2009/73, that provision being the only criterion by which the legality of the decision at issue may be reviewed. That provision, which imbues the principle of energy solidarity with specific legal content, requires that only security of supply must be verified. By contrast, other abstract aspects of the principle of energy solidarity cannot be relied on before the courts.

29 In addition, the Federal Republic of Germany submits that there is no evidence to suggest an obligation on the Commission, as executive body of the European Union, arising from the principle of energy solidarity as such, beyond the specific form given to that principle in Article 36(1) of Directive 2009/73, that principle being binding, at most, on the EU legislature.

30 The Republic of Poland, supported by the Republic of Latvia and the Republic of Lithuania, contends that the first ground of appeal is unfounded.

31 In particular, the Republic of Poland counters that the principle of energy solidarity, to which Article 194(1) TFEU refers, constitutes the specific expression of the general principle of solidarity between the Member States. According to the Republic of Poland, in the hierarchy of sources of EU law, general principles rank equally with primary law. In that regard, it argues that acts of secondary legislation must be interpreted, and their legality assessed, in the light of that principle. Consequently, the claim by the Federal Republic of Germany that Article 36(1) of Directive 2009/73 constitutes the only criterion for reviewing the legality of the decision at issue is incorrect.

32 Thus, according to the Republic of Poland, the principle of solidarity is binding not only on the Member States but also on the EU institutions, including the Commission, which, as guardian of the Treaties, must ensure that the general interest of the European Union is served.

33 In addition, the Republic of Poland claims that the security of gas supply in the European Union, which is one of the objectives of EU energy policy, must be ensured in accordance with the principle of solidarity laid down in Article 194(1) TFEU, that principle being a criterion for the assessment of the legality of measures adopted by the EU institutions, and in the present case of the decision at issue. It follows that the arguments of the Federal Republic of Germany aimed at reducing that principle to a purely political notion are unfounded.

34 The Republic of Latvia submits that the Federal Republic of Germany wrongly seeks to reduce the scope and application of the principle of energy solidarity, when Article 194(1) TFEU, which is a provision of primary law, imposes obligations on the Member States and on the EU institutions. That principle prevents the Member States from taking certain measures which impede the functioning of the European Union. The Commission should ensure in that respect that the Member States respect the principle of energy solidarity when implementing Article 36(8) of Directive 2009/73.

35 The Republic of Lithuania also takes issue with the categorisation of the principle of energy solidarity in the appeal. In its view, that principle is derived from the principle of sincere cooperation, laid down in Article 4(3) TEU, and from the principle of solidarity, laid down in Article 3(3) TEU. As a general principle of EU law, the principle of energy solidarity could be relied on in the context of the judicial review of the legality of Commission decisions, under Article 263 TFEU.

36 At the hearing, the Commission was invited by the Court to comment on the first ground of appeal. The Commission stated that it concurred with the argument put forward by the Federal Republic of Germany, in so far as the principle of energy solidarity is not an autonomous legal criterion that may be invoked in order to assess the legality of an act. According to the Commission, that principle is binding on the EU legislature only when it adopts an act of secondary legislation. The Commission, as executive body, is bound only by the requirements laid down in Article 36(1)(a) of Directive 2009/73, and the principle of energy solidarity can only be a criterion in the light of which the provisions of secondary legislation are interpreted.

Findings of the Court

37 Article 194 TFEU provides in paragraph 1 that, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, European Union policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market, ensure security of energy supply in the European Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy and promote the interconnection of energy networks (judgment of 4 May 2016, *Commission* v *Austria*, C-346/14, EU:C:2016:322, paragraph 72 and the case-law cited).

38 Thus, the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law.

39 In addition to Article 194(1) TFEU, several other provisions of the Treaties refer to the principle of solidarity. As regards the EU Treaty, in the preamble thereto, the Member States declare that, by establishing the European Union, they intend ‘to deepen the solidarity between their peoples’. Solidarity is also mentioned in Article 2 TEU, as one of the characteristics of a society founded on the values common to the Member States, and in the third subparagraph of Article 3(3) TEU, according to which the European Union is to promote, inter alia, solidarity among Member States. In accordance with Article 21(1) TEU, solidarity is also one of the principles governing the European Union’s external action and, under Article 24(2) and (3) TEU, it is among the provisions relating to the common foreign and security policy as ‘mutual political solidarity’ among Member States.

40 In the case of the FEU Treaty, Article 67(2) expressly refers to solidarity between Member States in matters of asylum, immigration and external border controls, and the application of that principle in that area is confirmed in Article 80 TFEU. In Title VIII of Part Three of the FEU Treaty, specifically in Chapter 1 which covers economic policy, Article 122(1) TFEU also refers explicitly to the spirit of solidarity between Member States, which additionally features in Article 222 TFEU, according to which the European Union and its Member States are to act jointly in a spirit of solidarity where a Member State is the object of a terrorist attack or the victim of a disaster.

41 It follows that, as the General Court correctly noted in paragraph 69 of the judgment under appeal, the principle of solidarity underpins the entire legal system of the European Union (see, to that effect, judgments of 7 February 1973, *Commission* v *Italy*, 39/72, EU:C:1973:13, paragraph 25, and of 7 February 1979, *Commission* v *United Kingdom*, 128/78, EU:C:1979:32, paragraph 12) and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the Court has held, inter alia, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States (judgment of 8 October 2020, *Union des industries de la protection des plantes*, C-514/19, EU:C:2020:803, paragraph 49 and the case-law cited).

42 As regards the allegedly abstract nature of the principle of solidarity, invoked by the Federal Republic of Germany in order to argue that it cannot be used in the context of judicial review of the legality of Commission acts, it must be pointed out that the Court, as the Advocate General noted in point 69 of his Opinion, expressly referred to the principle of solidarity mentioned in Article 80 TFEU in coming to the conclusion that, in essence, Member States had failed to fulfil certain of their obligations under EU law on border controls, asylum and immigration (judgments of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, EU:C:2017:631, paragraph 291, and of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 80 and 181).

43 That being so, there is nothing that would permit the inference that the principle of solidarity referred to in Article 194(1) TFEU cannot, as such, produce binding legal effects on the Member States and institutions of the European Union. On the contrary, as the Advocate General noted in points 76 and 77 of his Opinion, that principle, as is apparent from the wording and structure of that provision, forms the basis of all of the objectives of the European Union's energy policy, serving as the thread that brings them together and gives them coherence.

44 It follows, in particular, that acts adopted by the EU institutions, including by the Commission under that policy, must be interpreted, and their legality assessed, in the light of the principle of energy solidarity.

45 In that regard, the Federal Republic of Germany's argument that the principle of energy solidarity could at most be binding on the EU legislature, and not on the Commission as the executive body, cannot be upheld. That principle, like general principles of EU law, constitutes a criterion for assessing the legality of measures adopted by the EU institutions.

46 Therefore, contrary to the arguments advanced by the Federal Republic of Germany, according to which Article 36(1) of Directive 2009/73 gives specific form to the principle of energy solidarity in secondary legislation and is consequently the only article in the light of which the legality of the decision at issue should be reviewed, it must be held that that principle can be relied on in matters of EU energy policy in the context of the establishment and functioning of the internal market in natural gas.

47 As the Advocate General stated in points 76 and 104 of his Opinion, that principle cannot, moreover, be regarded as being synonymous with or limited to the requirement to ensure security of supply, referred to in Article 36(1) of Directive 2009/73, which is merely one of the manifestations of the principle of energy solidarity, since Article 194(1) TFEU sets out, in points (a) to (d), four different objectives which, in a spirit of solidarity between Member States, EU energy policy aims to achieve. Indeed, Article 36(1) of that directive cannot be read as limiting the scope of the principle of energy solidarity, referred to in Article 194(1) TFEU, which, as has been pointed out in paragraph 43 of the present judgment, governs the whole of EU energy policy.

48 Consequently, the absence in Article 36(1) of Directive 2009/73 of any reference to the principle of energy solidarity did not relieve the Commission of the need to examine the effect of that principle on the derogating measures adopted by the decision at issue.

49 It is apparent from the foregoing that the General Court was right to hold, in paragraph 70 of the judgment under appeal, that the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being 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.

50 That finding is not called in question by the arguments advanced by the Commission at the hearing, according to which it had not received information concerning the risk to security of supply in the Polish market for gas, which justified the fact that no account was taken of the principle of energy solidarity in the decision at issue.

51 Such a failure to communicate, unprompted, information concerning the risks for security of supply in the Polish market for gas cannot justify the lack of any examination by the Commission of the impact that the decision at issue could have on the gas market of the Member States liable to be affected.

52 Thus, the principle of energy solidarity, read in conjunction with the principle of sincere cooperation, requires that the Commission verify whether there is a danger for gas supply on the markets of the Member States, when adopting a decision on the basis of Article 36 of Directive 2009/73.

53 In addition, as the Advocate General noted in point 116 of his Opinion, the principle of energy solidarity requires that the EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole.

54 In view of the foregoing, the first ground of appeal must be rejected as being unfounded.

Second ground of appeal: non-applicability of the principle of energy solidarity

Arguments of the parties

55 By its second ground of appeal, the Federal Republic of Germany submits that, in paragraph 72 of the judgment under appeal, the General Court erred in law by finding that the principle of solidarity entails a general obligation, for the European Union and the Member States, in the exercise of their respective competences, to take into account all the interests liable to be affected.

56 According to the appellant, the General Court disregarded the fact that the principle of energy solidarity is an emergency mechanism, which must be used only in exceptional cases and which implies, in such cases, an obligation of unconditional assistance, meaning 'unconditional loyalty'. Taking that principle into account in anything other than exceptional cases would have the effect of impeding or preventing decision-making within the European Union, given that the various points of view and objectives could only rarely be reconciled. That is the case in this instance, since the interests of the Republic of Poland are different from those of the Federal Republic of Germany in the context of the decision at issue.

57 In the appellant's submission, that principle therefore merely means a duty to assist in the event of a disaster or crisis. That interpretation is confirmed by Article 3(3) TEU read in conjunction with Article 222 TFEU.

58 Even though 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 2017 L 280, p. 1) was not applicable at the time when the decision at issue was adopted, Article 13 thereof shows that the duty to assist that flows from the principle of energy solidarity is to be invoked only as a last resort, in a full emergency.

59 According to the Federal Republic of Germany, since the decision at issue was not adopted in such an emergency, the Commission was not required to take the principle of energy solidarity into account in that decision. It concludes from this that the judgment under appeal must be set aside in so far as it is based solely on the alleged lack of any reference to that principle in the decision at issue.

60 The Republic of Poland, supported by the Republic of Latvia and the Republic of Lithuania, contends that the second ground of appeal is unfounded.

61 In particular, the Republic of Poland counters that Article 194(1) TFEU requires account to be taken of the principle of solidarity among Member States in the context of any action falling within the European Union policy on energy, and that that obligation is not limited to action in times of crisis. In its view, it is preferable to prevent crises from occurring rather than to remedy them.

62 In addition, the analogy drawn by the Federal Republic of Germany between Article 194 TFEU and Article 222 TFEU is not correct in so far as the special emergency mechanisms, such as those provided for in Articles 122 and 222 TFEU, are of a nature and have objectives that are distinct from those of the principle of energy solidarity provided for in Article 194 TFEU.

63 As to the argument of the Federal Republic of Germany that the mechanisms of Regulation 2017/1938 show that the duty to assist is to be applied only as a last resort, this also is incorrect. In fact, that regulation provides for preventive measures and for emergency mechanisms applicable in crisis situations. In the present case, the Republic of Poland submits that there are genuine risks to the security of energy supply in Poland and the States of the central and eastern areas of Europe if the decision at issue were to be applied, owing to the dominant position of Gazprom on the market for the supply of gas.

64 The Republic of Latvia argues that the principle of energy solidarity does not apply only in order to deal with exceptional cases when they arise, but that it also implies the adoption of preventive measures. That principle cannot be interpreted as requiring 'unconditional loyalty' but should be understood to mean that the decision-making process is to take into account the particular characteristics of neighbouring States and of the region and respects the common objectives of the European Union in the field of energy. Thus, the Commission was required to assess, in the decision at issue, whether the amendments proposed by the German regulatory authority could affect the energy interests of the Member States liable to be affected.

65 The Republic of Lithuania also challenges the argument of the Federal Republic of Germany, contending that it is based on too narrow an interpretation of the principle of energy solidarity, which is not consistent either with the text of Article 194 TFEU or with the rights and obligations that flow from that provision.

66 The Commission did not comment on the second ground of appeal.

Findings of the Court

67 It must be noted that the wording of Article 194 TFEU does not give any indication that, in the field of EU energy policy, the principle of energy solidarity should be limited to the situations referred to in Article 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU must, for the reasons set out in paragraphs 41 to 44 of the present judgment, inform any action relating to EU policy in that field.

68 That finding cannot be called in question by Article 222 TFEU, which introduces a solidarity clause under which the European Union and its Member States are to act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. As the Advocate General noted in essence in points 126 and 127 of his Opinion, Article 194(1) TFEU and Article 222 TFEU cover different situations and have different objectives.

69 Thus, the EU institutions and the Member States must take into account the principle of energy solidarity, referred to in Article 194 TFEU, in the context of the establishment and functioning of the internal market and, in particular, the internal market in natural gas, by ensuring security of energy supply in the European Union, which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations. To that end, it is necessary to assess whether there are risks for the energy interests of the Member States and the European Union, and in particular to security of energy supply, before going on to conduct the analysis to which reference is made in paragraph 53 of the present judgment.

70 Furthermore, as regards Regulation 2017/1938, on which the Federal Republic of Germany relied in support of its argument that the duty of assistance must be invoked only as a last resort, it should be noted that that regulation provides for two categories of measure: preventive measures, aimed at preventing possible crisis situations from occurring, and emergency measures, should a crisis situation arise.

71 Thus, the General Court correctly held, in paragraphs 71 to 73 of the judgment under appeal, that the principle of energy solidarity entails a general obligation, for the European Union and the Member States, in the exercise of their respective competences in respect of EU energy policy, to take into account the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect their interests, as regards security of supply, its economic and political viability and the diversification of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.

72 As regards the argument of the Federal Republic of Germany that if the principle of energy solidarity were applicable in non-crisis situations, the European Union and the Member States would be subject to a requirement of 'unconditional loyalty', which would impede any decision within the European Union, it must be pointed out that such an interpretation is based on a misreading of the judgment under appeal.

73 In paragraph 77 of the judgment under appeal, to which the appeal makes no reference, the General Court correctly stated 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 that field. However, as has been pointed out in paragraphs 53 and 69 of the present judgment, the EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict.

74 Consequently, the second ground of appeal must be rejected as being unfounded.

Third ground of appeal: incorrect assessment as regards the account taken by the Commission of the principle of energy solidarity

Arguments of the parties

75 Should the Court accept the principle of energy solidarity as being a criterion applicable to the decision at issue, the Federal Republic of Germany submits, by its third ground of appeal, that the General Court disregarded (i) the fact that the Commission did take that principle into consideration when adopting that decision, and (ii) the fact that the Commission was not obliged to indicate in detail how it took that principle into account.

76 According to the Federal Republic of Germany, the General Court erred in law, in paragraph 81 of the judgment under appeal, by finding that the Commission had not examined the principle of energy solidarity in so far as it did not carry out an examination of the impact of the variation of the regime governing the operation of the OPAL pipeline on security of supply in the Polish gas market.

77 According to the appellant, that finding by the General Court is contradicted, first, by the process by which the decision at issue was adopted, including in particular the submission by the Republic of Poland of written comments before the adoption of that decision, as is apparent from paragraph 10 thereof; second, by the study carried out by a working group composed of representatives of the Ministry of Energy of the Russian Federation and the Commission, in relation to more efficient operation of the OPAL pipeline, as is apparent from paragraph 17 of the decision at issue; third, by the content of a Commission press release of 26 October 2016 concerning the consequences of that decision for the gas market in Europe, as is also apparent from paragraphs 80 to 88 of that decision; and, fourth, by the Commission's verification of security of supply in the examination of exemption conditions under Article 36 of Directive 2009/73.

78 Furthermore, there is a transit contract between the Republic of Poland and Gazprom for the transport of natural gas via the Polish section of the Yamal pipeline to supply the western European markets, including the Polish markets, until 2020, and a contract between the largest Polish energy supplier and Gazprom for deliveries of natural gas until the end of 2022.

79 In addition, the Federal Republic of Germany claims that the Republic of Poland aims, according to the statements of that Polish energy supplier, to be independent of Russian gas by 2022/2023.

80 The Federal Republic of Germany also maintains that the decision at issue puts the Republic of Poland in a better position as compared with its position under Decision C(2009) 4694, against which the Republic of Poland could have brought an action. Moreover, the OPAL pipeline contributes to the completion of the internal market in natural gas, bringing benefits for cross-border trade and security of supply.

81 The Republic of Poland contends that the third ground of appeal is inadmissible in that it seeks to call in question findings of fact.

82 As to the substance, the Republic of Poland, supported by the Republic of Latvia and the Republic of Lithuania, contends that this ground of appeal is unfounded.

Findings of the Court

83 By its third ground of appeal, the appellant submits that, in the decision at issue and during the process of its adoption, the Commission examined the principle of energy solidarity in the context of the variation of the regime governing the operation of the OPAL pipeline, envisaged by the decision at issue, and the consequences of that decision for the Polish gas market.

84 At the hearing before the Court, the Commission did not contest the General Court's assessment in respect of the decision at issue, while maintaining that, in its view, it was not required to assess the risks to the interests of the Member States liable to be affected or, therefore, to balance those interests, because it had verified, overall, whether the decision at issue represented a threat for alternative pipelines and found that that was not the case.

85 In that regard, it is apparent from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal is to be limited to points of law only and the appraisal of the facts by the General Court does not, save where they are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

86 However, it must be noted that, by virtue of part of the argument advanced under the third ground of appeal, the Federal Republic of Germany seeks to call in question findings of a factual nature.

87 Specifically, in so far as it invokes matters of fact surrounding the adoption of the decision at issue or that followed its adoption, with a view to challenging the General Court's assessment regarding the lack, in that decision, of any examination by the Commission of the question whether the variation of the regime governing the operation of the OPAL pipeline, proposed by the German regulatory authority, could affect the energy interests of Member States liable to be affected, the appellant does no more than to call in question the factual analysis carried out by the General Court, which is not subject to review by the Court of Justice.

88 It follows that the third ground of appeal is, to that extent, inadmissible.

89 Furthermore, in so far as the appellant challenges by this ground of appeal the General Court's interpretation of the decision at issue, relying to that effect on the paragraphs of that decision referred to in paragraph 77 of the present judgment, this ground of appeal must be rejected as being unfounded.

90 None of those paragraphs of the decision at issue is such as to call in question the General Court's finding in paragraph 82 of the judgment under appeal that the Commission did not, in that decision, examine 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 balance those effects against the increased security of supply at EU level.

91 The third ground of appeal must, therefore, be rejected as being in part inadmissible and in part unfounded.

Fourth ground of appeal: no obligation for the Commission to mention the principle of energy solidarity

Arguments of the parties

92 By its fourth ground of appeal, the Federal Republic of Germany submits, first, that the General Court erred in law by finding, in paragraph 79 of the judgment under appeal, that the decision at issue does not disclose that the Commission did, as a matter of fact, carry out an examination of the principle of energy solidarity and, second, that the Commission was not required to mention that principle in the decision at issue. In the view of the Federal Republic of Germany, that decision is correct so far as its content is concerned in that it did not jeopardise the security of gas supply in Poland, which was not at risk, and therefore the Commission had no reason to examine in detail the consequences of the decision at issue for the Polish gas market.

93 In that regard, the appellant refers to the case-law of the Court concerning the obligation to state the reasons for legal acts, in particular the judgment of 11 July 1989, *Belasco and Others* v *Commission* (246/86, EU:C:1989:301, paragraph 55), and to the principle of good administration, guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union, from which it follows that it is not necessary to specify all the relevant facts and points of law. In the

present case, to oblige the Commission to present all the consequences of the decision at issue for the Member States, in the light of the principle of energy solidarity, would be to exceed the requirements laid down by EU law.

94 The Republic of Poland contends that the fourth ground of appeal is ineffective and, in any event, unfounded.

95 The Republic of Lithuania, which analysed this ground of appeal in conjunction with the third ground of appeal, concurs with that analysis.

96 The Republic of Latvia and the Commission did not comment on the fourth ground of appeal.

Findings of the Court

97 It should be noted that the General Court found, in paragraphs 79 to 82 of the judgment under appeal, not only that the principle of solidarity was not mentioned in the decision at issue but also that the decision itself does not disclose that the Commission adequately examined the impact of the extension of the exemption in relation to the OPAL pipeline on the Polish gas market and on the markets of the Member States other than the Republic of Poland, which could be geographically affected.

98 Contrary to the appellant's claims, it is for that reason that the General Court concluded that the decision at issue should be annulled, and not merely because of the lack of any reference to the principle of energy solidarity in that decision or because the statement of reasons was insufficient.

99 Consequently, in so far as the judgment under appeal is based on the finding that the decision at issue was adopted in breach of the principle of energy solidarity, the fourth ground of appeal must be rejected as being ineffective.

Fifth ground of appeal: infringement of the second paragraph of Article 263 TFEU

Arguments of the parties

100 By its fifth ground of appeal, the Federal Republic of Germany submits that, in paragraph 79 of the judgment under appeal, the General Court infringed the second paragraph of Article 263 TFEU. This ground of appeal is in two parts.

101 By the first part of the fifth ground of appeal, the appellant maintains that the General Court erred in law in so far as it accepted that the decision at issue does not disclose that the Commission did, as a matter of fact, carry out an examination of the principle of energy solidarity, whereas a decision that is erroneous only from a formal aspect should not be automatically annulled.

102 According to the Federal Republic of Germany, under the second paragraph of Article 263 TFEU, decisions that are materially correct, albeit unlawful on procedural grounds, are not to be annulled.

103 The second part of the fifth ground of appeal relates to the fact that the General Court allegedly erred in law by taking into account the argument of the Republic of Poland concerning the alleged breach of the principle of energy solidarity, which should have been invoked in the context of an action against Decision C(2009) 4694. Accordingly, that argument, raised before the General Court in the context of an action for annulment of the decision at issue, is, it is claimed, out of time and should not therefore have been taken into account in this action.

104 The Republic of Poland and the Republic of Lithuania contend that the fifth ground of appeal is unfounded.

105 The Republic of Latvia and the Commission did not comment on the fifth ground of appeal.

Findings of the Court

106 As regards the first part of the fifth ground of appeal, it must be observed that, contrary to the appellant's claims, and as has been noted in paragraphs 97 and 99 of the present judgment, the General Court did not annul the decision at issue because of a failure to state reasons. In particular, in paragraphs 83 and 84 of the judgment under appeal, the General Court held that the decision at issue was adopted in breach of the principle of energy solidarity and that, therefore, that decision was to be annulled to the extent that it breached that principle. It follows that the first part of this ground of appeal is ineffective.

107 As regards the second part of the fifth ground of appeal, it is sufficient to note that the decision at issue amended the exemption conditions laid down in Decision C(2009) 4694 and that these two decisions are independent of one another, as the General Court stated in paragraph 57 of the judgment under appeal, to which the appeal does not refer; therefore the argument of the Federal Republic of Germany to the effect that the action brought by the Republic of Poland against the decision at issue is out of time because the Republic of Poland had not brought an action against Decision C(2009) 4694 cannot succeed.

108 It follows that the second part of the fifth ground of appeal is unfounded.

109 Consequently, the fifth ground of appeal must be rejected as being in part ineffective and in part unfounded.

110 It follows from all of the foregoing considerations that, since none of the grounds of appeal has been upheld, the appeal must be dismissed in its entirety.

Costs

111 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

112 Since the Republic of Poland has applied for costs to be awarded against the Federal Republic of Germany, and since the latter has been unsuccessful, the Federal Republic of Germany must be ordered to bear its own costs and to pay those incurred by the Republic of Poland.

113 In accordance with Article 140(1) of the Rules of Procedure, also applicable to appeal proceedings by virtue of Article 184(1) thereof, the Member States and institutions which have intervened in the proceedings are to bear their own costs. Where an intervener at first instance, who has not brought the appeal, participates in the proceedings before the Court, the Court may, under Article 184(4) of the Rules of Procedure, decide that the intervener is to bear its own costs.

114 Since the Republic of Latvia, the Republic of Lithuania and the Commission participated in the proceedings before the Court, they must be ordered to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Federal Republic of Germany to bear its own costs and to pay those incurred by the Republic of Poland;**

3. **Orders the Republic of Latvia, the Republic of Lithuania and the European Commission to bear their own costs.**

[Signatures]