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COMMON RULES FOR THE INTERNAL MARKET IN NATURAL GAS AND THE PRINCIPLE OF ENERGY SOLIDARITY

REGLAS COMUNES PARA EL MERCADO INTERIOR DEL GAS Y EL PRINCIPIO DE SOLIDARIDAD ENERGÉTICA

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Abstract: The author (a) analyses the way in which first the General Court and then the Court of Justice, with reference to an appeal by Poland against a decision of the Commission concerning the energy sector, have ruled on the relationship between the general principle of solidarity and that of energy solidarity, (b) points out, in this respect, the reasons why the Court's ruling, despite the appearance resulting from a brief point of it, should be understood as meaning that the Commission's decision was in- compatible with the principle of energy solidarity.

In addition to these observations, he points out that the Court, in its judgment, (a) concretely shared the opinion contained in the Advocate General's Opinion, according to which the legal effects of the fundamental or constitutional principles of the Union's legal system are intended to be understood "by those who must interpret them (ultimately the Court of Justice)" and (b) ruled out the possibility that the principle of energy solidarity constitutes an application of the principle of sincere cooperation, holding only that the former must be "read in conjunction" with the latter.

Keywords: general principle of solidarity, principle of energy solidarity, principle of sincere cooperation, fundamental and constitutional principles, the function of the Court of Justice as a court of last resort, binding positions of the Court of Justice.

Resumen: El autor (a) analiza la forma en que primero el Tribunal General y luego el Tribunal de Justicia, con referencia a un recurso de Polonia contra una decisión de la Comisión relativa al sector de la energía, se han pronunciado sobre la relación entre el principio general de solidaridad y el de la solidaridad energética, (b) señala, al respecto, las razones por las que la sentencia del Tribunal, a pesar de la apariencia resultante de un breve punto de la misma, debe entenderse en el sentido de que la decisión de la Comisión era incompatible con el principio de solidaridad energética.

Además de estas observaciones, señala que el Tribunal, en su sentencia, (a) compartió concretamente la opinión contenida en las conclusiones del Abogado General, según la cual los efectos jurídicos de los principios fundamentales o constitucionales del ordenamiento jurídico de la Unión están destinados ser entendidos "por quienes deben interpretarlos (en última instancia, el Tribunal de Justicia)" y (b) descartó la posibilidad de que el principio de solidaridad energética constituya una aplicación del principio de cooperación leal, sosteniendo únicamente que el primero debe ser " leer en conjunción" con este último.

Palabras clave: principio general de solidaridad, principio de solidaridad energética, principio de cooperación sincera, principios fundamentales y constitucionales, la función del Tribunal de Justicia como tribunal de última instancia, posiciones vinculantes del Tribunal de Justicia.

Summary: I. The Directives establishing common rules for the internal market in natural gas and the spirit of energy solidarity under Article 194 TFEU. II. The Commission Decision of 28 October 2016 and its challenge by Poland before the EU General Court. III. The General Court's limitation to the first ground for appeal: (a) the relationship between the Commission and the National Energy Regulatory Authorities. IV. (continued) (b) the alleged infringement of the contested decision with Article 194 TFEU and the principle of solidarity. V. The judgment of the General Court and Germany's challenge to it. VI. Preliminary observations on the Opinion delivered by Advocate General Campos Sánchez-Bordona.VII. (continued) the position taken in that Opinion. VIII. The judgment of the Court of Justice in the OPAL case and its reference to the general principle of solidarity. IX. The legal effects attributed by the Court to the principle of energy solidarity. X. The way in which the Court has come to attribute legal effects to the principle of energy solidarity. XI. The position taken by the Court on the relationship between the general principle of solidarity and the principle of energy solidarity, on the one hand, and the principle of loyal cooperation, on the other. XII. Conclusions.

I. The Directives establishing common rules for the internal market in natural gas and the spirit of energy solidarity under Article 194 TFEU

1. The European gas market was opened to competition and organised on the basis of common rules by Directive 98/30/EC[1]. This was repealed by Directive 2003/55/EC[2], which was in turn repealed by Directive 2009/73/EC[3], all relating to common rules for the internal market in natural gas, the first containing Articles 18 and 22, replaced in the second by Articles 32 and 36, identical to the first. Under the first Article (18, now 32) 'Member States shall ensure the implementation of a system of third-party access to transmission and distribution systems and LNG facilities based on published tariffs applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users'. The second (22 become 36), for its part, provides for exemptions from third party access obligations applicable, under certain conditions and for a limited period, to new gas system infrastructures, i.e. interconnectors, LNG and storage facilities, in relation to significant investments made in such infrastructures. The granting of such exemptions is subject to certain conditions, including those set out in Article 36(1)(a), according to which the investment involved in these new infrastructures must increase competition and enhance the safety of approvals. The issuance of such authorisations is the responsibility of the national regulatory authorities which, upon receipt of a request, must adopt a decision on the matter and are required to notify the European Commission, which, within two months of receipt, may either confirm the request or adopt a decision requiring the regulatory authorities to amend or withdraw it[4].

The Lisbon Treaty added to the above directives Article 194(1) TFEU, according to which the Union's energy policy aims, in a spirit of solidarity between Member States, to ensure the functioning of the energy market and the security of energy supply[5].

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[1] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, *OJEU* L 204/1998, p. 1.

[2] 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, OJEU L 176/2003, p. 57.

[3] 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, OJEU L 211/2009, p. 94.

[4] On these authorities and on the control on them exercised by the European Agency for the Cooperation of National Regulators, see T.M. Moschetta, *Commentary on Article 194 TFEU*, in F. Pocar, M.C. Baruffi (eds.), *Commentary on the Treaties of the European Union*, Padua, 2014, p. 1119.

[5] On those directives and on their purpose to realize the free access to the networks and to safeguard the energy supply of the EC/Union in line with the attention subsequently given by art. 194 TFEU to the values of the "solidarity among States" see, for all, M. Marletta, *Il Trattato di Lisbona e l'energia*, in AA.VV., *Scritti in onore di Ugo Draetta*, Naples, 2011, p. 400; ID., *Commento all'art. 194 TFEU*, in A. Tizzano (a cura), *Trattati dell'Unione Europea*, II ed. TIZZANO (ed.), Milano, 2014 p. 1651 ss.; ID., *Un nuovo tassello nel percorso di europeizzazione della disciplina sulle energie rinnovabil*i, in AA.VV., *Liber Amicorum Antonio Tizzano - De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 554 ss. For a first interpretation of Article 194 TFEU by the Court of Justice see ECJ 6 September 2012 C-490/10, European Parliament v. Council, EU:C:2012:525. On it see T. Moschetta, Commentary on Art. 194 TFEU, cit. p. 1117; M. Onida, *Commentary on art. 194 TFEU*, in C. Curti Gialdino (directed by), *Operational European Union Code*, Napoli, 2012, p. 1475.

II. The Commission Decision of 28 October 2016 and its challenge by Poland before the EU General Court

2. The OPAL pipeline consists of the underground western section of the Nord Stream pipeline, is primarily controlled by a Russian company and a company based in the Rhineland Palatinate region of Germany, and transports gas from Russian fields through the Baltic Sea into Germany, crossing it in a southerly direction to the Czech Republic, where its exit point is located. On 12 April 2013, OGT, Gazprom OAO and Gazprom Eksport LLC requested the German Regulatory Authority (Bundesnetzagentur - BNetzA) to amend a decision of 2009 which, on the basis of Directive 2003/55/EC, with reference to the significant investments made for the construction of that pipeline, exempted OPAL, for a period of 22 years, from its obligation to grant access to third parties up to the maximum limit of its exit capacity in Brandov (which could be booked by OPAL's own undertakings with a dominant position in the Czech Republic). This had the practical result that the remainder of OPAL's capacity remained unused[6].

3. In their application, the three companies asked the German regulator, in view of the investments made to increase OPAL's cross-border transmission capacity, to allow it to maintain the exemption for 50 % of the interconnection capacity granted to the OPAL group in 2009; and specified that the remaining capacity would be allocated by means of transparent and non-discriminatory auctions and that OGT, Gazprom, Gazprom Export and affiliated companies would be able to participate in these auctions in order to purchase and use interconnection capacity on equal terms with third parties.

4. These requests, except for minor changes, were granted and then con- firmed in a decision dated October 28, 2016 by the Commission[7].

The consequence is that (a) companies other than Gazprom and Gazprom Export are de facto excluded from access to OPAL's interconnection capacity at the Brandov exit point allowing Gazprom and Gazprom Export to deliver almost twice the volume of gas to the Czech Republic compared to the volume delivered under the 2009 OPAL exemption[8] and b) the transportation of Russian gas to the EU by the operators of the Yamal Europe (which runs through Belarus, enters the Baltic States, crosses Poland, enters Germany and continues onwards) and Brotherhood (which runs through Ukraine and Slovakia and enters the Czech Republic, from where the gas is then routed via connected pipelines to other Member States) will be significantly reduced[9].

Poland has appealed against the Commission's decision before the General Court of the European Union.

III. The General Court's limitation to the first ground for appeal: (a) the relationship between the Commission and the National Energy Regulatory Authorities

5. As regards the grounds of appeal put forward by Poland, the General Court confined itself to ruling on the infringement, alleged by that country, of Article 36(1)(a) of Directive 2009/73/EC, considered in conjunction with Article 194(1)(b) TFEU and with the principle of solidarity[10]. It did not

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[6] On this point see M. Szydlo, *Disputes Over the Pipelines Importing Russian Gas to the EU: How to Ensure Consistency in EU Energy Law and Policy?*, in *Baltic Journal of Law & Politics*, 2018, no. 11, p. 102.

[7] Commission Decision C(2016)6950 final of 28 October 2016 on the modification of the conditions for the exemption of the OPAL pipeline, granted under Directive 2003/55/EC from the application of third party access and tariff regulation requirements.

[8] For a similar remark see D. Buschle and K. Talus, *One for All and All for One? The General Court Ruling in the OPAL Case*, in *Oil, Gas & Energy Law Intelligence*, November 2019, no. 5, p. 3, according to which this will allow Gazprom to use 80 % of OPAL's transmission capacity.

[9] See M. Szydlo, *Disputes Over the Pipelines Importing Russian Gas to the EU: How to Ensure Consistency in EU Energy Law and Policy?*, cit., p. 104.

[10] General Court 10 September 2019, T-883/16, *Republic of Poland v. European Commission*, EU:T:2019:567, paragraphs 49 and 86. On the impact on the subject regime attributed by the legal literature to the principle of solidarity see Y. Petit, *La*

consider it necessary to rule on the other pleas, since the contested decision was annulled on the basis of the first plea.

6. By the first part of the first plea in law, Poland relies on the second condition of Article 36(1)(a) of Directive 2009/73/EC, according to which new major gas system infrastructures may, upon request and for a defined period of time, be the subject of a derogation to the third-party access provisions on condition that the investment relating thereto strengthens 'competition in gas deliveries and security of supply'. In Poland's view, the Commission's decision of 28 October 2016 was unlawful in so far as it provided for a new derogation from third-party access without taking care that it complied with the condition required for that derogation. The General Court was not of the same opinion because the contested decision did not amend the initial decision. That is because, as stated in paragraph 1, it is the national regulatory authority that decides on the derogation in Article 36 of Directive 2009/73/EC. It is in line with this that BNetzA adopted the 2009 derogation decision and in 2016 amended the conditions to which BNetzA itself had made it subject by concluding a public law contract with OGT. The General Court found that, in both cases, the Commission confined itself to exercising the control conferred on it by the third subparagraph of Article 22(3) of Directive 2003/55/EC and then by Article 36(9) of Directive 2009/73/EC, by requiring BNetzA to make amendments to its decisions. The initial decision and the contested decision thus constituted two independent decisions and each of them ruled on a measure envisaged by the German authorities, namely, on the one hand, BNetzA's decisions of 25 February 2009 and, on the other hand, the public law contract notified on 13 May 2016 equivalent to an administrative[11] decision.

7. With regard to the criterion relating to the improvement of security of supply, the General Court then found that it follows from the wording of Article 36(1)(a) of Directive 2009/73/EC that it is not the exemption sought but the investment which must satisfy that criterion - that is to say, in the present case, the construction of the OPAL pipeline. Consequently, it was in relation to the initial decision that it was for the Commission to ensure that the planned investment satisfied that criterion. On the other hand, the Commission was not required to examine compliance with that criterion in the contested decision, which merely approved an amendment to the conditions governing the exemption. Since no new investment was planned in that new phase and the amendment to the operating conditions proposed by BNetzA did not alter the OPAL pipeline as infrastructure, the Commission was not required in 2016 to add anything to what had been decided in 2009[12].

The General Court deduced from those two findings that the first plea in law, in part in so far as it is based on Article 36(a) of Directive 2009/73/EC, should have been rejected as 'irrelevant'[13].

IV. (continued) (b) the alleged infringement of the contested decision with Article 194 TFEU and the principle of solidarity.

8. With regard to the alleged infringement of Article 194 TFEU, Poland submitted that the contested decision (a) allowed Gazprom and the Gazprom group entities to redirect through the capacities of the Nord Stream pipeline new gas volumes to the EU market by making full use of the capacities of that pipeline, (b) compromised the exploitation of the pipeline supply capacities of OPAL's competitors, jeopardising the exploitation of the pipeline supply capacities of OPAL's competitors Braterstwo and

solidarité énergétique entre les Etats membres de l'Union européenne: une chimère?, in *Rev. aff. europ.*, 2009-2010, p. 771 ff.; N. Ahner, J. M. Glachant, *The Building of Energy Solidarity in the EU*, in J.M. Glachant, M. Hafner, J. De Jong, N. Ahenr, S. Tagliapietra, (eds.), *A New Architecture for EU Gas Security of Supply*, Brussels, 2012, p. 123 ff.; M. Knodt, A. Tews, *European Solidarity and Its Limits: Insights from Current Political Challenges* in A. Grimmel, S. My Giang (eds.), *Solidarity in the European Union. A Fundamental Value in Crisis,* Berlin, 2017, pp. 55-58; S. Villani, *The concept of solidarity within EU disaster response law. A legal assessment,* Bologna, 2021, pp. 89-90.

[11] Case T-883/16, cited above, paragraph 57.

[12] Ibid. paragraph 58.

[13] Ibid., para. 60.

Yamal and resulting in a reduction or even a complete interruption of gas transport by them; (c) adversely affected the energy security of its own territory; (d) infringed the general principle of solidarity between the Member States and between the Union and those States and (e) contradicted the spirit of solidarity which, under Article 194 TFEU, must underlie any decision taken in the energy sector. Poland added that the Nord Stream pipeline would increase Russia's strategic influence in the EU, in particular in Central and Eastern Europe, as it would enable gas supply to be interrupted via Ukraine without compromising the supply of gas to Western Europe.

9. The Commission disputed those arguments, stating that the principle of solidarity between Member States, referred to in Article 194(1) TFEU, is the expression, not of a general principle, but of a principle, stated specifically with reference to the energy sector, which is directed at the administration which applies the rules and concerns only urgent situations of crisis of supply or of the functioning of the internal market in gas. It argued that the normal functioning of that market is governed only by the principles laid down in Directive 2009/73/EC, nothing being added to that in a prescriptive sense by the article of the TFEU relied on by Poland. The Commission submits that the criterion of enhancing the security of gas supply, laid down in Article 36(1) of the directive, which was held to be satisfied in the contested decision by Poland, could be regarded as also taking into account the need to comply with the principle of energy solidarity.

10. In taking a position on these opposing arguments, the General Court did not accept the Commission's position[14]. It did, to a certain extent, echoing the Opinion delivered on 31 October 2019 by Advocate General Eleanor Sharpston in Commission v. Republic of Poland and Others (reiterating what had already been held on 8 June 2017 in her Opinion in Khadija Jafari v. Bundesamt fur Fremdenwesen und Asyl[15]), according to which there is a general principle of solidarity between Member States and between the Union and those States, which is capable of supplementing specific Community rules in specific sectors in order to give rise to rights and obligations going beyond what is provided for by those rules[16]. However, the General Court has expressed itself in a swinging way. First of all, it assumed that the spirit of energy solidarity referred to in Article 194(1) 'is the specific expression, in that sector, of the general principle of solidarity between Member States' (referred to, in particular, in Article 2 TEU, Article 3(3) TEU and Article 24(2) and (3) TEU as well as Article 122(1) TFEU and Article 222 TFEU). It then stated that "this principle" (referring unequivocally to the general principle of solidarity[17]) is the basis of the whole system of the European Union[18] (on the one hand the European Union is bound by an obligation of

[14] On the facts of the case and the position taken by the General Court see K. Lenaerts and S. Adam, *La solidarité, valeur commune aux états membres et principe fédératif de l'Union européenne*, in *Cahiers droit européen*, pp. 407 ff.

[15] For an argument that Article 194 TFEU places obligations on the Union vis-à-vis the Member States, see A. Boute, *The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline)*, in *Comm.Market Law Rev.*, 2020, p. 901.

[16] Opinion of Advocate General Eleanor Sharpston delivered on 31 October 2019 in European Commission v. Republic of Poland and Others, Joined Cases C-715,718 and 719/17, EU:C:2019:917. For a finding that the principle of solidarity advocated by Advocate General Sharpston has in any event, since the Court's OPAL judgment, become the lifeblood of European energy policy see D. Buschle and K. Talus, *One for All and All for One? The General Court Ruling in the OPAL Case*, cit., p. 12.

[17] For an interpretation of this point of the reasoning of the General Court as entailing a qualification of the principle of interstate solidarity - and not of the principle of energy solidarity - as a general principle, see F. Croci, *Solidarietà tra Stati membri dell'Unione Europea e governance economica europea*, Turin, 2020, p. 111 ff., who, from such a qualification, deduces its suitability not only as a criterion of interpretation, but also as a parameter of legitimacy of the decisions adopted by the institutions (p. 115). To this interpretation of that point of the reasoning of the General Court made by that author referred C. Favilli, in WebEx conference of 30 June 2021 Solidarity between EU Member States and European Economic Governance. Reflections on a recent volume, sponsored by the Institute of Politics and Development of the Scuola Universitaria Superiore Sant'Anna in Pisa. She noted that Advocate General Campos Sànchez-Bordona, in paragraph 96 of his Opinion submitted to the Court on 18 March 2021 in Case C-849/19, would be guided by that interpretation in considering the principle of solidarity as a criterion for understanding the rules of secondary legislation, as an element for filling the gaps found in those same rules and as a parameter for judicial review of them and of the decisions of the Union bodies adopted on the basis of those rules. It escaped her notice, however, that the Advocate General, in that point, attributed those functions not to the general principle of solidarity but to the more specific principle of energy solidarity.

[18] General Court, Case T-883/16, cited above, paragraph 69.

solidarity towards member States, 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[19]). Nevertheless, immediately afterwards it stated that the principle of energy solidarity cannot be limited to exceptional crisis situations[20] and entails a 'general obligation on the part of the Union and the Member States, in the exercise of their respective competences, to take account of the interests of the other stakeholders'[21] and 'to avoid adopting measures liable to affect the interests of the Union and the other Member States'[22]. Finally, while not abandoning the statement made earlier that the expression used in Article 194 TFEU is specific to the principle of solidarity, it concluded that the contested decision had been adopted in breach of the principle of energy solidarity and should therefore be annulled[23].

V. The judgment of the General Court and Germany's challenge to it

11. Challenging, on 20 November 2019, the judgment of the General Court, Germany's agents did not in any way mention the reference made by the General Court to the general principle of solidarity. They merely referred to the principle of energy solidarity and argued that it

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[19] Ibid., paragraph 70.

[20] For an underlining of this clarification made by the General Court and a remark in terms of which it contradicts the view of F. Casolari, *EU Loyalty after Lisbon: An Expectation Gap to Be Filled?*, in L.S. Rossi, F. Casolari (eds.), *The EU after Lisbon: Amending or Coping with the Existing Treaties*, Heidelberg, 2014, p. 122, according to which the principle of solidarity is not productive of legal effects outside the circumstances of crisis, see F. Croci, Solidarity among EU Member States and European Economic Governance, cit., p. 111 ff.

[21] The latter statement was made by the General Court in paragraphs 72 and 73 of its judgment in Case T- 883/16, cited above, even though it is not expressly provided for by any provision of the TEU and TFEU Treaties. The fact that according to art. 194 TFEU the action of the Union in the energy sector must be understood in a spirit of solidarity among the Member States leads, on the one hand, to give it a connotation which is not exclusively "mercantilistic" (M. Marletta, *Commentary on art. 194 TFEU*, cit., p. 1654), on the other hand, to envisage a cessation of energy sovereignty in an absolute and exclusive sense on the part of the Member States (D. Buschle and K. Talus, *One for All and All for One? The General Court Ruling in the OPAL Case*, cit., p. 9).

On the issues which, in the light of the General Court's judgment, a national authority must take into account as part of its task of considering the different interests to which it must pay attention and the impact of their consideration on the sovereignty of Member States see M. Münchmeyer, *Supercharging Energy Solidarity? The Advocate General's Opinion in Case C-848/19 P Germany v Poland*, in *https://euro peanlawblog.eu*, 9 avril 2021, D. Buschle and K. Talus, *One for All and All for One? The General Court Ruling in the OPAL Case*, cit., pp. 10-11. For a critique of the General Court's approach because it is marked by an excessively formalistic approach see A. Boute, *The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline)*, cited above, p. 912. For a parallelism, on the other hand, between what the General Court stated in paragraph 78 of the judgment and what the Commission argued in its guidelines on access to essential goods and services during Covid 19 see G. Di Federico, *L'assistenza transfrontaliera alla prova della pandemia*, in P. Manzini and M. Vellano (eds.), *Unione Europea 2020. I dodici mesi che hanno segnato l'integrazione europea*, Milan, 2021, pp. 75-76. Therein, that author notes that, according to these guidelines (which are not binding, but illustrate considerable margins for improvement rebus sic stantibus), the ultimate objective that could justify a temporary restriction to such access to the export authorization of those goods "would not be (anymore) the protection of a vital interest of the Member State invoking it, but, on the contrary, the protection of the health of the people living in the European Union".

[22] For an emphasis on the fact that, according to the General Court, Member States must avoid adopting measures which might harm the interests of the European Union and of the other Member States and did so by specifying, in paragraph 73 of Case T-883/16, that they must avoid doing so "with regard to security of supply, its economic and political sustainability and the diversification of sources of supply or supply", in order to take account of their de facto interdependence and solidarity see D. Buschle and K. Talus, *One for All and All for One? The General Court Ruling in the OPAL Case*, cit., p. 5. For this reason, according to those authors, Article 194 TFEU, since it merely provided that "Union policy on energy shall aim, in a spirit of solidarity between Member States [...]," could not have lent itself to the legal effect recognized by the Court to this last sentence. In line with this, in their view, for the ten years of European energy policy following the introduction of that article into Union law, the principle of solidarity 'was a sleeping beauty. Prince Charming turned out to come from Luxembourg". For a remark according to which the principle of solidarity, in general, in addition to a negative dimension, with the passage of time, tends to acquire also a positive dimension see S. Villani, The concept of solidarity within EU disaster response law. A legal assessment, cit., p. 8, in footnote.

[23] On the consequences for Gazdrom of the Court's confirmation of the General Court's judgment, see A. Ridley, *The 'principle of solidarity': OPAL, Nord Stream, and the shadow over Gazprom*, in *Atlantic Council, 17 October 2019, at https:/www.atlanticcouncil.org/blogs/energysource/the-principle-of-solidarity-opal-north-stream-and- the shadow-over-gazprom/*; S. Pirani and J. Sharples, *The Russia-Ukraine gas transit deal: opening a new chapter*, Energy Insight: 64, Oxford Institute for Energy Studies, February 2020,https://www.Osfordenergy.org.wpcms/wp-content/uploads/2020/02/The-Russia- Ukraine-gas- transit-deal-Insight-64.pdf.

— does not constitute a legal criterion giving rise to obligations to act on the part of the executive bodies,
— is not a general governing principle, it is only a political concept,
— because of its abstract and indefinite nature is not actionable,
— is applicable only in exceptional cases and only if strict conditions and requirements are met.
— should not be taken into account in any Commission decision.

Those agents have evidently confined themselves to these arguments (a) because of the fact that the Court of Justice has so far never recognised the principle in question as having the character attributed to it by the General Court in its judgment and (b) in line with an assumption that the Court of Justice's position in this regard is so well established that it cannot be changed by reason of that judgment.

Now, while the fact indicated in point a) is true, the hypothesized assumption of those agents hypothesized in b) cannot be taken seriously. It cannot be taken seriously first of all, because, even if it is linked to a more precise idea that the Court cannot change its case-law because of a ruling by a court inferior to it, it overlooks the mutual consideration that exists between the two courts, which is also due to the fact that many of the members of one court come from the other. Secondly, and above all, this assumption does not take into account the fact that an attitude of the Court of Justice in this regard was taken in a case, the Pringle case, in which it rejected the invocation of the principle of solidarity put forward by Advocate General Juliane Kokott to limit the application of the no bail-out clause provided by Article 125 TFEU. But that case was about the legitimacy of the establishment of the ESM in relation to the provision of Title VIII TFEU concerning economic and monetary policy which is completely different from Title XXI of the same TFEU related to energy[24].

In applying the provisions of Title VIII in Pringle, the Court had to take into account the fact that Art. 125 TFEU, although it could not be relevant, contributed to typically imprinting Title VIII with the idea of encouraging Member States to implement virtuous budgetary policies. Consequently, it considered legitimate the participation of Member States in an international agreement such as the ESM, which provides for financial assistance to a State in that area that is in difficulty and did so because, on one hand, it provides for forms of solidarity between member States (and not by the Union towards one of them) and, on the other hand, the assistance provided for by that agreement maybe possible only if it is indispensable for the preservation of that area. Title XXI of the TFEU, for its part, does indeed provide that the energy policy must be carried out in a spirit of solidarity between Member States, but without requiring coordination of art. 194 TFEU with provisions of the kind constituted by art. 125 TFEU.

VI. Preliminary observations on the Opinion delivered by Advocate General Campos Sánchez-Bordona

12. In an essay, already several times quoted[25], in contrast to the arguments put forward in the appeal filed by Germany to challenge the judgment of the General Court, it is stated that the OPAL judgment of the General Court gave rise to an extremely important step in the evolution of interstate solidarity. This is so, first and foremost, because it enshrined solidarity as a) a general principle of the Union, in line with what has been authoritatively argued in the same sense by a part of the legal literature[26], b) capable

[24] Of this G. Morgese (*Solidarity in fact ... and in law? L'Unione europea allo specchio della crisi pandemica*, in *www.Eurojus.it*, *special issue* 9/6/2020, p. 89, footnote 64) has in no way taken into account. He has, instead, given prominence to the objections expressed by Germany in the first ground of its appeal and he has emphasized that the judgment of the General Court, to constitute a relevant precedent, must be confirmed in unequivocal terms by the Court of Justice.

[25] F. Croci, Solidarietà tra stati membri dell'Unione europea e governance economica europea, p. 111 ff.

[26] See G. Strozzi and R. Mastroianni, *Diritto dell'Unione Europea Parte istituzionale*. VIII ed., Turin, 2020, p. 230 ff., according to whom it is not correct to distinguish between general principles and fundamental principles, since the latter have the same capacity to constitute parameters of validity of acts of the Union. On the general principles of Union law see K. Lenaerts, J.A. Gutiérrez-fons, *The Role of General principles of EU Law*, in A. Arnull, C. Barnard, M. Dougan, E. Spaventa

of producing binding legal effects and c) capable of constituting a source of rights and obligations both for the Union and for the Member States without it being necessary to invoke it in conjunction with other provisions of Union law. In addition, according to the author of that essay, it would confirm the relevance of that principle in the Community legal order as a whole, since, by virtue of its inherent nature in the Union system and its constitutional nature, it is 'capable of being applied across the board to all the policies of the Union'[27].

13. Advocate General Campos Sánchez-Bordona did not take the same line when he delivered his Opinion to the Court of Justice in the appeal proceedings brought by Germany[28] against that judgment[29]. He followed a more articulate path which took its cue from certain preliminary remarks on the way solidarity is referred to in Union law and its reflection on the rules concerning energy policy. These observations are based on an analysis of prior EU case law which led him to note that a) the principle of solidarity has a rank which could be qualified materially as constitutional and b) the fundamental question is whether that principle has a rank of legal principle[30], i.e., is capable of creating rights and obligations.

(eds.), *A constitutional order of States? Essays in EU law in honour of Alan Dashwood*, Oxford, 2011, p. 179 ff.; T. Tridimas, *The General Principles of EU Law*, Oxford University Press, 2006, p. 3 ff. D. Simon, *Les principes en droit communautaire*, in S. CAUDAL (ed.), *Les principes en droit*, Paris, 2008, p. 287 ff.

[27] See F. Croci, Solidarietà tra stati membri dell'Unione europea e governance economica europea, cit., p. 155-156, who, on the basis of these remarks, states that he does not consider divisible the thesis according to which there is no reason why the discipline emblematically embodied in art. 125 TFEU should prevail over solidarity. Moreover, he affirms this by recalling that there would be no reason for his stance if one were to share a) the opinion long expressed by eminent german figures, according to whom "Solidarity" in the true sense means that all of the countries concerned should comply with the fundamental rules of EMU by observing the disciplines of the Stability and Growth Pact and the "no bail out" principle. Fulfilling commitments that have been so solemnly undertaken is a core part of this, and those countries that may be tempted to undermine these principles would be demonstrating their own lack of solidarity" or b) the one, not very different, expressed by the British delegate to the preparatory works of the Charter of Fundamental Rights of the European Union, according to whom the British notion of solidarity does not have the same meaning as the corresponding continental notions.

It is always in consideration of the fact that, still on the basis of what has been indicated above in the text, expressing himself on Article 122, par. 2, TFEU, the author in question, not sharing the doubts in this regard advanced by F. Munari (Da Pringle a Gauweiler: i tormentati anni dell'Unione monetaria e i loro effetti sull'ordinamento giuridico europeo, in Il Diritto dell'Unione Europea, 2015, p. 723 ss.), considers that that article was suitable to constitute the legal basis for the adoption of Regulation 407/2010 establishing the EFSM and to operate in favour of Greece despite the fact that it had not been established that the situation that had led to the difficulties of that State (later proved to be covered by its fraudulent conduct) should be considered, as required by that provision, as beyond the control of that country.

[28] Opinion of Advocate General Manuel Campos Sánchez-Bordona delivered on 18 March 2021, Case C-848/19 P, Federal Republic of Germany v. Republic of Poland and European Commission, EU:C:2021:218.

[29] This is because of an element of factual fact order, which has been well illustrated, relating to health protection (despite the fact that this is the subject of only limited powers of the Union, which in this respect can 'support, coordinate or supplement the action of the Member States'), which is characterised by, in parallel to the attitude of the Advocate General, in the direction of a rejection of the configuration of solidarity as a general principle of the community order susceptible to find application with regard to all policies of the Union, see M. Gatti, *La risposta europea all'emergenza da Covid-19*, in P. Manzini and M. Vellano (eds.) *Europa 2020. I dodici mesi che hanno segnato l'integrazione europea*, cit., p. 31 ss. There he highlights the non-cooperative approach based on sovereignty that characterizes the international law adopted by the Member States of the Union, in the period immediately following the declaration of emergency by Italy on 7 January 2020 and the request for assistance to cope with the Covid-19 pandemic, forwarded to them through the Commission, in the framework of the operation of the Unional Civil Protection Mechanism, on 23 February 2020.

The author undoubtedly highlights the data in question in a manner not dissimilar to that of the Advocate General, despite the fact that, on p. 57, he observes that "it is normal that, in order to manage an emergency, the public authorities adopt acts derogating from the rules of general application". This remark, in fact, is made immediately after noting that "several Member States have not hesitated to deny the free movement of goods (as well as persons)" and in a sense, therefore, quite different from that in which, on p. 33, he called the data above and noted, also on p. 57, that by virtue of them European solidarity has "proved evanescent". With reference to the same approach of the Member States, of non-cooperation hinged on the sovereignty that characterizes international law, again said author considers that the development of the RESCEU Mechanism, which, established in 2019 in the framework of the reform of the Unional Civil Protection Mechanism by Decision n. 2020/414/EU, was charged with managing stocks of medical equipment according to the comitology method, cannot be taken for granted. Given that the operation of that mechanism, according to that method, requires approval by the Member States other than the state requesting assistance, in his view it will not be easy to obtain the cooperation of frugal states that are less fragile and, therefore, less in need of it.

[30] Opinion in Case C-848/19 P, cited above, paragraphs 61 and 63.

Proceeding to a summary analysis of the case law, the Advocate General pointed out that the Court of Justice has, first of all, qualified solidarity as a fundamental principle of the European order, to the point that, already in the Commission v. France ruling of 1969[31], it had stated that "solidarity [...] is the basis [...] of the Community system as a whole [...]. In the judgment Commission v. Italy of 1973[32], was even more forceful, stating that "failure to fulfil the duties of solidarity accepted by the Member States on their accession to the Community shakes the Community legal order to its very foundations". The Court subsequently referred to solidarity in a number of judgments to justify the sharing of burdens and benefits imposed by Union rules, but without identifying it as a general principle of law. Lastly, the Commission v. Poland and Others ruling of 2020 on the distribution of a mass influx of third-country nationals suddenly arriving in the territory of the Union explicitly referred to the principle of solidarity for the interpretation of an article of the TFEU 78(3) TFEU. It stated that the burdens arising from decisions taken pursuant to art. 78 (3) TFEU "must be shared among all Member States, in accordance with the principle of solidarity and fair sharing of responsibility [between them], since, under Article 80 TFEU, that principle governs the Union's asylum policy". From all of this data, Advocate General Manuel Campos Sánchez Bordona inferred that, according to the Court of Justice, the importance attributed in primary law to the principle of solidarity, as a fundamental or constitutional principle[33] of the process of European integration[34], is such that "it may be regarded "as significant enough to create", "consente di dotarlo di un significato idoneo a comportare" conseguenze giuridiche, "permet de le doter d'une signification apte a produir" "legal consequences"[35].

14. The use of the adjective "suitable" is important because it implies a distinction between an abstract aptitude and a concrete aptitude to produce legal consequences, i.e. to create rights and obligations: a distinction which, in the reconstruction in question, is relevant because it is linked to a connotation of fundamental or constitutional principles and norms[36], operative in a sufficiently institutionalized context (quite different from that made by Advocate General Eleanor Sharpston and the essay mentioned at the beginning of this paragraph[37]), as intended to be understood "by those who must interpret them (ultimately the Court)" to "discern the imperative content that is proper to them"[38].

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[31] 10 December 1969, 6 and 11/69, Commission of the European Communities v. French Republic, EU:C:1969:68, paragraphs 16/17.

[32] 7 February 1973, *Commission of the European Communities v. Italian Republic, EU:C:1973:13, paragraph 25*. *Italian Republic*, EU:C:1973:13, paragraph 25.

[33] For an underlining of the particular importance that the principle of solidarity assumes, in relation to energy supply, acquiring a character "which could be defined as constitutional" see the Opinion of Advocate General Mengozzi in Case C-226/16, ENI Spa and Others, EU:C:2017:616, paragraphs 33 and 34, as well as, more generally, A. Levade, *La valeur constitutionnelle du principe de solidarité*, in C. Boutayeb (ed.), *La solidarité dans l'Union européenne. Éléments constitutionnels et matériels*, Paris, 2011, p. 51 and J. Molinier (*Sous la direction de*), *Les principes fondateurs de l'Union européenne*, Paris, 2005, p. 250 (who qualifies solidarity as a «supraconstitutional» principle).

[34] As such, Advocate General Campos Sánchez-Bordona essentially understands it by qualifying it "as a value and as an objective of the process of European integration" and by indicating, in footnote 53, that he takes up with that qualification the statement that "solidarity is the lifeblood of the European project" made by Advocate General Sharpston in his opinion of 31 October 2019 in the joined cases *Commission v. Poland and Others.* Advocate General Sharpston, moreover, had added in those conclusions that "through their participation in that project and citizenship of the Union, the Member States and their citizens are endowed with obligations and benefits, duties and rights" and had further stated that the principle in question implies, at times, the acceptance of burden-sharing, a burden- sharing that "does not amount to examining the Treaties and secondary legislation to see what can be claimed", but "also requires the assumption of collective responsibilities as well as burdens (yes, burdens) to promote the common good": that is to say, it does not exclude burdens such as those capable of deriving from the obligation of solidarity referred to in Article 80 TFEU, understood as an obligation enshrined in a general principle of EU Law, which each Member State has towards the others.

[35] Opinion in Case C-848/19 P, cited above, paragraph 70.

[36] For a general view of the principle of solidarity as a constitutional value, see, for example, M. Ross, *Solidarity: A new constitutional paradigm for the EU?* In M. Ross and Y. Borgmann-Prebil (eds), *Promoting Solidarity in the European Union*, Oxford, 2010, pp. 23 ff.

[37] For a parallel qualification according to which solidarity, although "inherent in the EU legal order as a foundational value, it cannot (yet) be defined as a general principle of EU law" see, among many others, E. Dagilytė, *Solidarity: a general principle of EU law? Two variations on the solidarity theme*, in A. Biondi, E. Dagilytė, and E. Küçük (eds), *Solidarity in EU Law. Legal Principle in the Making*, Cheltenham-Northampton, 2018, p. 61 ff.

[38] Opinion in Case C-848/19 P, cited above, paragraph 71. The statement made at that point in the Opinion of Advocate

15. This reconstruction of the Court of Justice's thinking cannot be considered to be a slip of the tongue; it cannot be considered to be such because it is in harmony with all the other elements of the preliminary observations of Advocate General Manuel Campos Sánchez-Bordona and takes up a method of interpreting rules of a constitutional nature which is becoming increasingly widespread and has been authoritatively highlighted by an author, a former President of the Italian Constitutional Court[39], according to whom the text of one of these rules "is not a self-sufficient reality"; its interpretation a) "is not a passive act of mere recognition" but b) it is an internal phase in the process of the production of law, which completes and concludes it, bringing it to life by immersing it in the concreteness of daily life" and c) it gives rise to a "natural protagonism of the interpreter"[40].

That this is so is shown by the fact that the Advocate General, in paragraph 116 of his Opinion, did not state that Article 194 TFEU has, in itself, binding legal effects and he made consciously, since he referred extensively to the commentary on the Court's OPAL judgment made by authors, who unequivocally maintain that 'the principle of energy solidarity does not create an obligation for a certain result'[41].

VII. (continued) the position taken in that Opinion

16. Referring, at the end of his preliminary remarks, to the practical problem of proposing what the Court should decide, with specific reference to energy markets, about the concrete capacity of the principle of solidarity to produce legal effects, the Advocate General took up the idea that the interpretation of the Court of Justice must be made by paying attention to all the circumstances of the case in question and by realising the natural protagonism of its role as interpreter of last resort. He suggested to it to decide taking into account a) Article 194 TFEU, introduced by the Lisbon Treaty as a legal basis for the development of the Union's competences in the field of energy[42], a series of provisions of secondary law[43] and the fact that the Commission has also recognised that "the legality of its decisions could be

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General Campos Sánchez-Bordona was not grasped by M. Münchmeyer, *Supercharging Energy Solidarity? The Advocate General's Opinion in Case C-848/19 P Germany v Poland,* cited above, according to which the Advocate General would have sustained that both Article 194 and Article 80 TFEU can have direct legal effect.

[39] P. Grossi, *Plurality of the sources of law and implementation of the Constitution*, in Riv. trim. dir. proc. civ., 2019, p. 773 et seq. who, in this regard, recalls H.-G. Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, Tübingen, 1960

[40] A similar attitude seems to be taken by S. Villani, *The concept of solidarity within EU disaster response law. A legal assessment*, cit., p. 82, according to whom the place of solidarity in the constitutional context of community law acquires a particular significance in relation to the creative role played by the Court of Justice with regard to its interpretation of unwritten principles of such law. This position is, however, qualified by the fact that she expresses it by referring to the positions taken by the Court of Justice in the cases Commission v France of 10 December 1969, cited above, Commission v Italy of 7 February 1973, cited above, and Commission v United Kingdom of 7 February 1973 (both cited above in paragraph VI) and Commission v United Kingdom of 7 February 1979 (Case 128/78, EU:C:1979:32) and in Opinion 1/75 of 11 November 1975 (EU:C:1975:145). She points out that in those circumstances the Luxembourg judges conceived solidarity, not as an autonomous source of positive obligations, but rather of negative duties requiring Member States to refrain from acting against and to act in favour of the common interest of the Community (page 80); and shortly afterwards (on page 81), indicates that, in doing so, they have shown that they have regarded those negative duties as resalting, infact, from their obligation to comply with the principle of loyal cooperation.

[41] D. Buschle and K. Talus *One for All and All for One? The General Court Ruling in the OPAL Case*, cit., p. 8. These authors had, moreover, immediately added that the principle in question "calls for the performance of a balancing test of which the features are still largely unknow and subject to future clarification". The Advocate General gave a further sign of his agreement with them by stating, as will be indicated in paragraph VII, that the principle of energy solidarity may be used as a parameter for judicial review of decisions of Union bodies in this field: he said that such review must establish whether, in accordance with that principle, in each case in which one of those decisions is to be adopted, account has been taken, in a balanced manner, of the interests of the various Member States and those of the Union as a whole. According to T.M. Moschetta (La solidarietà interstatuale nella politica energetica dell'Unione europea: note a margine della sentenza del Tribunale Polonia c. Commission, in Annals of AISDUE, vol. I, 2019), for the General Court, interstate solidarity constitutes "a balancing instrument between the achievement of common objectives and the preservation of particular state interests".

[42] Opinion in Case C-848/19 P, cited above, paragraph 75

[43] Ibid., para. 81.

reviewed in the light of the principle of energy solidarity"[44]. He called to its attention that the principle of energy solidarity has acquired a "prominent feature"[45], felt, in the Union's legal system, with increasing intensity, as "fundamental" and "is key to ensuring that the European union's energy policy is able to achieve its objectives[46].

17. From the above, Advocate General Manuel Campos Sánchez-Bordona inferred that it was impossible to agree with Germany's argument that the principle of energy solidarity was too abstract. On the contrary, he took the view that it may, unlike mere rules, produce judicial effects, not only when reflected in a rule of secondary law but even in its absence, in the judicial review of decisions taken in the material field with reference to which it was included in the TFEU. It has clearly stated that the principle of energy solidarity can produce legal effects a) as a criterion for the interpretation of derivative rules adopted in the exercise of the competences of the European Union in the field of energy, b) as an element to fill the gaps encountered in this rules and c) as a parameter for judicial review, both of the legality of those derivative rules and of decisions of the Union's bodies in that field[47]. And, since Poland had based its action before the General Court on the conflict between the Commission's decisions and Article 36 of Directive 2009/73/EC, it stated, with specific reference to the case on which he was required to deliver his opinion, that it is true that that article "does not expressly mention energy solidarity among the factors to be taken into account when granting an exemption [...] to new pipelines"; however, "that lack of express mention to the principle of energy solidarity did not relieve the Commission from assessing the impact [of that principle] on its exemption decisions", because observance of it, in conjunction with what indicated in the previous paragraph and the elements set out at the beginning of this paragraph, could be imposed by article 194 TFEU[48].

As will have been noted, in his preliminary remarks the Advocate General had referred to the Court of Justice's ruling of 2 April 2020 in order to point out that in that ruling it attributed to solidarity a fundamental and materially constitutional character[49]. However, the Advocate General no longer took that ruling into account when suggesting to the Court the elements to consider in deciding the case at hand. In the case that led to the judgment of 2 April 2020, the Court was asked to rule on the legality of temporary measures provided for in Council decisions adopted under Article 78(3) TFEU in order to help Greece and Italy "to cope more effectively with an emergency situation characterised by a sudden influx of third-country nationals into their territory". It had to determine whether those decisions were in conformity with Article 80 TFEU, which provides that the Union's policies on border controls, asylum, immigration and their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States' and specifies that 'whenever necessary, acts of the Union adopted pursuant to [the chapter containing that provision] contain appropriate measures for the purpose of applying that principle'. This specification, contained in a provision of primary law, uses the principle of solidarity as a criterion for the interpretation and determination of the legality of acts of the institutions which the Court could not draw on. In his preliminary remarks to his Opinion, the Advocate General did not refer to the Court's judgment in order to evoke the Court's position on a question of whether the principle of solidarity imposed obligations on Member States among themselves, but only on a question of verifying the correctness of decisions of

[44] Ibid., para. 93.

[45] Ibid., para. 81.

[46] Ibid., point 82. For an underlining of the importance of what has been pointed out in this point and in the other points in the three previous notes, see the remark made by B. Bertarini, *The principle of solidarity between law and economy. Un nuovo ruolo dell'impresa per uno sviluppo economico inclusivo e sostenibile*, Turin, 2020, p. 31, according to whom the affirmation of a principle of solidarity in the European Union requires "a long normative path, which only in time leads to the affirmation of a principle of solidarity starting from the idea of solidarity" and which finds "in the founding Treaties of the Communities a first essential reference".

[47] See Opinion in Case C-848/19 P, cited above, paragraph 96. For a similar reconstruction of the position taken by the General Court on the operation in EU law of a principle of energy solidarity as a parameter of legitimacy, as a parameter of interpretation and as a criterion for balancing the interests involved in the sector see T. M. Moschetta, *La solidarietà interstatuale nella politica dell'Unione europea: nota a margine della sentenza del Tribunale Polonia v. Commission*, cit., 430-431.

[48] Opinion in Case C-848/19 P, cited above, paragraph 105.

[49] See supra par.VI.

a Community institution and, if that question was answered in the affirmative, whether those decisions had been properly followed up by those States[50]. That problem was entirely different from that posed by Germany's application. It was therefore sufficient for the Advocate General to have referred to that earlier case in the preliminary observations to his Opinion in order to emphasise, as indicated, the fundamental nature of that principle.

VIII. The judgment of the Court of Justice in the OPAL case and its reference to the general principle of solidarity

18. In its judgment of 15 July 2021, the Court of Justice, while emphasising that the main issue before it was the interpretation of Article 194 TFEU, it pointed out at paragraph 49 (a) that "the General Court held, 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" and (b) stated that it had done so "rightly", holding, only in passing, that the Union has "an obligation of solidarity between themselves and with regard to the common interest of the Union and the policies pursued by it"[51].

19. The Court's endorsement of the statement contained in paragraph 70 of the General Court's judgment constitutes a quite different attitude from the one it had taken in its judgment of 2 April 2020: in that judgment it had referred to the principle of solidarity in a context in which it had specifically and definitively ascertained the lawfulness of acts of the Council.

The passing statement contained in the judgment of 15 July 2021, on the contrary was neutralised by the fact that the Court annulled the contested decision because it conflicted not with it but with the principle of energy solidarity. That passing statement, however, was not insignificant; indeed, it cannot be excluded that, despite being entirely new[52], it may in future be invoked as an important reason for

[50] For a highlighting of this distinction see the speeches of F. Croci and F. Costamagna at the *WebEx conference on 30 June 2021 Solidarity between EU Member States and European Economic Governance. Reflections on a recent volume*, cited above. The importance of that distinction has not been grasped by A. Rizzo, *Ricollocazione infra communitaira e principio di solidarietà: un nuovo paradigma per le politiche d'asilo del- l'Unione,* in *Comunità int.*, 2017, p. 412, according to whom the Court, largely accepting the Advocate General's indications, has made recourse to the principle of solidarity enshrined in Article 80 TFEU. It is, moreover, in contrast with the Court's position the G. Morgese's statement (*Solidarietà di fatto ... e di diritto? L'Unione europea allo specchio della crisi pandemica*, cit., p. 85) according to which article 80 TFEU "does not contain an autonomous legal basis for the adoption of EU acts". This statement cannot be shared, first of all, because it is accompanied by the observation, is contradicted by the fact, mentioned above in the text, that so far it has not been used even jointly to adopt binding acts; and, then, because it is motivated on the basis of the fact that the second sentence of said article seems to impose on the institutions to act "whenever necessary" and therefore establishes in their favour a mere faculty to act. However, such a power does not rule out the possibility that when it is exercised in relation to Member States, as happened with the decisions in question, the acts adopted create positive obligations for them.

For a finding in line with the position of the Court of Justice, according to which solidarity obligations of a precise type are imposed on institutions and States even in the absence of norms which provide for this, see, instead, G. Itzcovich, *On the Legal Enforcement of Va- lues. The Importance of the Institutional Context*, in A. Jakab, D. Kochenov (eds.), *The En- forcement of EU Law and Values,* Oxford, 2017, p. 29 as well as G. Morgese, *Solidarietà di fatto ... e di diritto ? The European Union in the mirror of the pandemic crisis*, cit., p. 88.

[51] CJEU 15 July 2021, C-848/19 P, Federal Republic of Germany v. Republic of Poland and European Commission, EU:C:2021:598, paragraph 49.

[52] It is true, in fact, that the Court of Justice had already referred to the principle of solidarity in order to seriously censure France, Italy and the United Kingdom in the cases mentioned above in footnotes 33 e 34; but it had done so in order to counter the violation by them of their duty to respect Community law and to act in favour of the common interest of the Community and not in order to affirm an obligation of solidarity between Member States. The indication contained in F. Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, Naples, 2020, according to which the supranational solidarity among member states is manifested in specific legal obligations. This indication, in fact, is referred to by that author only as an objective of the Treaties. This author indicates, instead, that the Court, by the ruling 19 September 2013 (C-140/12, Pensionsversicherungsanstalt v. Peter Brey, EU:C:2013:565) consider that "a certain financial solidarity of the citizens of the host Member State towards those of other Member States", even if then (quoting A. Mcdonnell, *Equality for Citizens in the EU: Where Did All the Flowers Go?*, in L.S. Rossi, F. Casolari (eds.), *The Principle of Equality in EU Law*, cit., p. 199 ff.) adds that such solidarity is definitely weakened in the subsequent case law.

enhancing the general principle of solidarity, as, moreover, already happened in the context of the case Alexios Anagnostakis v. European Commission[53], which led to the judgment of the Court of Justice of 12 September 2017 confirming an earlier judgment of the General Court[54]: a case in which the appellant, albeit unsuccessfully, had invoked that principle, seeking the annulment of a decision of the Commission rejecting his application for registration of a legislative initiative by citizens seeking the introduction into EU law of a mechanism of a general and permanent nature capable of allowing a State in difficulty not to repay all or part of its public debt.

20. It was for that reason that the Court of Justice, for its part, first, did not refer to that point of the judgment of the General Court anywhere else in its judgment and, in paragraphs 48 and 50, referred specifically to the principle of energy solidarity; it then confirmed the judgment of the General Court annulling the contested decision on the ground that it was incompatible with it. Moreover, paragraph 49 of the Court's judgment cannot, however, be relied upon as binding precedent in future cases since it could have acquired such significance only if it had actually resolved the problem with reference to which it was expressed. Which, as indicated above, was not the case.

Consequently, the attitude adopted by the Court on this point can only be understood in one of two ways: either in the sense that it constitutes an obiter dictum, or in the sense that the principle of solidarity, as indicated in paragraph 70 of the Advocate General's Opinion, is "significant enough" "idoneo a comportare" rights and obligations, distinguishing between an abstract and a concrete capacity to produce legal consequences: an abstract capacity because, although it has different aspects and degrees of concreteness, as a value and as an objective of the process of European integration, it can be endowed with a meaning capable of producing legal consequences; a concrete capacity which can be realised only if there are specifications and elements such as those indicated by the Advocate General in points 75, 81 and 82 of his Opinion[55] and that he has made it clear that they must be understood by those who have to interpret them (in the last instance the Court of Justice), who have the task of 'discerning the normative content which is proper to them'[56].

The statement in question cannot be considered to have constituted a mere obiter dictum. In fact, it may reasonably be held that a finding that the principle of solidarity entails rights and obligations, not only in relation to acts adopted by the Commission, but also in relation to the relations of one Member State with others, was made by reference to its specification in Article 194 TFEU. On the other hand, it is not comprehensible to understand it as related to a general application of that principle, if one takes into account that it was accompanied by the statement that the Member States have an obligation of solidarity among themselves and with regard to the common interest of the Union and the policies pursued by it. If the General Court and the Court of Justice had really intended to make such a statement in the second sense, they would certainly have realised the important consequences that could be drawn from it and they would have felt the need not to contain it in a mere passage of their reasoning.

IX. The legal effects attributed by the Court to the principle of energy solidarity

21. Beyond what has been noted in the previous paragraph, at least on two points the Court of Justice has expressed itself in a manner not dissimilar to that of its Advocate General.

The observation made above, in the text, that the case law of the Court of Justice is new is not inconsistent with the statement contained in F. Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, cit., according to which the supranational solidarity among member States is manifested in specific legal obligations. With those statements he, infact, was referring to the ruling 19 September 2013 (C-140/12 Pensionsversicherungsanstalt v. Peter Brey) stating that the possession of economic resources by European Union citizens is a "necessary requirement for obtaining the legal right to reside on the territory in other member States".

[53] ECJ 12 September 2017, C-589/15 P, *Anagnostakis v. European Commission*, EU:C:2017:663

[54] Trib. 30 September 2015, T-450/12, *Anagnostakis v. European Commission*, EU:T:2015:739.

[55] See *supra* par. VI.

[56] Opinion in Case C-848/19 P, cited above, paragraph 71.

First of all, the Luxembourg Judges stated that the spirit of solidarity mentioned in Article 194(1) TFEU must guide any action of the Union in the field of energy policy, i.e. in adopting all the acts governing it. Consequently, they held that the principle of energy solidarity must be taken into account by the institutions of the Union as well as by the Member States in order to ensure the security of supply of the Union, which implies not only facing emergency situations when they occur, but also adopting measures aimed at preventing crisis situations. In the face of Germany's argument that such an application of the principle in question would amount to imposing on the Union and the Member States 'unconditional loyalty' which would hinder any decision, they pointed out how correctly, at the paragraph 77 of the judgment under appeal, the General Court stated that the institutions and the member States implementing the energy policy must preventively take into account their different interest and balanced them in case of conflicts[57].

22. The Court, moreover, again in a manner not dissimilar to what was done by its Advocate General, stated that the principle of energy solidarity implies that a) "the acts adopted by the EU institutions, including by the Commission [...], must be interpreted, and their legality assessed, in the light of the principle of energy solidarity"[58] and b) that principle cannot "be regarded as being … limited to the requirement to ensure security of supply, referred in Article 36(1) of Directive 2009/73". This is because that requirement constitutes "only one of the manifestations of the principle of energy solidarity, since Article 194(1) TFEU sets out [...] four different objectives which, in a spirit of solidarity between Member States, EU energy policy aims to achieve"[59]. Consequently, it ruled that 'the absence in the 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'[60] and, therefore, from taking account of the ability to fill the gaps in the relevant secondary legislation.

X. The way in which the Court has come to attribute legal effects to the principle of energy solidarity

23. As regards the role played by the Court in giving prominence to the principle of energetic solidarity as a legal principle, the Court has formally distinguished itself from the way in which the Advocate General had considered it to be capable of giving rise to rights and obligations in relations between Member States, in relations between them and the Union and in relations with the subjects of the Community legal order.

24. The Advocate-General had come to attribute legal effects to the principle of energy solidarity in the manner already indicated in paragraphs V and VI, highlighting the central role to be played in this respect by the courts and, in particular, by the Court of Justice. The Court of Justice, for its part, took as its starting point the consideration that the principle of solidarity underlies the entire legal system of the European Union[61] and went on, in the context of the review of the legality of the Commission's acts at issue in the case, to refer to the manner in which, in its judgment of 2 April 2020, it had applied that principle, as referred to in Article 80 TFEU (thus finding, as has been seen, that the Commission had

[57] For an interpretation of the judgment of the General Court in the sense that it could be understood as attributing to the principle of solidarity a function susceptible to be carried out not only in the energy sector but also in all the other sectors in which the Union has acquired a competence, an interpretation which, as will be seen in the following paragraphs, has not been accepted by the Court of Justice, cf. A. Boute, *The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline)*, cit. p. 907; T.M. Moschetta, *La solidarietà inter statuale nella politica energetica dell'Unione europea: note a margine della sentenza del Tribunale Polonia v. Commission, cit.,* p. 428 ff.

[58] C-848/19 P, cited above, paragraph 44.

[59] *Ibid.* paragraph 47.

[60] *Ibid.* paragraph 48.

[61] For a similar statement according to which the notion of solidarity justifies, develops and adapts the powers of the institutions of the Union and those of the member states in view of an even closer Union see D. Simon, *Le système juridique communautaire*, Paris, 2001, pp. 146-147; C. Boutayeb, *La solidarité, un principe immanent au droit de l'Union européenne*, in C. Boutayeb (ed.), *La solidarité dans l'Union européenne. Éléments constitutionnels et matériels*, Paris, pp. 10-11.

legitimately proceeded to establish the infringement by some States of their obligations under EU law). It concluded that (a) '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 the institutions of the European Union' when that principle "forms the basis of all the objectives of the Union's energy policy, serving as the thread that brings them together and gives them coherence"[62] and (b) that "acts adopted by the EU's Institutions including by the Commission under that policy" must be interpreted and their legality assessed in the light the principle of energy solidarity[63].

It cannot be ignored that statement (b), which constitutes the conclusion of the Court's reasoning, was not imposed by a provision such as Article 80 TFEU, which the Court took into account in its judgment of 2 April 2020[64], and did not follow automatically from the premise set out in (a) on which it is based. It constitutes an addition to European Union law resulting from the exercise of the function which the Community system recognised to the courts and, ultimately, to the Court of Justice. The Advocate General pointed out that function[65]. The Court has concretely exercised it in practice.

XI. The position taken by the Court on the relationship between the general principle of solidarity and the principle of energy solidarity, on the one hand, and the principle of loyal cooperation, on the other

25. As far the relationship between the general principle of solidarity and the principle of energy solidarity, on the one hand, and the principle of loyal cooperation, on the other hand, an important recent study refers to this, paying[66] specific attention to the way in which, in its OPAL ruling, the General Court considered that this principle operates.

That study makes reference, firstly, to a series of rules of primary and secondary EU law expressing the need to pursue solidarity among member states and, secondly, to the ruling of the Court of Justice of 18 March 1980[67] applying Article 58 of the ECSC Treaty. Among these rules of primary law, the study refers to (a) Article 122 TFEU, which allows the Council to decide, "in a spirit of solidarity between Member States", on appropriate measures in the event of serious difficulties arising from the supply of certain products, starting with those in the energy sector, (b) Article 67 TFEU, according to which the Union must develop a common policy on asylum, immigration and external border control which is "based on solidarity between Member States", (c) article 80 TFEU, according to which the Union's action in this fields is governed by the 'principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'; (d) Article 222 TFEU, which requires both the Union and the Member States to take the necessary measures to provide assistance to those among them which are victims of terrorist attacks or affected by man-made natural disasters, if they expressly request it and (e) EU Regulation 2020/461[68] providing assistance to countries affected by a serious health emergency.

26. The same study associates the judgment of 18 March 1980 with these rules, since in that judgment the Court specified that the anti-crisis policy in the steel sector 'is based on the fundamental

[62] C-848/19 P, cited above, paragraph 43.

[63] *Ibid.*, para. 44.

[64] See *supra* par. VIII.

[65] For a recognition to the Court of Justice of a creative role played with reference to the unwritten principles of Union law, in the framework of its hermeneutic activity carried out in relation to the affirmation according to which "Community solidarity is fully included among the fundamental principles of the system of the European Union" in its ruling 29 June 1978, case 77/77 (*Benzine en Petroleum Handelsmaatschappij bv and a. v. Commission of the European Communities*, EU:C:1978:141 see F. Croci, *Solidarietà tra Stati membri dell'Unione Europea e governance economica europea*, cit. p. 38-39.

[66] F. Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, cit., p. 66.

[67] Court of Justice 18 March 1980, 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79, *SpA Ferriera Valsabbia and Others v Commission of the European Communities*, EU:C:1980:81.

[68] Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and countries negotiating their accession to the Union affected by a major public health emergency, *OJEU* L 99/2020, p. 9.

principle of solidarity between different undertakings'[69]. And then considers that said set of rules and said judgment differs from (a) the provisions of the EU Treaty, such as Article 24(3) TEU (reinforced by Article 31(2) TEU), which requires the Member States to support the CFSP unreservedly in a spirit of loyalty and mutual solidarity and which translates into a general obligation to fulfil the tasks arising from the founding treaties, and (b) the judgment in Commission v. Italy of 7 February 1973, in which the Court of Justice held that 'failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the community legal order'[70].

The author of that study then takes into account that, in the context of the set of provisions and the Court's ruling mentioned above, the two principles, at least in abstract, appear distinct "but complementary"[71]. He, nevertheless, deems that the second set of provisions and rulings referred to above concretise the affirmation of an obligation on the part of both the Union and the Member States to act in such a way as not to impede the pursuit of the Union's policy objectives, in fact corresponding to a duty to respect the principle of sincere cooperation laid down in Article 4(3) TEU. He finally

— equates the OPAL judgement of the General Court with this second set of rules and rulings,
— attaches particular importance to the terms used by the General Court in paragraph 77[72] (according to which, as seen in the previous paragraph VIII, the institutions of the Union and the Member States must, in implementing energy policy, take account of the interests both of the Union and of the various Member States and of the need to balance those interests in the event of conflict),
— concludes that by that paragraph the General Court established an obligation of the Union and the member States not to hinder the energy policy objectives as set out in article 194 (1) TFEU and therefor the obligation on them to apply the principle of solidarity is "nothing more than an obligation to respect the principle sincere cooperation !"[73].

The Court of Justice has expressed itself differently. It has assumed that the principle of solidarity is autonomous, even if closely linked to the principle of sincere cooperation, laid in Article 4(3) TEU, by virtue of which the Union and the Member States respect and assist each other in the tasks arising from the Treaties[74].

XII. Conclusions

27. The result arrived at by the Court of Justice, implicitly taking into account the elements set out in the Opinion of the Advocate General (including Article 194 TFEU[75]), is significant, even if not as significant as that which it would have reached if it had adopted the understanding of the effects of the

[69] Case C-154/78 Ferriera Valsabbia SpA and Others v European Commissions, cited above, paragraph 59. The clarification of the reasons why in such a case the Court has qualified the principle of solidarity as a fundamental principle strongly coincides with those used by K. Lenaerts and S. Adam, in a very recent essay, *La solidarité, valeur commune aux états membres et principe fédératif de l'Union européenne*, cit., pp. 309-312. These authors recall that that principle is commonly linked to the awareness of the community of interests within a given group, leading its members to share advantages and duties in a fair and equitable manner, as well as to assist one other and to avoid causing harm to one another.

[70] Case 39/72, cited above, paragraph 25.

[71] Page 69, footnote 99 where he indicates that such a qualification for their relationship is made by A. Berramdane, *Solidarité et loyauté dans le droit de l'Union européenne*, in C. Boutayeb, *La solidarité dans l'union européenne. Eléments constitutionnels et matériels*, cit., p. 70 ff.

[72] See *supra* paragraph X.

[73] Page 72.

[74] See C-848/19 P, cited above, paragraph 41. The Court of Justice's view of the principle of solidarity as autonomous from that of loyal cooperation is not contradicted by the fact that in paragraph 52 it states that the former must be "read in conjunction" with the latter. The use of this expression, in fact, is quite different from that of the expression used in the work referred to above, according to which the two principles must be "read together", since this unequivocally implies an overcoming of the autonomy of one principle with respect to the other.

[75] See *supra* paragraph X.

general principle of interstate solidarity erroneously attributed by some to the judgment of the General Court. It is not excluded that that result, beyond the impact that it is destined to have in the framework of the management of energy policy, as hypothesized by an author in a commentary on the Opinion of the Advocate General, may indirectly encourage the attribution of legal effects to solidarity also in relation to other sectors (with the exception of cases in which reference is made to it on a purely political level) for the management of which the treaties mention it[76]. And, as sustained by another author[77], again with reference to sectors other than energy, it can also be understood as the manifestation of a tendency towards a change that could lead to the belief that a) in substance, the inspiring principle of the Treaty has changed, b) the cardinal principle of economic matters no longer consists in the mere prohibition of financial aid to Member States and c) a form of solidarity is now admitted, also in the economic field. The enhancement of the principle of solidarity resulting from the perception of the increased importance of the symmetrical dimension that the principle has acquired following the Covid- 19 pandemic and the centrality given to its intergenerational dimension by the Next Generation EU[78] could certainly contribute to a strengthening of this trend.

[76] See M. Münchmeyer, *Supercharging Energy Solidarity? The Advocate General's Opinion in Case C-848/19 P Germany v Poland*, cit.

[77] G. Contaldi, *European solidarity in the economic field at the time of the covid-19 pandemic*, in *Ord. Int. Human Rights,* 2020, pp. 449-450.

[78] European Recovery Plan, proposed by the European Commission on 27 May 2020, on which the member States agreed in occasion of the European Council session held between 17 and 21 July 2020.