

~~FOREIGN INVESTMENTS IN EU ENERGY
AND ENERGY SOLIDARITY IN THE
LIGHT OF OPAL JUDGEMENT~~

OVERVIEW

1. ENERGY SOLIDARITY
2. ENERGY SOLIDARITY AFTER JUDGEMENT IN T-883/16, "OPAL"
3. IMPACT ON FOREIGN INVESTMENT IN EU ENERGY SECTOR

„ENERGY SOLIDARITY“

Article 194 [Energy]

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.

ENERGY SOLIDARITY- AFTER OPAL

Principle of energy solidarity requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures likely to affect the interests of the EU and other Member States as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.



(1) GENERAL APPLICABILITY (2)REQUIRES A BALANCING ACT

REMARKS ON OPAL

ENERGY SOLIDARITY NOW A GENERALLY APPLICABLE PRINCIPLE OF EU ENERGY LAW

POSITIVE:

RECOGNIZES THE INCREASINGLY INTERLINKED NATURE OF EU ENERGY MARKETS
CONTRIBUTES TO EU SPEAKING WITH "ONE VOICE"

NEGATIVE:

MOVES MORE POWER TO EU AND THE COMMISSION AND RESTRICTS THE ENERGY RIGHTS OF THE MEMBER STATES
CREATES LEGAL OBLIGATIONS BASED ON A PRINCIPLE, RATHER THAN CLEAR RULES
ENERGY SECURITY CONSIDERATIONS ARE (VERY) OPEN FOR (MIS)INTERPRETATION

IMPACT ON FOREIGN ENERGY INVESTMENTS (1)

RE-INTERPRETATION OF EXISTING ENERGY ACQUIS?

THIRD COUNTRY CERTIFICATION UNDER ART 11 OF DIRECTIVE 2009/73/EC:

"GRANTING CERTIFICATION WILL NOT PUT AT RISK THE SECURITY OF ENERGY SUPPLY OF THE MEMBER STATE AND THE COMMUNITY"

OPAL JUDGMENT MAY IMPLY THAT RISK ON SECURITY OF ENERGY SUPPLY NEEDS TO BE ASSESSED WIDER THAN BEFORE

IMPACT ON FOREIGN ENERGY INVESTMENTS (2)

REGULATION (EU) 2019/452 ESTABLISHING A FRAMEWORK FOR THE SCREENING OF FOREIGN DIRECT INVESTMENTS INTO THE UNION PROVIDES:

COOPERATION MECHANISM IN RELATION TO FOREIGN DIRECT INVESTMENTS (SCREENED OR NOT) TO ASSESS WHETHER IT AFFECTS SECURITY OR PUBLIC ORDER

FINAL DECISION BY THE MEMBER STATE UNDERTAKING THE SCREENING, BUT MUST GIVE "DUE CONSIDERATION" TO COMMENTS AND CONCERNS FROM OTHER MEMBER STATES

IN TAKING A DECISION ON SECURITY IMPACT OF AN INVESTMENT, MEMBER STATES MUST CONSIDER POTENTIAL IMPACT ON CRITICAL ENERGY INFRASTRUCTURE AND SUPPLY OF ENERGY

OPAL JUDGEMENT MAY IMPLY THAT (1) A MEMBER STATE MUST EX OFFICIO CONSIDER WHETHER DECISION IS LIKELY TO AFFECT OTHER MEMBER STATES AND (2) MIGHT SET THE THRESHOLD HIGHER THAN "GIVE DUE CONSIDERATION"



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