



## EU Court Sides with Poland in OPAL Dispute

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On 15 July, the Court of Justice of the EU (CJEU) ruled in favour of Poland in a dispute over the legal status of the OPAL pipeline. The verdict means that Gazprom will not be allowed to use the full capacity of the Nord Stream 1 pipeline, which is connected to OPAL. The company will challenge this while also arguing that the completion and commissioning of Nord Stream 2 (NS2) is necessary for increased gas supplies to the EU.

### What is the significance of the OPAL pipeline?

OPAL is an important part of the pipeline network [allowing Gazprom to bypass Ukrainian gas transit](#). Its annual capacity is 36.5 billion cubic metres (bcm), and together with the NEL pipeline (20 bcm) comprises the onshore branch of Nord Stream 1 (55 bcm). NEL transports Russian gas from NS1 to the western part of Germany and OPAL to the south—to the German-Czech border and through Czechia to southern Germany and France. Decreasing the capacity of OPAL available for Gazprom means lower supplies to Germany via NS1.

### What was the legal status of the pipeline until now?

In 2009, in an effort to ensure competitive access to OPAL, which was under construction at the time, the European Commission (EC) issued a decision limiting Gazprom's ability to use the pipeline's capacity available to it to 50%, which is 12.8 bcm (the company could only use more if it met the condition of selling some of the gas to third parties on market terms, which it did not do). [However, Germany managed to get the EC to adopt a new decision in 2016 effectively allowing Gazprom to use the entire capacity](#). Poland, supported by Lithuania and Latvia, challenged the decision before the EU General Court, accusing the EC of violating the principle of energy solidarity enshrined in Article 194 of the Treaty on the Functioning of the EU (the complaint was also filed by a company owned by PGNiG). [In September 2019, the Court upheld Poland's complaint, reinstating the 50% cap](#). This judgment was appealed by Germany.

### What does the judgment concern?

The 15 July CJEU judgment dismissed the German appeal and ended the case in Poland's favour. The court ruled that when issuing the decision in 2016, the EC did not sufficiently take into account the effects on the security of gas supply in Poland, other countries of the region, or the EU as a whole. It therefore violated the principle of energy solidarity, and for this reason the 2016 decision was annulled. The court stated unequivocally that the principle of energy solidarity is not just a political notion but has legal significance. It must be respected by the EU institutions and requires taking into account both the energy interests of the EU as a whole and its individual members. It is also applicable in all cases and not, as Germany maintained, only in crisis situations.

### What does the verdict mean for other disputes in the EU concerning energy issues?

The CJEU's ruling determines that the EC must factor in the principle of energy solidarity when issuing decisions concerning the energy sector, for example, those establishing the legal framework for the operation of cross-border pipelines or electricity grids. The Commission is obliged to consider not only the energy interests of the EU and the state in which the investment is made but also those of other EU members, and balance them appropriately. This guarantees that Poland's key interests will be respected in case of the implementation of energy projects under the jurisdiction of the Commission by other EU Member States. However, it also requires Poland to consider the legitimate energy interests of other EU

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members when carrying out such investments in order to avoid a conflict with the Commission.

## **What is the international significance of the verdict?**

Gazprom and Germany could try to change the EC's 2009 OPAL decision by claiming that the additional supplies via the pipeline do not harm the energy security of the region. Moreover, the company and the Russian authorities will depict the CJEU verdict as a blow to gas consumers and [discrimination of Gazprom](#). The verdict will also be used to support completing and commissioning NS2. Gazprom is not currently booking the available capacities of the

Ukrainian gas pipelines despite the highest gas prices in Europe in more than 10 years and record-low gas storage levels (storage facilities were 47% full at the beginning of July, compared to 80% last year), which is a sign that NS2 is meant to be the main supply route for Russian gas. The threat of winter gas shortages will be used to pressure EU institutions and Member States to allow the quick commissioning of NS2 by, for example, [omitting EU procedures](#) or [exempting NS2 from some EU regulations](#). Poland should closely monitor the Russian actions and in case of any possible violations, quickly involve the EC and CJEU.