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RESEARCH ARTICLE

The Evolution of the Public Security Defence in EU Free Movement Law: Lessons from the Energy Sector

Kaisa Huhta

Associate professor of European law, especially energy law the University of Eastern Finland and at the Centre for Climate Change, Energy and Environmental Law (CCEEL)
Email: kaisa.huhta@uef.fi

Abstract

This Article analyses the evolution of the public security defence to justify restrictions on free movement within the EU in the context of the energy sector. Taking the seminal 1984 *Campus Oil* case as the point of departure for its analysis, the Article focuses on the interplay between public security and energy security and shows two key changes in the case law of the Court of Justice of the European Union. First, it demonstrates how the scope of the public security defence in the energy sector has gradually narrowed. Second, it shows how the public security defence has developed to take into account evolving social, technological, and legal contexts in the EU energy sector. Culminating in cases like *Hidroelectrica* in 2020 and *OPAL* in 2021, analysis of the relevant case law suggests that, despite the societal dependence on energy and the ongoing geopolitical turmoil in Europe, the Court of Justice interprets exceptions from free movement in an increasingly strict manner, highlighting the primacy of internal market approaches to energy security.

Keywords: Free movement of goods; justification; public security; energy sector; energy security

I. Introduction

Recent developments in Europe have brought energy security to the forefront of the European Union ('EU') policy agenda.[1] Energy prices have drastically increased in recent years, causing widespread concerns over the affordability of energy for households and industry. The Russian invasion of Ukraine in spring 2022 has amplified uncertainty over the availability and price of energy, further aggravating the socio-economic difficulties experienced especially by low-income and vulnerable households.[2]

Energy security, or security of supply, has no well-established definition. It is a polysemic policy objective that is generally thought to comprise the *uninterrupted availability of affordable energy*.[3] As is true of many other EU policy objectives, the fundamental approach to ensuring energy security in EU law, at its core, relies on the internal market. The internal markets for energy, which have been progressively implemented since the 1990s, are expected to achieve, or at least positively

[1]COM(2022) 230 final, *REPowerEU Plan*; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L261; Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L206; Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders [2022] OJ L335; Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335; Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices [2022] OJ L335.

[2]V Jack, 'Ukraine War Heats Up Energy Poverty Debate' (*Politico*, 17 May 2022) https://www.politico.eu/article/ukraine-war-heats-up-energy-poverty-debate (last accessed 24 January 2023).

[3]L Chester, 'Conceptualising Energy Security And Making Explicit Its Polysemic Nature' (2010) 38 *Energy Policy* 887.

contribute to, secure supply at affordable prices.[4] In this approach, all resources—including energy and energy security—of all Member States are pooled by creating an area without internal border restrictions, so that those pooled resources can be utilized in the most cost-efficient way.[5] This approach implies that Member States are expected to share not only the security benefits of the internal market, but also the potential security risks of this increased interdependence. That is to say that Member States are expected to be dependent on each other for energy security. The prevalence of the internal market approach, and its energy security implications, were most recently addressed by the Court in 2021 in *Germany v Poland (OPAL)*, which established the principle of energy solidarity as a legally binding principle of EU energy law and thus further strengthened the value of the internal market in pursuing the EU's energy policy objectives.[6]

In EU free movement law, this line of internal market thinking finds legal expression in Articles 34 and 35 of the Treaty on the Functioning of the European Union ('TFEU'), which prohibit quantitative and qualitative restrictions on imports and exports and all measures having equivalent effect. However, modern societies' profound dependence on energy products and the resulting deep interconnection between energy and national security mean that security of energy supply must be guaranteed even if the internal market fails to achieve it. To cater for these kinds of situations, EU free movement law allows for exemption from the principle of free movement of goods but only when justified on grounds of Article 36 TFEU or on the basis of mandatory requirements established in the case law of the Court of Justice of the European Union (hereinafter the 'Court'). Article 36 TFEU provides that the rules on free movement of goods preclude prohibitions or restrictions on imports, exports or goods in transit unless justified on grounds of *public security*, among other things, if they do not 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. The concept of public security is politically charged and difficult to define. It has been pointed out that '[o]f all the grounds for exceptions from free movement, public security is most closely associated with what is traditionally understood as the core of national sovereignty, that is, the sphere of activity within which the State has primary responsibility to protect its territory and citizens'.[7]

Because of its long history in EU law and its current topicality in European politics, energy provides a powerful sectoral example of the evolution of the public security defence in EU free movement law. Since the 1960s, energy has been consistently treated as a product in the context of free movement of goods,[8] and a robust body of case law on energy and free movement has developed since. Most recently, the Court ruled on security of energy supply in the context of free movement of goods in *Hidroelectrica*—a case that went largely unnoticed in both internal market law scholarship and EU energy law scholarship.[9]

Against this background, this Article analyses the evolution of the public security defence in EU free movement law in the context of the energy sector and demonstrates its implications on the ongoing energy crisis in Europe. Taking the seminal 1984 *Campus Oil* case, which was the first to combine energy and public security, as the point of departure for its analysis, the Article focuses on the interplay between public security and energy security and shows two key changes in the case law of the Court. First, it demonstrates how the scope of public security defence in the energy sector

[4]See, for instance, Recital 2 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125.

[5]K Huhta, 'Too Important to Be Entrusted to Neighbours? The Dynamics of Security of Electricity Supply and Mutual Trust in EU Law' (2018) 43 *European Law Review* 920, p 933.

[6]*Germany v Poland*, C-848/19 P, EU:C:2021:598.

[7]P Koutrakos, 'Public Security Exceptions and EU Free Movement Law' in P Koutrakos, N Shuibhne and P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Bloomsbury, 2019), p 191.

[8]Established implicitly in *Costa v ENEL*, 6/64, EU:C:1964:66 and later confirmed in *Almelo*, C-393/92, EU:C:1994:171, paras 27–28. The Court has been consistent in this approach. See eg *Commission v Netherlands*, C-157/94, EU:C:1997:499; *Commission v France*, C-159/94, EU:C:1997:501; *Commission v Italy*, C-158/94, EU:C:1997:500; *Essent and Others*, C-105/12 to C-107/12, EU:C:2013:677.

[9]*Hidroelectrica*, C-648/18, EU:C:2020:723.

has gradually narrowed while the scope of the concept of energy security has broadened. Hints in this direction were given as early as 1990, when Koen Lenaerts, who was then a judge of the Court of First Instance, opined that '[t]here simply is no nucleus of sovereignty that the Member States can invoke, as such, against [the European Union]'.[10] Second, the Article shows how the interpretation of the public security defence has also developed to take into account the evolved social, technological, and legal contexts in the EU energy sector. Edward makes the persuasive point that while the wording of the rules on free movement has largely remained unchanged for more than half a century, 'they were written for a very different world'.[11] This change in the world to what it is today is well illustrated in the evolved interpretation of these cornerstone provisions of EU free movement law. Culminating in cases like *Hidroelectrica* in 2020 and *OPAL* in 2021, analysis of the relevant case law suggests that the Court interprets the exceptions from the principle of free movement in an increasingly strict manner, highlighting the primacy of internal market approaches to energy security. In other words, while the scope of the energy security concept has broadened because of social, technological, and legal changes in the energy sector, the Court's interpretation of public security to justify restrictions to free movement is increasingly narrow despite the societal dependence on energy and the ongoing geopolitical turmoil in Europe.

This Article is structured in the following way. Discussing energy in the context of free movement, Part II focuses on transformations in energy security approaches in EU law and policy, explaining the evolved social, technological and legal contexts in which the energy sector operates. Part III analyses early interpretations of the public security defence in EU free movement law, showing how it was first established and justified. Part IV explores the use of the public security defence in the twenty-first century, leading up to *Hidroelectrica* in 2020. Part V highlights the key changes that have taken place in the Court's interpretative approach and, on the basis of the analysed case law, elucidates how the public security defence is understood today. Finally, Part VI offers conclusions.

II. The Historical Development of Energy Security in the EU Internal Market

Technological development in the twentieth century and the resulting growth in energy demand have made ensuring energy security an important policy issue and a political priority in Europe.[12] However, the issue of what the concept of energy security is considered to include has evolved over time. In the early days of the EU, energy security revolved around issues such as access to fossil fuels, affordability of energy prices, geopolitics, and energy independence. While these issues are still unquestionably relevant, the scope of energy security has broadened to encompass new areas entirely.[13] First, the role of energy in the functioning of a modern society has progressively increased over time, which has broadened the range of issues that must be addressed under the energy security umbrella. Access to affordable energy is essential in order to meet very basic human needs, including clean water, cooking and nourishment, adequate housing and modern health care, telecommunications, banking, transportation, and contemporary agriculture.[14] Second, the low-carbon energy transition constitutes a fundamental technological and societal shift in the way in which energy is produced and consumed, which has important implications

[10]K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, p 220.

[11]D Edward, 'The Exceptions to the Four Freedoms: The Historical Context' in *Exceptions from EU Free Movement Law*, note 7 above, p 1.

[12]F Hedenus, C Azar, and D Johansson, 'Energy Security Policies in EU-25 – The Expected Cost of Oil Supply Disruptions' (2010) 38 *Energy Policy* 1241.

[13]K Huhta, 'Energy Security in the Energy Transition: A Legal Perspective' in G Wood et al (eds), *The Palgrave Handbook of Zero Carbon Energy Systems and Energy Transitions* (Palgrave, 2022).

[14]M Wewerinke-Singh, 'A Human Rights Approach to Energy: Realizing the Rights of Billions Within Ecological Limits' (2022) 31 *Review of European, Comparative and International European Law* 16, pp 18–19; S Tully, 'The Human Right to Access Electricity' (2006) 19 *The Electricity Journal* 30, p 34.

for energy security. Most significantly, fossil fuels are gradually being complemented and will eventually be replaced by renewable energy sources. This was certainly not the case in the early years of the EU. Even as late as in 2000, Advocate General Jacobs stated in his opinion in the well-known *PreussenElektra* case that 'wind as an energy source is not yet as important for the modern economy as petroleum products'.[15] The assessment of the role of wind energy to energy security in Europe two decades later would surely be dramatically different.

The increase in renewable energy sources in the overall energy mix makes energy systems less dependent on fossil fuels, but more dependent on other critical minerals (such as lithium and cobalt), which alters the geopolitical questions that emerge as a result. Furthermore, the variable nature of many renewable energy sources dictates that the new energy security solutions will have to include measures to ensure energy security even when the supply of energy is not as steady as is the case where fossil fuels are used. These system-level security issues are further complexified by the increasing globalization and interconnectedness of energy markets. This means that they are increasingly exposed to sudden and unpredictable shocks, such as pandemics or war, that shake energy security and the means by which it is pursued. The development of the concept and scope of energy security in response to these issues is also reflected in EU law and in the way in which energy security justifications are interpreted under the internal market rules.

The pursuit of energy security has a long tradition in EU law. In fact, the earliest secondary energy law instruments focused solely on energy security, dealing with the issue of minimum oil stocks to ensure energy security in a turbulent global oil market in the 1960s and 1970s.[16] They were adopted on the basis of Article 103 of the Treaty Establishing the European Economic Community ('EEC') (conjunctural policy), which allowed the Council to unanimously adopt legislation to address, among other things, difficulties that arise in the supply of certain products. While this provision has been repealed, it has several features in common with what is now Article 122 TFEU,[17] which allows the EU to adopt secondary legislation appropriate to the economic situation, particularly if severe difficulties arise in the supply of certain products, especially energy. It is, therefore, unsurprising that the legal instruments to safeguard energy security and minimum oil stocks adopted later, between 2004 and 2009, also used Article 122 TFEU as their legal basis.[18]

The first extensive sector-specific legal instruments were adopted in the 1990s[19] and relied entirely on (what is now) Article 114 TFEU for their legal basis. They were, accordingly, instruments for internal market harmonization,[20] and all gave a central role to the pursuit of energy security. Since the 1990s, the energy sector has been the object of increasing legislative measures in the form of the energy packages in 1996, 2003, 2009, and 2018–2019. All of these packages contain an increasing number of provisions that pursue, or at the very least have an impact on, energy security and all of them emphasize the role of the internal market in achieving these objectives.

While some of the energy-specific sectoral legislation adopted on the basis of Article 114 TFEU remains in force, the majority of the EU's energy security legislation now in force relies on Article 194 TFEU, the first paragraph of which reads:

[15]Opinion of AG Jacobs in *PreussenElektra*, C-379/98, EU:C:2000:585, para 209.

[16]The earliest versions of these instruments were Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products [1968] OJ L308/14 (repealed); and Council Directive 73/238/EEC of 24 July 1973 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products [1973] OJ L228/1 (repealed).

[17]P Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th ed (Hart, 2010), pp. 377–78.

[18]The latest of these, which is still in force, is Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products [2009] OJ L265/9.

[19]Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJL 27/20 (repealed); 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 [1998] OJ L204/1 (repealed).

[20]On the functioning of the provision, see I Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market* (Edward Elgar, 2013).

> 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.

A careful reading of the provision shows that the internal market plays a dual role in EU energy policy. First, it lays down the assumption that EU energy policy should be pursued '[i]n the context of the establishment and functioning of the internal market and … in a spirit of solidarity'. Second, it establishes the functioning of the energy market as an objective of EU energy policy. This is to say that the internal market is, in fact, not only an objective of EU energy policy but also the instrument through which EU energy policy is pursued. The provision gives written form to the underlying premise that the internal market is, indeed, central to achieving the EU's energy policy objectives.

Adopted in 2009, this constitutional backbone of EU energy law now also explicitly specifies security of supply as an objective of EU policy for the first time in Treaty history. However, for a long time, energy and energy security were too politically sensitive to be regulated through extensive secondary rules.[21] In the context of this political sensitivity, it was Treaty law that was first applied to the energy sector in 1964, implicitly confirming that energy was indeed considered a product in the context of free movement of goods.[22] Since then, a considerable number of cases concerning the nexus between free movement and energy have come before the Court. While much of this case law focuses on energy as a product, there is also a clearly discernible body of case law that revolves around the free movement of capital in the energy sector.[23] Similarly to the free movement of goods, the rules on free movement of capital prohibit all restrictions on the movement of capital between Member States and between Member States and third countries unless such restrictions can be justified on grounds of public security, among other interests.[24]

Some activities in the energy sector, such as providing secure energy networks and the provision of sufficient generation capacity, could be considered as services rather than goods.[25] However, the Court has consistently held all elements of energy activities to be products rather than services in the context of free movement law. In the absence of case law that would change this approach, it is therefore a logical approach to treat energy under the rules on free movement of goods.[26] It is in this context of the history of energy and free movement law that the following sections zoom in on the public security defence in the Court's case law.

[21]K Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' (2021) 4 *International & Comparative Law Quarterly* 991.

[22]*Costa v ENEL*, note 8 above.

[23]See golden shares cases *Commission v Portugal*, C-367/98; *Commission v France*, C-483/99, EU:C:2002:327; *Commission v Belgium*, C-503/99, EU:C:2002:328; *Commission v Spain*, C-463/00, EU:C:2003:272; *Commission v Italy*, C-174/04, EU:C:2005:350; *Commission v Spain*, C-274/06, C:2008:86; and *Commission v Italy*, C-326/07, EU:C:2009:193.

[24]Arts 63, 65 TFEU.

[25]See analogously, the distinction between goods and services in the World Trade Organization ('WTO') Rules: WTO, 'Energy Services: Background Note by the Secretariat', S/C/W/52, 9 September 1998; and the distinction between goods and services in television broadcasting in *Sacchi*, C-155/73, EU:C:1974:40, paras 6–7, and *Procureur du Roi v Debauve*, C-52/79, EU:C:1980:83.

[26]For a different view, see F Roques, C Verhaeghe, and G Dezobry, 'Cross-Border Participation in Capacity Mechanisms: Legal and Economic Issues' in L Hancher, A de Hauteclocque, and F Salerno (eds), *State Aid and the Energy Sector* (Hart Publishing, 2018), p 184.

III. Early Interpretations of the Public Security Defence

A. Campus Oil

The seminal *Campus Oil* case was the first to combine free movement of goods, energy, and the public security defence.[27] This landmark ruling from half a century ago continues to be the Court's main point of reference when discussing energy security and justifying restrictions on free movement, and it is a well-established point of reference in both energy law scholarship and general internal market law scholarship when discussing justifications for trade restrictions in EU law.[28]

The *Campus Oil* case concerned a measure enacted by the Irish government to safeguard energy security in Ireland in the 1980s. To meet a significant proportion of Ireland's oil demand, the Irish government had set up a state-owned oil company, which purchased the only operational oil refinery in the early 1980s to prevent it from closing down.[29] Had Whitegate been allowed to close down, Ireland would have become entirely dependent on external supplies of oil. To ensure the continuation of operations at Whitegate, the Irish government had enacted a purchase obligation for all petroleum importers, requiring them to purchase a proportion of their requirements from the Whitegate refinery at prices that were determined by the Irish government and typically higher than market-based equivalents.[30]

The Irish measure was brought before a national court by petroleum traders on grounds of an alleged violation of EU law. The case was referred to the Court to ascertain whether the purchase obligation enacted by the Irish government was contrary to (what is now) Article 34 TFEU and, if so, whether it could be justified on grounds of public security established in (what is now) Article 36 TFEU. The Court gave an affirmative answer to both questions. However, it is only the latter affirmation that has given the ruling its reputation and its continued relevance in the sphere of both energy and free movement law.

Most significantly, the Court established that energy security could, indeed, constitute a legitimate reason for justifying an exemption from the free movement of goods. It famously held that

> petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect.[31]

However, the Court set out three key criteria by which to assess whether a measure to protect energy security was consistent with the demands of Article 36 TFEU. First, it held that recourse to Article 36 is no longer justified if EU law 'already provides for the necessary measures to ensure protection of the interests set out in that article'.[32] That is to say that EU-level harmonization to ensure energy security would have prevented Ireland from successfully invoking the public security defence.

Second, the Court confirmed that Article 36 TFEU can only apply to 'matters of a non-economic nature'.[33] In other words, Article 36 TFEU cannot allow Member States to derogate from Treaty rules 'by pleading the economic difficulties'[34] caused by the removal of intra-EU trade restrictions.

[27] *Campus Oil*, 72/83, EU:C:1984:256.

[28] See Koutrakos, note 7 above; L Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford University Press, 2009), pp 463–65.

[29] *Campus Oil*, note 27 above, paras 3–5.

[30] Ibid, para 2.

[31] Ibid, para 34.

[32] Ibid, para 27.

[33] Ibid, para 35.

[34] Ibid.

Third, the Court conducted a proportionality assessment. It confirmed its earlier approach that, as Article 36 TFEU constitutes an exception to a fundamental principle of the Treaty, it must be given a strict interpretation, which must not go further than is necessary to protect public security.[35]

Curiously, the Court considered all these requirements to be met by the Irish measure. With regard to harmonization, it held that while the Community rules in force at the time did give energy-dependent countries like Ireland 'certain guarantees' of energy security, those guarantees did not constitute an 'unconditional assurance' of energy security.[36] It explained that, even though the EU precautions reduced the risk of Member States being left without oil supplies, 'there would none the less still be real danger in the event of a crisis'.[37] In its assessment of Article 36 TFEU and matters of a non-economic nature, the Court conceded that the Irish measure transcended 'purely economic considerations' because of 'the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence'.[38] Finally, it considered that the Irish measure did not restrict trade in the internal market more than absolutely necessary.[39]

The Court's conclusion in *Campus Oil* can be and has been rightfully criticized, as it tolerated the justification of a clearly protectionist measure under Treaty rules.[40] It is nevertheless consistently referenced in case law on security of supply and free movement under EU law.[41] However, the Court seems to refer to *Campus Oil* primarily to distinguish the case at hand from it and to indicate why the criteria established in *Campus Oil* are not satisfied.[42] This approach has led inevitably to the Court narrowing of the scope of the public security defence as a justification for restricting free movement in the interest of ensuring security of supply. In fact, the Court already took a step back from its interpretation in *Campus Oil* in the 1990s in two cases concerning energy security in Greece.

B. The Greek Cases

Shortly after *Campus Oil*, the application of the public security defence to energy security was again tested, this time in Greece, which, similarly to Ireland, was dependent on imported oil.[43] In 1988, the Commission brought infringement proceedings before the Court on grounds of alleged violation of the rules on free movement of goods.

Prior to the proceedings, Greece had adopted national measures that partially maintained exclusive importation and marketing rights in respect of petroleum products in Greece. The government had also adopted certain measures concerning importation, exportation and marketing procedures, which among other things, made trade in petroleum products conditional upon approval being granted by the Greek authorities. Finally, the government had adopted a system of maximum consumer prices which restricted the importation and exportation of such products from or to other Member States.[44]

Clearly inspired by the Court's conclusion in *Campus Oil*, Greece invoked the public security defence and argued that its measures were justified on grounds of its 'special geopolitical

[35]Ibid, para 37.
[36]Ibid, para 31.
[37]Ibid, para 30.
[38]Ibid, para 35.
[39]Ibid, para 37.
[40]Opinion of AG Jacobs in *PreussenElektra*, note 15 above, para 209. See also K Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2012), p 275.
[41]For example, *Commission v Greece*, C-398/98, EU:C:2001:565, para 29; *Commission v Belgium*, note 23 above, paras 27, 46; *Commission v Greece*, C-347/88, EU:C:1992:525, paras 47–50; *Essent and Others*, note 8 above, para 59; *Commission v Italy*, C-174/04, note 23 above.
[42]For example, *Commission v Greece*, C-347/88, note 41 above, paras 47–50; *Commission v Spain*, C-463/00, note 23 above; *Commission v France*, note 23 above; *Commission v Italy*, C-326/07, note 23 above; and, in contrast, *Commission v Belgium*, note 41 above.
[43]*Commission v Greece*, C-347/88, note 41 above.
[44]Ibid, para 1.

situation'.[45] The Court conceded that, in line with its reasoning in *Campus Oil*, 'a Member State which is totally or almost totally dependent on imports for its supplies of petroleum products may rely on grounds of public security'[46] and that 'the aim of ensuring a minimum supply of petroleum products at all times is capable of constituting an objective covered by the concept of public security within the meaning of Article 36'.[47] However, without much focus on Greece's import dependency or the importance of energy security, the Court took the view that Greece had failed to demonstrate that there would be a threat to energy security in the absence of the measures it had adopted and that, in any case, those measures went further than necessary to achieve their objective.[48] The Court concluded that, as this was the case, the Greek measures did not comply with the requirement of proportionality under Article 36 TFEU.[49]

A decade later, another Greek case came before the Court.[50] Similarly to the first Greek case, the Commission brought an action against Greece for infringement of the free movement rules. Greek law in force at the time required petroleum marketing companies to hold minimum stocks of petroleum products, which had to be obtained from within Greece. These companies were entitled to transfer the supply obligation to Greek refineries from which they had bought products during the previous calendar year.[51] Such transfers could only be made to refineries established in Greece and, as a result, the measure was considered contrary to Article 34 TFEU.

The Court again confirmed its approach in *Campus Oil* and highlighted that the maintenance of a stock of petroleum products on national territory that allowed the continuity of supplies to be guaranteed constitutes a public security objective within the meaning of Article 36.[52] However, it did not consider the Greek measures to be justified on grounds of public security. First, it recalled that Article 36 TFEU could never be used to justify measures that exceeded the limits of what was appropriate and necessary to achieve the desired objective and that energy security in Greece could have been achieved by less restrictive measures.[53] Second, it went back to its reasoning in *Campus Oil*, and reiterated that purely economic arguments can never be used to justify quantitative restrictions.[54]

The Greek cases demonstrate the Court's keenness to narrow down its interpretation of the public security defence less than a decade after forming its opinion in *Campus Oil*. This trend has continued in the twenty-first century cases that are the focus of the next section.

IV. The Public Security Defence in the Twenty-First Century

A. The Golden Share Cases

The first twenty-first century case cluster on the public security defence in the energy sector did not focus on free movement of goods, but free movement of capital.[55] This line of cases concerned national legislation in various Member States that empowered governments to intervene in the decisions of companies that had been recently privatized and which operated in strategically important

[45]Ibid, para 47.
[46]*Campus Oil*, note 27 above, para 51; *Commission v Greece*, C-347/88, note 41 above, para 48.
[47]*Commission v Greece*, C-347/88, note 41 above, para 58.
[48]Ibid, paras 49–50, 60.
[49]In literature, see A Johnston and G Block, *EU Energy Law* (Oxford University Press, 2012), p 241.
[50]*Commission v Greece*, C-398/98, note 41 above.
[51]Ibid, para 6.
[52]Ibid, para 29.
[53]Ibid, paras 28, 30.
[54]Ibid, para 30.
[55]On energy specifically, see *Commission v France*, note 23 above; *Commission v Belgium*, note 41 above; *Commission v Italy*, C-174/04, note 23 above; *Commission v Spain*, C-274/06, note 23 above; *Commission v Italy*, C-326/07, note 23 above; *Commission v Portugal*, C-543/08, EU:C:2010:669; and *Commission v Portugal*, C-212/09, EU:C:2011:717. On golden shares in other strategically important sectors, see *Commission v Portugal*, note 23 above; *Commission v Spain*, C-463/00, note 23 above; *Commission v United Kingdom*, C-98/01, EU:C:2003:273; *Commission v the Netherlands*, C-283/04, EU:C:2006:608; and *Commission v Germany*, C-112/05, EU:C:2007:623.

sectors, such as postal services, telecommunications, and, most importantly from the point of view of this analysis, energy.[56] These national measures allowed governments to impact ownership structures and organizational and leadership models and to block certain kinds of unwanted decisions in these companies through 'golden shares', which carried with them special rights not attached to other shares of the company. In all cases, the Court held these measures to be contrary to free movement of capital. In a number of these cases, it also assessed their justifiability on the basis of public security.[57] However, it held that the restrictive measures were justified on grounds of public security in only one of the cases.[58]

In *Commission v Belgium*, the Commission brought an action for a declaration that Belgium had failed to comply with its obligations under the rules on free movement of capital.[59] Belgium had adopted legislation, vesting in the state a golden share in a Belgian gas company called Distrigaz that allowed the state to be notified of certain company decisions and to oppose these decisions as well as to appoint representatives to the board of directors.

Belgium did not deny that this restricted the free movement of capital but argued that it was justified by reference to public security to ensure security of energy supply and that the measure adopted was designed to be proportionate and adequate in relation to the objective pursued. As with the other golden share cases, the Court considered the measures to be contrary to Article 63 TFEU but was persuaded by the arguments relating to justification. First, it confirmed that, in line with *Campus Oil*, safeguarding energy supplies in the event of a crisis constitutes a legitimate public security interest.[60] Second, it held that the Belgian measure complied with the principle of proportionality, as it did not make Distrigaz's decision making conditional upon prior approval, but was rather based on ex post opposition.[61] The government was also obliged to adhere to strict time limits when expressing opposition, which the Court considered to contribute to the proportionality of the measure.[62] Furthermore, the government was entitled to intervene only in certain types of predefined and strategic decisions the management of which had security implications.[63] Finally, governmental intervention was only allowed if there was a threat that the energy policy objectives could be compromised.[64] On these grounds, the Court considered the Belgian measures to be capable of guaranteeing, on the basis of objective criteria subject to judicial review, security of energy supply.[65]

However, the Court also emphasized that, as a derogation from the fundamental principle of free movement of capital, the requirements of public security must be interpreted strictly.[66] In line with its earlier judgments in *Rutili* and *Église de scientologie*, it highlighted that because of this exceptional role of the public security defence, it can be successfully invoked only if there is 'a genuine and sufficiently serious threat to a fundamental interest of society'.[67]

The Court was not equally convinced of the public security defence utilized in the other golden share cases. In several instances, it confirmed that safeguarding energy security was a legitimate

[56]H Bjørnebye, *Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production* (University of Oslo, PhD thesis 2009), p 78.

[57]*Commission v Portugal*, note 23 above; *Commission v Belgium*, note 41 above; *Commission v Spain*, C-463/00, note 23 above; *Commission v Spain*, C-274/06, note 23 above; *Commission v Italy*, C-326/07, note 23 above.

[58]*Commission v Belgium*, note 41 above.

[59]Ibid.

[60]Ibid, para 46.

[61]Ibid, para 49.

[62]Ibid.

[63]Ibid, para 50.

[64]Ibid, para 51.

[65]Ibid, para 52.

[66]Ibid, para 47.

[67]*Commission v Belgium*, note 41 above, para 47; *Église de scientologie*, C-54/99, EU:C:2000:124, para 17; *Rutili v Minister for the Interior*, 36/75, EU:C:1975:137, para 28.

public security interest capable of justifying restrictions to the free movement of capital, but found the measures adopted by Member States to go further than necessary to achieve the pursued objective.[68]

B. Hidroelectrica

The public security defence was most recently invoked by a Member State and assessed by the Court in *Hidroelectrica*, a case which bears the name of a vertically integrated electricity company of which the Romanian State is the majority shareholder.[69] Hidroelectrica had sold energy directly to the Hungarian energy market. As a result of these transactions, an administrative fine had been imposed upon Hidroelectrica for breaching Romanian law, which was interpreted to require that all available electricity must be offered for sale in a transparent and non-discriminatory manner on the competitive electricity market in Romania.[70] While the wording of Romanian law did not explicitly prohibit the sale of electricity directly to another Member State, the National Energy Authority's established interpretation of Romanian law did.[71]

Hidroelectrica had brought an action before the Romanian Court of First Instance to seek annulment of the administrative penalty imposed upon it. It argued that the interpretation that required electricity producers to conduct sales exclusively through a centralized Romanian electricity market operator constituted a restriction within the meaning of Article 35 TFEU and was not justified in the light of Article 36 TFEU.[72]

The Romanian Court discharged Hidroelectrica from the payment of the fine and questioned the relevant National Regulatory Authority's interpretation of Romanian law. In response, the Authority brought an appeal before the Regional Court, which then made a preliminary reference to the Court. In essence, the Regional Court asked the Court whether the National Regulatory Authority's interpretation of Romanian law was contrary to the rules on free movement of goods and, if so, whether the interpretation could nevertheless be justified on grounds of public security.[73]

The Court assessed the Romanian measure and concluded that it constituted a measure having equivalent effect to a quantitative restriction within the meaning of Article 35 TFEU. It held that preventing bilateral trading outside the Romanian centralized electricity market implied a prohibition on direct exports and, therefore, fell within the scope of application of Article 35 TFEU. The fact that the Romanian government was able to show that electricity had been exported despite the legislation in force was not enough to convince the Court otherwise.[74] The Court also did not consider the measure to be justifiable under Article 36 TFEU. The Court's argumentation in the case shows how much has changed since the 1980s and how the public security defence has not only narrowed in scope but also come to encompass very different social, technological, and legal contexts than those that prevailed in the 1980s. The next Part focuses on exploring this interpretational evolution of the public security defence to what it is today.

[68] *Commission v Portugal*, C-212/09, note 55 above; *Commission v Portugal*, C-543/08, note 55 above; *Commission v Italy*, C-326/07, note 23 above; *Commission v France*, note 23 above.

[69] *Hidroelectrica*, note 9 above.

[70] Ibid, para 11.

[71] EU law requires that Member States' National Regulatory Authorities in the energy sector be independent and gives them broad discretionary powers in interpreting and applying EU energy law. In literature, see K Huhta, 'C-718/18 *Commission v. Germany*: Critical Reflections on the Independence of National Regulatory Authorities in EU Energy Law' (2021) 30 *European Energy and Environmental Law Review* 255.

[72] *Hidroelectrica*, note 9 above, para 12.

[73] Ibid, paras 11–18.

[74] Ibid, paras 24–27.

V. Exploring the Status Quo of the Public Security Defence

A. Justifying Restrictions on Free Movement of Goods on Grounds of Energy Security

Arguably much has changed in the EU and in EU law since the seminal *Campus Oil* ruling. The reasoning in *Campus Oil* suggested that 'once public security touches upon the most vital interests of the State, and therefore gives rise to the core of the functions which a State carries out in order to protect its citizens, there is more leeway for autonomous action'.[75] In the light of the case law post *Campus Oil* this conclusion no longer holds true. The *telos* of Article 36 TFEU is not to reserve certain matters to the exclusive jurisdiction of Member States but to allow derogation from the principle of free movement to the extent that this is necessary in order to protect the interests mentioned in Article 36 TFEU.[76]

The evolved social, technological, and legal contexts in the EU energy sector discussed above in Part II have inevitable implications for the way in which the energy security argument plays out within the public security defence. Nevertheless, *Hidroelectrica* once again confirms that safeguarding secure energy supply can constitute a public security ground within the meaning of Article 36 TFEU.[77] According to Advocate General Campos Sánchez-Bordona in *Hidroelectrica*, the role of energy security in this context is further strengthened by the fact that Article 194 TFEU states it as an objective of EU energy policy.[78]

While it is clear throughout the relevant case law on the public security defence that energy security can still constitute a legitimate public security interest, *Hidroelectrica* demonstrates that its scope is narrow. This is to say that while the scope of the energy security concept has broadened because of social, technological, and legal changes in the energy sector, the scope of the public security defence has narrowed. This development is in keeping with the dual role of the internal market in the energy sector established through Article 194(1) TFEU: the markets, not states, should be the primary driver of energy security, leaving states to intervene in their functioning only as a failsafe or last resort in the event the markets fail to deliver an adequate level of security.

This line of thinking is well reflected in the Court's creation and interpretation of criteria to limit the unnecessary widening of the public security defence under Article 36 TFEU. The first of these criteria is proportionality, which was yet again the main reason that Romania failed to convince the Court of the existence of a legitimate public security interest in *Hidroelectrica*.

The Court took the view that the Romanian measure, which was interpreted to require national electricity producers to offer for sale all the electricity available to them on the platforms managed by the only operator designated for national electricity market trading services, did not seem inappropriate to ensure security of supply from the outset.[79] This was particularly the case because it was intended to ensure that the available electricity was directed more towards internal consumption.[80] However, the Court pointed out that, while electricity producers were under this obligation, electricity traders were not. Traders were able to buy electricity on the wholesale market and subsequently export it to other Member States without restrictions similar to those imposed on electricity producers.[81] The Court concluded that, because of this inconsistency and the unsystematic application of the restriction, the proportionality requirement could not be met.[82]

[75] See Koutrakos, note 7 above, p 193.

[76] *Simmenthal*, C-106/77, EU:C:1978:49, para 14; *Commission v Germany*, 153/78, EU:C:1979:194, para 5; *Campus Oil*, note 27 above, para 32.

[77] *Hidroelectrica*, note 9 above, para 36.

[78] Opinion of AG Campos Sánchez-Bordona in *Hidroelectrica*, note 9 above, para 58.

[79] *Hidroelectrica*, note 9 above, para 37.

[80] Ibid, para 38.

[81] Ibid, para 40.

[82] *Hidroelectrica*, note 9 above, paras 40, 46. See also *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, para 37.

In addition to proportionality, the Court has consistently held that the public security defence is limited by the existing level of harmonization and the prohibition on using it to pursue purely economic considerations. Finally, the public security defence is further limited by recent interpretations of the principle of solidarity in EU energy law. The interpretation of these restrictive criteria in *Hidroelectrica* is explored in the following subsections.

B. Increasing Harmonization in the Energy Sector

It is settled case law that when a matter is exhaustively harmonized, it must be assessed in the light of the harmonizing provisions and not under primary law.[83] That is to say that if a matter is extensively harmonized, recourse to Article 36 TFEU is no longer possible.[84] The harmonizing legislation is expected to sufficiently protect the interests established in Article 36 TFEU, including public security, and to remove the need to invoke the general justification grounds.[85]

As early as *Campus Oil* in 1984, it was argued that existing Community harmonization was sufficient to remove the need to invoke the public security defence. The Court agreed that there was indeed existing harmonization on energy security that provided some guarantees for countries whose supplies of petroleum products depended totally or almost totally on imports.[86] Nevertheless, it did not consider the matter to be *exhaustively* harmonized. It held that those harmonizing measures did not provide *unconditional assurance* that supplies would be maintained at a level that would ensure that Ireland's minimum energy needs would be met.[87]

The EU legal framework for energy generally and energy security specifically has increased dramatically since *Campus Oil*. While the legal framework for energy security of the 1980s focused on the availability of fossil fuels,[88] the existing legal framework for energy security in the EU has broadened in tandem with the broadened concept of energy security. The existing legislation covers both short- and long-term energy security issues. Long-term energy security is addressed by increasing energy efficiency, pursuing ambitious climate goals, diversifying the energy mix and ensuring sufficient generation of electricity within the EU.[89] In the short-term, the legal framework includes rules that emphasize the prevention, preparation for and the management of energy crises.[90]

Most importantly from the point of view of the free movement and the internal market, the existing legislation highlights the role and importance of solidarity in approaching energy security.[91] In fact, it makes abundant reference to the internal market and the four freedoms in security contexts.

[83]See eg *Ålands Vindkraft AB v Energimyndigheten*, C-573/12, EU:C:2014:2037, para 57; *VIPA*, C-222/18, EU:C:2019:751, para 52; *Hidroelectrica*, note 9 above, para 25.

[84]*Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42; *Keck Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, para 15; *Ratti*, 148/78, EU:C:1979:110; *Denkavit*, 251/78, EU:C:1979:252; *Oberkreisdirektor des Kreises Borken and Others v Moormann*, C-190/87, EU:C:1988:424; *Commission v Germany*, C-102/96, EU:C:1998:529; *Toolex*, C-473/98, EU:C:2000:379, para 25; *Hedley Lomas*, C-5/94, EU:C:1996:205, para 18; *Ålands Vindkraft AB v Energimyndigheten*, note 83 above, para 58; and in literature P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed (Oxford University Press, 2015), pp 703–04; N Boeger, 'Minimum Harmonisation, Free Movement and Proportionality' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012).

[85]*Carlo Tedeschi*, 5/77, EU:C:1977:144, paras 34–35; *Campus Oil*, note 27 above, para 27.

[86]*Campus Oil*, note 27 above, para 32.

[87]Ibid, para 31.

[88]See the original Minimum Oil Stocks Directives 68/414/EEC and Directive 73/238/EEC, note 16 above.

[89]COM(2014) 330 final, *European Energy Security Strategy*; COM(2022) 230 final, *REPowerEU Plan*, note 1 above.

[90]Art 1 of Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, OJ 2019, L158/1.

[91]Regulation (EU) 2019/941, note 90 above; Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 [2017] OJ L280/1. Most recently: Council Regulation (EU) 2022/1854, note 1 above; Council Regulation (EU) 2022/1369, note 1 above; Council Regulation (EU) 2022/2576, note 1 above; Council Regulation (EU) 2022/2577, note 1 above; and Council Regulation (EU) 2022/2578, note 1 above.

For example, the most recent Electricity Market Directive states that the four freedoms 'are achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers'.[92] It also reiterates the public security interest in the context of third country certification by stating that nothing in those rules 'shall affect the right of Member States to exercise, in accordance with Union law, national legal controls to protect legitimate public security interests'.[93] Similar examples can be found elsewhere in secondary law. For instance, the recitals to Regulation 2015/1222 state that '[s]ecurity of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in electricity'.[94] If EU energy law is viewed as a whole rather than specifically in a security context, the volume and detail of harmonizing measures is even more striking.[95]

In *Hidroelectrica*, the Romanian government attempted to lean on this increased level of harmonization in the energy sector to demonstrate that Article 35 TFEU no longer applied. In particular, it invoked Article 5 of Regulation 2015/1222, which explicitly allows the Member States to designate a single operator for national electricity market trading services.[96] It argued that, because of the harmonizing rules enshrined in Regulation 2015/1222, the case should be assessed in the light of those provisions rather than in the light of primary law.[97] The Court found this an easy argument to dismiss, as the events on which the main proceedings focused fell outside the temporal scope of Regulation 2015/1222.[98] Furthermore, the Court pointed out that the Electricity Market Directive in force at the time[99] did not fully harmonize that market and did not set out specific rules for electricity trading.[100] It concluded that Article 35 TFEU was applicable, and so too was Article 36 TFEU, in principle.

This analysis of *Hidroelectrica* suggests that, in relation to assessing the exhaustiveness of harmonizing legislation, the line of reasoning established in *Campus Oil* still holds. In fact, it seems that the threshold for finding exhaustive harmonization is quite high. It is questionable whether any legal framework could genuinely provide *unconditional* assurances in respect of such a multidimensional and complex objective as security of supply in a market-based setting.[101] The prevailing EU legal approach does not require states to unilaterally guarantee the supply of energy during all hours of the year but expects the balance between supply and demand to incentivize a level of security that final consumers are willing to pay for. The cost of guaranteeing an absolutely reliable energy system within which no supply disruptions could take place would be absurdly high. In other words, the market-based approach to energy security is not expected *unconditionally* to guarantee security of supply but only to guarantee the level of security of supply for which the demand side, ie the industry and consumers, is prepared to pay. In fact, security of supply is very much *conditional* on the market price of energy and the corresponding economic incentives. In this market-based setting, the level of harmonization for energy security should be extremely high for it to pass the unconditionality test.

[92]Directive (EU) 2019/944, note 4 above, Rec 11.

[93]Ibid, Art 53(9).

[94]Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management [2015] OJ L197/24.

[95]See Table 1 in K Huhta, 'The Scope of State Sovereignty under Art. 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' (2021) 4 *International Comparative Law Quarterly* 991 (which lays out all the EU energy legislation from 1960 to 2020).

[96]Commission Regulation (EU) 2015/1222, note 94 above.

[97]*Hidroelectrica*, note 9 above, para 24.

[98]Ibid, para 26.

[99]Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55 (repealed).

[100]*Hidroelectrica*, note 9 above, para 27.

[101]See Bjørnebye, note 56 above, p 70.

C. Affordability of Energy as a 'Purely Economic Consideration'

In *Campus Oil*, and in many later cases, the Court confirmed that Article 36 TFEU can only apply to 'matters of a non-economic nature'.[102] In terms of energy security, this has meant that the public security defence cannot be successfully invoked to restrict free movement of goods to safeguard the affordability element of energy security. This is the case even if the high price of energy aggravated the socio-economic difficulties experienced by low-income and vulnerable households.

This approach was again confirmed in *Hidroelectrica*, in which the Court held that

> (s)ecuring the supply of electricity does not mean securing the supply of electricity at the best price. The purely economic and commercial considerations underlying the national legislation at issue in the main proceedings are not grounds of public security within the meaning of Article 36 TFEU, or requirements relating to the public interest which make it possible to justify quantitative restrictions on exports or measures having equivalent effect. If such considerations were able to justify a prohibition on direct export of electricity, the very principle of the internal market would be undermined.[103]

Here, the Court's argumentation seems essentially to confirm that while the availability of energy can constitute a legitimate public security interest, the affordability of energy cannot. On this issue, the Court was convinced by the views of Advocate General Campos Sánchez-Bordona, who considered the interpretation of Romanian law to prevent the increase in energy prices 'inherent in the need to import electricity'.[104] The Advocate General also drew a distinction between trade restrictions on grounds of public security 'in emergencies caused by exceptional circumstances', which could very well be justified, and restricting trade 'systematically, for no other purpose than to prevent the market from operating freely and obtain a better price for domestic consumers', which clearly went beyond legitimately defensible grounds.[105] The Advocate General was also convinced by Hidroelectrica's argument in which it did not dispute that it should comply with statutory requirements ensuring a minimum supply of energy for national consumption, but contended that it should also be allowed to export any excess electricity freely through means other than the centralized Romanian electricity market.[106] Similarly to the Greek cases, the aim of ensuring a minimum supply of energy could have been justifiable here, but measures that aim to achieve more than the minimum go beyond the proportionality requirement. Echoing the views of Advocate General Campos Sánchez-Bordona, the Court confirmed that if such 'purely economic or commercial considerations' were allowed to justify restrictions on intra-EU trade, the very idea of the internal market would be lost. This fits well with the fundamental assumption in EU energy law that the internal market is expected to achieve, or at least positively contribute to the uninterrupted availability of affordable energy.[107]

D. The Relevance of the Energy Solidarity Principle

When functioning perfectly and without market distortions, the internal market approach in the energy sector is assumed to produce energy where the cost of doing so is lowest and to give rise to transactions in which the price of and demand for that energy is the highest. This approach implies that Member States are expected to be *dependent* on other countries to supply energy

[102] *Campus Oil*, note 27 above, para 35.
[103] *Hidroelectrica*, note 9 above, para 43.
[104] Opinion of AG Sánchez-Bordona in *Hidroelectrica*, note 9 above, para 74.
[105] Ibid, para 75.
[106] Ibid, para 76.
[107] K Huhta, *Capacity Mechanisms in EU Energy Law: Ensuring Security of Supply in the Energy Transition* (Kluwer Law International, 2019), pp 131–34.

when needed.[108] Sharing the benefits and the cost-efficiencies of this increased interdependence is uncomplicated, but increased interdependence and interconnectedness also means that risks materializing in one Member State may be eventually borne by neighbouring Member States too. Sharing this effect of interdependence in the energy sector is a politically sensitive issue of national security. Member States are not keen to surrender control in respect of energy and leave it to be governed at EU level. This sensitivity has most recently been echoed in European energy policy discussions after the Russian invasion of Ukraine. The rapid phaseout of imported Russian gas has increased prices everywhere in Europe, and caused energy policy decisions made at national level to impact upon the price and availability of energy in neighbouring Member States. For example, Norway has already decided to limit electricity exports to Europe to safeguard its national energy security interests in the wake of expected energy shortages in winter 2022.[109]

Article 194(1) TFEU addresses the challenge of sharing the security risks in the energy sector with the principle of solidarity, which was recently confirmed to constitute a legally binding principle of EU energy law in *Germany v Poland (OPAL)*.[110] The case in question concerned the OPAL pipeline, which is an onshore component of Nord Stream 1, which transports Russian gas to Europe. The origins of the dispute date from 2016 when the Commission decided to grant Gazprom, the Russian gas monopoly, the right to use a majority of the pipeline's capacity. Poland contested the Commission's decision on the grounds that Gazprom's virtually exclusive right to use the pipeline's transmission capacity threatened its energy security.[111] Poland argued that the decision should be annulled on the basis of solidarity as enshrined in Article 194(1) TFEU. The General Court ruled in favour of Poland. Germany intervened in the proceedings by bringing an appeal in respect of the case before the Court, arguing that energy solidarity had no legally binding role in EU energy law. The Court came to the opposite conclusion in 2021.[112]

Both Advocate General Campos Sánchez-Bordona and the Court emphasized the importance of energy solidarity both for the internal market and to ensure achievement of the EU's energy security policy objective. Although criticized in EU energy law scholarship,[113] the case underlines the internal market approach to energy security and the interdependence it requires. In respect of the application of the public security defence, this solidifies the fact that importing and exporting energy—and sharing the benefits and the risks of these shared resources—is 'a fundamental element in ensuring the supply both in each Member State and in the European Union as a whole'.[114]

VI. Conclusions

This Article set out to analyse the evolution of the public security defence in free movement law in the context of the energy sector. It first explained the dramatic social, technological, and legal changes that have taken place in the EU energy sector over the last half century. This examination showed how the internal market has been gradually structured to be at the very centre of EU energy

[108]See Huhta, note 5 above.

[109]L Paulsson and T Treloar, 'Norway Moves to Limit Power Exports in Blow to Europe' (*Bloomberg*, 8 August 2022) https://www.bloomberg.com/news/articles/2022-08-08/norway-must-follow-eu-rules-if-cutting-power-exports-lobby-says (last accessed 24 January 2023).

[110]*Germany v Poland*, note 6 above. For further discussion of the case in the internal market context, see P Oliver and K Huhta, 'Free Movement of Goods in the Labyrinth of Energy Policy and Capacity Mechanisms' in L Hancher et al (eds), *Capacity Mechanisms in the EU Energy Market* (Oxford University Press, 2022).

[111]*Poland v Commission*, T-883/16, EU:T:2019:567.

[112]*Germany v Poland*, note 6 above.

[113]A Boute, 'The Principle of Solidarity and the Geopolitics of Energy: *Poland v Commission (OPAL Pipeline)*' (2020) 57 *Common Market Law Review* 889; K Talus, 'The Interpretation of the Principle of Energy Solidarity: A Critical Comment on the Opinion of the Advocate General in *OPAL*' (*Energy Insight 89, Oxford Institute for Energy Studies*, April 2021) https://www.oxfordenergy.org/wpcms/wp-content/uploads/2021/04/Insight-89-The-interpretation-of-the-principle-of-energy-solidarity-.pdf (last accessed 24 January 2023).

[114]Opinion of AG Sánchez-Bordona in *Hidroelectrica*, note 9 above, para 81.

policy both constitutionally and sectorally but also how sectoral legislation has increased and gradually complexified over the years. This complexity was well described in *Hidroelectrica* by the Advocate General, who openly pointed out that he was 'afraid that it proved impossible to gain a complete picture of the characteristics of the Romanian electricity market'.[115]

Taking the well-known and frequently cited *Campus Oil* case as the starting point of the analysis, the Article traced the judicial development of the public security defence from 1984 to 2021. This showed how, following cases like *Hidroelectrica* in 2020 and *OPAL* in 2021, the scope of public security defence in the energy sector has gradually not only narrowed in scope but also developed to take into account the evolved social, technological, and legal contexts in the EU energy sector. In line with earlier and well-established interpretations of EU law, this process of narrowing is entirely in line with the notion that exemptions from fundamental EU rules should be interpreted strictly.[116]

In practice, the analysis found that the evolved public security defence is dependent upon five key factors. First, the national measure must be capable of contributing to energy security, which has, and is, consistently held to have the capacity to constitute a legitimate public security interest. Second, the measure must comply with the proportionality requirement set out in Article 36 TFEU. Third, and strongly connected with the principle of proportionality, the measure must not pursue 'purely economic' goals and, if it does, it is considered to go beyond what is necessary to safeguard energy security. Fourth, the public security defence can only be successfully invoked if the matter has not been exhaustively harmonized. Finally, the pursuit of energy security through the public security defence is further narrowed by the principle of energy solidarity, which underpins the internal market and has been confirmed as a legally binding principle of EU energy law.

The ongoing war in Europe and its consequences for the availability of affordable energy are testing the resilience of the internal market and the EU Member States' shared confidence in internal market approaches to energy security. However, in the case law of the Court, this confidence in the internal market's ability to positively contribute to energy security is apparent in the Court's interpretation of the public security defence.

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[115]Ibid, para 39.

[116]*Rutili v Minister for the Interior*, note 67 above, para 27; *R v Bouchereau*, 30/77, EU:C:1977:172, para 30; *Commission v Netherlands*, note 8 above, para 37; *Commission v France*, note 8 above, paras 53–55; *Église de scientologie*, note 67 above, para 17; *Commission v Italy*, C-326/07, note 23 above, para 70; *Commission v Belgium*, note 41 above, para 47; *Commission v France*, note 23 above, para 48; *Commission v Spain*, C-463/00, note 23 above, para 72.

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