Regulation (EU) 2026/261: A constitutional assessment of its legal basis and Treaty compatibility under EU law

The recent Regulation (EU) 2026/261 of the European Parliament and of the Council of 26 January 2026 on phasing out Russian natural gas imports and preparing the phase-out of Russian oil imports, improving monitoring of potential energy dependencies and amending Regulation (EU) 2017/1938 has entered into force, although certain prohibitions are subject to different implementation timelines.

According to public sources,[1] the measure might be challenged before the Court of Justice of the European Union (CJEU), potentially raising issues of Treaty compatibility and the lawfulness of its adoption procedure. Against that background, this article outlines, from a strictly technical perspective, some of the legal questions that could arise, without prejudging any eventual judicial assessment.

Relevant context

Following Russia's invasion of Ukraine and disruptions to established supply patterns, REPowerEU was launched to reduce the Union's structural dependence on Russian energy imports. Regulation (EU) 2026/261 forms part of that policy trajectory, combining (i) a gradual phase-out of certain imports with (ii) diversification and monitoring mechanisms aimed at reinforcing energy security.

The Regulation relies on Articles 194 and 207 TFEU as legal basis for its adoption. Article 194 TFEU provides a basis for Union action in energy policy, including measures relating to market functioning and security of supply. Article 207 TFEU establishes the Union's exclusive competence in the common commercial policy, including the regulation of trade flows with third countries.

The choice of legal basis thus reflects the Regulation's dual dimension: it operates both regulating trade (by prohibiting specific imports) and as an energy policy instrument designed to preserve the stability and resilience of the internal energy market against possible disruptions.

The discussion on the proper legal basis

Under Article 263 TFEU, Member States may bring annulment actions challenging the legality of Union acts, including on the ground of an incorrect legal basis.

According to the Court, the determination of the appropriate legal basis is a matter of constitutional significance. It ensures compliance with the principle of conferral enshrined in Article 5 TEU and defines the nature and scope of the Union's competence, as well as the applicable legislative procedure.[2] The CJEU has consistently held that the legal basis of a Union

[1] See <https://www.euractiv.com/news/hungary-to-sue-eu-over-russian-gas-ban/> and Hungarian Minister of Foreign Affairs, Péter Szijjártó's declarations on social media platform X (see link).

[2] Opinion 2/00 ("Cartagena Protocol"), ECLI:EU:C:2001:664, paragraph 5.

act must be determined according to objective criteria amenable to judicial review, [3] including in particular the aim and the content of the measure.[4]

Where an act pursues multiple objectives, the Court's "centre of gravity" analysis distinguishes between (i) measures with a predominant objective (single legal basis) and (ii) measures whose components are inseparably linked and equally important (potential dual legal basis, subject to procedural compatibility).

The CJEU has previously established that the question of the correct legal basis must be determined according to objective criteria amenable to judicial review,[5] including in particular the aim and the content of the measure.[6] Its importance relies on Article 5 of the Treaty of the European Union (TEU), that determines that the Union may act only within the competences conferred upon it.

In the present context, the constitutional inquiry would therefore focus on the respective scope and objectives of Articles 194 and 207 TFEU, and on whether the Regulation's trade restrictions are ancillary to its energy-security objective, or whether both dimensions are of equal constitutional weight.

1º Article 207 TFEU (Common Commercial Policy)

The EU has exclusive competences for the adoption of regulations regarding the framework for implementing the common commercial policy.[7] Article 207 TFEU specifies that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action, which include the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms and respect for the principles of the United Nations Charter and international law, among others.

Competences under the common commercial policy also include the negative aspect of regulating, meaning the prohibition of certain acts of trade. A recent example would be the adoption of the Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, which restricts market access through a trade ban.

[3] CJEU, judgment of 11 June 1992, case C-300/89, *Commission v Council* ("Titanium dioxide"), ECLI:EU:C:1991:244, paragraph 10; and CJEU, judgment of 8 September 2009, case C411/06, *Commission v Parliament and Council*, ECLI:EU:C:2009:518, paragraph 45.

[4] CJEU, judgment of 28 June 1994, case C-187/93, *Parliament v Council*, ECLI:EU:C:1994:265, paragraph 28. See also CJEU judgments: Case C-411/06, *Commission v Parliament and Council* ("Shipments of waste"), ECLI:EU:C:2009:518, paragraph 77; and Case C-81/13, *UK v Council*, ECLI:EU:C:2014:2449, paragraph 36.

[5] CJEU, judgment of 11 June 1992, case C-300/89, *Commission v Council* ("Titanium dioxide"), ECLI:EU:C:1991:244, paragraph 10; and CJEU, judgment of 8 September 2009, case C411/06, *Commission v Parliament and Council*, ECLI:EU:C:2009:518, paragraph 45.

[6] CJEU, judgment of 28 June 1994, case C-187/93, *Parliament v Council*, ECLI:EU:C:1994:265, paragraph 28. See also CJEU judgments: Case C-411/06, *Commission v Parliament and Council* ("Shipments of waste"), ECLI:EU:C:2009:518, paragraph 77; and Case C-81/13, *UK v Council*, ECLI:EU:C:2014:2449, paragraph 36.

[7] CJEU, Judgment of 21 December 2011, case C-366/10, *Air Transport Association of America*, ECLI:EU:C:2011:864.

The approach adopted in that case is much closer to that of the Regulation (EU) 2026/261, which aims to govern trade flow in the natural gas sector by prohibiting such trade with the Russian Federation, with the objective of securing the Union's energy market and protect its fundamental interests.

The scope of the common commercial policy has been clarified in Opinion 2/15 of 16/05/2017,[8] where the Court defines an act as "pertaining a common commercial policy" if it relates specifically to such trade in that it is essentially intended to promote, facilitate or, in this case, govern such trade, and has direct and immediate effects on it, as part as the EU's exclusive competence in this area.

Opinion 2/15 also reflects the Court's method for determining whether multiple legal bases are needed, including through an "absorption" approach where one objective is predominant. This is especially relevant in cases where the regulation goes beyond the common commercial policy scope and regulates policy areas considered "mixed" and would need to cover the legal requirements for both basis.

The Court's approach to mixity and competence allocation may vary by context; for example, in the COTIF Case,[9] the Court considered that the EU could indeed act on its own in the framework of agreements also covering shared competences if the Commission could reach the required majority in the Council for the adoption of the decision, meaning that the use of the different legal basis depends entirely on a political choice of the Council.

2º Article 194 TFEU (Energy Policy)

On a different note, energy policy is a shared competence, and the Treaties expressly empower the Union to act where measures are necessary to ensure the functioning of the energy market and the security of supply, in a spirit of solidarity between the Member States.

However, it also contains a limitation: that such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. Article 194 TFEU is *lex specialis* in relation to energy matters and must be used as a legal basis for the direct pursuit of EU energy policy objectives. [10]

However, the Member State's rights are not absolute and can be override by a superseding objective of the Union,[11] as long as it does not pose a serious risk to threat of rupture of that

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[8] CJEU, Opinion 1/15, 16/05/2017, Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376.

[9] CJEU, judgement of 5 December 2017, Case C-600/14, Germany v. Council, ECLI:EU:C:2017:935.

[10] CJEU, Judgment of 22 September 2020, Case C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742.

[11] Szabo, V., The EU Member States' Right to Electricity Mix, Masaryk University Journal of Law and Technology, Vol. 10:12016.

Member State's electricity supply in a public security ground. In judgment *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, the Court considers: [12]

> "159 It follows that the answer to Question 8(d) is that the first subparagraph of Article 6(4) of the Habitats Directive must be interpreted as meaning that **the objective of ensuring security of the electricity supply in a Member State at all times constitutes an imperative reason of over-riding public interest**, within the meaning of that provision. The second subparagraph of Article 6(4) of that directive must be interpreted as meaning that if a protected site likely to be affected by a project hosts a priority natural habitat type or priority species, a finding which it is for the referring court to make, only a need to nullify a genuine and serious threat of rupture of that Member State's electricity supply constitutes, in circumstances such as those in the main proceedings, a public security ground, within the meaning of that provision." (Emphasis added.)

In *Poland v Parliament and Council*,[13] the Court addressed the appropriate legal basis for measures affecting the energy market and rejected an interpretation that would automatically trigger special procedures whenever environmental measures significantly affect Member States' energy choices, noting that such effects are often inherent in EU action and that overly broad limitations would unduly constrain Union policymaking.

The same reasoning can be applied to Article 194 TFEU. A broad interpretation of its competence limitation would unduly restrict the scope of EU energy policy, as virtually any measure in this field inevitably affects Member States' energy choices. The Court's logic suggests that Article 194(2) limits Union action only where a measure is specifically intended to alter a Member State's choice of energy sources or the structure of its energy supply as its primary objective — for example, a direct ban on nuclear energy or coal.[14]

Moreover, the interpretation of what constitutes a "significant effect" must be read in light of the principle of energy solidarity. As clarified in *Poland v Commission*,[15] solidarity entails a reciprocal obligation: both the Union and the Member States must take account of each other's interests and balance them where conflicts arise. It does not imply that EU energy measures may never adversely affect individual Member States, but rather that such effects must be duly weighed in the legislative process.

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[12] CJEU, Judgment of 29 July 2019, case C-411/17, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, ECLI:EU:C:2019:622.

[13] CJEU, judgment 21 June 2018, Case C-5/16 *Poland v Parliament and Council*, ECLI:EU:C:2018:483, para 1.

[14] Huhta, K., The scope of State sovereignty under article 194(2) TFEU and the evolution of EU competences in the energy sector, British Institute of International and Comparative Law, 2021, see <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/82D1631524E2B91F9610D8294B3A791D/S0020589321000269a.pdf/scope_of_state_sovereignty_under_article_1942_tfeu_and_the_evolution_of_eu_competences_in_the_energy_sector.pdf>.

[15] CJEU, judgment of 10 September 2019, case T-883/16 *Poland v Commission* ECLI:EU:T:2019:567.

Review of the compatibility with the Regulation

The Court will likely address the question of the correct legal basis by applying the “absorption test” and review the objectives pursued by the Regulation, in relation to the measures adopted. For the adoption of this Regulation, the two legal basis examined are: Article 207 TFEU, related to the EU’s exclusive competence regarding common commercial policy and Article 194 TFEU, related to the EU’s shared competence regarding energy policy.

When applied to the Regulation (EU) 2026/261, it is necessary to refer to the specific justification and objectives given in the Recitals. The text provides a more robust justification for the energy policy dimension of the Regulation, through a layered justification that combines legal basis, factual necessity and both explicit and implicit references to the principles of subsidiarity, proportionality and necessity. In doing so, the institutions take into account the non-exclusive nature of the Union’s competence in this area.

The main objective, maintaining the security of supply as a legitimate Union interest, is carefully motivated, with attention to traditional CJEU case law. In this sense, the Court has previously recognised energy security as a legitimate and weighty public interest justifying far-reaching intervention.[16]

The Recitals, then, operate on the implicit assumption that, although energy remains largely within Member State control, cross-border gas markets, infrastructure interconnections, and import dependencies fall within the sphere where Union action is envisaged by Article 194 TFEU. This is based on the necessary coordination in a matter that cannot be effectively addressed through uncoordinated national measures without risking market fragmentation or circumvention.

Regarding subsidiarity, Recital 39 addresses the objectives of monitoring dependencies and the fact that phasing out Russian gas cannot be sufficiently achieved by Member States and can be better achieved at the Union level.

The CJEU generally accepts graduated and conditional regimes as strong indicators of proportionality.[17] Albeit some explicit references to solidarity between Member States and the maintenance of the security of the gas supply, the proposal addresses proportionality and necessity through different methods: (i) a generous transition phase for the implementation of the prohibition that allows for the process of diversifying gas supplies away from the Russian Federation; (ii) tasking the Member States with creating national diversification plans “to reduce demand, foster renewable energy production and ensure alternative supplies, as well as possible technical, contractual or regulatory barriers which may complicate the diversification process”; and (iii) by setting some exceptions and emergency measures, as well as details on cooperation and allocation of financial responsibilities between the Member States and the Union concerning possible investor-to-state dispute settlement resolution cases related to this Regulation.

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[16] CJEU, judgment of 11 September 2014, C-204/12 to C-208/12, Essent Belgium NV, ECLI:EU:C:2014:2192.

[17] CJEU, judgment of 28 March 2017, C-72/15, PJSC Rosneft Oil Company, ECLI:EU:C:2017:236.

These are the main regulatory powers that remain with the Member States for further developing their energy regulation under a common framework that aims to protect the Union's energy market.

However, a challenger could argue that the import prohibition is structurally closer to sanctions or trade defence, pushing the centre of gravity towards Article 207 TFEU. The Regulation pre-empts this, in line with the Court's approach in *Poland v. Commission*,[18] by expressly justifying the prohibition to the need to ensure the "security of supply" in the European energy market as its main objective, adopting mitigating factors for its timed adoption and conferring structure for further regulation by the Member States.

In this respect, the measure differs from previous foreign policy sanctions against the Russian Federation. Rather than operating primarily as an instrument of external policy, it is presented as part of a broader regulatory framework designed to reinforce the stability and resilience of the internal energy market.

Conclusion

Whether this architectural design ultimately determines the outcome of any annulment proceedings would depend on the Court's assessment of the Regulation's centre of gravity and of the balance struck between trade governance and energy policy objectives. For the time being, the Regulation provides a noteworthy illustration of the evolving interaction between Articles 194 and 207 TFEU in situations where energy security and external trade intersect.

[18] CJEU, judgment of 10 September 2019, case T-883/16 *Poland v Commission,* ECLI:EU:T:2019:567.