

INSTITUTIONAL REPORT

*Odile Beynet and Tibor Scharf**
(rapporteurs)

Energy solidarity and energy security – from green transition to the EU crisis management

Introduction

Energy solidarity, energy security, the green transition and crisis management are, contrary to what might be implied by the title given for this year’s “Institutional report” for Topic III, not necessarily conflicting goals. As we will endeavour to show, they are different aspects of energy policy which have always been present. However, it can be argued that the emphasis on one or other aspect has evolved in response to shifting policy imperatives and in reply to crisis – most clearly so in response to the Energy Crisis in the wake of the Russian war of aggression against Ukraine. The green transition is not necessarily an antithesis to crisis management – rather the green transition is a response to a crisis – climate change – and could also be argued to constitute a bundle of crisis management measures. Equally, the EU’s response to the energy crisis brought about by the Ukraine war, and in particular its REPowerEU plan included a number of measures that are aimed at fostering energy security, the green transition and solidarity.¹ The energy crisis of 2022 was arguably a catalyst to speed up developments which have been there all along²: diversification of supply and lessening dependency on fossil fuel in favour of renewable energy sources. These have been the guiding principles of the REPowerEU Plan, which followed and set into practice the aims of the Versailles

* Odile Beynet and Tibor Scharf are Legal Advisors at the Legal Service of the European Commission. All views expressed are personal and cannot in any way reflect the views of the European Commission or bind it. The authors would like to thank Amira Kan’an, who was a trainee at the Legal Service of the Commission, for her research and help with the earlier versions of this report.

¹ Der Chin Horng, ‘The EU’s Energy Crisis Management to the Russia-Ukraine War’, *European Energy and Environmental Law Review*, August 2024, p. 173.

² See also Leigh Hancher: ‘EU Energy market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead’, SIEPS papers January 2024, available online: <https://www.sieps.se/en/publications/2024/eu-energy-market-regulation-after-the-2022-energy-crisis/>; Simon Dekeyrel: ‘The European energy crisis: Shock therapy for the EU’s clean energy transition’, EPC policy brief 11 January 2024; Federico Fabbrini: ‘The EU’s Response to the War-Induced Energy Crisis: Legal and Budgetary Issues to “insure Domestic Tranquility”’, *Legal Issues of Economic Integration* 51 N° 4 (2024), pp. 349–376, who argues that the war and the EU measures take in response to it “it strengthened transnational solidarity in the energy sector; and leveraged internal market competences to push for a green industrial deal” (p. 375).

Declaration of 11th March 2022³ adopted just over two weeks after the Russian invasion of Ukraine: reducing the Union's dependence on Russian fossil fuels by fast forwarding the clean transition (and diversifying its supplies).⁴ What the energy crisis arguably also brought to light is the need for a coordinated European approach to energy policy.⁵

How all these notions fit together and how effectively they have all been part of energy policy will be explored in this report.

Finally, we will assess how the EU has responded to the energy crisis and assess whether this also fits into the overall pattern of energy policy or constitutes a radical change of track.

I. Energy policy triangle

Energy policy is complex due to the numerous interdependencies it entails. To illustrate this point, one can think of a few examples: energy supply is necessary for the economy to function (to put it simply: no electricity means no internet), but also for every single citizen (heating, cooking, lighting as its most basic), not to mention for transport, an aspect we shall leave aside in this report. Yet hydrocarbon-based non-renewable primary energy sources (as opposed to secondary energy such as electricity) can be extracted in the EU only to a small extent. In 2022, 69.5% of all energy in the EU was produced from coal, oil and gas and the EU energy import dependency rate stood at 62.5% in that same year,⁶ and was particularly marked for gas.⁷ This implies the crucial need to secure energy supplies. On the other hand, energy and especially hydrocarbon-based energy production leads to greenhouse emissions, which the EU has committed to reduce in the context of climate change. Additionally, energy needs to be sufficiently affordable to avoid energy poverty

³ European Council, *Versailles Declaration*, Press Release 247/22 (11 March 2022).

⁴ Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, REPowerEU Plan, COM(2022)230final.

⁵ REPowerEU Plan also aims at “joining forces to achieve a more resilient energy system and a true Energy Union.” See also Daniel Calleja, Tim Maxian Rusche and Trajan Shipley: ‘EU Emergency – call 122? On the Possibilities and Limits of using Article 122 TFEU to respond to situations of crisis’, *CJEL*, Vol 29, Issue 3, published October 28, 2024: “Since 2008, the Union faced a series of crises. The response – sometimes after initial attempts by Member States to “go it alone” – was ultimately always found at the level of the Union, within the existing EU Treaties, as they stood after the Treaty of Lisbon, and entailed new tasks and new responsibilities for the Union.”

⁶ Eurostat Energy Statistics 2022 figures, available online at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Energy_statistics_-_an_overview#Imports_and_exports

⁷ This dependency is the main objective, for instance, of Regulation (EU) 2017/1939 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply (“Security of Supply Regulation”), OJ L 280, 28.10.2017, pp. 1–56, see Recitals 1 and 2.

for consumers and excessive prices for industrial production which would put EU production at a competitive disadvantage.

Accordingly, energy policy evolves around three main objectives which are mutually interdependent: (i) competitiveness, (ii) sustainability, and (iii) security of supply.⁸ This has become to be known as “energy policy triangle” or as “energy trilemma framework,” the latter being described as “a practical, systems based approach to guiding and tracking performance in managing the connected challenges of energy security, social equity, and environmental sustainability.”⁹ Whilst the trilemma speaks of “social equity,” this notion is encompassed in the idea of “competitiveness”¹⁰ in the energy triangle. Hence both the triangle and the trilemma are effectively the same approach used to analyse and develop energy policy not only in the EU but world-wide.

These goals (security of supply, competitiveness, and sustainability) are also those set out by Article 194 TFEU which spells out what is expected from the European Union in the energy area.¹¹ It is unsurprising then that these notions are mentioned as a constant refrain in EU energy policy papers,¹² and very clearly in the 2020 Communication – published in 2010 – where it is said: “A common EU energy policy has evolved around the common objec-

⁸ See e.g.: ‘EU Governance for the Future’, European Parliament, Study 2015, PE 518.776 available online at: https://www.europarl.europa.eu/RegData/etudes/STUD/2015/518776/IPOL_STU%282015%29518776_EN.pdf; R. Fleming, ‘The Energy Trilemma’. In: M. M. Roggenkamp, K. J. de Graaf, and R. Fleming (Eds.), *Energy Law, Climate Change and the Environment* (pp. 31–40). (Elgar Encyclopedia of Environmental Law, Vol. 9). Edward Elgar Publishing. <https://doi.org/10.4337/9781788119689.IX.3>. This approach is not singular to the EU, see e.g. Raisul Islam Sourav, ‘The Dilemma of the Energy Law and Policy Triangle in Recent Energy Laws and Policies in Bangladesh’, *Hydro Nepal: Journal of Water, Energy and Environment* 2018, 22, pp. 10–15. <https://doi.org/10.3126/hn.v22i0.18991>

⁹ See: World Energy Council’s *World Energy Trilemma Index 2024*, forward, available online at: https://www.worldenergy.org/assets/downloads/World_Energy_Trilemma_2024_Full_Report.pdf?v=1721938251

¹⁰ See e.g.: Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions and the European Investment Bank, *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy* COM(2015)/080 final, where the goal is set out as follows: “The goal of a resilient Energy Union with an ambitious climate policy at its core is to give EU consumers – households and businesses – secure, sustainable, competitive and affordable energy;” thus explicitly linking the notion of competitiveness and affordability.

¹¹ Callies/Ruffert/Callies AEUV Art. 194 Rn. 3.

¹² See e.g.: Energy Union Report, COM (2024) 404 final published 11.09.2024, point 2 entitled ‘Ensuring a Secure and Competitive Energy and Climate Transition through the European Green Deal and REPowerEU Plan’. Available online at: https://energy.ec.europa.eu/document/download/bd3e3460-2406-47a1-aa2e-c0a0ba52a75a_en?filename=State%20of%20the%20Energy%20Union%20Report%202024.pdf, but see also 14 years earlier: Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions *Energy 2020 – A Strategy for competitive, sustainable and secure energy* of 10.11.2010, COM(2010) 639 final, p. 2, available online at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0639:FIN:En:PDF>

tive to ensure the uninterrupted physical availability of energy products and services on the market, at a price which is affordable for all consumers (private and industrial), while contributing to the EU's wider social and climate goals. The central goals for energy policy (security of supply, competitiveness, and sustainability) are now laid down in the Lisbon Treaty.¹³

In this context, the notion of competitiveness implies a competitive and integrated market for energy (electricity, gas and now also hydrogen) seeking to obtain as low (i.e. competitive) prices as possible.

The sustainability objective encompasses all environmental and climate concerns¹⁴: here the main aim is reducing greenhouse emission by using less energy and resorting more to renewable energy sources. Energy related emissions account for a large part of the EU's total greenhouse gas emissions.¹⁵

Security of supply on the other hand refers to the secure and uninterrupted supply of energy, a necessity not least as the economy depends on it.¹⁶ This goal includes tackling uncertainties as to supplies, bearing in mind that the European Union is largely energy import dependent and thus this notion needs to cover external relations to supplier countries in order to secure long term partnerships and also to address any import dependencies, for instance by diversification. Furthermore, the notion of security of supply involves energy infrastructure aspects (both internally for the efficient distribution of energy and externally for energy to be transported to the EU) and internal market aspects. Somewhat colourfully, but no less accurately, the Commission has described energy as being “the life blood of our society” in its 2020 Commu-

¹³ Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions *Energy 2020 – A Strategy for competitive, sustainable and secure energy* of 10.11.2010, COM (2010) 639 final, p. 2, available online at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0639:FIN:En:PDF>

¹⁴ It thus covers a broad range of aspects which have to be considered in devising energy policy, Kay Scheller, ‘Energiewende: Deutschland hinkt seinen ambitionierten Zielen hinterher’, *EnWZ*, 7/2024, p. 242.

¹⁵ Up to 80%, see Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions *Energy 2020 – A Strategy for competitive, sustainable and secure energy* of 10.11.2010, COM(2010) 639 final, p. 2, available online at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0639:FIN:En:PDF>; see also Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions “Fit for 55”: delivering the EU's 2030 Climate Target on the way to climate neutrality’, COM/2021/550 final, point 2.2.3, which (still) assumes a share of 75%, as does the 2024 State of the Energy Union Report, COM(2024) 404 final published 11.09.2024, p. 1, available online at: https://energy.ec.europa.eu/document/download/bd3e3460-2406-47a1-aa2e-c0a0ba52a75a_en?filename=State%20of%20the%20Energy%20Union%20Report%202024.pdf

¹⁶ Whilst the January 2006 interruption was largely limited to Ukraine, the full supply stop January 2009 – during a rather cold period at the time – substantially affected a number of eastern Member States; see further Kreuter-Kirchhof: ‘Europäische Energiesolidarität – Wege zur Vorbeugung und Bewältigung schwerer Energieversorgungskrisen in der EU’, *NVwZ* 2022, pp. 993, 994.

nication.¹⁷ And it may be more than a coincidence, that this communication had substantial security of supply considerations, including diversification of supply, as it came in the wake of the 2006, and in particular the 2009, interruptions of supplies by Russia.

These three goals are interdependent. Energy saving, for instance, not only reduces greenhouse gas emissions, thus assisting towards the attainment of the EU's climate goals, but it also reduces import dependency and thus helps for the EU's security of energy supply to grow. Indeed, it has been found that an increase in Europe's energy efficiency by 1% will result in gas imports falling by an additional 2.6%.¹⁸

The three goals are in principle of equal weight with not one priming over the other.¹⁹ Rather, depending on the policy considerations at any given time, one or other of the goals will be more prominently considered,²⁰ this leading to each of the triangle's angles being more or less large, depending on the policy considerations preponderant at any one time. This aspect will be looked at in further detail below.

Nevertheless – or perhaps because of – the interdependence which means that any emphasis on one goal will necessarily impact on the other, tensions can and do emerge. As described by Simone Tagliapietra, “in an ideal world, these three components would be perfectly balanced and countries would be able to offer their citizens a secure, cost-competitive and environmentally sustainable energy system. But, in reality, difficult trade-offs exist between these three components and governments must take policy choices that might – at least temporarily – favour one or two elements over the other(s).”²¹

The emphasis on decarbonisation, for instance, may lead – at least in the short run – to higher energy prices as carbon emissions are priced in, or more gener-

¹⁷ Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions *Energy 2020 – A Strategy for competitive, sustainable and secure energy* of 10.11.2010, COM(2010) 639 final, p. 2, available online at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0639:FIN:En:PDF>

¹⁸ Opening speech of the (then) Vice-President for Energy Union Maroš Šefčovič at the Energy Union Conference, Riga, February 6, 2015, available online at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_4225

¹⁹ Callies/Ruffert/Callies AEUV, 6th edn. 2022, Article 194 para. 4; Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV/Gundel, 2. Aufl. 2023, AEUV Art. 194, Rn. 6 But see C-411/17 Inter-Environnement Wallonie, ECLI:EU:C:2019:622, which suggest at para. 155 f that security of supply might prime over environmental considerations – as also argued in the Austrian national report point 5.2.

²⁰ See also: Austrian national report Question 1, Section II.

²¹ Simone Tagliapietra, ‘Keeping the energy policy triangle in balance is key to reach net-zero’, 9.11.2021, Bruegel, available online at: <https://www.bruegel.org/comment/keeping-energy-policy-triangle-balance-key-reach-net-zero>

ally to additional expenses, for instance for necessary investments into new and more efficient generation or heating systems. The move to electric mobility is an example, not only for necessary enormous investments, but also for an increased demand for electricity which may in turn lead to higher electricity prices. These possible tensions, particularly in the short-term transition to a greener energy production, are recognised, for instance, when the “Fit for 55”²² Communication foresees mitigating measures. It notes: “In this spirit, a new Social Climate Fund will provide dedicated funding to Member States to support European citizens most affected or at risk of energy or mobility poverty, to accompany the introduction of the Emissions Trading to road transport and buildings. Energy poverty alone affects up to 34 million people in the European Union today. The Fund will help mitigate the costs for those most exposed to fossil fuel price increases during the transition.” In this context, the notion of solidarity comes into play: again, in the “Fit for 55” Communication, it was argued that “This is why solidarity is a defining principle of the European Green Deal – between generations, Member States, regions, rural and urban areas, and different parts of society – as exemplified by the Just Transition Mechanism and a number of other instruments put in place at EU level in recent years. Reaching climate neutrality will require a shared sense of purpose, collective efforts and a recognition of different starting points and challenges. Many citizens, especially younger people, are ready to change their consumption and mobility patterns when empowered by relevant information in order to limit their carbon footprint and to live in a greener, healthier environment. However, this package also addresses the concerns of those whose employment or income are affected by the transition.”²³

Solidary became particularly prominent in the wake of the invasion of Ukraine and the resulting Energy Crisis, two factors massively and suddenly increased the tensions for energy policy. The need for security of supply and the requirement to try to keep prices low – or rather as low as possible and in particular as close as possible to the price corridor form before the invasion of Ukraine and the Energy Crisis.

With that background let us turn to these notions in more detail.

²² Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions “Fit for 55”: delivering the EU’s 2030 Climate Target on the way to climate neutrality’, COM (2021) 550 final, of 14.07.2021, point 2.1.

²³ Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions “Fit for 55”: delivering the EU’s 2030 Climate Target on the way to climate neutrality’, COM (2021) 550 final, of 14.07.2021, point 2.1.

I-1. Energy in the Treaties

Strangely, for a Union which is the successor to the European *Coal* and Steel Community, a dedicated legal basis for energy was introduced into the Treaties only relatively recently.

At the creation, the European Coal and Steel Community covered, with coal, one of the two main energy sources at the time,²⁴ as did the separate Euratom Treaty for nuclear energy. Yet neither the Rome Treaty on the European Economic Community nor the European Community Treaty or even the Maastricht Treaty contained a specific legal basis on energy.²⁵ Before the Lisbon Treaty there was merely Article 3 (1) (u) of the European Community Treaty which foresaw that for the purposes set out in Article 2 (essentially to establish a common market and a monetary union), the activities of the Community shall include “measures in the spheres of energy, civil protection and tourism.” However, this did not amount to a self-standing legal basis,²⁶ even though it largely assuaged the doubts about a competence for Community action on energy.²⁷ The combination with civil protection and tourism (civil protection and tourism still now only a supporting and coordinating competence according to Article 6 TFEU) may be further testimony to the idea that Member States were not yet ready to rescind a real competence in energy to the Community level²⁸: both during the Amsterdam and Nice negotiations, debates were inconclusive on the inclusion of an energy article.²⁹ It is only with the Lisbon Treaty that an energy article was at last introduced, the current Article 194 TFEU.³⁰

This is all the more remarkable as, almost 24 years before the Lisbon Treaty, the then Member States of the European Economic Community had a wake-up call in the form and shape of the 1973 oil crisis. The *First Guidelines for a Community Policy on Energy* were presented to the Council on 18 December 1968: already then, the Commission noted among other that: “A Community energy

²⁴ See also Groeben, von der/Schwarze/Jens Hamer, 7. Ed. 2015, AEUV Article 194 Rn. 1.

²⁵ Simon Hirsbrunner in Schwarze/Becker/Hatje/Schoo, EU-Kommentar 4. Ed. 2019, paras. 1–2.; T. Maxian Rusche, ‘EU renewable electricity law and policy: from national targets to a common market’, pp. 201–213.

²⁶ Simon Hirsbrunner in Schwarze/Becker/Hatje/Schoo, EU-Kommentar 4. Ed. 2019, para. 2.

²⁷ *Lecheler/Gundel*, EuZW 2003, 622, following: “Ein weiterer Schritt zur Vollendung des Energie-Binnenmarktes: Die Beschleunigungs-Rechtsakte für den Binnenmarkt für Strom und Gas,” p. 623.

²⁸ See e.g. *Lecheler/Gundel*, EuZW 2003, 622, following: ‘Ein weiterer Schritt zur Vollendung des Energie-Binnenmarktes: Die Beschleunigungs-Rechtsakte für den Binnenmarkt für Strom und Gas’, in which the academic debate at the time is set out about whether the then Article 95 EC was a sufficient legal basis for the energy market integration aimed at by the “Second Package,” i.e. Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.

²⁹ Simon Hirsbrunner in Schwarze/Becker/Hatje/Schoo, EU-Kommentar 4. Ed. 2019, paras. 3.

³⁰ Groeben, von der/Schwarze/Jens Hamer, 7.ed. 2015, AEUV Article 194 paras. 5, 6.

policy is also necessary in order to counterbalance within the Community the risks arising from the great dependence of the Member States on imports and from insufficient diversification of the sources of supply.³¹ But by 1973 not much further progress had been achieved.³² It has been argued that, if the EEC at the time had a credible common energy policy at its disposal, its vulnerabilities to these sorts of events would have been reduced.³³ The Commission noted at the time that the year “1973 showed us how far the dependence of Europe on outside sources of energy and raw materials can endanger its prosperity.”³⁴ Two of the considerations much stressed recently, solidarity and the need for joint action, were equally already present as the Commission further noted: “We must respond by a greater degree of solidarity to the common difficulties arising from the energy crisis; we must respond to outside challenges with joint action on the international plane.”³⁵ Whist the need for a common energy policy was seen since the inception, its realisation did not happen, essentially due to national reticence to a shared approach, and due to the differences between the energy structures and policies of the Member States.³⁶ It is also interesting to note that the idea that energy – in that case oil – could be used as a geopolitical tool (not to say “weaponised”) was already present back in 1973. It is no surprise that this episode led to an acceleration of the development of a common energy policy³⁷: *The First Guidelines for a Community Policy on Energy* were already presented to the Council on 18 December 1968. Already then the Commission noted among other that “A Community energy policy is also necessary in order to counterbalance within the Community the risks arising from the great dependence of the Member States on imports and from insufficient diversification of the sources of supply.” The Council meeting of 22–23 May 1973 was exclusively devoted to energy policy.³⁸ In 1973, the Commission had presented its *Guidelines and priority actions under the Community energy policy*³⁹ which made a comprehensive assessment of energy policy needs at the time, already finding that “the underlying problem besetting energy policy is to guarantee long term security

³¹ Presented to the Council on 18 December 1968, document COM (68) 1040, p. 6.

³² See also S. Labbate: ‘Energy and transatlantic relations: The attempts to establish a European energy policy on the eve of the 1973 oil crisis’, *Journal of European Integration*, 2014, pp. 97–119.

³³ Peter Stingelin, ‘Europe and the Oil Crisis’, *Current History*, Vol. 68, No. 403, March 1975, pp. 97, 98.

³⁴ 7th General Report on the Activities of the European Communities, 1974, p. XVI.

³⁵ 7th General Report on the Activities of the European Communities, 1974, p. XVII.

³⁶ Peter Stingelin, ‘Europe and the Oil Crisis’, *Current History*, Vol. 68, No. 403, March 1975, pp. 97, 98.

³⁷ 7th General Report on the Activities of the European Communities, 1974, p. XIX: “The Copenhagen Summit Conference gave the first impulse to this, and laid down general principles concerning both how to implement a policy on stable supplies, [...], and the elaboration of a long-term strategy for making the Community less dependent on others through intensive and rationalized exploitation of all available sources of energy and through growing recourse to nuclear power.”

³⁸ Draft conclusion of the Council on 22–23 May 1973, Council Document 3/1382/73 (PV/CONS/R 8 of 19.09.1974).

³⁹ Communication from the Commission to the Council, presented on 27 April 1973, SEC (73) 1481, 19 April 1973.

of supplies under satisfactory economic conditions” after having also recognised that the protection of the “environment introduces a further constraint,” in particular in respect of gas, “In view of its special advantages, particularly as regards environmental conservation care must be taken to ensure its best use,” thus the policy triangle appeared already then.

One of the responses at the times was the adoption of 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,⁴⁰ which among other, obliges Member States to impose restrictions on consumption, depending on the estimated shortages, to give priority to supplies of petroleum products to certain groups of users⁴¹ and to regulate prices, all this after consultation and coordination at Community level.⁴² Council Directive 73/238/EEC was based on the then article 103 TEC, which was a precursor to the present article 122 TFEU.⁴³ Hence it may not be an exaggeration to say that there is a strong sense of *déjà vu* when looking at the 2022 response to the energy crisis – or of continuity in the approach to energy policy.

But it took a further considerable time for an energy legal basis to be added to the Treaties. While Article 194 TFEU lists four goals, namely (a) to ensure the functioning of the energy market, (b) to ensure security of energy supply in the Union, (c) to promote energy efficiency and energy saving and the development of new and renewable forms of energy, and (d) promote the interconnection of energy networks. These still fit the policy triangle.⁴⁴ Indeed the goal to ensure the interconnection of energy networks – can be seen as supporting two goals: (a) the functioning of the Union energy market by ensuring flows beyond national borders as well as to ensure, for electricity, the transportation of the increasing part of renewable electricity generation, and (b) also to ensure the security of energy supply in the Union: as was seen in particular during the 2009 Gas crisis, when Gas stopped flowing from the Russian Federation via Ukraine, good interconnections including reverse-flow capacities are crucial to ensure security of supply. Hence the interconnection of networks is really a subsidiary and supporting goal to the first three.⁴⁵

⁴⁰ OJ L 228 of 16.08.1973, pp. 1–2.

⁴¹ Article 1.

⁴² Article 3, paras. 1 and 2.

⁴³ Pechstein/Nowak/Häde, *Frankfurter Kommentar EUV/GRC/AEUV/Thiele*, 2nd edn. 2023, AEUV Article 122 Para 3. There were more measures concerning energy adopted on the basis of 103 TEC in the 1970s, see also Daniel Calleja, Tim Maxian Rusche and Trajan Shipley, ‘EU Emergency-call 122? On the possibilities and limits of using Article 122 TFEU to respond to situations of crisis’, pp. 533 to 535, *The Columbia Journal of European Law* 29, summer 2024, <https://heinonline.org/HOL/Contents?handle=hein.journals/coljeul29&id=1&size=2&index=&collection=journals>

⁴⁴ Pechstein/Nowak/Häde, *Frankfurter Kommentar EUV/GRC/AEUV/Gundel*, 2nd edn. 2023, AEUV Article 194, para. 5.

⁴⁵ *Ibid.*

I-2. Solidarity and energy

Solidarity was “present at the creation,” as European integration is founded on the idea of solidarity.⁴⁶ As Robert Schumann said. “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”⁴⁷ It is mentioned among the values listed as founding ones in Article 2 TEU and part of the very foundations of values upon which the Union is built.⁴⁸ Yet, just like the energy legal basis, it found its way into the Treaties specifically for energy relatively late, even if it was present, as a principle, in the Treaties from the beginning⁴⁹). Here it is interesting to note that the wording of Article 194 TFEU is largely, but not entirely, that of Article III-256 of the Treaty Establishing a Constitution for Europe, but with the addition in particular of the spirit of solidarity between Member States. This was inserted to reflect the wish of a national delegation further to the various tensions in the supply of gas originating in disputes between the Russian Federation and Ukraine in 2006⁵⁰ (the other addition is the promotion of the interconnection of energy networks in Article 194 (1) d) TFEU). Accordingly, already in the mid-2000s, one can see how the external threat to security of supply influences the EU’s energy policy⁵¹ and here very concretely the draft-

⁴⁶ Kaisa Huta and Leonie Reins, ‘Solidarity in European Union Law and its application in the Energy Sector’, *International and Comparative Law Quarterly*, Vol. 72, Issue 3; Daniel Calleja, Tim Maxian Rusche and Trajan Shipley, ‘EU Emergency-call 122? On the possibilities and limits of using Article 122 TFEU to respond to situations of crisis’, *The Columbia Journal of European* 29, summer 2024, pp 27–28, <https://heinonline.org/HOL/Contents?handle=hein.journals/coljeul29&id=1&size=2&index=&collection=journals>

⁴⁷ Schuman Declaration May 1950, available online: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en

⁴⁸ As mentioned by Koen Lenaerts and Stanislas Adam in ‘La solidarité, valeur commune aux États membres et principe fédératif de l’Union européenne’, *Cahiers droit européen*, 2021/2-2 juillet 2021: “Son inscription dans cette disposition par les auteurs des traités témoigne de ce qu’elle relève des « racines profondes et [de] l’empreinte identitaire de l’Union européenne. Ainsi élevée au rang de valeur par le droit primaire, la solidarité constitue une référence de pensée et d’action caractérisant l’économie d’ensemble du projet d’intégration que constitue l’Union, même si l’expérience récente montre que des différences importantes subsistent dans la manière dont la conçoivent les États membres.”

⁴⁹ Being mentioned in the 1951 Preamble to the Treaty Establishing the European Coal and Steel Community Treaty. See also Kais Huta and Leonie Reins, ‘Solidarity in European Union Law and its application in the Energy Sector’, *International and Comparative Law Quarterly*, Vol. 72, Issue 3.

⁵⁰ Simon Hirsbrunner in Schwarze/Becker/Hatje/Schoo, EU-Kommentar; s Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV/Gundel, 2. Ed. 2023, AEUV Article 194, para. 1; see on the 2006 gas dispute: J. Stern, ‘The Russian-Ukrainian gas crisis of January 2006’, Oxford Institute for Energy Studies, available online at: <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2011/01/Jan2006-RussiaUkraineGasCrisis-JonathanStern.pdf>. J. Stern’s appraisal of the effects of the 2006 gas crisis between Ukraine and the Russian Federation seems ominously prescient today. “It is not wise for any country or region to become overly dependent on a single supplier or a single supply route,” 4th edn., 2019, para. 4, p. 13.

⁵¹ See L. Schramm, ‘Some differences, many similarities: comparing Europe’s responses to the 1973 oil crisis and the 2022 gas crisis’, *European Political Science Review* (2024), 16, pp. 56–71, who finds that “Scholarship suggests that an external threat like a war in their neighborhood prompted member states to close ranks and build capacities on the European level.”

ing of a Treaty article to include a notion meant to address that threat. As will be shown later, this influence – or twisting of the triangle towards one of the three goals of energy policy – has been amplified in the 2022 gas crisis.

Nevertheless, the notion of solidarity is a vague one, not as such defined in the Treaties and there has long been a debate about whether it was even legally binding.⁵² It has also been argued that the notion of solidarity has been lessened in its reach by the provision of Article 194 (2) 2nd sentence TFEU which reads: “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, without prejudice to Article 192 (2) (c).”⁵³ The scope of Article 194 (2) 2nd sentence has led to considerable debate.⁵⁴

Arguably, Article 194 (2) 2nd sentence TFEU should be read in conjunction with Declaration 35 on Article 194 of the Treaty on the Functioning of the European Union: “The Conference believes that Article 194 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article 347.” Article 347 TFEU in turn provides that: “Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.” Therefore, if one reads Article 194 (2) 2nd sentence jointly with Declaration 35, it emerges that suggesting that Article 194 (2) 2nd sentence limits the notion of solidarity is a steep proposition. Indeed, Declaration 35 arguably clarifies the Member States’ understanding that measures taken should be taken only under the conditions of Article 347 which in turn provides for mutual consultation in the – exceptional case – when such a measure would be necessary. However, this can be seen as an additional clarification – and not a limitation – of Article 194 (2) 2nd sentence, and the question still remains debated how far Member States remain fully free to choose their energy mix.⁵⁵

⁵² Kais Huta and Leonie Reins, ‘Solidarity in European Union Law and its application in the Energy Sector’, *International and Comparative Law Quarterly*, Vol. 72, Issue 3, with numerous references to the debate.

⁵³ Pe Kais Huta and Leonie Reins, ‘Solidarity in European Union Law and its application in the Energy Sector’, *International and Comparative Law Quarterly*, Vol. 72, Issue 3; Pechstein/Nowak/Häde, *Frankfurter Kommentar EUV/GRC/AEUV/Thiele*, 2nd edn. 2023, AEUV Article 122 paras. 11 and 27.

⁵⁴ Pechstein/Nowak/Häde, *Frankfurter Kommentar EUV/GRC/AEUV/Thiele*, 2nd edn. 2023, AEUV Article 122 paras. 27–33.

⁵⁵ Calliess/Ruffert, *EUV/AEUV* 6. Auflage 2022, para. 25; Geiger/Khan/Kotzur/Kirchmair/Kotzur/Niehaus, 7. Aufl. 2023, AEUV Article 194 Rn. 6.

At the latest since the *OPAL* litigation and in particular the judgement by the ECJ on appeal, the notion of solidarity has been clarified.⁵⁶ This case concerned an exemption decision which the Commission adopted in 2016, by which it exempted 50% of capacity in *OPAL* – one of the onshore pipelines connecting to Nord Stream 1 – from third party access. The decision furthermore prescribed non-discriminatory access to some of the remaining of capacity via auctions where both Gazprom and third parties were able to participate, guaranteeing however Gazprom access to another 20% of capacity. This exemption decision replaced an earlier one from 2009 which prevented Gazprom from being able to use more than 50% of *OPAL* capacity unless it conducted a 3 bcm gas release programme. In September 2019, the General Court in extended composition⁵⁷ annulled the 2016 decision on the grounds of it being in “breach of the principle of energy solidarity,” thus re-instating the 2009 exemption decision.

The General Court in extended composition first clarified that the “spirit of solidarity” referred to in Article 194(1) TFEU is the specific expression in this field of energy of the general principle of solidarity between the Member States, mentioned, *inter alia*, in Article 2 TEU, in Article 3(3) TEU, Article 24(2) and (3) TEU, in Article 122(1) TFEU, and in Article 222 TFEU. That principle is at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU.⁵⁸

The Court went on to rule that: “As regards its content, it should be emphasised that the principle of solidarity entails rights and obligations both for the European Union and for the Member States. [...] In the context of energy policy, that implies, *inter alia*, obligations of mutual assistance in the event that, following for example natural disasters or acts of terrorism, a Member State is in a critical or emergency situation as regards its gas supply. However, [...] the principle of energy solidarity cannot be restricted to such extraordinary situations which would exclusively involve the competence of the EU legislature. On the contrary, the principle of solidarity also entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders.”⁵⁹ In order to conclude that: “As regards, more specifically, the energy policy of the

⁵⁶ See also: Ruth Weber, ‘Die Neuordnung der EU-Wirtschaftsverfassung durch Art. 122 AEUV? Eine Analyse am Beispiel des Solidaritätsbeitrags als Notfallmaßnahme’, *AöR* 149(2024), pp. 83–89; Jörg Gundel, ‘Der Grundsatz der Energiesolidarität als justiziable Vorgabe des europäischen Energierechts’, *EuZW*, 2021, p. 758; Kreuter-Kirchhof: ‘Europäische Energiesolidarität – Wege zur Vorbeugung und Bewältigung schwerer Energieversorgungskrisen in der EU’, *NVwZ* 2022, p. 993.

⁵⁷ Case T-883/16, *Poland v Commission*; EU:T:2019:567.

⁵⁸ *Ibid.*, para. 69.

⁵⁹ In the French version of the judgement, para. 72 says: “Au contraire, le principe de solidarité comporte également une obligation générale, de la part de l’Union et des États membres, dans le cadre de l’exercice de leurs compétences respectives, de tenir compte des intérêts *des autres acteurs*.”

European Union, that policy requires the European Union and the Member States to endeavour, [...] to avoid adopting measures liable to affect the interests of the European Union and the 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.”⁶⁰ This very far-reaching concept of solidarity was appealed by Germany, the Member States whose NRA had originally granted the exemption for OPAL, subject to the contested Commission decision.

However, the Advocate General Campos Sánchez-Bordona concurred with the General Court’s ruling and recommended rejection of the appeal. He was followed by the ECJ in Grand Chamber formation.⁶¹

Interestingly the AG’s opinion reviews the concept of solidarity both in the Treaties in general but also in the case-law and as concerns energy. He concluded that the notion of solidarity in article 194 TFEU produces legal effects and is “justiciable and, accordingly, capable of legal application. As such, that principle, unlike mere rules, may produce effects – depending on its nature – not only where it has been enshrined in a provision of secondary law but also, in some instances, in the absence of such a provision, and, of course, in the judicial review of decisions adopted in the subject area for which it was established.”⁶²

The AG went further to opine that: “The principle of energy solidarity [...], does not stop at ensuring security of supply, as referred to in Article 36(1)(a) of Directive 2009/73. Increased gas supply will not necessarily mean increased solidarity in the internal market in gas: if the increase in supply is concentrated in a few States and remains in the hands of a dominant undertaking able to distort competition on that market, it may operate to the detriment of the interests of one or more Member States in an unjustified (non-solidary) fashion.”⁶³ And finally the AG considers that the principle of solidarity required an assessment of the interests involved on a case-by-case basis, this eventually leading, as the concept is an abstract one, to the nature of the assessment being “defined over time, inasmuch as it is subject to the scrutiny of the Court of Justice, and dynamic in character, further influenced as this will be by the future development of the European Union’s energy policy.”

The ECJ confirmed that approach, clarifying that “the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself

⁶⁰ Case T-883/16, *Poland v Commission*; EU:T:2019:567; paras. 70–73.

⁶¹ Case C-848/19 P, *Germany v Poland and Commission*; ECLI:EU:C:2021:598.

⁶² AG Opinion in case C-848/19 P, *Germany v Poland and Commission*; ECLI:EU:C:2021:218, para. 99.

⁶³ *Ibid.*, para. 104.

one of the fundamental principles of EU law,⁶⁴ and that the “the principle of solidarity underpins the entire legal system of the European Union.”⁶⁵

The ECJ also clarifies that “It must be noted that the wording of Article 194 TFEU does not give any indication that, in the field of EU energy policy, the principle of energy solidarity should be limited to the situations referred to in Article 122 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU must, for the reasons set out in paragraphs 41 to 44 of the present judgment, inform any action relating to EU policy in that field.”⁶⁶ Accordingly, the duty for both the EU Institutions and the Member States, to take the principle of energy solidarity into account when adopting acts in the energy sector, ensuring in particular security of energy supply in the European Union, entails the adoption of measures to deal with emergencies as well as of preventive measures. The European Union and the Member States must balance the energy interests involved and avoid adopting measures that might affect the interests of stakeholders liable to be affected, as regards security of supply, its economic and political viability and the diversification of sources of supply. They should do so in order to take account of their interdependence and *de facto* solidarity.

This wide notion of solidarity means that the effect of any act taken by the Institutions should always be assessed for its possible effects on other Member States.⁶⁷ It also implies equally that Member States should not act without that assessment being made.

This interpretation is in the logic of the general understanding of solidarity which presupposes that, in its application, Member States do take into account the interests of others (as equally relevant) and therefore are prepared to find a suitable compromise between their and other’s interests.⁶⁸ On other words: if common action is envisaged, it is difficult to envisage how Member States remain free to act as if they were not committed to common action.⁶⁹

⁶⁴ Case C-848/19 P, *Germany v Poland and Commission*; ECLI:EU:C:2021:598, para. 38.

⁶⁵ *Ibid.*, para. 41.

⁶⁶ *Ibid.*, para. 67.

⁶⁷ As Koen Lenaerts and Stanislas Adam argue in ‘La solidarité, valeur commune aux Etats membres et principe fédératif de l’Union européenne’, *Cahiers droit européen*, 2021/2 - 2 juillet 2021, p. 407 examining the notion of solidarity specifically in the field of energy: “Il s’ensuit qu’un esprit de solidarité doit inspirer l’ensemble de cette politique.”

⁶⁸ Calliess/Ruffert/Calliess, 6th edn. 2022, AEUV Article 222, para. 2.

⁶⁹ As Koen Lenaerts and Stanislas Adam set out in ‘La solidarité, valeur commune aux Etats membres et principe fédératif de l’Union européenne’, *Cahiers droit européen*, 2021/2 - 2 juillet 2021, p. 374: “[...]a Cour a très tôt promu cette acception institutionnelle ou fédérative de la solidarité en rattachant celle-ci aux principes d’égalité entre les États membres et de coopération loyale, désormais consacrés à l’article 4, paragraphes 2 et 3, TUE [...] Ce prononcé de principe met particulièrement bien en lumière le caractère central de la solidarité au sein d’un système fédératif, tant dans une dimension verticale (des entités fédérées envers la fédération et réciproquement)

Arguably the whole European project is founded on solidarity,⁷⁰ and it is no surprise that this notion features – in general terms – in Article 2 TEU, among the fundamental values of the Union and can be seen as *fil conducteur* in the Treaties.⁷¹ Whilst there is no uniform definition of the concept of solidarity, it being mentioned in diverse contexts in the Treaty,⁷² the general approach of reciprocal considerations is nevertheless a common one and the mention in Article 194 TFEU thus really only being, as the ECJ held, “a specific expression, of that general principle in the field of energy.”⁷³

And, of course, solidarity is also present in Article 122 (1) TFEU which has been extensively used as legal basis for the emergency measures taken during the energy crisis (we will address this in more details further in the present report). As very accurately argued, during the crisis, “in a very short period of time, the EU has adopted several legal instruments to address the energy crisis. All of these legal emergency instruments rely heavily on the idea of solidarity and highlight its role in the EU’s crisis responses.”⁷⁴

I-3. Security and energy

Let us now turn to the second concept in Article 194 TFEU at issue in this report, namely security of energy supply, as mentioned in Article 194(1) b TFEU.

Contrary to the notion of solidarity, security of energy supply is not contained in the *chapeau* of Article 194, but is one of the objectives for energy policy enumerated in letters a to d of Article 194 (1) TFEU. In the context of Article 194, this notion of security of supply is arguably restricted to exactly that: ensuring that the supply of energy in the Union is secure.⁷⁵ An illustration is Regulation 2017/1938 concerning measures to safeguard the security of gas supply⁷⁶ the aim of which is, as set out in its Recital 3, “to ensure that all

qu’horizontale (entre entités fédérées). Bien plus qu’une simple philanthropie ou un altruisme circonstanciel, cette solidarité traduit une véritable prise de responsabilité de chaque entité engagée dans une entreprise fédérative, dont elle reflète en ce sens la nature profonde.”

⁷⁰ See: preamble to the TEU, where it says: “Desiring to deepen the solidarity between their peoples...”; Groeben, von der/Schwarze/Konrad Lachmayer, 7. Aufl. 2015, AEUV Art. 222, Rn. 3

⁷¹ Streinz/Ohler, 3. ed. 2018, AEUV Art. 222, para. 1.

⁷² For example, the parties to the EU Treaty are, in accordance with the preamble to that Treaty, pursuing the desire “to deepen the solidarity between their peoples.” Under the third subparagraph of Article 3(3) TEU the Union is to promote “economic, social and territorial cohesion, and solidarity among Member States.” In the chapter on economic policy, Article 122(1) TFEU refers explicitly to solidarity between Member States., Cf Opinion by AG Kokott, Case C-370/12, Pringle, ECLI:EU:C:2012:675, para. 142, see further Groeben, von der/Schwarze/Konrad Lachmayer, 7th edn. 2015, AEUV Article 222, para. 3.

⁷³ Case C-848/19 P, *Germany v Poland and Commission*, ECLI:EU:C:2021:598, para. 38

⁷⁴ Kaisa Huta and Leonie Reins, ‘Solidarity in European Union Law and its application in the Energy Sector’, *International and Comparative Law Quarterly*, Vol. 72, Issue 3.

⁷⁵ Grabitz/Hilf/Nettesheim/Nettesheim, 83. EL Juli 2024, AEUV Article 194, Rn. 16.

⁷⁶ OJ L 280, 28.10.2017, p. 1.

the necessary measures are taken to safeguard an uninterrupted supply of gas throughout the Union.” Even more clearly, Recital 2 of Regulation 2019/941 on risk-preparedness in the electricity sector⁷⁷ where this notion comes into play in energy policy: “Well-functioning markets and systems, with adequate electricity interconnections, are the best guarantee of security of electricity supply. However, even where markets and systems function well and are interconnected, the risk of an electricity crisis, as a result of natural disasters, such as extreme weather conditions, malicious attacks or fuel shortages, can never be excluded. The consequences of electricity crises often extend beyond national borders. Even where such crises start locally, their effects can rapidly spread across borders. Some extreme circumstances, such as cold spells, heat waves or cyberattacks, may affect entire regions at the same time.”

In other words, the notion of security of supply would not cover security issues more generally such as public security as envisaged in Articles 36, 45, 52, 202 TFEU or 67, internal security as foreseen in Articles 71 and 72 or national security as in Article 4 TEU and Articles 73 TFEU or 346 TFEU. Nor would it cover security policy in the sense of the sanctions (under the legal basis of Article 215) or in the sense of Common Foreign and Security Policy as in Article 17 TEU. Further to Article 27 TEU, the Common Foreign and Security Policy is in any event a matter for the High Representative and Foreign Affairs Council and, already for that reason, apart from Article 194 TFEU matters.

The field of international security is arguably closely linked to solidarity as it removes the security of supply from the exclusive realm of the Member States to make it a common objective of Union policy.⁷⁸ As Recital 3 of Regulation 2019/941 on risk-preparedness in the electricity sector sets out: “[...] in a context of interlinked electricity markets and systems, electricity crisis prevention and management cannot be considered to be a purely national task.” This concept would logically include external aspects, as it is difficult to envisage how the objective could be fulfilled only by looking at the internal market, considering the large import dependency for energy of the Union.⁷⁹ It concerns both necessary elements of energy supply: *first* the actual supply with (primary) energy, but also *second*, the security of the necessary infrastructure to ensure that this supply can physically take place.⁸⁰

⁷⁷ OJ L 158, 14/06/2019, pp. 1–21.

⁷⁸ Calliess/Ruffert/Calliess, 6. Aufl. 2022, AEUV Art. 194, Rn. 13.

⁷⁹ Vedder/Heintschel von Heinegg, Europäisches Unionsrecht, 2. Auflage 2018, para. 6a; Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV/Gundel, 2. Aufl. 2023, AEUV Art. 194, Rn. 11 and 34.

⁸⁰ Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV/Gundel, 2. Aufl. 2023, AEUV Art. 194, Rn. 10–11.

Unlike Article 122 TFEU, which will be considered later in this report, security of supply under Article 194 TFEU is an element of the ordinary legal basis for all energy legislation.⁸¹ This has led to a panoply of legislation, that was adopted not only in response to the recent energy crisis in the field of gas (which were temporary and based on Article 122 (1) TFEU) but taking permanent measures to address security of supply in a permanent way: as an example, Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply⁸² is motivated by the need to ensure security of supply across the Union as its Recitals 1 and 2 set out, “[n]atural gas (gas) remains an essential component of the energy supply of the Union. A large proportion of such gas is imported into the Union from third countries. A major disruption of gas supply can affect all Member States, the Union and Contracting Parties to the Treaty establishing the Energy Community, signed in Athens on 25 October 2005. It can also severely damage the Union economy and can have a major social impact, in particular on vulnerable groups of customers.” Therefore, the security of supply angle is an important one and, as Recital 4 of that same Regulation sets out, several pieces of legislation, whilst improving the situation, had not yet attained the objective of security of supply, and required further action. It states: “Union law, in particular Directive 2009/72/EC of the European Parliament and of the Council, Directive 2009/73/EC of the European Parliament and of the Council, Regulation (EC) No 713/2009 of the European Parliament and of the Council, Regulation (EC) No 714/2009 of the European Parliament and of the Council, Regulation (EC) No 715/2009 of the European Parliament and of the Council and Regulation (EU) No 994/2010 of the European Parliament and of the Council, has already had a significant positive impact on the security of gas supply in the Union, both in terms of preparation and mitigation. Member States are better prepared to face a supply crisis now that they are required to establish preventive action plans and emergency plans, and they are better protected now that they have to meet a number of obligations regarding infrastructure capacity and gas supply. However, the Commission’s report on the implementation of Regulation (EU) No 994/2010 of October 2014 highlighted areas in which improvements to that Regulation could further bolster the security of gas supply in the Union.”

In other words, security of supply has been a major issue before the crisis and one that is subject to considerable Union legislation. This is also the case of electricity, were, due to the interconnected nature of the grids, security of supply necessarily risks being more than a national issue. Maintaining the stable supply of electricity for all Europeans is no easy task given that the EU electri-

⁸¹ Ibid., Rn. 13; Grabitz/Hilf/Nettesheim/Nettesheim, 83. El. Juli 2024, AEUV Art. 194 Rn. 16.

⁸² 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, OJ L 280, 28.10.2017, pp. 1–56.

cal power grid is one of the largest and most complex systems in the world. As with gas pipelines, electricity grids are strongly interconnected across Europe and well beyond the EU. An outage in one country might trigger blackouts or shortages of supply in other areas and countries.⁸³ In electricity, the issue is addressed primarily by ensuring an efficient market through the regulation: “Well-functioning markets and systems, with adequate electricity interconnections, are the best guarantee of security of electricity supply. However, even where markets and systems function well and are interconnected, the risk of an electricity crisis, as a result of natural disasters, such as extreme weather conditions, malicious attacks or fuel shortages, can never be excluded. The consequences of electricity crises often extend beyond national borders. Even where such crises start locally, their effects can rapidly spread across borders. Some extreme circumstances, such as cold spells, heat waves or cyberattacks, may affect entire regions at the same time. In a context of interlinked electricity markets and systems, electricity crisis prevention and management cannot be considered to be a purely national task. The potential of more efficient and less costly measures through regional cooperation should be better exploited. A common framework of rules and better coordinated procedures are needed in order to ensure that Member States and other actors are able to cooperate effectively across borders, in a spirit of increased transparency, trust and solidarity between Member States.”⁸⁴ But, in addition, specific legislation targeted at the security of supply is also in place, such as the Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector.⁸⁵ It sets out a common framework of rules on how to prevent, prepare for and manage electricity crisis, bringing more transparency in the preparation phase and during an electricity crisis and ensuring that measures are taken in a coordinated and effective manner.

More recently, the new rules on the electricity market design⁸⁶ were intended not only to address the way the market functions, but also to combat market abuse and manipulation, which was observed or at least suspected⁸⁷ also during the crisis (aggravating the price peaks), more effectively.⁸⁸

⁸³ See: https://commission.europa.eu/news/focus-energy-security-eu-2020-04-27_en

⁸⁴ Recitals 2 and 3, 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 L 158, 14.06.2019, pp. 1–21.

⁸⁵ 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 L 158, 14.06.2019, pp. 1–21.

⁸⁶ The new electricity market design rules consist of the amending Directive EU/2024/1711 and the amending Regulation EU/2024/1747. They were adopted on 21 May 2024 and entered into force on 16 July 2024.

⁸⁷ See e.g.: <https://www.gov.si/en/news/2022-10-28-in-the-light-of-the-energy-crisis-the-ministry-of-finance-favours-decisive-action-in-financial-markets/>

⁸⁸ This in addition to the already existing market abuse regime for energy: the Regulation on Energy Market Integrity and Transparency, Regulation (EU) No 1227/2011, (“REMIT”) which in-

Clearly, the notion of security of supply also covers external relations issues as the EU is still largely import-dependent for its energy needs. In that context, security of supply has been a driving element of the Union's external energy policy for some time. As set out in the 2020 Communication: "Building on the legal basis in the Lisbon Treaty, which clarifies and strengthens the external dimension, the EU's external energy policy must ensure effective solidarity, responsibility and transparency among all Member States, reflecting the EU interest and ensuring the security of the EU's internal energy market."⁸⁹

Furthermore, in January 2012, the EU established an information exchange mechanism to facilitate the coordination with and between EU countries when negotiating international energy agreements with third countries (Decision 994/2012/EU⁹⁰). In its Recital 3 it was set out that "the proper functioning of the internal energy market requires that the energy imported into the Union be fully governed by the rules establishing the internal energy market. An internal energy market that does not function properly puts the Union in a vulnerable and disadvantageous position with regard to security of energy supply [...]." This decision was repealed and replaced by the Decision on establishing an information exchange mechanism in the field of energy (EU/2017/684),⁹¹ which entered into force on 2 May 2017. It introduces a mandatory ex-ante assessment by the Commission to help Member States ensure the compatibility of intergovernmental energy agreements (hereafter 'IGAs') with EU law. Whilst this *ex ante* assessment is required for IGAs in the field of gas and oil, IGAs in the field of electricity are to be submitted to the Commission only after their ratification. The decision also requires Member States to submit all existing international energy agreements to the Commission for assessment.⁹²

roduces a EU-wide wholesale market monitoring framework, has constituted an important and innovative regulatory development. REMIT came into force in December 2011 and provided for an explicit prohibition of market manipulation, attempted market manipulation and insider trading, together with alternative (to antitrust) enforcement tools. It was indeed felt that the antitrust laws, <https://fsr.eu.eu/remi-the-emerging-case-law-at-eu-and-national-level/>

⁸⁹ Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions *Energy 2020 – A Strategy for competitive, sustainable and secure energy* of 10.11.2010, COM(2010) 639 final, point 5.

⁹⁰ OJ L 299, 27.10.2012, pp. 13–17.

⁹¹ Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU. OJ L 99, 12.04.2017.

⁹² This Decision has recently been amended to be extended to hydrogen, including hydrogen compounds such as ammonia and liquid organic hydrogen carriers by Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 OJ L, 2024/1789.

Here again, the energy crisis and in particular the Russian weaponisation of energy supply has worked as a catalyst. As set out in the EU external energy engagement strategy⁹³ which was presented in May 2022 as part of the REPowerEU plan, “[...], Russia’s invasion of Ukraine has far-reaching consequences for the energy security of not only the EU, but the entire world. Russia’s actions have triggered unprecedented price volatility on the energy markets and underlined the need for partnerships based on trust and shared long-term goals.”⁹⁴

More generally, the EU external energy engagement strategy aims to reinforce the EU’s engagement with partners and strengthen its climate and energy diplomacy. It sets out the objectives of the EU’s external energy policy which include reducing overall energy demand and ensuring fair competition for resources, boosting energy savings, energy efficiency and the development of renewables. The objectives of external energy policy further include supporting Ukraine to build back better, preparing for further EU energy market integration, repairing energy infrastructure and paving the way for a future green hydrogen partnership. Whilst not all of this is solely linked to security of supply, all these aspects certainly contribute to the security of energy supply.

I-4. Energy and environment

The environmental goals, which include of course the climate aspect, to be reflected in energy policy, are possibly among the most complex. Like the notion of solidarity, the environment or rather “regard for the need to preserve and improve the environment” is part of the *chapeau* of Article 194 TFEU: the environmental goals thus touch on all aspects of the energy policy and legislation – no action in the field of energy can be considered without envisaging its effects on environment and climate. More generally, the European Council stated in its conclusions of 12 December 2019, that all relevant Union legislation and policies need to be consistent with, and contribute to, the fulfilment of the climate-neutrality objective while respecting a level playing field, and invited the Commission to examine whether this requires an adjustment of the existing rules.⁹⁵

This emphasis on the environment will necessarily lead to constant trade-offs and the need for readjustment. The complexity of this relation is well illustrated

⁹³ Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU external energy engagement in a changing world* JOIN/2022/23 final of 18.05.2022.

⁹⁴ *Ibid.*, point 6 conclusion.

⁹⁵ See Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’), OJ L 243, 9.07.2021, pp. 1–17, Recital 25.

in the EU Climate law, where Recital 11 says: “In light of the importance of energy production and consumption for the level of greenhouse gas emissions, it is essential to ensure a transition to a safe, sustainable, affordable and secure energy system relying on the deployment of renewables, a well-functioning internal energy market and the improvement of energy efficiency, while reducing energy poverty.”⁹⁶

An example is the role of natural gas: whilst gas emits greenhouse gasses on burning (through to a lesser degree than some other fossil fuels, and especially coal⁹⁷), it cannot immediately be banned from the system in spite of its harmful effect on climate: as recognised in the REPowerEU Communication, energy security in the UE still relies on gas as a transitional fuel.⁹⁸

With this background we shall now turn to the Union’s response to the energy crisis and discuss how this response fitted the energy policy triangle and whether, and if so to what extent, it may have overemphasised one of its three goals. Or whether it simply front-loaded developments which were in motion in any event. Or a bit of both.

II. The Union’s response to the energy crisis

Following Russia’s invasion of Ukraine in February 2022, the European Union has been facing a severe energy crisis. Indeed, high prices of gas had already been observed in the Union since September 2021 and, with the “weaponisation” of energy by Russia in the framework of the war in Ukraine, the export of gas from the Russian Federation to the Union significantly declined. Russian pipeline gas imports from July to September 2022 were down by 74% relative to the same period in 2021. The steep decrease in gas supplies from Russia set the gas prices spiking, with a direct spill-over effect on electricity prices. The sharp increase in gas prices and the resulting demand for alternative fuels also led to an increase in other commodity prices such as those of crude petroleum and coal. The historically high and volatile energy prices have in turn contributed to inflation and created a risk for the economy of the Union as a whole. The energy security of the European Union has proven fragile, showing its over-reliance on gas, oil and coal imports from Russia: before the outbreak of the conflict, Russia covered more than 40% of European gas imports.

⁹⁶ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’), OJ L 243, 9.07.2021, pp. 1–17.

⁹⁷ See: <https://www.iea.org/data-and-statistics/data-tools/greenhouse-gas-emissions-from-energy-data-explorer>

⁹⁸ Commission Communication on REPowerEU Plan, at 1, COM (2022) 230 final (May 18, 2022), introduction.

In summer 2022, wholesale gas prices reached historically high levels of above EUR 300 per MWh. The high gas prices, combined with reduced availability of nuclear power plants and weak hydroelectric production due to droughts, exerted additional pressure on the already tight wholesale electricity market. The European Power Benchmark was EUR 339 per MWh on average in the third quarter of 2022, that is 222% higher on average than in the third quarter of 2021. In some Member States, the wholesale electricity price went above EUR 400 per MWh.⁹⁹ The effects were increasingly trickling down to households and businesses. The burden on energy consumers became so pronounced that there was a risk of serious and lasting harm for those consumers and for the economy. Member States were hence increasingly starting to take different kinds of measures to shield energy consumers, which in turn threatened to fragment the internal energy market due to its strong interconnectedness.

At the same time, the high and volatile prices generated higher than expected revenues for some electricity generators and high surplus profits for companies and permanent establishments in the crude petroleum, natural gas, coal and refinery sectors. Such revenues could not have been foreseen or expected under normal conditions.

In those circumstances, on 18 May 2022, a few weeks after the Russian invasion of Ukraine, and in line with the request of the conclusion of the European Council meeting held in Versailles on 10 and 11 March,¹⁰⁰ the European Commission presented the REPowerEU plan.¹⁰¹ The key objective of this plan was to phase out the Union's dependency on Russian gas, oil and coal imports. This strategy is based on four key pillars: supply diversification, energy saving measures, substitution of fossil fuels by renewable energy sources and investment incentives.

However, such ambitious objectives could only be achieved in the medium to long term, but not immediately, and the energy situation of the Union, with the threat of a complete stop of Russian gas imports (the cessation of Russian gas exports being used as a weapon of war) was a serious and urgent crisis situation for the EU economy. Thus, while considering the implementation of this REPowerEU plan in the medium and long term, the EU had to adopt emergency measures for an immediate short-term energy security response.

In this context of acute energy crisis, the European Union has acted rapidly through various successive and complementary coordinated measures to

⁹⁹ See: European Commission, *Quarterly report on European electricity markets*, Q3 2022, <https://circabc.europa.eu/ui/group/3ef9355f-1ffe-4c82-ba19-f60a3ed2f652/library/eed6f527-1752-40c6-bf21-1a6850546dba/details>

¹⁰⁰ Versailles Declaration, Recital 16, March 10–11, 2022.

¹⁰¹ Commission Communication on REPowerEU Plan, at 1, COM (2022) 230 final (May 18, 2022).

contain and mitigate the impact of high energy prices on businesses and households, to collectively reduce gas and electricity consumption, to diversify supplies and to speed up the green transition with the objective of swiftly breaking free from its dependency on Russian gas. Between June and December 2022, within only seven months, the EU adopted as many as six regulations to mitigate the crisis¹⁰² with the objective to break free from its dependency on Russian gas.

If the Union has been able to adopt so quickly six regulations, it is because it relied, for five of them, not on the usual legal basis of Article 194 TFEU, which specifically concerns energy, but Article 122(1) TFEU, which allows the Union to take urgent measures in the case of a crisis.

As topic I relates to EU Emergency Law specifically, it is not the purpose of the present report on topic III to address general legal and institutional issues about the use of Article 122 (1) TFEU. However, it is not possible to address the question of the energy crisis management without examining the measures, mostly based on Article 122 (1) TFEU, taken by the Union to face the crisis. In this report we will focus mainly on whether the Union's response has been effective and has achieved its objectives and whether the use of Article 122 TFEU (1) in its framework was appropriate to respond to the crisis.

II-1. The measures adopted by the Union as an immediate response to the crisis

II-1.a. Regulation 2022/1032 on Gas Storage

The first measure adopted in response to the crisis was not of a temporary measure, but a permanent one, designed to strengthen the already existing provisions of EU law as regards security of supply in gas. It was hence adopted based on the usual legal basis for energy policy, that is, on Article 194 TFEU.

¹⁰² Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage//data.europa.eu/eli/reg/2022/1032/oj, establishing gas storage filling obligations for winter 2022/2023; Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas, // data.europa.eu/eli/reg/2022/1369/oj; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, //data.europa.eu/eli/reg/2022/1854/oj; Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable reference prices and exchanges of gas across borders, data.europa.eu/eli/reg/2022/2576/oj, Council Regulation (EU) No 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy//data.europa.eu/eli/reg/2022/2577/oj and Council Regulation (EU) No 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect citizens of the Union and the economy against excessively high prices, data.europa.eu/eli/reg/2022/2578/oj

The European Union experienced a prolonged period of volatile and high energy prices in 2021 due to lower-than-usual storage filling levels, due to various factors. The increased geopolitical tensions after Russia's invasion of Ukraine in the beginning of 2022 amplified uncertainties and highlighted the need for well-filled gas storage for future winters. Gas storage, in particular Underground Gas Storage (UGS), is essential for the security of supply as it provides an additional reserve in case of strong demand or supply disruptions. Gas storage can cover up to one third of the EU's gas demand in winter and it reduces the need to import additional gas and contributes to absorbing supply shocks.

On 23 March 2022, the Commission published a Communication on “Security of Supply and Affordable Energy Prices,”¹⁰³ together with a proposal for a new regulation on gas storage. The proposed measures aimed to ensure that underground storage facilities are filled every year ahead of the winter to enhance the security of supply and reasonable prices for winter 2022–2023 and beyond.

Regulation 2022/1032¹⁰⁴ on Gas storage has been adopted on 29 June 2022 (hereafter ‘Regulation 2022/1032’, or the ‘Gas Storage Regulation’). This regulation aims to optimise the EU's winter preparedness by ensuring that gas storage facilities are sufficiently filled by setting a series of new rules.

These new rules are the following:

- Filling targets and trajectories are set. According to the new amended Article 6a of Regulation 2017/1938, Member States shall meet a filling target for the aggregated capacity of all underground storage facilities that are located on their territory at the beginning of the heating season, that is, by 1st November 2022, of 80% which, from 1st November 2023, is increased to 90%. It then provides for a “filling trajectory,” a set of intermediate targets for each Member State's underground gas storage facilities, to be set by implementing acts adopted by the Commission by 15 November of the preceding year.
- Gas storage facilities are considered critical infrastructures, and all EU storage operators have to go through a new certification process by early 2024 at the latest, in order to reduce the risk of external interference.
- Storage site operators should report filling levels to national authorities and EU Member States should monitor filling levels on a monthly basis and report to the Commission.
- A solidarity mechanism of burden sharing is created. Indeed, some EU Member States have more storage than their own domestic consumption, while others do not have storage facilities. However, all EU Member States

¹⁰³ COM/2022/138.

¹⁰⁴ Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage (OJ L 173, 30.06.2022, p. 17).

benefit from the guaranteed filling levels. So the new burden-sharing mechanism ensures that not only EU Member States with storage facilities pay the security of supply costs of the minimum filling target.

The first Implementing Regulation¹⁰⁵ adopted on 23 November 2022 set out the filling targets for intermediate gas storage that EU Member States should meet to reach the 90% gas storage target by 1st of November 2023. It set intermediate targets for 1st February, May, July, and September 2023 for EU Member States with underground storage on their territory and linked to their market area. These targets are based on the proposals made by EU Member States in September 2022, taking into account the load factors of the previous five years, and the Commission's assessment of the overall security of supply situation in the EU and in each EU country.

Regulation 2022/1032 on Gas Storage has played a crucial role in ensuring availability of sufficient gas for the winter. Indeed, each year since the introduction of Regulation 2022/1032 on Gas Storage (hereafter 'the Gas Storage Regulation'), the EU has exceeded its gas storage filling target. Indeed, all Member States have met their intermediate storage targets on time and some even went beyond the mandatory filling target.¹⁰⁶

The first report from the Commission on the implementation of the Gas Storage Regulation,¹⁰⁷ published in March 2023, confirmed that an EU-wide storage level of 94.9% was reached by 1st November 2022 and that the average gas storage level (83.4%) was still high at the end of 2022.

In 2023, the 90% filling gas storage target was already reached on 18th August 2023, about 2.5 months before the deadline and, as of 1st November 2023, gas storages in the EU were 99.4% full, well above the 90% target. All Member States achieved their regulatory targets individually. By the end of 2023, in December 2023, gas storages were still 89% full.¹⁰⁸

¹⁰⁵ Commission Implementing Regulation (EU) 2022/2301 of 23 November 2022 setting the filling trajectory with intermediary targets for 2023 for each Member State with underground gas storage facilities on its territory and directly interconnected to its market area (C/2022/8593) OJ L 305, 25.11. ELI: http://data.europa.eu/eli/reg_impl/2022/2301/oj

¹⁰⁶ JCR Technical Report, Monitoring the gas storage trajectory in the European Union in 2022 Regulation (EU) 2022/1032, p. 25, <https://publications.jrc.ec.europa.eu/repository/handle/JRC132366>

¹⁰⁷ Report from the Commission to the European Parliament and the Council on certain aspects concerning gas storage based on Regulation (EU) 2017/1938 of the European Parliament and of the Council, COM(2023) 182 final, 27 March 2023.

¹⁰⁸ Report from the Commission to the European Parliament and the Council on certain aspects concerning gas storage based on Regulation (EU) 2017/1938 of the European Parliament and of the Council Brussels, 27 February 2024, COM(2024) 89 final.

In 2024 again, the 90% target of filling gas storage was reached already on 19 August 2024, well over two months ahead of the deadline. On 1st November 2024, the EU-wide gas storage level was over 95%, recording approximately 100 bcm of gas in stock at the beginning of the winter. It represents around one third of the EU's annual gas consumption.

In February 2024, the Commission published a report¹⁰⁹ on certain aspects concerning gas storage, which concluded that these measures (together with the gas demand reduction Regulation, analysed later in this report) did not only help guarantee security of supply, but also contributed to stabilising energy prices, benefitting the competitiveness of the EU economy and reducing bills for citizens from the peaks seen in August 2022 after the Russian invasion.

The Gas Storage Regulation illustrates perfectly how security of supply and solidarity are closely interlinked and at the core of the EU reaction to the energy crisis. Innovative provisions such as a solidarity mechanism of burden sharing have been put in place, hence mutualising the burden of storage facilities to ensure the security of supply of all Member States.

Indeed, some Member States have very large storages capacities compared to their consumption, which can serve also (or mainly) users in neighboring Member States. By way of example, Latvia's storage capacity corresponds to 186% of its own consumption and Austria's aggregate capacity in storage exceeded its annual consumption (111%). Germany's underground storage facilities on the other hand correspond only to around 29% of the country's annual gas consumption.¹¹⁰

This required the creation of a mechanism in the Gas Storage Regulation to ensure that such differences in the storage capacities of Member States can be taken into account. Accordingly, the Gas Storage Regulation provides for Member States without own underground storage take part in the financing of the filling of the gas storage, either by booking a minimum amount of storage capacities corresponding to at least 15% of their annual consumption, or by way of a bilateral burden sharing agreement with Member State(s) disposing of storage.¹¹¹ It also provides for several individual reductions from storage obligations for Member States which contribute in an exceptionally high man-

¹⁰⁹ Report from the Commission to the European Parliament and the Council on certain aspects concerning gas storage based on Regulation (EU) 2017/1938 of the European Parliament and of the Council Brussels, 27 February 2024, COM(2024) 89 final.

¹¹⁰ Study on the impact of the measures included in the EU and National Gas Storage Regulations, VIS Economic & Energy Consultants, October 2023, p. 181, https://www.acer.europa.eu/sites/default/files/documents/Publications/VIS-study_Gas_Storage_Report.pdf

¹¹¹ See: Article 6c (1) and (2) of the Gas SoS Regulation, as amended by the Gas Storage Regulation. See in this context also Recital (20) of the Gas Storage Regulation.

ner to security of supply¹¹² or for Member States which rely to a lesser extent on underground storage (e.g. because of LNG capacities).¹¹³

This balance is however not easy to find as some national measures show. The example of the German gas storage levy is very illustrative of this tension. The *Gasspeicherumlage*¹¹⁴ was introduced in Germany in 2022 as a way to finance the costs of Germany's storage filling. It was called "storage" fee because it serves to finance the costs of storage filling. Unlike in other EU Member States, however, not only domestic taxpayers or storage users have to contribute to the costs of the filling of German storage. This storage fee was charged to users of the German gas grid, independently from their use of storage: § 35(e) EnWG extends the fee to exit points to neighboring Member States, thereby making foreign gas transport customers pay for using the German grid – even in cases where the grid is used for the sole purpose of transiting gas through Germany – in order to finance gas storage in Germany.

Several Member States (Austria, the Czech Republic, Poland, and Hungary) complained about this fee.¹¹⁵ These Member States underlined the effects of the storage fee on the Central and Eastern European region. They notably complained about increasing difficulties to access gas imports from Western Europe in this region, and about the risk that the efforts to diversify away from Russian gas could be hampered. They also raised concerns about the effect the storage fee has on the internal gas market and its likely additional costs for consumers. According to the German authorities, the measure was justified because filling the storage sites in Germany ultimately benefits security of gas supply in the EU as a whole.

Following other Member States complaints and informal discussions with the Commission, Germany abolished this controversial fee, as of 1st January 2025.¹¹⁶

Overall, Regulation 2022/1032 on Gas storage has been an undeniable success. Indeed, it has been adopted very fast (proposal from the Commission on 23 March 2022, adoption by 29 June), even though based on Article 194 TFUE, hence requiring adoption by co-decision. Moreover, it has been well implemented by Member States and unchallenged before the Court.

¹¹² See e.g.: Article 6a(2) and 6c (5) of Gas SoS Regulation, as amended by the Storage Regulation, addressing the situation of Lithuania.

¹¹³ See e.g.: Article 6c (3) of the Gas SoS Regulation, as amended by Gas Storage Regulation.

¹¹⁴ Gesetz zur Änderung des Energiewirtschaftsgesetzes zur Einführung von Füllstandsvorgaben für Gasspeicheranlagen sowie zur Änderung von § 246 des Baugesetzbuchs vom 26. April 2022. Das Gesetz wurde am 29. April 2022 im Bundesgesetzblatt (BGBl. I S. 674) verkündet.

¹¹⁵ See: <https://www.euractiv.com/section/energy-environment/news/germanys-gas-tariff-puts-eu-energy-solidarity-at-risk-energy-commissioner-says/>

¹¹⁶ See: <https://www.euractiv.com/section/eet/news/berlin-to-abolish-controversial-gas-transit-fee-with-support-from-cdu-leader/>

Let us turn now to the “emergency Regulations,” as, in addition to this first measure, the European Union has used the legal basis of Article 122(1) TFEU for the adoption of series of five emergency measures.

II-1.b. Regulation 2022/1369 on Gas Demand Reduction

The first of these measures is Regulation 2022/1369¹¹⁷ on coordinated Gas Demand Reduction measures of 5 August 2022 (hereafter ‘Regulation 2022/1369’ or the ‘Gas Demand Regulation’).

The objectives of this regulation are twofold: first, to reduce demand to save gas in view of the severe difficulties of supply in the Union and second, to prepare, in a spirit of solidarity, for the possibility of a complete disruption of gas supplies from Russia at any time, in case of a Union alert.¹¹⁸ Reducing gas demand will help ensure the filling of storage capacities and contribute to drive energy prices down, to the benefit of Union consumers.

First, as regards the reduction of demand, according to Article 3 (titled “Voluntary demand reduction”) the Regulation foresees a voluntary mechanism where Member States “shall use their best efforts” to reduce gas demand at least by 15% compared to their average gas consumption in the period between 1st August 2022 and 31st March compared with the five consecutive years preceding the date of entry into force of the Regulation.

Member States have a wide margin of discretion for its implementation as, according to Article 6, they “shall be free to choose the appropriate measures to reduce demand,” while respecting the principles set out in Article 6 of Regulation (EC) n° 2017/1938.¹¹⁹ Despite this freedom, and in line with the title of the Regulation, these national measures should be coordinated.

Hence, Article 7 provides for cooperation between Member States through the relevant risk groups and Member States have to update their national emergency plans pursuant to Article 8 of Regulation 2017/1938¹²⁰ to take into account their voluntary demand-reduction measures. Member States shall consult the Commission and the relevant risk groups before adopting their revised emergency plans.

¹¹⁷ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas, OJ L 206, 8.8.2022, p. 1, ELI: <http://data.europa.eu/eli/reg/2022/1369/oj>

¹¹⁸ See: Recital 5 of Regulation 2022/1369 on Gas Demand Reduction.

¹¹⁹ 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, OJ L 280, 28.10.2017, p. 1, <http://data.europa.eu/eli/reg/2017/1938/oj>

¹²⁰ 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, OJ L 280, 28.10.2017, p. 1, <http://data.europa.eu/eli/reg/2017/1938/oj>

Consequently, the Gas Demand Regulation ensures a fair balance between the power of each Member State to determine its choice between different energy sources and the general structure of its supply, in accordance with Article 194 (2) TFEU and the need for a common response to the Union's common energy challenges.

In line with those principles, Article 4 provides for the possibility of a declaration of a "Union alert" by the Council in clearly defined circumstances, based on a proposal from the Commission, which would make gas demand reduction mandatory.

According to Article 4, there are two situations in which the Commission can make such a proposal. First, under para. 2, where there is a substantial risk of a severe gas supply shortage or where an exceptionally high demand for gas occurs, for which the voluntary measures under Article 3 are not sufficient, which results in a significant deterioration of the gas supply situation in the Union and where the market is not able to manage the disruption without the need for non-market-based measures.

Or, second, under para. 3, where at least five competent authorities that have declared an alert at national level in accordance with Article 11(1)(b) of Regulation (EU) 2017/1938¹²¹ so request. Hence, the conditions for declaring an "Union alert" are striff such an alert is declared, which has not been the case so far, Member States are subject to a mandatory demand reduction (Article 5) whereby each Member State must reduce its gas consumption in a similar way as under the voluntary mechanism (e.g. for the period between 1 August 2022 and 31 March 2023, the consumption shall be 15% lower compered to its reference gas consumption). This obligation is however subject to several exemptions in order to take into account the specific situation of each Member State¹²² giving again some margin of discretion to Member States who, under paragraphs 5 to 8, "may" limit the mandatory demand reduction, taking into account their national circumstances. These exemptions apply mainly to Member States which are not interconnected with the gas network of other Member States or to Member States whose electricity network is not synchronised with the European electricity system, and which are highly dependent on gas to produce their electricity.

Article 8 provides for the monitoring of the implementation of demand-reduction measures. Members States must report on the demand reduction

¹²¹ 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, OJ L 280, 28.10.2017, p. 1, ELI: <http://data.europa.eu/eli/reg/2017/1938/oj>

¹²² See: Article 5, paras. 3–8.

achieved to the Commission every two months, and even monthly in the event of an EU alert.

According to Article 9, the Commission had to carry out a review of the Regulation before it ceases to be in force (by 1 May 2023) in view of the general situation of gas supply to the Union and present a report on the main findings of that review to the Council. Article 9 foresees that, based on this review, the Commission may prolong the period of application of the Regulation.

The Commission carried out this review¹²³ and its results were summarised in a report presented by the Commission to the Council. The report analysed different scenarios, with and without an extension of demand-reduction efforts under Regulation 2022/1369. It concludes that without continued demand reduction, storage levels would only reach 69 bcm by the end of October 2023, which is significantly below the 90% (89.4 bcm) target for 1 November set out in Regulation (EU) 2017/1938 and that storage levels would be fully depleted by February 2024. It concludes that a continued demand reduction of 15% over a twelve month period until the end of March 2024 is necessary in order to ensure that Member States are able to comply with the storage target of 90% set out in Regulation (EU) 2017/1938.

Consequently, “in view of the imminent gas supply crisis caused by Russia’s unprovoked and unjustified invasion of Ukraine”¹²⁴ and the fact that serious challenges to the security of energy supply remain¹²⁵ the Council, upon proposal from the Commission, adopted Regulation 2023/706 of 30 March¹²⁶ extending the period of application of Regulation 2022/1369 for a period of one year until 31 March 2024.

After March 2024, taking into account that the Gas Demand Regulation is of a temporary nature, but that the energy crisis, though not as acute, is not over, the Council adopted a recommendation,¹²⁷ based on Article 292 TFUE in conjunction with Article 194 (2) TFUE, that encourages Member States to continue reducing their gas consumption until 31 March 2025, by at least 15%

¹²³ Report from the Commission to the Council of 20 March 2023, review on the functioning of Regulation (EU) 2022/1369 on coordinated gas demand reduction, COM/2023/173 final.

¹²⁴ Recital (1), Proposal for a Council Regulation amending Regulation (EU) 2022/1369 as regards the extension of the period of application of demand-reduction measures for gas and the strengthening of reporting and monitoring of the implementation of such measures, COM (2023) 174 final of 20 March 2023, p. 9.

¹²⁵ Recital (3), *ibid.*

¹²⁶ Council Regulation (EU) 2023/706 of 30 March 2023 amending Regulation (EU) 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation, OJ L 93, p. 1, <http://data.europa.eu/eli/reg/2023/706/oj>

¹²⁷ Recommendation of 8 of March 2024, <https://www.consilium.europa.eu/en/press/press-releases/2024/03/25/security-of-gas-supply-council-gives-final-green-light-to-voluntary-demand-reduction-measures/>

compared to their average gas consumption in the period from 1 April 2017 to 31 March 2022 (hence in a similar way as in the Gas Demand Regulation).

This recommendation is also of a limited duration as it is intending to bridge the gap between the end of the emergency Regulation, which is temporary, and more permanent measures. Indeed, it aims at helping Member States to take adequate supply security measures until the transposition of the directives on energy efficiency¹²⁸ and renewables¹²⁹ in 2025 is effective as both directives will bring structural demand reduction in the near future, while achieving EU's decarbonisation goals.

Some Member States – more dependent on Russian gas than others – have been critical about this Regulation. Poland, in particular, argued that the EU's call for solidarity on gas is not reciprocated on other issues, for example the Emissions Trading System (ETS), which the Polish government blames for driving up energy prices in Poland.

Poland brought an action for annulment of Regulation 2022/1369 against the Council (case C-675/22) on 2 November 2022.¹³⁰ Hungary intervened in this case, supporting Poland's action. Poland raises, first, the plea that its legal basis, namely Article 122(1) TFEU, is incorrect. It argues that the main objective of the contested Regulation is to have a significant effect on the conditions for exploiting energy resources, the choice between different energy sources and the general structure of a Member State's energy supply. It also argues that, since that Regulation affects the freedom to shape the energy mix, it should have been adopted on the basis of Article 192(2)(c) TFEU, to which the 2nd subpara. of Article 194(2) TFEU refers, hence in accordance with a special legislative procedure under which the Council acts unanimously. It also raises a plea alleging a breach of the principle of legal certainty and of the principle of energy solidarity. This case is still pending at the time of writing.

However, in general, this EU initiative on gas demand reduction has been considered a success. Gas consumption thus decreased by almost 18% in the period August 2022–March 2023, compared to the average of the last five years. Only a minority of countries have not met the EU target, namely Ireland, Spain, Slovenia, Slovakia, Poland, Belgium, and Malta, as they have

¹²⁸ Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955, OJ L 231, 20.09.2023, p. 1, <http://data.europa.eu/eli/dir/2023/1791/oj>

¹²⁹ Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 OJ L, 2023/2413, 31.10.2023, ELI: <http://data.europa.eu/eli/dir/2023/2413/oj>

¹³⁰ OJ C 7, 9.1.2023, p. 18, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CN0675>

experienced an increase in gas consumption. Thanks to the demand reduction measures, the EU has succeeded in phasing-out approximately 65 billion cubic meters of Russian gas in 2023, primarily in households and industries. The EU as a whole reduced its gas consumption by 20% between 2021 and 2023.¹³¹

This Regulation illustrates the way the energy crisis led to measures fostering at the same time all aspects of the energy policy triangle: sustainability, security of supply and competitiveness, while taking into account the specific situation of each Member State.

II-1.c. Regulation 2022/1854 to address High Energy Prices

Following a proposal adopted by the Commission on 14 September, the Council adopted Regulation 2022/1854¹³² on an emergency intervention to address high energy prices (hereafter ‘Regulation 2022/1854’), a mere three week later, on 6 October 2022. This Regulation introduces measures to reduce demand for electricity and redistribute the energy sector’s exceptional surplus revenues and profits caused by the crisis to households and businesses to mitigate the effects of rising energy prices. This regulation provides for four main inter-related measures¹³³:

First, the regulation provides for measures to reduce electricity consumption, in particular during peak hours, with a view to reducing costs for consumers (see Articles 3 to 5).

Second, Regulation 2022/1854 introduces a cap on market revenues from electricity produced from sources with lower marginal costs (so-called infra-marginal costs technologies), such as renewable energy sources, nuclear energy and lignite. This cap of the market revenue is set to a maximum of EUR 180 per MWh of electricity produced (see Articles 6 and 7). The cap applies temporarily from 1 December 2022 until 30 June 2023 (see Article 22(2)(c) of Regulation 2022/1854). Pursuant to Articles 8 and 9 Member States may deviate from the agreed measures to go further in order to achieve the objectives of the regulation. Third, the regulation introduces a solidarity contribution for Union companies and permanent establishments operating in the crude oil, natural gas, coal and refinery sectors to mitigate the direct economic impact of the soaring energy prices on the budgets of governments, final customers and companies across the Union (see Articles 14 to 18).

¹³¹ See: <https://ieefa.org/resources/two-years-repowereu-gas-reduction-track-latest-target-raises-risks>
<https://ieefa.org/resources/two-years-repowereu-gas-reduction-track-latest-target-raises-risks>

¹³² Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ L 261I, 07/10/2022, p. 1, ELI: <http://data.europa.eu/eli/reg/2022/1854/oj>

¹³³ See: Recital (15) of Regulation 2022/1854.

Finally, Member States must ensure that all surplus revenues resulting from the application of the cap on market revenues are used to finance measures in support of final electricity customers that mitigate the impact of high electricity prices on those customers (see Article 9 and 10). Pursuant to Articles 8 and 9, Member States may deviate from the agreed measures to go further in order to achieve the objectives of Regulation 2022/1854.

Article 20(1) provides that the Commission is to review the general electricity supply situation and prices in the European Union and submit a report to the Council on its overall findings. The Commission then has the possibility to propose to extend the period of application of the regulation if justified by economic circumstances or the functioning of the electricity market. In its report, delivered in June 2023,¹³⁴ the Commission concluded that it did not consider it necessary to prolong Regulation 2022/1854, taking into account the proposal, based on Article 194 TFUE, setting the reform of the EU electricity market and giving a long-term response to the energy crisis.¹³⁵

This regulation has been challenged by several private companies acting in the energy sector seeking its annulment before the EU General Court as regards the solidarity contribution¹³⁶ as well as the revenue cap.¹³⁷ These cases allege an incorrect legal basis as well as discrimination and breach of various other fundamental principles. Regulation 2022/1854 is also subject to several preliminary ruling references where issues about its validity are raised,¹³⁸ or where measures taken by Member States to implement it are challenged, and questions of interpretation concerning that Regulation arise.¹³⁹ It is also challenged indirectly, based on Article 26 of the Energy Charter Treaty in three investor-State arbitration proceedings, which are administered by the International Centre for the Settlement of Investment Disputes (ICSID). All these cases are still pending at the time of writing.

¹³⁴ Report from the Commission to the European Parliament and the Council on the review of the emergency intervention to address high energy prices under Council Regulation (EU) 2022/1854, Brussels, 5.06.2023, COM (2023) 302 final, p. 12.

¹³⁵ This proposal has been adopted by the co-legislators since then, see Regulation (EU) 2024/1747 of the European Parliament and of the Council of June 13 (the “Regulation”) came into force, amending Regulations (EU) 2019/942 and (EU) 2019/943 regarding improving the Union’s electricity market design.

¹³⁶ Cases T-775/22, T-795/22, T-802/22, T-803/22.

¹³⁷ Case T-759/22.

¹³⁸ See: cases C-358/24 and C-533/24.

¹³⁹ See: case IADS-2/23ICSID *Klesch Group v European Union*.

II-1.d. Regulation 2022/2576 Enhancing Solidarity

On 19 December 2022, after a proposal adopted by the Commission on 22 November, the Council adopted Regulation 2022/2576¹⁴⁰ enhancing solidarity through better coordination of gas purchases, reliable reference prices and cross-border exchanges of gas (hereafter ‘Regulation 2022/2576’). The most important measures the Regulation 2022/2576 establishes are the following: first, it creates a system of demand aggregation and voluntary joint purchasing¹⁴¹; second, it creates a mechanism to prevent excessive gas prices, especially by managing excess volatility in energy derivative markets¹⁴² and, third, it provides for different solidarity measures towards protected consumers in the event of a gas emergency.¹⁴³

The common purchasing platform aims to foster security of supply by enabling joint purchasing natural gas LNG and hydrogen for the Member States and at affordable prices, after aggregating their demand (at least 15% of the Member States’ storage filling obligations are subject to demand aggregation). This aggregation of the demand is intended to avoid undertakings outbidding each other, hence driving the price of gas higher.

Regulation 2022/2576 foresees joint purchasing as a two-step process. The first is mandatory and the second voluntary. In the first step, gas purchasing companies must aggregate part of their demand using an EU-wide dedicated service provider, selected through a public procurement procedure. Member States must ensure that at least 15% of their storage filling requirements for next year are included by their companies in the demand aggregation process (approx. 13.5 bcm across the EU as a whole). Beyond these 15%, the aggregation is voluntary but based on the same mechanism. Having matched demand with supply through this aggregation process, the second step implies that some of these companies voluntarily deciding to form a gas purchasing consortium (or multiple, regional consortia).

An *ad hoc* Steering Board made up of national and Commission officials assesses whether planned gas purchases strengthen security of supply and respect the principle of solidarity (however, it will not assess their compatibility with the EU’s competition rules, which remains the prerogative of the Commission). In accordance with Article 3 of Regulation 2022/2576, companies must notify essential contractual information to the Commission. The Commission, taking

¹⁴⁰ 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, OJ L 335, 29.12.2022, p. 1, ELI: <http://data.europa.eu/eli/reg/2022/2576/oj>

¹⁴¹ See: chapter II, Articles 3 to 11 of the Regulation.

¹⁴² See: chapter III, section 1, Articles 15 to 17.

¹⁴³ See: chapter IV, Articles 23 to 28.

into account the opinion of the Steering Board, will assess whether planned purchases could have a negative impact on the EU's internal energy market or on security of supply. Although it cannot prohibit the conclusion of a contract, it can issue recommendations on further co-ordination and joint purchasing to individual gas companies. The commercial information to be notified must of course be treated as confidential by the Commission and the Steering Board.

Second, price intervention by an “intra-day volatility management mechanism” is provided for in Article 15. Each trading venue on which energy-related commodity derivatives are traded must set up, for each energy-related commodity derivative traded on it, an intra-day volatility management mechanism to establish price limits above and below which orders cannot be executed. Article 17 provides that the European Securities and Markets Authority (“ESMA”) will coordinate and monitor the implementation of this mechanism. In this context, Article 18 to 22 define the role of the European Agency for the Cooperation of Energy Regulators (“ACER”), which is responsible for examining price data and publishing an LNG benchmark.¹⁴⁴

Thirdly, as regards the emergency mechanism, there can be temporary measures to distribute gas “fairly” across borders, to preserve gas supply to the most critical customers and to ensure the implementation of cross-border solidarity measures. This is an explicit expression of the spirit of solidarity between Member States.

The Commission proposed a one-year extension until 31 December 2024 of this emergency measure, which was adopted by the Council on 23 December 2023.¹⁴⁵ In its report on the Regulation, the Commission had underlined that “global gas markets remain under severe stress and market balances are expected to remain precarious in the short term. This situation has negative consequences on gas prices which, despite being lower than the peak experienced in summer 2022, remain more than twice as high than pre-crisis levels. [...]”¹⁴⁶ Similarly, the Prolongation Regulation states that “not extending the period of application of Regulation (EU) 2022/2576, which will cease to apply on 30 December 2023, would risk jeopardising the stabilised but fragile situation reached by the Union to date and weakening resilience to likely future developments such as a complete halt of Russian gas imports.”

In May 2023, the EU announced the successful outcome of the first-ever international tender for joint purchasing of EU gas supplies. By leveraging

¹⁴⁴ See: Recital (55) of Regulation 2022/2576.

¹⁴⁵ Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application, OJ L, 2023/2919, 29.12.2023, ELI: <http://data.europa.eu/eli/reg/2023/2919/oj>

¹⁴⁶ COM (2023) 762 final of 28 November 2023, p. 2.

its collective economic weight, the EU managed to attract bids from a total number of 25 supplying companies equivalent to more than 13.4 billion cubic meters of gas (bcm) – surpassing the 11.6 bcm of joint demand that EU companies submitted through the recently established AggregateEU mechanism.¹⁴⁷ The fifth short-term tender round was launched in March 2024.

In its report on European competitiveness published in September 2024,¹⁴⁸ former Italian Prime Minister Mario Draghi underlined that the EU should strengthen its joint gas purchasing activities to make best use of its collective bargaining power and reduce its exposure to volatile spot prices (see page 39 *et seq.* of the report in question). The report concludes that gas would remain part of the energy mix in Europe over the medium term and that it is key to reduce gas price volatility. It recommends reinforcing joint procurement – at least for LNG – to leverage Europe’s market power.

In her “Political guidelines for the next Commission” (2024–2029)¹⁴⁹ Ursula von der Leyen indicates that she will propose to activate and extend the aggregate demand mechanism to go beyond gas and include hydrogen and critical raw materials.

II-1.e. Regulation 2022/2577 on Permitting

After a proposal adopted by the Commission on 28 November 2022, another emergency Regulation was adopted on 22 December 2022 in the wake of the energy crisis, namely Council Regulation (EC) No 2022/2577¹⁵⁰ establishing a framework to accelerate the deployment of renewable energy (hereafter ‘Regulation 2022/2577’ or the ‘Permitting Regulation’).

This Regulation provides for temporary rules of to accelerate the permit-granting process applicable to the production of energy from renewable energy sources. It particularly focused on specific renewable energy technologies or types of projects capable to achieve a short-term acceleration of the pace of deployment of renewables in the Union. It applied to all permit-granting processes that have a starting date within the period of its application and is without prejudice to national provisions establishing shorter deadlines than those laid down in Articles 4, 5 and 7.

¹⁴⁷ See: https://energy.ec.europa.eu/news/eu-energy-platform-eu-attracted-over-134-bcm-gas-first-joint-gas-purchasing-tender-2023-05-16_en

¹⁴⁸ See: https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#paragraph_47059

¹⁴⁹ See: <https://www.csreurope.org/newsbundle-articles/europes-choice-von-der-leyens-political-guidelines-for-next-term>

¹⁵⁰ Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29.12.2022, p. 36, ELI: <http://data.europa.eu/eli/reg/2022/2577/oj>

In this regard, Article 3(1) of Regulation 2022/2577 contains a presumption of overriding public interest for the planning, construction, and operation of installations for the production of energy from renewable sources, the connection of such installations to the grid, the related grid itself, as well as storage assets.

These measures accelerating the deployment of renewables contributed to improve the situation as concerns the security of supply and the energy prices. Indeed, in view of the interconnectivity of the power systems between Member States, the increased share of renewable energy production in one Member State can help to ease a shortage in another Member State, thus fostering solidarity between Member States to face of the energy crisis. An accelerated deployment of renewable energy capacity is essential to address the energy crisis as it increases security of supply and the protection of consumers from price volatility by reducing the Union’s overall gas demand and import dependency. Accordingly, this is another example of the energy policy triangle at work: the measure, whilst seeking to speed up the deployment of renewables (thus contributing to sustainability) simultaneously increases security of supply and competitiveness (by helping to lower energy prices). The International Energy Agency estimated that average wholesale electricity prices would have been 8% higher in all European markets in 2022 without the additional renewables installed capacity.¹⁵¹ According to Eurostat, in the first half of 2023, renewable energy production in the EU was record high.¹⁵² The Commission’s report also highlights positive developments in terms of increase in renewable energy deployment in the months following the entry into force of Regulation 2022/2577.

After its report of 28 November 2023 on the review of Council Regulation 2022/2577,¹⁵³ the Commission proposed the extension of certain measures with the greatest potential to accelerate the deployment of renewable energy,¹⁵⁴ namely Articles 5 on “repowering renewable power plants” and Article 6 on “[a]ccelerating the permit-granting process for renewable energy projects and related grid infrastructure necessary to integrate renewables into the grid.”¹⁵⁵ By Council Regulation (EU) 2024/223¹⁵⁶ of 22 December 2023 amending

¹⁵¹ See: <https://www.iea.org/reports/renewable-energy-market-update-june-2023/how-much-money-are-european-consumers-saving-thanks-to-renewables>

¹⁵² See: https://ec.europa.eu/eurostat/databrowser/product/view/nrg_cb_pem

¹⁵³ See: https://energy.ec.europa.eu/publications/report-commission-council-review-council-regulation-eu-20222577-22-december-2022-laying-down_en

¹⁵⁴ See: Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy.

¹⁵⁵ Recitals (18) to (22) of Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy.

¹⁵⁶ Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, OJ L, 2024/223, 10.01.2024, ELI: <http://data.europa.eu/eli/reg/2024/223/oj>

Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, Regulation (EU) 2022/2527 was extended until 30 June 2024 and until June 2025 for some of its provisions.

This Regulation is a good example of how the current energy crisis can be seen a historic turning point or catalyst towards a cleaner and more secure energy system. Renewables' continued and accelerated deployment is critical to limit global warming, as well as to ensure EU energy security.

II-1.f. Regulation 2022/2578 setting a Market Correction Mechanism

The last of the emergency Regulations taken on the basis of Article 122 (1) in the wake of the energy crisis is Council Regulation (EC) No 2022/2578¹⁵⁷ proposed by the Commission on 22 November and adopted on 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices (hereafter 'Regulation 2022'). This Regulation establishes a temporary Market Correction Mechanism (MCM) that aims to limit European gas prices below a dynamic bidding limit for orders placed on the Amsterdam Title Transfer Facility (TTF), in order to limit episodes of excessively high gas prices which do not reflect world market prices.¹⁵⁸ The market correction mechanism is activated when a market correction event occurs.¹⁵⁹ This event is deemed to occur when two conditions are fulfilled: (1) the front-month TTF settlement price exceeds €180/MWh for three working days and (2) it is 35 EUR/MWh above a published reference price for three working days. The reference price is calculated and published daily, based on the available prices of several spot and settlement prices by the EU Agency for the Cooperation of Energy Regulators (hereafter 'ACER').

ACER is in charge of price monitoring,¹⁶⁰ which will publish a market correction notice following the market correction event.¹⁶¹ In case of a market correction event ACER activates a dynamic bidding limit for at least 20 working days, which makes it impossible for TTF derivatives market participants to submit orders for TTF derivatives above the limit.¹⁶²

¹⁵⁷ 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, OJ L 335, 29.12.2022, p. 45, ELI: <http://data.europa.eu/eli/reg/2022/2578/oj>

¹⁵⁸ Article 1.

¹⁵⁹ Article 4(1).

¹⁶⁰ Article 3.

¹⁶¹ Article 4(3).

¹⁶² Article 4(5).

ACER has published a report assessing the market effects resulting from the gas Market Correction Mechanism.¹⁶³ On a proposal from the Commission,¹⁶⁴ Council Regulation (EU) 2023/2920¹⁶⁵ extended the application of Regulation (EC) No 2022/2578 until 31 January 2025 in view of the persistence of severe difficulties exposing the Union as a whole to risks of energy shortages and high energy prices.¹⁶⁶

Accordingly, and as a take away, the energy crisis showed that the European Union managed to adopt, in a very short time-span, no less than six regulations to tackle the energy crisis. This is remarkable in terms of intensity and rapidity of the Union action. This result is arguably due to the use of Article 122 (1) TFEU, a previously comparatively rarely used specific legal basis designed for emergency situations, enabling measures to be adopted by Council without involvement of the European Parliament. Apart from Regulation 2022/1032, which was adopted under Article 194(2) TFEU, these measures are all emergency measures based on Article 122(1) TFEU.

Emergency measures are subject to the work of Group I, hence this report will not address in detail general issues relating to Article 122 TFEU.¹⁶⁷

However, in order to analyse the way the Union tackled the energy crisis it is necessary to consider the reliance on Article 122 TFEU in the context of the energy crisis and analyse how this legal basis has been a key instrument to enhance security of supply and ensure solidarity in the energy crisis whilst also furthering the Green transition in line with the energy policy triangle.

II-2. The use of Article 122 TFEU to tackle the energy crisis

II-2.a. Article 122 TFEU: an introduction

Article 122(1) TFEU states that: “Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures

¹⁶³ See: <https://acer.europa.eu/news-and-events/news/acer-publishes-its-assessment-report-market-effects-resulting-gas-market-correction-mechanism>

¹⁶⁴ COM (2023) 761 final of 28 November 2023.

¹⁶⁵ Council Regulation (EU) 2023/2920 of 21 December 2023 amending Regulation (EU) 2022/2578 as regards the extension of its period of application.

¹⁶⁶ Recital (9) of Council Regulation (EU) 2023/2920 of 21 December 2023 amending Regulation (EU) 2022/2578 as regards the extension of its period of application.

¹⁶⁷ For an in-depth overview of Article 122 TFEU, see the Article by Daniel Calleja, Tim Maxian Rusche and Trajan Shipley, ‘EU Emergency-call 122? On the possibilities and limits of using Article 122 TFEU to respond to situations of crisis’, *The Columbia Journal of European Law* 29, summer 2024, <https://heinonline.org/HOL/Contents?handle=hein.journals/coljeul29&tid=1&size=2&index=&collection=journals>

appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.”

Contrary to Article 194 TFEU, which provides for the ordinary legislative procedure, Article 122 (1) TFEU provides for a swift non-legislative procedure for the adoption by the Council of measures appropriate to the economic situation, on the basis of a proposal from the Commission and without the participation of the European Parliament.

This provision has its origin in Article 103 of the Treaty of Rome. Over the years, the versions of this provision have evolved. The Treaty of Maastricht replaced the unanimity required by Article 103(2) of the Treaty of Rome by a qualified majority. In 2009, the Lisbon Treaty introduced a reference to the spirit of solidarity, one of the fundamental values of the Union¹⁶⁸ and the example of the energy sector.

Article 122 (1) mentions that it applies “without prejudice to other procedures.” This “without prejudice to other procedures” provision reflects that if the measure, absent the situation of urgency, could be based on another legal basis, it only allows for a temporary derogation from the other legal bases. The Court clarified the meaning of that introduction of Article 122(1) TFEU and thus of its relationship with other specific provisions of the Treaties dealing with the same matter. In the *Balkan Export* case,¹⁶⁹ the Court held that Article 122(1) TFEU may be used instead of an existing legal basis in the Treaty, where necessary because of the urgency of the situation, emphasising the essentially transitional nature of the measure adopted. The “without prejudice” clause ensures that the measures adopted on Article 122 TFEU basis cannot undermine or circumvent the use of other legal basis in the absence of such specific circumstances and as a consequence ensures the respect of the principle of inter-institutional balance.¹⁷⁰ According to a study of the European Parliament,¹⁷¹ the “without prejudice” clause implies that recourse to Article 122(1) TFEU would require the Council to explicitly address why recourse to Article 122(1) TFEU is necessary, despite the existence of alternative legal bases in the treaties.

¹⁶⁸ See: Articles 2 and 3 TEU and the first para. of Protocol No 28 on economic, social and territorial cohesion.

¹⁶⁹ Judgment of 24 October 1973, 5/73, *Balkan Import Export*, ECLI:EU:C:1973:109

¹⁷⁰ See: Article of Daniel Calleja, Tim Maxian Rusche and Trajan Shipley “EU Emergency-call 122? On the possibilities and limits of using Article 122 TFEU to respond to situations of crisis”, *The Columbia Journal of European* 29, summer 2024, <https://heinonline.org/HOL/Contents?handle=hein.journals/coljeul29&tid=1&size=2&index=&collection=journals>, page 550

¹⁷¹ Study requested by the AFCE committee, European Parliament, *The use of Article 122 TFEU, Institutional implications and impact on democratic accountability*, p. 32, September 2023, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2023\)753307](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)753307)

In *Balkan Export*, the Court emphasised that the principle of proportionality, a general principle of EU law and thus a fundamental principle of primary law, remains fully applicable to such a measure. Otherwise, it could undermine democratic decision-making processes, be it legislative or budgetary procedures.¹⁷² More specifically, the Court of Justice has held that the then Article 103(2) of the Treaty of Rome confers on the Council “the powers necessary to take, in principle, such cyclical measures as may prove necessary to maintain the objectives of the Treaty; it would be impossible for the Institutions to carry out the tasks assigned to them in those areas if they were deprived of such an opportunity, inherent in any economic management.”¹⁷³ The factors to which the Court refers in order to justify recourse to Article 103 were “the sudden occurrence of the events which the Council had to deal with, the urgency of the measures to be taken and the seriousness of the situation.”¹⁷⁴

In sum, where another legal basis is available, Article 122(1) TFEU, as an exceptional legal basis, allows the Council to derogate from the normal decision-making process to act more quickly, but only temporarily, when emergencies of an economic nature so require and in so far as necessary.¹⁷⁵

The surge in reliance on Article 122 (1) TFEU as a legal basis in the context of the energy crisis raised legal as well as institutional issues – the European Parliament in particular voiced concerns as regards the interinstitutional balance and its role, commissioning a study on “The use of Article 122 TFEU.”¹⁷⁶ In this context the present report will examine whether the use of article 122 TFEU was appropriate, legally sound and efficient in the context of the energy crisis.

For the specific interplay between Article 122(1) TFEU and Article 194(1) TFEU, however, it is important to keep in mind that Article 194(2) TFEU also starts with the words “without prejudice to the application of other provisions of the Treaties.” The Court of Justice has clarified the interplay between the two “without prejudice” provisions in Case C-490/10¹⁷⁷ as follows:

¹⁷² Judgment of 24 October 1973, 5/73, *Balkan Import Export*, 5/73, ECLI:EU:C:1973:109, para. 14 and 15.

¹⁷³ Judgment of the General Court of 24 October 1973, *Balkan Import Export*, EU-CEL1973-109, para. 17.

¹⁷⁴ Judgment of the Court of 24 October 1973, *Balkan Import Export GmbH v Hauptzollamt Berlin Packhof*, Case 5/73, ECLI:EU:C:1973:109EU-Cles 1973-109, para. 16.

¹⁷⁵ Otherwise, it could undermine the standard democratic decision-making processes, be it legislative or budgetary procedures, see *Balkan Import Export*, 5/73, ECLI:EU:C:1973:109, paras. 14 and 15.

¹⁷⁶ Study requested by the AFCO committee, European Parliament, The use of Article 122 TFEU, Institutional implications and impact on democratic accountability, September 2023, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2023\)753307](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)753307)

¹⁷⁷ Judgement of the Court of 6 September 2012, *European Parliament v Council of the European Union*, Case C-490/10, ECLI:EU:C:2012:525, paras. 66 and 67.

“Article 194 TFEU, introduced by the Treaty of Lisbon, therefore inserted into the TFEU an express legal basis for the European Union policy on energy. As is apparent from its wording, in particular that of Article 194(2) TFEU, that provision constitutes the legal basis for European Union acts which are ‘necessary’ to achieve the objectives assigned to that policy by Article 194(1) TFEU.

Such a provision constitutes the legal basis intended to apply to all acts adopted by the European Union in the energy sector which are such as to allow the implementation of those objectives, subject to, as can be deduced from the terms ‘[w]ithout prejudice to the application of other provisions of the Treaties’ at the beginning of Article 194(2) TFEU, the more specific provisions laid down by the TFEU on energy. As the Council noted, Articles 122 TFEU and 170 TFEU are *inter alia* covered, concerning severe difficulties arising in the supply of energy products and trans-European networks respectively, as well as the competences that the European Union has under other provisions of the Treaty, even if the measures at issue also pursue one of the objectives of the energy policy stated in Article 194(1) TFEU.¹⁷⁸

II-2.b. The conditions for the use of Article 122

An exceptional situation leading to serious difficulties

The existence of an exceptional or emergency situation is not explicitly mentioned as such in Article 122 TFEU. However, that condition was deduced by the Court, from the clause “without prejudice to other procedures.”¹⁷⁹ It can also be inferred by the reference to economic situation followed by “in particular” in the case of severe difficulties arising in the supply of certain products: Article 122(1) TFEU provides that the Council, on a proposal from the Commission, may decide on measures appropriate to the economic situation “in particular if severe difficulties arise in the supply of certain products, notably in the field of energy.” Hence, Article 122 (1) TFEU itself gives as an example a situation such as the one faced by the EU during the energy crisis (serious difficulties in the supply of energy products). In that regard, the case-law has clarified that this remains only an example of a variety of possibilities.¹⁸⁰ But as underlined by the above-mentioned Study of the European Parliament,¹⁸¹

¹⁷⁸ See for a detailed discussion Daniel Calleja, Tim Maxian Rusche and Trajan Shipley, ‘EU Emergency – call 122? On the Possibilities and Limits of using Article 122 TFEU to respond to situations of crisis’, *CJEL*, Vol 29, Issue 3, published October 28, 2024, p. 527, 533 and 553.

¹⁷⁹ Judgment of 24 October 1973, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*, Case C-5/73, ECLI:EU:C:1973:109, paras. 15 and 17.

¹⁸⁰ Judgment of 30 September 2015, *Anagnostakis v Commission*, T-450/12, EU-Tforthwith 2015-739, paragraph 42. In the literature see also: Grabitz/Hilf/Nettesheim/Bandilla, 80. EL August 2023, AEUV Article 122, point 10.

¹⁸¹ Study requested by the AFCO committee, European Parliament, The use of Article 122 TFEU, Institutional implications and impact on democratic accountability, p. 29, September 2023, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2023\)753307](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)753307)

these economic measures come within the scope of the “appropriate measures” which Article 122(1) TFEU foresees and their adoption in response to the energy crisis seems “an example par excellence of the intended purpose of the legal basis given the severe difficulties which have arisen in the (affordable) supply of gas and electricity.”

In the past, the Court of Justice had found such an emergency situation in *Balkan Import-Export*, where the Court allowed derogations from the agricultural rules to take account of the urgent need to compensate for the consequences of national monetary measures.¹⁸²

While the reference to supply problems is only an example of the type of situations that may be addressed, it nevertheless clearly shows that Article 122(1) TFEU is not intended to regulate ordinary situations of economic policy, but rather situations of economic emergency, such as serious supply difficulties. This interpretation is also confirmed by the 2020 Joint Declaration of the European Parliament, the Council and the Commission on budgetary control of new proposals based on Article 122 TFEU with potential significant implications for the Union budget, according to which the three institutions “note that Article 122 TFEU constitutes a legal basis for the adoption of measures to address specific crisis situations.”¹⁸³

In the case of the responses to the energy crisis described above, it can hardly be disputed that such a crisis, manifested by extraordinarily severe supply difficulties since February 2022 and resulting price hikes, was proven.

This was also reflected in the statement of reasons and wording of the Regulations. For example, Article 1 of Regulation 2022/1369 provides that its subject matter is to establish “rules to address a situation of severe difficulties in the supply of gas, with a view to safeguarding Union security of gas supply, in a spirit of solidarity.”

In the same context, Regulation 2022/1854 addresses the increase in energy prices. Although that objective is not specifically that of supply, it is related to the aspect of competitiveness and it itself establishes the causal link between the two. Indeed, Recital 7 states that “The current disruptions of gas supply,

¹⁸² Judgment of 24 October 1973, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*, Case C-5/73, EU-CELISH1973, para. 15; Judgment of 24 October 1973, *Case C-10/73, Rewe Zentral AG v Hauptzollamt Kehl*, para. 15. Although those cases were decided under the earlier provision of Article 122(1) of the EEC Treaty, the relevant requirements have not changed and the judgments therefore remain relevant.

¹⁸³ Joint Declaration of the European Parliament, the Council and the Commission on budgetary control of new proposals submitted on the basis of Article 122 TFEU which are likely to have significant implications for the Union budget, OJ 2020 C 244/I/5.

the reduced availability of certain power plants and the resulting effects on gas and electricity prices constitute a serious difficulty in the supply of energy products (gas and electricity) within the meaning of Article 122(1) of the Treaty on the Functioning of the European Union (TFEU). There is a serious risk that the situation could deteriorate further in the winter season 2022-23 in case of further disruptions of gas supplies and a cold winter season driving up the demand for gas and electricity. Such further deterioration could lead to more upward pressure on the prices of gas and of other energy commodities with a resulting impact on electricity prices.”

As stated by the Study of the Parliament mentioned above¹⁸⁴: “These economic measures come within the scope of the ‘appropriate measures’ which Article 122 (1) TFEU foresees.”

The measures adopted must be appropriate to the economic situation

Article 122 (1) TFEU states that the measures adopted must be appropriate to the economic situation. Indeed, Article 122(1) TFEU belongs to Chapter 1 of Title VIII TFEU, entitled “Economic Policy.”

The requirement that a measure under Article 122(1) TFEU must be adapted to the economic situation has two aspects: first, the measures adopted must be intended to remedy economic difficulties and, second, they must be appropriate to that difficulty, specifically reflecting the principle of proportionality,¹⁸⁵ which requires that Union action must not go beyond what is necessary to attain the objectives of the Treaty.

The determination of the nature of a policy depends on its objective and not on the means employed, which may not be economic in nature. Thus, the measures adopted may be of a fiscal, social or health-related nature, provided that the aim of those measures is to deal with a difficult economic situation.

All the emergency Regulations adopted in the wake of the energy crisis aim at ensuring mitigating the energy crisis by fostering security of supply, limiting the excessive pricing of energy, helping consumers to afford energy and enhancing solidarity among Member States. As a side aspect, most of them arguably furthered the Green Transition in so far as they were concerned with energy saving or accelerating the roll out of renewable energy investments. By taking measures at EU level, the emergency Regulations have the objective to

¹⁸⁴ Study requested by the AFCO committee, European Parliament, The use of Article 122 TFEU, Institutional implications and impact on democratic accountability, p. 29, September 2023, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2023\)753307](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)753307)

¹⁸⁵ Case C-151/17, *Swedish Match*, judgment of 22 November 2018, EU:C:2018:938, para. 35.

avoid that Member States adopt uncoordinated national emergency measures that could endanger security of supply at Union level, endanger the good functioning of the internal energy market and creating an additional burden for EU industry and consumers. Their aim was to avoid serious distortions in the EU energy markets and the EU economy as a whole, hence intending to remedy economic difficulties envisaged by Article 122 (1) TFEU.

In Case 5/73 *Balkan Import-Export*, the Court interpreted the sentence “measures appropriate to the economic situation” as conferring on the Council a broad discretion as to the choice of measures to be taken.¹⁸⁶ Nevertheless, the Commission and the Council remain bound by their obligation to respect the principle of an open market economy in accordance with Article 119(1) and (120) TFEU.¹⁸⁷

In short, Article 122 (1) TFEU enables the Council to adopt, in a spirit of solidarity, a wide range of measures appropriate to the economic situation, in exceptional situations which require urgent action. The type of measure adopted on that basis depends on the assessment of what is needed to reestablish the economic situation, which can justify adopting measures in different areas of Union law.

The measures should be temporary

The Court has held that measures adopted on the basis of Article 122(1) TFEU must be temporary.¹⁸⁸ The temporary nature of the measures also stems from the principle of proportionality. The effect on the institutional balance of the exclusion of the European Parliament as co-legislator, is mitigated by the temporal limitation of measures based on Article 122 (1) TFEU, making it a legal basis limited to temporary crisis situations where the European Parliament otherwise would have co-decision powers, because the different legal basis provides for such powers.¹⁸⁹

All the Regulations taken during the energy crisis and based on Article 122 (1) TFEU have been strictly limited in their duration. Most of them have been adopted for a duration of one year. The possibility to prolong them is foreseen only under strict conditions, entailing a report from the Commission,

¹⁸⁶ Judgment of 24 October 1973, *Balkan Import Export*, 5/73, EU: C: 1973: 71 para. 18; see also judgment of 16 February 2022, *Case C-157/21, Poland v Parliament and Council*, para. 98 and the case-law cited; judgment of 8 December 2020, *Case C-626/18, Poland v Parliament and Council*, para. 95.

¹⁸⁷ Grabitz/Hilf/Nettesheim/Bandilla, 80. EL August 2023, AEUV Article 122, point 12.

¹⁸⁸ See Case C-5/73 *Balkan Import Export GmbH v Hauptzollamt Berlin Packhof*, judgment of 24 October 1973, para. 15.

¹⁸⁹ Judgment of the Court of 24 October 1973, *Balkan Import Export GmbH v Hauptzollamt Berlin Packhof*, Case 5/73, EU-Cles 1973-109, paras. 13 to 17.

examining the effects of the regulation and the necessity of a prolongation in view of the circumstances. As mentioned above, the Commission proposed to renew only some Regulations, and for some of them only for specific provisions (see for example the permitting Regulation). The prolongations have also been adopted for a limited period of time and only when the measures were still needed in view of the specific circumstances. Regulation 2022/1854, following the conclusion of the Commission, was not extended.

The measures should be taken in a spirit of solidarity

As explained above the principle of solidarity is one of the fundamental principles of EU law,¹⁹⁰ underlying the entire legal system of the Union. It is enshrined in Articles 2 and 3 TFEU and in its preamble. Solidarity is included not only in the preamble to the Charter of Fundamental Rights of the European Union, but in its entire Title IV. The reference to solidarity in Article 122(1) TFEU appeared after the entry into force of the Lisbon Treaty in 2009.

In this context, the spirit of solidarity required by Article 122(1) TFEU cannot be limited to a requirement of financial assistance between Member States. Indeed, unlike Article 122(2) TFEU, which explicitly refers to “Union financial assistance to the Member State concerned,” Article 122(1) TFEU does not mention any financial assistance. Therefore, the wording “spirit of solidarity” does not necessarily require direct assistance between Member States.

According to the case law, the principle of energy solidarity entails the necessity to assess the existence of risks to the energy interests of the Member States and the Union, and in particular to the security of energy supply, with a view to weighing up the interests at stake, taking into account the interests of both the Member States and the Union as a whole.¹⁹¹ This may involve the adoption of measures ensuring a coordinated and coherent policy response by Member States to an urgent challenge, as the Union has done in the energy emergency measures described above.

All the emergency Regulations adopted to tackle the energy crisis have been taken in a spirit of solidarity. Cooperation and coordination, allowing Member States to mitigate the crisis while preserving a level playing field and avoiding distortions in the internal market, indeed reflect the spirit of solidarity. Moreover, some measures, in line with the spirit of solidarity, have required that certain Member States go beyond their strictly own national interest in

¹⁹⁰ Judgment of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU-COURT 2022-97, para. 129; judgment of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, Case C-157/21, EU-CEL2022-98, para. 147, and Case C-848/19 P, *Germany v Poland*, ECLI:EU:C:2021:598, para. 38.

¹⁹¹ See: Case C-848/19P, *Germany v. Poland*, OPAL, above-mentioned, paras. 71 *et seq.*

the interest of the Union. According to the case-law, the application of the principle of energy solidarity does not mean that the EU's energy policy must not, in any event, adversely affect the specific interests of the Member State concerned in that field.¹⁹² In this sense, the case law of the Court of Justice clarifies that the principle of solidarity may impose a heavier burden on certain Member States as long as there is an overall beneficial effect in addressing the consequences of the economic emergency. It is not contrary to the spirit of solidarity where a measure does not benefit all Member States in the same way and goes even to the detriment of some to the benefit of others.¹⁹³

For example, the financial benefits stemming from the temporary solidarity contribution created by Regulation 2022/1854 may not benefit all Member States in the same way as a consequence of the divergent presence in the respective Member States of entities falling within the scope of the measure. However, in a spirit of solidarity between Member States, they may assign a share of the proceeds of the temporary solidarity contribution to the financing of common measures to reduce the harmful effects of the energy crisis, which will benefit all Member States, such as investments in line with the REPowerEU objectives such as projects with a cross-border dimension, or to promote investments in energy efficiency and renewable energy, including in cross-border projects, and in the Union renewable energy financing mechanism provided for in Article 33 of Regulation (EU) 2018/1999 of the European Parliament and of the Council.¹⁹⁴

Another example is the Gas Demand Regulation. It does not affect in the same manner the different Member States, depending on their energy mix and their reliance on gas imports. However, the energy crisis created an immediate risk of disruption of gas supply to the Union as a whole, and, as underlined by Recital 9 of the Regulation “measures taken at Union level to reduce demand should benefit all Member States by reducing the risk of a greater impact on their economies.” To ensure the energy security of supply of the Union, the Regulation has ensured a fair balance between the interests of the Member States and those of the Union, in a spirit of solidarity. For example, Article 5 (1) (3) (7) of Regulation 2022/1369 lays down certain derogations and restrictions on demand reduction, taking into account the national specificities of each Member State and, according to Article 6 (1), Member States must ensure that the measures they chose to apply in order to reduce gas demand do not endanger the security of gas supply of other Member States or of the Union.

¹⁹² See: Judgment of the Court in *Case 848/19P Germany v Poland*, para. 73.

¹⁹³ Geiger/Khan/Kotzur/Kirchmair, *EUV/AEUV*, 7. Auflage 2023, Rn. 5.

¹⁹⁴ See: Article 17 Regulation 2022/1854.

The promotion of renewable energies, as was done with Regulation 2022/2577, is also an expression of energy solidarity as any increase in renewable energies in one Member States benefits all Member States in the energy internal market. As underlined by Recital 21 of this Regulation: “[...] given the degree of integration of the Union’s energy markets, any increase in the deployment of renewable energy in one Member State should also benefit other Member States in terms of security of supply and lower prices.” Indeed, when markets are coupled, efficiency gains or improvements in the market structure of a Member State, such as the production of more renewable energy, are to some extent passed on to neighboring Member States.¹⁹⁵

Sudden character of the difficulties

In *Balkan Export*, the Court relied inter alia on the “sudden occurrence of the events which the Council had to deal with.”¹⁹⁶ The doctrine concluded that Article 122(1) TFEU is limited to a conferral of competence on the Council in times of acute emergency, provided another legal basis exists in the Treaties to deal with these difficulties in normal times.¹⁹⁷ However, it should be noted that acute emergency situations cannot be reduced to situations where there is no longer a solution. The European Union cannot be required to wait for a complete interruption before acting and the use of Article 122(1) TFEU is not limited to an absolute cessation of supply in order to establish serious difficulties.

In 2022, the energy crisis due to Russia’s aggression against Ukraine came after another major crisis that also had an impact on the energy situation: the COVID-19 crisis had already triggered an increase in energy prices and supply difficulties. As early as 13 October 2021, the Commission had communicated its “fight against rising energy prices” through a “toolbox for action and support.”¹⁹⁸ So, one could wonder whether in 2022 the energy crisis was a sudden event constituting an acute emergency.

¹⁹⁵ See: Section 3.3.1 of ACER’s April 2022 report on wholesale electricity markets <https://www.acer.europa.eu/document/acers-final-assessment-eu-wholesale-electricity-market-design>: “Day-ahead market integration provides cheaper electricity across Europe and facilitates the growth of renewables while improving overall welfare. In particular, market coupling ensures that electricity usually flows from low-priced areas to areas with high prices. Where the quantities of locally produced wind and solar electricity are limited, Member States benefit from relatively cheaper electricity (including renewable electricity) produced elsewhere in Europe.”

¹⁹⁶ *Balkan Export*, C-5/73, para. 15.

¹⁹⁷ Geiger/Khan/Kotzur/Kirchmair/Khan/Richter, 7. Aufl. 2023, Article 122 of the Rules of Procedure 4; Ludwigs: Unionsrechtliche Rahmenseetzungen zur Bewältigung der Energiekrise (EuZW 2023, 506), p. 509.

¹⁹⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling rising energy prices: a toolbox for action and support, COM (2021) 660 final of 13 October 2021; Guillaume Dezobry, ‘The contribution on the infra-marginal rent: a fiscal measure to remedy the malfunctioning of wholesale electricity markets’, *Fiscal Law* No. 38, 21 September 2023, 277.

However, it is undeniable that the war of Russia against Ukraine was sudden and not expected. And the supply and price difficulties were also not anticipated. Indeed, in its communication on tackling rising energy prices of October 2021 the Commission noted that energy supply was not under immediate threat and that markets expected wholesale gas prices to stabilise by April 2022. Hence it can be said that the situation since February 2022 was not expected and sudden.

The prolongations (very limited, in time and in scope) are in conformity Article 122 (1) as the measures prolonged were not meant as lasting measures but measures limited in time to face the same specific temporary situation caused by the sudden crisis. The prolongation of some measures was justified by the uncertainties surrounding energy markets at the time of the decision to prolong. However, Article 122(1) TFEU cannot constitute a basis for lasting measures. If the measures are taken to improve the long-term situation of the EU energy supply in a permanent and structural way, they should be based on Article 194 TFEU.¹⁹⁹

This is in line with the wording of Article 122 (1) TFEU, which establishes that the measures adopted are “without prejudice to any other procedures provided for in the Treaties.” This implies that outside the specific circumstances rendering the recourse to emergency measures taken under Article 122 (1) TFEU necessary, the other legal basis provided by the treaties should be used. For the specific case of energy, where both Article 122(1) TFEU and 194(2) TFEU apply based on that “without prejudice” clause, the Court of Justice decided that Article 122(1) TFEU constitutes a *lex specialis* compared to Article 194(2) TFEU.²⁰⁰

This is what the European Union has done, by including some measures adopted as emergency measures due to the energy crisis in long lasting measures. It is the case, for example, about the mechanism for demand aggregation and the joint purchasing of natural gas, adopted in the emergency Regulation 2022/2576 which has been introduced as a permanent measure in Regulation 2024/1789 (section 5), adopted on the basis of Article 194 TFEU as part of the Hydrogen and Decarbonised Gas Market Package adopted on 21 May 2024.²⁰¹ In the electricity field, many long-lasting measures needed to accelerate the

¹⁹⁹ In this sense, Sikora, Grundstrukturen der Energieversorgungssicherheit, NJW 2023, 2989, 2992. para. 22.

²⁰⁰ See discussion above in section II.2a.

²⁰¹ Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009, OJ L, 2024/1789, 15.07.2024, *ELI*: <http://data.europa.eu/eli/reg/2024/1789/oj>

deployment of renewable energy as well as to mitigate price volatility have been adopted in the “electricity market design” package, which is duly based on Article 194 TFEU.²⁰²

This necessary rapidity of action has undoubtedly been achieved by the adoption of no less than five emergency Regulations during the energy crisis. The longest duration between a proposal and its adoption was just over two months for Regulation No 2022/2576 (proposal on 18 October 2022, and adoption on 19 December 2022). The shortest time was achieved for Regulation No 2022/1369 there have been only 16 days between the Commission’s proposal and its adoption by the Council (proposal on 20 July and adoption by 5 August 2022) and then only 10 days for its extension.²⁰³ Hence, the swift European Union reaction to the energy crisis was undeniably achieved thanks to Article 122 (1) TFEU.

However, this rapidity achieved thanks to the use of Article 122 TFEU as a legal basis should be nuanced: the proposal for a Regulation on gas storage (Regulation 2022/1032 of 29 June 2022 amending Regulations 2017/1938 and No 715/2009 with regard to gas storage), based on Article 194 TFEU, was adopted on 29 June, on a proposal of 23 March. Hence the adoption by co-decision only took three months, showing that in case of emergency the co-legislators can act very fast as well. However, these three months were much longer than the mere few weeks that have mostly been needed for the adoption of some of the emergency Regulations.

In a situation where the Union has faced serious difficulties in the supply of energy resources, in particular gas, and the European Union was called upon to act quickly, this provision seems to be almost tailor-made. However, the repeated use of Article 122 (1) TFEU as a legal basis has an impact on the institutional balance and raises concerns and issues in this regard.²⁰⁴

II-2.c. The institutional balance

Article 122 (1) TFEU enables a very fast adoption of measures; however, where another legal basis exists that provides for the use of a legislative procedure,

²⁰² Including Directive (EU) 2024/1711 of the European Parliament and of the Council of 13 June 2024 amending Directives (EU) 2018/2001 and (EU) 2019/944 as regards improving the Union’s electricity market design, OJ L, 2024/1711, 26.06.2024, ELI: <http://data.europa.eu/eli/dir/2024/1711/oj> and Regulation (EU) 2024/1747 of the European Parliament and of the Council of 13 June 2024 amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union’s electricity market design OJ L, 2024/1747, 26.06.2024, ELI: <http://data.europa.eu/eli/reg/2024/1747/oj>

²⁰³ Adoption of 30 March 2023, based on a proposal of 20 March 2023, COM (2023) 174 final.

²⁰⁴ See Article of Daniel Calleja, Tim Maxian Rusche and Trajan Shipley, ‘EU Emergency-call 122? On the possibilities and limits of using Article 122 TFEU to respond to situations of crisis’, *The Columbia Journal of European Law* 29, summer 2024, <https://heinonline.org/HOL/Contents?handle=hein.journals/coljeul29&id=1&size=2&index=&collection=journals>, page 548 ff.

this could impact the role of the European Parliament in the decision-making process, if Article 122(1) TFEU allowed for the creation of permanent and structural measures in those areas. As Montesquieu, in its famous essay “De l’esprit des lois” had underlined – albeit in a different institutional context, the Council representing the democratically elected governments of Member States: “Le gouvernement monarchique a un grand avantage sur le républicain : les affaires étant menées par un seul, il y a plus de promptitude dans l’exécution.” Indeed, the involvement of only one institution, the Council, allows to act fast, but has an impact on the interinstitutional balance as there is no involvement of the European Parliament, representing the European citizens.

Hence, the repeated use of Article 122 (1) TFEU as a legal basis to tackle the energy crisis could have led to an inter-institutional crisis and given rise to actions for annulments from the European Parliament. This has not been the case, no doubt as the European Parliament also realised the severity and unprecedented nature of the crisis and accepted the existing institutional set-up of the European Union Treaties, which vests the Union emergency powers in the Commission and the Council.

However, the energy crisis led to further discussions and reflections between the Institutions on the institutional balance and led to significant progress in the implication of the European Parliament.

Before the start of the energy crisis, and in the wake of the COVID-19 crisis, where measures based on Article 122(1) TFEU had been taken to face the consequences of the pandemic, a “Joint declaration of the Parliament, the Council and the Commission on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget” had been agreed²⁰⁵ whereby the Commission should accompany any proposal based on Article 122 (1) TFEU by an assessment of its budgetary implication. In case the Parliament considers that there are appreciable implications for the Union budget, it can trigger a special procedure whereby the Council and Parliament will discuss and agree on the budgetary implications of the proposal. However, this progress in the involvement of the European Parliament, while significant, has no impact when the acts adopted under Article 122 (1) have no appreciable implications for the Union budget, as for the five energy acts described above.

²⁰⁵ OJ 2020 (C 4441/5). Made binding pursuant to Article 295 TFEU by footnote 4 of Annex 1 to the Interinstitutional Agreement between the Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, OJ 2020 L 4331/28: “Where the Commission submits a proposal for an act of the Council under Article 122 TFEU with potential appreciable budgetary implications, the procedure as set out in the joint declaration of the European Parliament, the Council and the Commission of 16 December 2020 on budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget (OJ C 444, 22.12.2020, p. 5) is applicable.”

After the energy crisis, a study commissioned by the European Parliament²⁰⁶ concluded that, though “the recourse by the Council to Article 122 TFEU to adopt measures combatting the energy crisis [...] appears legally acceptable” and “properly based on Article 122 TFEU,” “it does appear problematic that the Council does not explicitly motivate its measures on their compatibility with the ‘without prejudice to’ clause in Article 122 (1) TFEU.”²⁰⁷ The study further considered it desirable that the Council “explicitly address why recourse to Article 122 (1) TFEU is really necessary, despite the existence of alternative legal bases in the Treaties,” taking into account the context of the measure.

On 21 October 2024, the Presidents of the European Parliament and the European Commission made a Joint Statement on the revision of the Interinstitutional Framework Agreement. The Joint Statement contains different political principles which will “form the basis of a revision of the *2010 Framework Agreement* on relations between the European Parliament and the European Commission.” One of these principles is a commitment on the side of the Commission to “provide comprehensive justification and information on the exceptional cases where the proposals by the Commission are based on Article 122 TFEU.”²⁰⁸

Conclusions: The effect of the energy crisis on energy policy

Has the EU lived up to the challenges posed by the energy crisis and managed to stay on course? As argued “transforming the energy crisis into an opportunity for energy autonomy requires unwavering political determination and crisis management from the EU and its Member States. This endeavour calls for solidarity and sincere cooperation among 27 Member States, and the promotion of long-term energy structural adjustment in order to overcome the challenges caused by the energy crisis, and to enhance EU energy security and the well-being of EU citizens into the future.”²⁰⁹ We would say: this has been accomplished.

Looking at the policy objectives fixed, accelerating the green transition while diversifying energy supply sources and decoupling from the import dependency of the Russian Federation – and in the immediate term lower energy prices – one can say: yes the EU was successful: prices went down,²¹⁰ imports

²⁰⁶ Study requested by the AFCO committee, European Parliament, ‘The use of Article 122 TFEU, Institutional implications and impact on democratic accountability’, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2023\)753307](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)753307), September 2023

²⁰⁷ *Ibid.*, p. 32.

²⁰⁸ See: <https://www.europarl.europa.eu/news/en/press-room/20241021IPR24772/european-parliament-and-european-commission-agree-on-strengthening-cooperation>

²⁰⁹ Der Chin Horng, ‘The EU’s Energy Crisis Management to the Russia-Ukraine War’, *European Energy and Environmental Law Review*, August 2024, p. 173.

²¹⁰ We would not dare to try and quantify what the contribution of EU policies and measures were to this: But we do consider that EU policies and measures at the very least positively contributed to this development.

from Russia were greatly reduced whilst at the same time the goal of a green transition was, if anything, accelerated.

Nevertheless and more generally, whilst the REPowerEU strategy aims to foster climate goals whilst enhancing security by increased renewable energy production, it is not altogether clear that the phase out of fossil fuel will not imply security concerns of its own: the clean energy transition may lead to a greater minerals and metals dependence, as the EU has only insignificant mining capacity for these critical raw materials.²¹¹ As in the case of oil and gas, their origin is largely out of the EU.²¹² However, and this is maybe the most important take away: the vulnerability from out of EU supply chains has been made very clear during the energy crisis: in this respect also, the Russian war of aggression has been a catalyst: “One of the goals set by EU environmental policy is the reduction of fossil fuel consumption. This goal has become even more critical in the light of the EU’s need to decrease its reliance on Russian gas, oil, and coal imports, which, following Moscow’s aggression against Ukraine, have been identified as a significant vulnerability in the foreign policies of EU Member States.”²¹³

It remains to be seen how the still relatively recent measures, many of which (i.e., the measure based on Article 122 (1) TFEU) were temporary, will alter the approach to energy policy. But it is clear that sustainability and security of supply have become – at least in the short and medium term – the prominent angles of the triangle, and that the energy crisis was an illustration of the importance and relevance of the principle of solidarity in the energy sector.

²¹¹ On the issue of critical raw materials and the Union’s policy response, including the Critical Raw Materials Act, see https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials_en

²¹² See also Leigh Hancher: ‘EU Energy market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead’, SIEPS papers, January 2024, point 4. Available online: <https://www.sieps.se/en/publications/2024/eu-energy-market-regulation-after--the-2022-energy-crisis/>

²¹³ Marco Padovanand and Nicolò Cusimano, ‘The Future of International Trade and the European Economic Security Strategy’, *Global Trade and Customs Journal*, Volume 20, Issue 2, p. 79.