



FIDE2025

Katowice

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

XXXI FIDE Congress | **Katowice 2025**
Congress Publications Vol. 3

Edited by Krzysztof Pacuła



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

FIDE2025

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XXXI Congress of the International Federation of European Law

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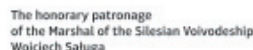
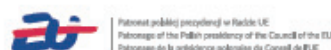
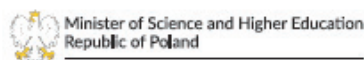
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The proceedings of the XXXI FIDE Congress in Katowice in 2025 are published in three volumes.

This book (Vol. 3) contains the reports of the General Rapporteur (Alicja Sikora-Kalèda), the Institutional Rapporteurs (Odile Beynet, Tibor Scharf) and the National Rapporteurs on Topic 3: Energy solidarity and energy security – from green transition to the EU's crisis management

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General Rapporteur: Alicja Sikora-Kalèda

Institutional Rapporteurs: Odile Beynet, Tibor Scharf

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XXXI FIDE Congress | Katowice 2025

TOPIC III – Energy solidarity and energy security – from green transition to the EU’s crisis management

FOREWORD

1. XXXI FIDE Congress in Katowice

Founded in 1961, the International Federation for European Law (Fédération Internationale pour le Droit Européen – FIDE) brings together national associations from the Member States of the European Union and beyond. Its mission is to advance knowledge of EU law and to foster unity within the legal community, all in service of the enduring project of European integration. One of the most significant manifestations of FIDE’s workings is the organisation of biennial congresses, which convene participants from across Europe and afar, including representatives of the judiciary, public authorities, academia, and legal practice.

The previous, XXX FIDE Congress, flawlessly organised by the Bulgarian Association for European Law, took place from 31st May to 3rd June 2023 in Sofia. This event set an extraordinary standard for excellence and stood as a testament to the remarkable cordiality of our colleagues from the Bulgarian Association – a cordiality that the Polish Association of European Law has had the privilege to experience also throughout the past two years.

As per decision of the FIDE Steering Committee, the privilege of organising the XXXI FIDE Congress was entrusted to the Polish Association of European Law. Consequently, on Saturday of the 3rd June 2023, at the close of the XXX FIDE Congress, Alexander Arabadjiev, President of the Bulgarian Association, passed on the FIDE Presidency to Maciej Szpunar, President of the Polish Association of European Law. With this symbolic act, we embarked on our own journey to organise the next Congress.

Thus, in 2025, Poland has the honour of hosting the FIDE Congress for the very first time, at an occasion which coincides with its presidency of the Council of the European Union.

The Polish Association of European Law was fortunate to be joined by two dedicated co-organisers – the city of Katowice and the University of Silesia. The unwavering support and firm belief in FIDE’s mission shared

by Marcin Krupa, Mayor of Katowice, and Professor Ryszard Koziółek, Rector of the University, have been instrumental in bringing the 2025 Congress to fruition.

Historically, the overwhelming majority of FIDE Congresses have taken place in the capital cities of the countries from which the host associations originated. In 2025, however, the honour of hosting the Congress fell to Katowice – a city that proudly stands as the vibrant heart of the region of Upper Silesia and serves as the capital of that region. Yet, there is far more to justify this choice than the city's appeal, its logistical convenience, or the support generously offered by the co-organisers.

In the aftermath of the First World War, following the restoration of Polish independence in 1918, the fate of Upper Silesia remained uncertain due to the claims of both Poland and Germany to the region. Ultimately, a unique solution was proposed, in which the vision of Jean Monnet, who would come to be regarded as the chief architect of European integration, played a key role. The disputed territory was to be divided between Poland and Germany, which would then conclude a bilateral agreement governing the cross-border functioning of this hybrid creation. These efforts culminated in the signing of the German-Polish Convention on Upper Silesia in Geneva on 15th May 1922.

Under the Convention, an arbitral tribunal was established as one of the bodies overseeing the implementation of the Convention. The Tribunal was entrusted with the authority to interpret, in a binding manner, the provisions of the Convention at the request of national courts and other public bodies. Some scholars have noted that the preliminary reference procedure before the Court of Justice of the European Union bears a striking resemblance to the mechanism employed by the Upper Silesian Arbitral Tribunal.¹ Remarkably, one of the core mechanisms of the European Union's legal system, the preliminary ruling procedure, traces its conceptual lineage to a legal innovation implemented over a century ago in Upper Silesia.

2. The themes of the XXXI FIDE Congress in Katowice

Each FIDE Congress is defined by thoughtfully chosen themes, reflecting the pressing legal questions of their time. For those seeking to understand the

¹ See, to that effect, M. Erpelding, 'Local International Adjudication: The Groundbreaking "Experiment" of the Arbitral Tribunal for Upper Silesia', in: M. Erpelding, B. Hess, H. Ruiz Fabri (eds.), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I*, Baden-Baden 2019, p. 318; F. Irurzun Montoro, '¿La cuestión de interpretación ante el Tribunal Arbitral de la Alta Silesia (1922-1937) como antecedente de la cuestión prejudicial europeo?', *Revista Espanola de Derecho Europeo* 2017, No. 63, pp. 31–34.

evolving landscape of the European Union and the challenges it has confronted at key historical moments, the FIDE Congresses constitute unparalleled points of reference and a true chronicle of legal dialogue on EU law.²

It was in the spirit of this tradition that we set out to identify the themes of the 2025 Congress.

In a process set in motion in 2022, the Polish Association established an advisory committee. This body included *Miguel Poiares Maduro*, former Advocate General at the Court of Justice of the European Union, Dean of the Global School of Law at the Universidade Católica Portuguesa and Adjunct Professor at the School of Transnational Governance of the European University Institute in Florence; *Daniel Sarmiento*, Professor of EU and Administrative Law at the University Complutense of Madrid; and *Stanislas Adam*, Legal Clerk in the Chambers of the President of the CJEU. They were joined by the Polish Judges at the General Court, *Nina Półtorak* and *Krystyna Kowalik-Bańczyk*. Members of the Board of the Polish Association of European Law – *Maciej Szpunar*, *Dagmara Kornobis-Romanowska*, *Sylvia Majkowska-Szulc*, and myself – who also formed part of this committee, wish to express our sincere gratitude to these esteemed colleagues, whose insights have significantly shaped the intellectual agenda of the 2025 Congress.

We also benefited from the invaluable input of the FIDE Steering Committee, national associations, the academic community, and legal practitioners, whose collective and individual insights enriched the conceptualisation of the Congress main themes.

The topics ultimately selected for the XXXI FIDE Congress were the following:

Topic 1: EU Emergency Law

Topic 2: EU Digital Economy: general framework (DSA/DMA) and specialised regimes

Topic 3: Energy solidarity and energy security – from green transition to the EU's crisis management

In retrospect, each of the selected themes emerged organically from the specific context and challenges that defined the years 2022 and 2023.

² See, for early manifestations of the links between the FIDE Congresses and evolution of EU law, M. Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos judgment', *International Journal of Constitutional Law* 2014, Vol. 12(1), pp. 149–150.

By way of illustration, and with full awareness of the necessarily general and subjective nature of this recollection: the choice of “emergency law” as one of the Congress themes was almost instinctively shaped by the recent and still resonant experience of the COVID-19 pandemic. The year 2022 likewise marked a watershed moment in the European Union’s approach to digital governance, exemplified by the adoption of the Digital Services Act and the Digital Markets Act (DSA/DMA). This emerging legal landscape prompted a necessary reflection on the interaction between these landmark instruments and the broader corpus of EU and national law. The inclusion of energy solidarity and security, in turn, was at least in part influenced by the brutal war near the European Union’s eastern border and the profound geopolitical instability it triggered – bringing issues of energy resilience, autonomy, and solidarity to the forefront of the Union’s legal and political discourse.

Remarkably, over the course of just two years, the relevance of these central themes intensified for reasons that have evolved with the shifting tides of our times.

The concept of “emergency” now seems to encompass a broader array of challenges: from trade conflicts and hybrid threats to the strategic manipulation of digital platforms that threaten democratic institutions. In a similar vein, the Digital Services Act and Digital Markets Act now stand as both bulwarks and battlegrounds for freedom of expression and democratic resilience. Meanwhile, energy solidarity and security are confronted with the reality that traditional alliances may be shifting, and the explosive growth of artificial intelligence and data centres has created new demands and new geopolitical fault lines in that regard.

Hence, the choice of topics for the XXXI FIDE Congress was vindicated, albeit for reasons that partially differed from those that were initially anticipated.

Understandably, these transformations demand renewed reflection on the existing legal frameworks. Through the steadfast commitment and deep insight of the authors whose works constitute this publication, it is our privilege to present to the reader a detailed exploration of the three Congress themes, addressing both the initial concerns and the new challenges that have surfaced over the past two years.

The experiences outlined above impart a valuable lesson and serve as a cautionary tale: rarely can we anticipate all the challenges that the future might bring. It is only through collective effort that we can devise the solutions required to confront such challenges. I remain deeply convinced that this publication provides an excellent confirmation of this thought.

3. Acknowledgements

The present publication is the result of the tireless work and dedication of many individuals. On behalf of the Board of the Polish Association of European Law, I wish to express our profound appreciation to all who have contributed to shaping the agenda and preparing the reports for the XXXI FIDE Congress.

I am particularly grateful to the General Rapporteur for Topic III, *Alicja Sikora-Kalèda*, Professor at the Jagiellonian University, Kraków. I also wish to thank the Institutional Rapporteurs – *Odile Beynet* and *Tibor Scharf* from the European Commission’s Legal Service.

Special thanks are also due to the national rapporteurs, whose thoughtful and rigorous contributions form the backbone of this volume and reflect the rich diversity of legal traditions across the European Union.

The organisation of the XXXI FIDE Congress would not have been possible without the generous support of our sponsors and institutional partners.

The steadfast support of the Court of Justice of the European Union and the European Commission proved indispensable to the success of this endeavour.

Krzysztof Pacuła

Secretary General and Member of the Board of the Polish Association of European Law

TOPIC III – Energy solidarity and energy security – from green transition to the EU’s crisis management

QUESTIONNAIRE

General Rapporteur: Alicja Sikora-Kalêda

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Energy solidarity and energy security¹ are two interrelated concepts that both play an important role in the field of EU energy law. Considered as “quintessence of what is both the *raison d’être* and the objective of the European project,”² solidarity operates as a “consolidating agent” carrying the European project ahead. The multifaceted principle of solidarity is given a specific expression in various fields of EU law, notably within the Union’s energy policy under Article 194(1) TFEU. In recent years, challenges related to the Union’s energy policy have become a true litmus test for the solidarity *between the Member States and Union’s citizens* in its various dimensions. Security of energy supply constitutes a key objective of EU energy policy under Article 194 TFEU, which has gained a particular importance in the aftermath of the energy crisis and requires continuous adaptation, notably in view of the cybersecurity threats. Beyond its relevance at the level of the Union’s energy policy, energy security may be explored from the national legal and constitutional perspective. Against the background of shared competence between the Union and its Member States in the field of energy, the purpose of this chapter is to analyze the evolution and the boundaries of both the principle of energy solidarity and the objective of energy security in the context of EU and national law.

What are the multidimensional elements of the principle of energy solidarity and the objective of energy security and their impact on the EU and national constitutional frameworks?

¹ Article 194 TFEU refers to “security of supply.”

² See Opinion of Advocate General Bot in joined cases *Slovakia v Council*, C-643/15, C-647/15, EU:C:2017:631, point 17.

1. What is the place and nature of the concepts of energy solidarity and energy security (security of energy supply) in your national legal order? Do these concepts form part of the national constitutional framework, as interpreted by the national courts, including the constitutional courts? How are these concepts articulated and reconciled in the national case law, as well as national constitutional and legislative practice? In its judgement in the *OPAL* case³ the Court of Justice of the EU (hereafter ‘the Court’) confirmed that the EU principle of energy solidarity is not purely political and programmatic, but a legally binding principle. In this context, how are the principles of energy solidarity or energy security operationalized in the national jurisprudence?

2. In the *OPAL* case,⁴ the Court ruled 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 one of the fundamental principles of EU law.”⁵ How would you define the impact of this conceptualization of energy solidarity as a “specific expression,” on the fundamental principle of solidarity in EU law, and potentially on a comparable principle in national law? Should energy solidarity be viewed as a “corrective tool,” outlining the limits to the national sovereignty in the field of energy in the name of common interest? Should it be viewed as a building block of the Union’s constitutional framework, reaching *beyond* particular national interests and forming part of the “Union’s constitutional identity” as referred to in the *Rule of law conditionality judgements* of the Court⁶? In the latter case, should energy solidarity as part of the Union’s constitutional identity be considered both in the internal and the external context?

3. Pursuant to Article 194 TFEU, EU’s energy policy aims “in a spirit of solidarity between Member States,” to ensure the functioning of the energy market, to ensure security of energy supply in the EU, to promote energy efficiency and energy saving and the development of new and renewable forms of energy and to promote the interconnection of energy networks. Given that energy solidarity applies to all objectives of EU’s energy policy, is there a tension between those various objectives and, if so, how can they be reconciled? Is energy solidarity liable to trigger legal effects in relation to green transition? Are social and fundamental rights dimensions of EU law relevant in this context?

4. Tensions between environmental and economic objectives frequently arise in the energy field, both at the Union’s level and in bilateral relationships

³ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598.

⁴ *Ibid.*

⁵ *Ibid.*, point 38.

⁶ Judgment of the Court in case *Poland v Parliament/Council*, C-157/21, EU:C:2022:98, point 145.

between Member States. As the Court's case law shows, these tensions particularly arise in the case of large industrial installations. This is due to the cross-border dimension of possible environmental damage, and to the fact that large projects potentially affect energy choices of a given Member State (cf. *Hinkley Point, Turów, CEZ*).⁷ Moreover, these tensions play a particular role in the context of interconnected energy networks, where several EU secondary law acts refer to regional and bilateral dimensions of solidarity.⁸ Have such cross-border, bilateral tensions occurred in your Member State and did they lead to legal and jurisprudential developments? Did they lead to a coordinated action with other Member States, for instance, in response to a supply crisis? Have the concepts of energy solidarity and energy security been invoked in this context?

5. The principle of energy solidarity does not exclude that EU energy policy may in some cases have negative impact for the individual interests of a given Member State. Thus, its application may have to be balanced against the principle of proportionality. EU energy measures trigger very diversified consequences for Member States owing to the particularity of their constitutional, economic, geographic and social characteristics. Should the need to ensure a proper balance between solidarity and proportionality in EU energy law take into account divergences between the Member States, or should it be based on a common denominator?

6. Pursuant to Article 4(2)(i) TFEU, energy belongs to the area of shared competence between the EU and the Member States. How would you define, in the current state of development of EU law, the intensity of this shared competence? Specifically, since in a growing number of instances the objectives under Article 194 TFEU cannot be achieved at the national level only, does energy solidarity, as interpreted by the Court, contribute to the shift towards the predominant exercise of the competence by the EU in the field of energy? Taking the example of electricity and the realities of an interconnected grid, one may wonder to what extent there can be a purely national energy policy. Similar thoughts can be entertained in the context of gas – and in the future also hydrogen – where sourcing and consumption are no longer taking place

⁷ Judgment of the Court in case *Austria v Commission (Hinkley Point)*, C-594/18 P, EU:C:2020:742; order of the Vice-President of the Court in case *Czech Republic v Poland (Mine de Turów)*, C-121/21, EU:C:2021:420 and judgment of the Court in case *ČEZ*, C-343/04, EU:C:2006:330.

⁸ See for instance Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, pp. 94–136); 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, pp. 1–56); 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, pp. 1–21).

on a purely national basis.⁹ In that context how do you interpret the notion of “spirit of solidarity between Member States” in Article 194 TFEU in the context of energy security?

7. Defining the content of security of energy supply is particularly challenging in the Union’s multilevel legal architecture. Also, in the modern digitalized world, the need to make critical energy infrastructure more resilient requires its continuous adaptations, including those due to real-time requirements and cascading effects of energy systems. In the current state of EU law, in particular in the light of EU measures adopted in the context of the crisis following Russia’s war of aggression against Ukraine, what are the main components of the concept of “security” in the field of EU energy law and national law? How does this concept take into account constitutional, economic, geographical and political specificities of the Member States? Given potential cybersecurity threats, how do you assess current resilience and risk preparedness at the Union’s level and at the level of your Member State? In the same vein, given the recent pipelines incidents (Nord Stream, Balticconnector), should the concept of energy security be seen in a wider sense than from the angle of “security of supply”?

8. Energy solidarity implies rights and obligations both for the Union and for the Member States. Thus, questions of the Union’s unity arise *vis-à-vis* the outside world, including in the field of external energy policy. In this context, how does the principle of energy solidarity affect the exercise of EU’s external policy, in particular in relation to the projects of common interest¹⁰? Through the prism of security of supply and the imperative of diversifying supply routes and creating new routes that decrease the EU’s dependence on a single supplier, what is an interplay between energy solidarity and energy security in the external relations? How does the objective of security of supply affect EU’s external competence in the field of energy?

⁹ 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, pp. 1–35) was adopted as part of the crisis response. That Regulation includes measures to jointly purchase gas, to limit excessive gas prices and market volatility as well as measures to tackle a possible gas supply emergency in a coordinated manner and certain aspects of demand aggregation and of a joint purchasing mechanism. A Commission report published on 28.09.2023 found that these measures have played an important role in stabilizing energy markets and ensuring an adequate supply of gas to the EU over the past year, and that certain aspects of the demand aggregation and joint purchasing mechanism could be made more permanent. Arguably that Regulation (and other measures adopted in response to the energy crisis) is a further signal that energy law and policy may have shifted more to a supranational approach.

¹⁰ Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ L 109, pp. 14–31). In parallel, see Memorandum of Understanding on a Strategic Partnership in the field of energy, concluded by President von der Leyen and President Aliyev in Baku on 18 July 2022.

9. An important step in the EU's energy policy was the Energy Union strategy, which encompasses energy security¹¹ However, whilst a number of initiatives focusing on reinforcing the cooperation may be launched at the level of the Union, security of supply remains Member States' responsibility. Using the gas market example, how would you evaluate the current state of security supply from the governance perspective? In particular, what is the impact of shared responsibility¹² for the security of gas supply on the security supply of the Union as a whole? Is the current governance model, involving multiple actors at national and Union level, adequate, or should it evolve towards the Union-driven one? Which conclusions do you draw from the experiences of the recent energy crisis in this context?

Section II: Energy solidarity, energy security and green transition

In the aftermath of the EU Green Deal, a wave of legislative acts and pending proposals under the European Commission's "Fit for 55" initiative has a potential to profoundly change the Union's legal framework. The clean energy transition, aiming at reducing greenhouse gas emissions and enhancing the quality of life of the EU citizens is indeed one of the flagship objectives of the European Green Deal. How do the considerations of fairness and solidarity, and of leaving no one behind in the context of green transition, affect the articulation of the EU's climate objectives?

What is generally an interplay between (i) the climate neutrality, (ii) energy solidarity and (iii) security of energy of supply ?

1. Given important economic and political differences between the Member States in the energy field, could and should the (energy) solidarity be relied upon to ensure coherence in the process of reshaping the climate neutral future of the Union's economy? Or, rather, is the 2050 climate neutrality objective such a powerful concept that it is gradually reshaping the meaning of energy solidarity and energy security in EU and national law?

¹¹ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ L 328, pp. 1–77).

¹² Article 3 and 4 of 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, pp. 1–56).

2. What is the impact of the EU measures adopted so far in the context of “Fit for 55”¹³ on the development and application of EU and national energy law and, in particular, on the concepts of energy solidarity and energy security? Have any specific legal issues and challenges been discussed in your Member State, especially, by reference to these concepts?

3. Given its broad scope, could the constantly evolving principle of “do no significant harm”¹⁴ play a significant role in the area of energy law, in particular given the integration clause contained in Article 11 TFEU, as well as the wording of Article 194 TFEU which refers to the need to preserve and improve the environment? Are there any comparable national legal concepts, mirroring the EU notion of “do no significant harm” or resonating with it?

4. EU law includes the notion of “energy poverty” which is currently encompassed also in non-energy legal acts.¹⁵ In the global perspective, an inevitable link between energy and sustainable development¹⁶ implies that the availability of energy at an affordable price for all consumers must be understood through the prism of climate change. How would you evaluate the social dimension of green transition in the field of energy law at the Union’s level and its impact at national level? Does the concept of energy security in your national framework encompass social components? Has the financing under the Just Transition Fund¹⁷ contributed to the fair green transition in your country so far?

5. One of the crucial aspects of the EU law is State aid control. The impact of State aid measures in the area of energy must be viewed in the context of the Union’s integrated and interconnected energy market, as well as its underlying legal principles, in particular since the rationale behind State aid may conflict with the solidarity rationale. Whilst it seems that the assessment of measures under Article 106 TFEU is open to environmental scrutiny, as confirmed in

¹³ See: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals_en

¹⁴ See Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, pp. 13–43). Applicable in the context of the post-COVID recovery, the mandatory respect of the “do no significant harm” principle is also essential under the RRF Regulation (Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, pp. 17–75)).

¹⁵ Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 (OJ L 130, pp. 1–51) and 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 (recast) (OJ L 231, 20.9.2023, pp. 1–111).

¹⁶ *World Energy Assessment: Energy and the Challenge of Sustainability*, 2000 UNDP.

¹⁷ Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund (OJ L 231, pp. 1–20).

the *Hinkley Point* case,¹⁸ is there any potential for the energy solidarity scrutiny in the State aid context? To what extent can State aid measures be reconciled with the concept of energy solidarity?

6. The recently revised TEN-E Regulation¹⁹ amounts to one of the most comprehensive measures regarding the energy infrastructure. How would you define the relationship between Articles 170–172 TFEU and Article 194 TFEU? In particular, what is the relationship between the concept of energy solidarity and the concept of projects of common interest under Articles 170–172 TFEU and Regulation (EU) 2022/869?

7. How to define the relationship between decarbonization and security of energy supply? For instance, to what extent should efforts to decrease fossil fuels also be pursued for energy security reasons at the level of the Union?

8. How to define, in the current state of development of EU law, the relationship between Article 192(2)(c) TFEU and Article 194 TFEU? Are there any limits in EU law to the Member States' freedom to set their energy mix? If not, should there be any limit? Does energy solidarity amount to such a limit? What margin is there left to individual Member States to “determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply”?

9. The impact of the climate change on the way Member States construe their choices between different energy sources is inevitable. What are the main legal tools adopted in your Member State to tackle the climate-related considerations in the context of its energy mix?

10. The Union suffers from scarcity of natural resources, in particular regarding the energy resources. In the 2000 Green Paper “Towards a European energy security strategy”²⁰, the Commission referred to “Gulliver in chains,” noting the problem dependence on external supplies. Scarcity of resources emphasizes the need to diversify energy supplies and to enhance trade relationships with worldwide partners. While in the field of energy the EU has shared external competence, in the light of the Court's case law, in particular the COTIF judgment,²¹ the shared nature of that competence does not preclude

¹⁸ Judgment of the Court in case *Austria v Commission (Hinkley Point)*, C-594/18 P, EU:C:2020:742.

¹⁹ Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013 (OJ L 152, pp. 45–102).

²⁰ COM(2000) 769 final.

²¹ Judgment of the Court in case *Germany v Council (COTIF)*, C-600/14, EU:C:2017:935.

the EU to act alone in this area. How do the respective roles of the EU and of the Member States keep evolving in external sphere, in particular, regarding security of supply?

11. How would you evaluate the impact of REPowerEU²² regarding energy security from your Member State's perspective? Has your Member State applied for particular support to finance reforms in the energy sector including in diversifying energy supplies? How would you evaluate REPowerEU's impact from the cohesion policy and energy security perspective in your country?

Section III: The EU's crisis management in the field of energy and its limits

In response to the energy crisis, in 2022, the EU has significantly enhanced its legal toolbox of crisis management measures. In particular, Article 122(1) TFEU has become one of the most widely used legal bases ensuring the Union's readiness and resilience. The crisis management measures are anchored in energy solidarity, whilst responding to the objective of energy security. This chapter explores the role of both concepts in the context of a crisis, while discussing the sufficiency of existing EU crisis management instruments.

What are the limits of the Union's energy crisis managements tools?

1. In the *OPAL* case,²³ the Court considered 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 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU must inform any action relating to EU energy policy. Thus, the principle of energy solidarity encompasses measures to be adopted in order to prevent crises before they arise. Do you consider that Article 194 TFEU is an appropriate tool to manage an energy crisis at the Union's level both before and during potential crisis or is Article 122 TFEU a more suitable legal basis, given notably its celerity and adoption procedure? Would it be justified to argue that operationalizing of the Union's legal toolbox in crisis should rely to the widest possible on expeditious recourse to Article 194 TFEU, which

²² Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC (OJ L 63, 28.2.2023, pp. 1–27).

²³ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598.

remains the classic legal basis of the EU energy policy,²⁴ possibly combined with other legal bases? If so, why?

2. The recent energy crisis measures²⁵ have demonstrated both the risks of the Union's energy dependence and the need of enhanced energy solidarity. Such measures must, nevertheless, remain commensurate with the crisis management context. What are the limits for the role of energy solidarity in the times of crisis? What are the limits of Article 122 TFUE, including the possibility of extension in time of the measures adopted in the emergency framework? Were these crisis management instruments more efficient from the security of supply perspective compared to the classic measures of EU energy legislation? Can you identify any legal issues related to such measures in your national legal order?

3. Do the Treaties provide a sufficiently robust Union energy crisis management toolbox? The crisis response might also be needed in the case of natural disasters which, in the era of a climate change, are liable to affect the Union's economy and the lives of its citizens. Is it thus possible to revitalize, in parallel, other Treaty instruments, including Article 222 TFEU, in case of major climate related threats jeopardizing security of energy supply of the Union?

²⁴ See, amendments of Directive 2009/119/EC which requires Member States to maintain emergency minimum oil stocks). The scope of application of Gas Directive 2009/73/EC extends to future gas pipelines to and from third countries, with derogations for existing pipelines. Special provisions exist under Directive 2013/30/EU on the safety of offshore oil and gas operations.

²⁵ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261 I, pp. 1–21) and 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, pp. 1–35).

GENERAL REPORT

TOPIC III – Energy solidarity and energy security – from green transition to the EU’s crisis management

*Alicja Sikora-Kalėda**

I. Introduction

A) Objectives and context

Energy is the foundation of our economies. It symbolises considerations that lay at the genesis of the three European Communities,¹ as well as the current challenges facing the European Union. The restructuring of energy systems is viewed by leading economic scientists as a critical turnaround for humanity.² Whether conveying a strife-ridden notion or an umbrella term,³ energy ontologically refers to the Earth resources used to produce power. The “energy trilemma,” which refers to the balancing of energy security, affordability, and sustainability, encapsulates the substance of regulatory challenges in this area.⁴ Thus, energy efficiency and the way the related resources are produced, distributed and consumed remain key aspects of energy policy, economy, and law. As aptly summarised in the emerging field of energy humanities, to put it simply, “energy matters.”⁵ The difficult evolution of the EU’s energy policy, originally characterised by inadequacy and inconsistency,⁶ very well illustrates the thesis that the legal regulation of the Union’s energy markets has always

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¹ About the genesis and first fundamental errors, M. Ippolito, *Contribution à l’étude du problème énergétique communautaire*, Librairie générale de droit et de jurisprudence, Paris 1969, pp. 312–326.

² S. Dixon-Declève, O. Gaffney, J. Ghosh, J. Randers, J. Rockström, P. Espen Stoknes, *Earth for All. A Survival Guide for Humanity. A Report to the Club of Rome*, New Society Publishers, 2022, p. 127.

³ M. Marder, *Energy Dreams of Actuality*, Columbia University Press, 2017, p. 4.

⁴ *The energy trilemma: What is it and how does it influence EU energy policy*, Ramboll Group Report 2024.

⁵ I. Szeman, ‘Towards a Critical Theory of Energy’, in: *Energy Humanities. Current State and Future Directions*, M. Misik, N. Kujundžić, Springer 2020, pp. 23–36.

⁶ The Development of an Energy Strategy for the Community, COM (81) 540 final para. 1.

been dependent on ideological shifts and geopolitical developments.⁷ Ambiguity and versatility of this topic has long captivated academic interest. Given its horizontal economic relevance and its close interaction with other areas of EU and national law, it is not surprising that energy law has more than once been chosen as a topic of the past FIDE Congresses. Those past conferences situated the energy debate in a triangular structure based on competitiveness, security, and sustainability, coupled with the parallel questions on the impact on national sovereignties and on the external dimension of the EU's action.⁸

Solidarity is the driving force of the European integration, just as it is “*la condition de toute société*.”⁹ Since the conclusion of the founding treaties, solidarity has emerged in EU law as a Union value “*aux usages multiples*.”¹⁰ It serves as an underlying leitmotif of mutual trust, a key element of social dimension of the Union, a legitimising driver of internal cohesion, and a unifying feature of the EU's external action. As emphasised by the Court of Justice of the European Union (hereafter ‘the CJEU’ or ‘the Court’), the principle of solidarity, which specific expression is mentioned in Article 194 TFEU, is itself one of the fundamental principles of EU law.¹¹ Tested in various policy contexts, solidarity gained particular momentum at the time of the crises, notably in the context of migration, finance, pandemics and the rule of law crisis, whilst raising, in parallel, controversies indicating its omnipresence and indeterminacy.¹² At the global level, there is an inextricable link between solidarity and sustain-

⁷ T. Daintith, L. Hancher, ‘A Legal Perspective on Energy Policy’, in: T. Daintith, L. Hancher (eds.), *Energy Strategy in Europe: The Legal Framework*, European University Institute, Walter de Gruyter, Berlin, New York, 1986, pp. 1–12.

⁸ V FIDE Congress Berlin 1970: *Gemeinschaftsrecht und nationale Rechte*, V. Internationaler Kongress für Europarecht vom 23. – 26. September 1970 in Berlin, C Heymanns Verlag KG Köln Berlin Bonn München 1971; G. Flore, ‘Rapport général, Coopération entre les États membres et les Communautés européennes en matière d’énergie’, p. III/1; XVII FIDE Congress Berlin 1996: *Energy and Environmental Protection in a European Perspective*; P. Badura, ‘Generalbericht’, *Deutsche Wissenschaftliche Gesellschaft für Europarecht und Nomos Verlagsgesellschaft*, Baden-Baden 1996, p. 510; XIX FIDE Congress, Helsinki 2000 *Community Law Affecting Networks (Telecom, Energy and Information Technology)*; XXV FIDE Congress Tallinn 2012 *The Interface between European Union Energy, Environmental and Competition Law*, P. D. Cameron, *The Interface between Energy, Environment and Competition Rules of the European Union*.

⁹ E. Brosset, R. Mehdi, N. Rubio, ‘Avant-propos’, in: E. Brosset, R. Mehdi, N. Rubio (eds.), *Solidarité et droit de l’Union européenne : un principe à l’épreuve*, Aix en Provence, DICE Éditions, 2021, p. 9.

¹⁰ R. Mehdi, ‘Rapport Introductif’, in: M. Mezaguer, A. Millet-Devalle, N. Pigeon (eds.), *Union européenne et solidarité(s), Actes du congrès 2022 de l’Association française d’études européennes (AFEE) 2024*, Bruylant, Bruxelles, p. 25.

¹¹ *Case Germany v Poland*, C-848/19 P, EU:C:2021:598, para 38 (hereinafter: *OPAL judgement*).

¹² I. Goldner Lang, ‘The EU Financial and Migration Crises: Two Crises – Many Facets of EU Solidarity’, in: A. Biondi, E. Dagilyte and E. Küçük (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar, 2018). For an overview, see *European Solidarity in Action and the Future of Europe*, M. Kaeding, J. Pollak, P. Schmidt, Springer, Cham, 2022; M. Blanquet, ‘Le paradoxe des solidarités dans l’Union européenne’, in: M. Mezaguer, A. Millet-Devalle, N. Pigeon (eds.), *Union européenne et solidarité(s), Actes du congrès 2022 de l’Association française d’études européennes (AFEE) 2024*, Bruylant, Bruxelles, pp. 428–460.

ability, where solidarity encompasses intergenerational and intragenerational dimensions, reflecting the aim to secure “social foundations for all people now and for the future while safeguarding the ecological bases for all life.”¹³ In the realm of international relations, solidarity is viewed as a way to ensure collective security in view of the global threats, as well as one of the principles that are the basis for international cooperation.¹⁴ This global complexity is mirrored at EU level, in particular in the field of EU energy policy where solidarity, security and green transition trigger regulatory transformation by both coinciding and colliding continuously.

Remarkably, solidarity neither as an EU value nor as a concretised principle has been a specific subject of the FIDE deliberations. Yet, one could note the concluding remarks of the General Report of the 2012 FIDE Congress in Tallinn, which recognise the relevance of principle of solidarity in the area of energy, as a potentially influential concept liable to be interpreted dynamically by the Court of Justice.¹⁵ These remarks can be viewed as the juncture point and an invitation for the discussions at the 2025 FIDE Congress. Drawing inspiration from the legal developments stemming from the judgement of the CJEU in *OPAL* case, this report constitutes an attempt to unpack the principle of solidarity in the present context.

The present exploratory analysis focuses on the operationalisation of solidarity and its various manifestations in the field of EU energy law, as the point of departure for analysing its interaction with the objectives of energy security and green transition. Other relevant legal concepts such as the principle of conferral also play a key role in this analysis. From this standpoint, energy sector is viewed as a case study, an area illustrating the conceptualisation and impact of the legal principle of solidarity. The ensuing analysis covers both its meaning for the evolution of existing legal framework and its significance for the dynamics characterising internal and external competences of the Union. Likewise, an interaction between energy solidarity and energy security, against the background of measures adopted in response to the global phenomenon

¹³ B. Sjöfjell, ‘Solidarity, sustainability and the role of Business’, in: Cecilia M. Bailliet (ed.), *Research handbook on international solidarity and the law*, Northampton: Edward Elgar Publishing, 2024, pp. 399–420; M. Leach, K. Raworth, J. Rockström, *Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity World Social Science*, Report 2013 (OECD Publishing 2013).

¹⁴ The UN Secretary-General’s 2023 Report on A New Agenda for Peace: “Collective security is gravely undermined by the failure of Member States to effectively address the global and interlocking threats before them, to manage their rivalries and to respect and reinforce the normative frameworks that both govern their relations with each other and set international parameters for the well-being of their societies. These phenomena are rooted in the neglect of a set of principles that are the basis for friendly relations and cooperation among nations and within societies: trust, solidarity and universality.”

¹⁵ P.D. Cameron, ‘General Report’, in: *XXV FIDE Congress Tallinn 2012 The Interface between European Union Energy, Environmental and Competition Law*, p. 32.

of climate change, is meant to spell out legal strengths and weaknesses of the potential operationalisation of solidarity at a more general level. The scope of this analysis goes beyond discussing law in books or assessing regulatory efforts at the EU and national levels, but also involves gathering views as to what is ultimately the *rationale* of elevating energy solidarity to the status of a general legal principle. For the purposes of this exercise, EU energy law and policy serves as an adequate conceptual laboratory, given the substantial influence of the horizontal principles and global phenomena in this area.

Finally, this general report mirrors Union's heterogeneity at its prime. Indeed, the Union is characterised by diverse energy landscapes (Portugal). Whilst building-blocs of the EU internal energy market have been anchored in the concepts of liberalisation,¹⁶ and energy transition,¹⁷ its volatility, interdependence and crisis vulnerability have prompted a variety of the Union's responses, the most recent one being the electricity market design (EMD).¹⁸ These concepts are of paramount importance given the five dimensions of the Energy Union which builds upon closely related and mutually reinforcing dimensions of security, solidarity and trust, energy efficiency, fully integrated market, climate action, and decarbonising the economy.¹⁹ In the Energy Union, as echoed by various statistics and national reports, each Member State represents its natural particularity and may be categorised in line with various criteria such as sustainability leadership, fossil fuel dependence, level of energy security, these categorisations being themselves moving targets. This picture of heterogeneity is meaningful when discussing both coinciding and contrasting views expressed in the reports submitted on the present topic regarding, in particular, the role of the concept of solidarity in the energy law area and more generally in EU law as a whole.

B) Methodology and time framework

Inspired by jurisprudential, academic and geopolitical trends, this general report builds upon the national reports of the Member States and Norway, as

¹⁶ D. Geradin, *Twenty Years of Liberalization of Network Industries in the European Union: Where Do We Go Now?*, Nijmegen Druk 2006. Regarding evolution of the EU energy law regime, see L. Hancher, K. Talus, M. Wüstenberg, 'Retrospective application of legal rules in the European Union: recent practice in the energy sector', *Journal of Energy & Natural Resources Law*, Vol. 39, 2021 – Issue 1, pp. 65–81.

¹⁷ *Research Handbook on EU Competition Law and the Energy Transition*, L. Hancher, I. Herrera Anchustegui (eds.), Edward Elgar 2024.

¹⁸ Regulation (EU) 2024/1747 amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union's electricity market design, and Directive (EU) 2024/1711 amending Directives (EU) 2018/2001 and (EU) 2019/944 as regards improving the Union's electricity market design. Both instruments entered into force on 16 July 2024.

¹⁹ The Energy Union Strategy (COM/2015/080). See State of the Energy Union Report 2024 (COM/2024/404).

well as the institutional report, all those reports submitted between September 2024 and February 2025. The national reports provide an opportunity for national experts and academics to inform one another about their understanding of solidarity, energy solidarity and energy security and various challenges of green transition, whilst contributing to their general understanding in EU law.

Regarding the structure of the general report, it follows major trends accentuated in the national reports in response to the questionnaire, whilst recognising a diversity of interpretations on some points and understanding expressed in unison on others. Thus, while the questionnaire is the starting point of this joint exercise, the present report does not follow its structure precisely. Furthermore, a very strong diversity of the submitted reports shaped trajectory of this general report. Some national reports engage strictly in the legal discussion and focus on the national legal framework and practice. Energy being inextricably linked to the geopolitical reality, many reports insist on the political dimension constraining legal choices and requiring new forms of solidarity, in particular in the external action of the Union. Given a particular richness and complexity of the national and institutional reports, this general report constitutes neither a summary nor a comparative legal exercise. It is meant to grasp a thrust of the reports whilst articulating novel and controversial aspects of the debate oscillating around solidarity. Finally, it is worth emphasising that some of the national reports constitute themselves self-standing, fascinating analyses. Therefore, this report is an invitation to explore them further.

This general report is structured as follows. Following the Introduction in Part I, Part II is dedicated to the concept of solidarity and the principle of energy solidarity in EU law and national law. Part III addresses various aspects of energy security and energy solidarity. Part IV gathers opinions and concerns voiced in relation to the principle of conferral and division of competences between the Union and Member States in the area of EU energy policy. Part V focuses on fairness and social dimension of the green transition, including energy poverty. Part VI focuses on the litigation in the aftermath of the adoption of the EU measures in the context of the recent energy crisis under Article 122 TFEU.

Regarding the timeline of the report, the questionnaire for Topic III was drawn in December 2023. As is often the case of complex, multi-phase projects such as the present report, time works against the full accurateness of the substance. In the meantime, new judgements of the EU judiciary regarding the impact of energy solidarity and legality control of the EU emergency measures based on the solidarity rationale have been either handed down or the cases are still pending. Also, as highlighted in a number of national reports (Germany, France, Croatia), a significant debate in the scholarship emerged regarding

the concept of energy solidarity itself. In parallel, new policy initiatives such as the Competitiveness Compass strategy of January 2025, European Commission insist on the relevance of energy in drawing a joint roadmap for decarbonisation and competitiveness. This latest strategy emphasises the need for a unified legal framework for businesses, simplification of regulations, and leveraging renewable energy to lower barriers for businesses and improve the investment environment. Competitiveness Compass indicates also a need to reduce dependencies and enhancing security, notably through the Clean Trade and Investment Partnerships to secure supplies of raw materials, clean energy, sustainable transport fuels, and clean technologies from global partners.²⁰ The EU legal framework keeps evolving too as demonstrated by the recent amendments fostering *de facto* solidarity in gas area, adopted after the completion of the Topic III questionnaire.²¹ Likewise, areas of cybersecurity and environmental cost of Artificial Intelligence (AI) arise as new technology-based challenges in the energy sector. Finally, whilst transit of Russian gas via Ukraine has reached its historical end in January 2025,²² scholars argue that without transitional arrangements for several individual EU Member States, new threats for the energy security might arise.²³ There is no doubt, by the time the FIDE Congress takes place in May 2025, new issues will shape the forthcoming debate.

II. Many solidarities, one *telos*. Energy solidarity – substance, limits, prospects

Part II of the general report explores selected aspects of solidarity in the Union's constitutional context and the EU principle of energy solidarity as interpreted in the *OPAL* judgement. It outlines the exclusivity of energy solidarity as EU law concept and oscillates around various controversies in the aftermath of the *OPAL* ruling and further streamlined in the light of the recent case-law of the EU Courts. Finally, various *de facto* solidarities are highlighted.

A) Constitutional dimension of solidarity – selected aspects (Questions 1 and 2, Section I)

Within the realm of the EU constitutional framework the founding values of the European Union, common to the Member States, contained in Article 2

²⁰ See: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339

²¹ 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 (recast) OJ L, 2024/1789.

²² See: https://energy.ec.europa.eu/document/download/e8a46964-f29b-44f8-9410-689f9e34463b_en

²³ See: <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2024/12/NG196-Transit-of-Russian-gas-across-Ukraine.pdf>

TEU, include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, in a society in which, *inter alia*, non-discrimination, justice, solidarity and equality between women and men prevail.²⁴ It underpins the entire legal system of the European Union.²⁵ Solidarity is considered as “[t]he driving force behind European integration,” reflecting the “close mutual dependence that is being created and developed between Member States” (France). Conceptual variety and complexity of solidarity in EU law is illustrated by multiplicity of its interpretations. Whether viewed as “the last classical principle of European constitutionalism,”²⁶ “a fuzzy legal term,”²⁷ “much voiced but little elaborated,”²⁸ solidarity has triggered significant academic research.²⁹ Beyond the realm of EU values and founding principles, solidarity is characterised by sectoral and contextual appropriations as illustrated notably by asylum solidarity,³⁰ civic solidarity,³¹ and solidarity between EU citizens,³² “bounding solidarity” in the COVID-19 context,³³

²⁴ Case *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 192.

²⁵ Case *Germany v Poland*, C-848/19 P, EU:C:2021:598, para. 41.

²⁶ A. von Bogdandy, ‘Founding Principles’, in: *Principles of European Constitutional Law*, A. von Bogdandy, J. Bast (eds.), Hart 2011, pp. 11–54.

²⁷ A. Ott, ‘A Flexible Future for the European Union: The Way Forward or a Way Out?’, in: S. Blockmans, S. Prechal (eds.), *Reconciling the Deepening and Widening of the European Union*, TMC Asser Press, 2007, p. 153.

²⁸ P.G. Xuereb, ‘The Future of Europe: Solidarity and Constitutionalism: Towards a Solidarity Model’, 27 *European Law Review* (2002), pp. 643, 647.

²⁹ *Ex multis* see P. G Xuereb, ‘The Future of Europe: Solidarity and Constitutionalism. Towards a Solidarity Model’ (2002) 27 *el Rev* 643; M. Ross, ‘Promoting solidarity: from public services to a European model of competition?’ (2007) 44 *Common Market Law Review* 1057, 1069; I. Domurath, ‘The three dimensions of solidarity in the EU legal order: limits of the judicial and legal approach’, *J. Eur. Integr.*, 35 (2013), pp. 459–475; A. Sangiovanni, ‘Solidarity in the European Union’, *Oxf. J. Leg. Stud.* 33 (2013), pp. 213–241; F. De Witte, *Justice in the EU. The Emergence of Transnational Solidarity*, 2015, Oxford University Press; P. Hilpold, ‘Understanding solidarity within EU law: An analysis of the “islands of solidarity” with particular regard to monetary union’, 2015 *Yearbook of European Law*, 34(1), pp. 257–285; E. Küçük, ‘Solidarity in EU law: An elusive political statement or a legal principle with substance?’, in: A. Biondi, E. Dagilyte, E. Küçük (eds), *Solidarity in EU law: legal principle in the making* (Edward Elgar 2018, p. 44; I. Goldner Lang, ‘Is there solidarity on asylum and migration in the EU?’ (2013) 9 *Croatian Yearbook of European Law & Policy* 1, 7; G. Butler, ‘Solidarity and its limits for economic integration in the European Union’s internal market’, *Maastricht Journal of European and Comparative Law* 2018, Vol. 25(3), pp. 310–331.

³⁰ E. Küçük, ‘Solidarity in EU law. An elusive political statement or a legal principle with substance?’, *Maastricht Journal of European and Comparative Law*, (2016), 23(6), pp. 965–983; D. Saracino, ‘The European Union’s response to the refugee movements from Ukraine: The end of the solidarity crisis?’, *Central and Eastern European Migration Review*, Vol. 13, No. 2, 2024, pp. 179–200.

³¹ C. Lahusen, ‘Civic Solidarity in Transnational Spaces. Organisation and Institutionalisation of Solidarity Within the European Union’, in: H. Krunke, H. Petersen, I. Manners (eds.), *Transnational Solidarity. Concept, Challenges and Opportunities*, 2020, Cambridge University Press, pp. 301–324.

³² F. de Witte, *Justice in the EU. The Emergence of Transnational Solidarity*, OUP, Oxford 2015.

³³ I. E. Oana, Z. Truchlewski, ‘Bounded solidarity? Experimental evidence on cross-national bonding in the EU during the COVID crisis’, *European Journal of Political Research*, Volume 63, Issue 3, August 2024, pp. 815–838.

“budgetary solidarity.”³⁴ As noted famously in the scholarship “[a]ny particular use of any concept of commonsense or of the natural sciences is liable to be contested for reasons better or worse.”³⁵ Whether solidarity is an “essentially contested concept,”³⁶ a value, emotion, a “normatively dependent concept”³⁷ or just a “concept not being defined in a binding manner”³⁸ goes beyond the scope of this general report. However, in the light of the submitted reports, the concept of solidarity echoes “a special kind of *joint action* constituted by a characteristic profile of interpersonal attitudes, norms, dispositions, and behaviors triggered by one’s identification with another on the basis of a role, cause, way of life, condition, or set of experiences.”³⁹ Various references in the national reports coincide in understanding solidarity as “justifying grounds that give it normative substance [...], and that such an approach to the term is useful for purposes of both empirical analysis [...] and normative assessment.”⁴⁰ In addition, specifically in the context of the EU legal order context it is the historical account of solidarity, a genesis of the Union which allows to engage in the interpretative theological exercise to grasp the operational thrust of solidarity.⁴¹ What is equally important to unwrap solidarity in context is an accurate understanding of *the present moment* anchored often in geopolitical context, and “how clear the common objectives are and whether there is a shared understanding of responsibility for the fate of fellow-Europeans and others in need, invite us to reflect on what it truly means to participate in the European project.”⁴² Understanding *now and here* in formulating the principle of energy solidarity has been highlighted in most of the national reports illustrating precisely practical obstacles especially in the context of security of supply, both internally and externally.

The inherent indeterminacy of solidarity, in particular from the point of view of its justiciability, as enshrined in Article 2 TEU or, spirit of solidarity and expressed in Article 194 TFEU and other horizontal provisions of the

³⁴ Case *Poland v Parliament/Council*, C-157/21, EU:C:2022:98, para. 147.

³⁵ W.B. Gallie, *Essentially contested concepts*, Meeting of the Aristotelian Society at 21, Bedford Square, London, W.C.1, on March 12th, 1956, at 7.30 p.m., <https://cooperism.law.columbia.edu/files/2023/12/Gallie-Essentially-Contested-Concepts-1955-CL.pdf>

³⁶ *Ibid.*

³⁷ R. Frost, ‘The meaning(s) of solidarity’, in: A. Sangiovanni (ed.) *Solidarity – Nature, grounds, and value. Andrea Sangiovanni in dialogue*, Manchester University Press, 2024, pp. 205–221.

³⁸ K. Bayertz, ‘Four Uses of “Solidarity”’, in: *Solidarity*, K. Bayertz, 1999, Kluwer, pp. 3–28.

³⁹ A. Sangiovanni, ‘Solidarity: nature, grounds, and value’, in: A. Sangiovanni (ed.), *Solidarity – Nature, grounds, and value. Andrea Sangiovanni in dialogue*, Manchester University Press, 2024 Lead Essay, p. 10; A. Sangiovanni, ‘Solidarity as Joint Action’, *Journal of Applied Philosophy* 32, no. 4/2015, pp. 340–359.

⁴⁰ R. Frost, ‘The meaning(s) of solidarity’, in: A. Sangiovanni (ed.), *Solidarity – Nature, grounds, and value. Andrea Sangiovanni in dialogue*, Manchester University Press, 2024, pp. 205–221.

⁴¹ See: Opinion of AG Sharpston, in cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic*, ECLI:EU:C:2019:917, paras. 246 and 247.

⁴² E. Sharpston, ‘Thinking About Solidarity and EU Law’, in: E. Kassoti and N. Idriz (eds.), *The Principle of Solidarity, Global Europe: Legal and Policy Issues of the EU’s External Action*, pp. 153–162.

treaties⁴³ has been contemplated in the case-law of the CJEU where legal contours of solidarity have been outlined. Solidarity has been given a powerful legal entrenchment through the jurisprudential operationalisation. In *OPAL*, the CJEU judged that the spirit of solidarity between Member States, mentioned in Article 194 TFEU, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law.⁴⁴ Further conceptual exercise has been recently outlined by the Court in the rule of law conditionality judgement, by reference to Article 2 TEU and direct reliance on the *OPAL* judgement.⁴⁵ Against this background, conceptual hesitations regarding solidarity as referred to in Article 2 TEU in the Union's constitutional and sectoral contexts are echoed in the national reports. In view of the French rapporteurs, "[t]he interpretation of solidarity as a value" should be "dissociated from its meaning in energy matters" where "solidarity refers to functional requirements within the internal energy market, which can be explained in particular by the interdependence of networks, the need to secure supplies and the need to take account of supplies from other States." In the Slovene report energy solidarity refers to "a fundamental component of the EU's constitutional framework, transcending national interests and forming part of the Union's constitutional identity in the meaning of the rule of law conditionality case-law." Greek rapporteurs view energy solidarity as a specific expression of the general principle of solidarity which "constitutes part of the constitutional identity of the EU." Furthermore, a relationship between solidarity and principle of loyal cooperation under Article 4(3) TEU is discussed in the Polish report whose authors note that Article 4(3) TEU covers solidarity in a vertical dimension, between the Union and its Member States, but not between the Member States. Yet, the principle of solidarity in the meaning of the *OPAL* case is of a broader scope than the principle of loyal cooperation since it comprises both vertical cooperation under Article 4(3) TEU and an additional aspect shaped as "a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences," to consider their interests and balance them.

B) Energy solidarity in the national legal frameworks (Question 1, Section I)

Among the lessons learnt from the national reports, a conclusion can be drawn that energy solidarity, at least at the current stage, belongs to the realm of EU law. Yet, as noted in the Finnish report, "the energy solidarity principle is of such recent origin, that it is yet to play a broader role in national legal frameworks or in the case law of the national courts." Dutch rapporteurs

⁴³ EU treaty, in the preamble thereto, the Member States declare that, by establishing the European Union, they intend "to deepen the solidarity between their peoples" and Article 2 TEU, Article 3(3) TEU, Article 21(1) TEU, Article 24(2) and (3) TEU. In FEU treaty, Article 67(2), Article Article 80 TFEU, Article 122(1) TFEU, Article 222 TFEU.

⁴⁴ Case *Germany v Poland*, C-848/19 P, EU:C:2021:598, para. 38.

⁴⁵ Case *Poland v Parliament/Council*, C-157/21, EU:C:2022:98, para. 147.

express a strong doubt insofar the EU law concept of energy solidarity which “solely pertains to Union policy could even apply to situations within a single Member State.”

It follows from most of the national reports the concept of energy solidarity in the meaning of EU law and the case-law of the CJEU is absent in the national constitutional framework, whilst traditional concepts enhancing international cooperation, national security and social policy and security of supply can be considered as sporadic, indirect references to energy solidarity. In rare cases the principle of energy solidarity has been referred to in the case-law of the Constitutional Courts, as noted in the Bulgarian report.⁴⁶ A meaningful dimension of solidarity viewed as the “keystone” of the entire constitutional order resonates in the Italian Constitution where principle of solidarity is enshrined in its Article 2 and strongly echoed in the case-law of the Italian Constitutional Court which notably qualified principle of solidarity as a criterion for scrutinizing constitutionality of the national legislation. Thus, interesting developments have been highlighted in the Italian report in relation to the implementation of the Council Regulation 1854/2022 on an emergency intervention⁴⁷ which has triggered an incidental question of the constitutionality of the solidarity contribution.⁴⁸ In the light of the Greek report, the Greek constitutional framework situates principles of energy solidarity and security as an integral part of the national legal order, given that EU law forms an integral part of the national legal order. In the Greek jurisprudence, energy solidarity has been referred to in the case law of the Council of State regarding the constitutionality of the national legislation on extraordinary levy on the excess profits of electricity companies.⁴⁹ Globally, combined provisions of the Greek economic constitution and social market economy rationale, are considered “as being able to establish the prospect of its utilization as a means for the co-assessment of energy solidarity parameters.”

More generally, the closest references to the combined dimension of energy solidarity and energy security are those at the national legislative level regard-

⁴⁶ Ruling No. 6 of 11.05.2023 of the Constitutional Court of the Republic of Bulgaria in case No. 3/2023 (on the competence of the Constitutional Court to rule on issues in the field of nuclear energy).

⁴⁷ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices OJ L 261I, pp. 1–21.

⁴⁸ Lazio Regional Administrative Court Order No. 773/2024 of 16.01.2024 regarding constitutionality of the solidarity contribution introduced by Article 1, paragraphs 115 *et seq.* of Law No. 197/2022 potentially in conflict – pursuant to Article 117 of the Italian Constitution.

⁴⁹ Greek Council of State decisions No. 185-188/2024, which ruled that the provisions of Article 37 of Law 4936/2022 on the imposition of an extraordinary levy on the excess profits of electricity companies do not contravene the Constitution, since reasons of public interest justify the imposition of similar restrictions on freedom to conduct business.

ing the cooperation among the regions of a State like in case of Portugal⁵⁰ or regional solidarity with other Member States of the Union in the Lithuanian law, although the concept of energy solidarity as such is not referred to neither in the Lithuanian legislation nor its case-law.⁵¹ In many cases such, as illustrated by the Latvian report, “energy solidarity manifests through participation in regional cooperation.” Thus, the Latvian Constitutional Court recognises relevance of energy solidarity in adjudicating energy market regulations and disputes that involve energy policy, particularly concerning cross-border cooperation and compliance with EU energy law.⁵² In a similar vein, Danish rapporteurs underscore that “energy solidarity is reflected in Denmark’s commitment to the EU’s energy policies and its participation in regional energy cooperation initiatives” and consider that “Danish law may need to incorporate the principle of energy solidarity more explicitly” in order to align with the Union’s approach of a mutual support and cooperation among the Member States. The Polish Constitution does not seem to enshrine principle of solidarity, but solidarity is viewed as one of the underlying values as illustrated by the solemn references to the duty of solidarity in its Preamble. Also, it constitutes one of the bases of the social market economy under Article 20 of the Polish Constitution. Whilst there are no references to energy solidarity in the Polish Energy Law, a concept of regional solidarity in the Polish legislation mirrors EU law approach by providing for cooperation between the Polish authorities “with the authorities of other EU Member States for the purpose of guaranteeing ‘the security of the supply of gaseous fuels’ and ‘promoting regional solidarity in ensuring that security’.” In the French legislation energy solidarity “is occasionally used in a territorial context, particularly with a view to providing access to energy, and in particular to clean energy, for certain areas that lack it. The French legislator has also given the regions responsibility for planning the energy transition, and the municipalities for leading it.”⁵³ Whilst references to security of supply appear in Belgian legislation⁵⁴ and have been extensively addressed in the case-law of the Belgian Constitutional and Belgian Council of State, the concept of energy solidarity is reflected neither in the Belgian Electricity Act nor in the national jurisprudence. Similarly, it results from the Croatian report that energy solidarity and energy security have not yet been addressed in the national jurisprudence. As noted in the Dutch report, following *OPAL* ruling, “no recalibration or adjustment of policy and/or legislation

⁵⁰ Portugal Decree-Law no. 15/2022, of 14 January, Article 9(3)(e) establishing that “the main providers of the national electricity system have the public service responsibility of ensuring ‘convergence’ of the [national electricity system] translated into solidarity and cooperation with the electricity system of the Portuguese autonomous regions.”

⁵¹ Article 62 of the Law on Natural Gas of the Republic of Lithuania, which addresses regional solidarity.

⁵² Judgment of the Constitutional Court of the Republic of Latvia as of 27 October 2022, No 2021-31-0103.

⁵³ See: French Law no. 2015-992 of 17 August 2015 on the energy transition for green growth.

⁵⁴ Belgian Electricity Act of 29 April 1999.

has taken place,” in Dutch law which addresses exhaustively security of supply in the national context. Hungarian legislation contains sporadic references to solidarity viewed as being related to Article 222 TFEU, notably in area of Natural Gas Supply which identifies steps to be taken in the event of a solidarity measure under Article 13(1) of Regulation 2017/1938. Energy solidarity is not articulated in the Slovenian Constitution, concept which has not given rise to the jurisprudence of the Slovenian Constitutional Court neither. The principle of energy solidarity is not referred to in the Finnish Constitution, but relevant aspects of energy solidarity which relate to the protection of vulnerable consumers have been considered in the practice of the Constitutional Committee of the Finnish Parliament. Belgian rapporteurs confirm “with certainty” that the concept of energy solidarity is not part of the Belgian Constitution.

C) Principle of energy solidarity in EU law – substance, limits, prospects (Questions 1 and 2, Section I)

Legal conceptualisation of the principle of solidarity in EU law is open to interpretation and operates differently in different areas of EU law.⁵⁵ Energy area is not an exception. Energy solidarity as a consequential trajectory of the EU policy has arisen in the series of crises,⁵⁶ which have triggered weaponising legal tools and contractual obligations for the sake of shaping the energy policy.⁵⁷ Ambiguity of the relevance of solidarity viewed as a political⁵⁸ or programmatic concept,⁵⁹ prone to bargaining rather than judicial review⁶⁰ in the energy sector has been largely discussed in the scholarship before the *OPAL* judgement.⁶¹ In general, crucial objections to the concept of solidarity in the EU energy area before the *OPAL* case seemed to build upon the abstract nature of solidarity and potential risks of solidarity as a centralised, public ap-

⁵⁵ For historical foundations, see Peter G Xuereb, ‘The Future of Europe: Solidarity and Constitutionalism. Towards a Solidarity Model’ (2002) 27 *el Rev* 643, in environmental area, see: A. Sikora, *Constitutionalisation of Environmental Protection in EU Law*, Europa Law Publishing, Zutphen 2020; in the Monetary Union, see: P. Hilpold, ‘Understanding Solidarity Within eu Law: An Analysis of the “Islands of Solidarity” with Particular Regard to Monetary Union’ (2015) 34, p. 257, in particular pp. 257–275.

⁵⁶ C. Banet, ‘Legal mechanisms to ensure energy solidarity, in international and EU law’, in: C. Bailliet (ed.), *Research Handbook on International Solidarity and the Law*, Northampton: Edward Elgar Publishing, 2024, p. 399–420; M. Misík, A. Nosko, ‘Each one for themselves: Exploring the energy security paradox of the European Union’, *Energy Research & Social Science*, 2023/99.

⁵⁷ R. Fleming, ‘A legal perspective on gas solidarity’, *Energy Policy*, Volume 124, January 2019, pp. 102–110.

⁵⁸ M. Münchmeyer, ‘The Principle of Energy Solidarity: *Germany v Poland*’ (2022) 59 *CMLRev.*, pp. 915, 916–917.

⁵⁹ R Fleming, ‘A Legal Perspective on Gas Solidarity’, (2019) 124 *Energy Policy*, p. 102.

⁶⁰ K. Talus, *EU Energy Law and Policy*, OUP 2013.

⁶¹ For an overview, see K. Huhta, L. Reins, ‘Solidarity in European Union Law and its application in the energy sector’, *International and Comparative Law Quarterly*, Vol. 72, No. 3, 29.06.2023, pp. 771–791.

proach in contrast with the EU's energy market liberalisation which although not immune to the market failures, remains anchored in the competitiveness principles. Likewise, doubts regarding inequitable distribution of resources among Member States were highlighted. All in all, while energy solidarity was viewed as a crucial element of EU energy policy, its effectiveness and equity were questioned in light of practical challenges and the historical context of energy governance.⁶²

Against this background, as highlighted by the Court in *OPAL* judgement “the spirit of solidarity between Member States [...], constitutes a *specific expression*, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law” (emphasis by the General Rapporteur).⁶³ Following Advocate General's Opinion, the Court concluded that “there is nothing that would permit the inference that the principle of solidarity referred to in Article 194(1) TFEU cannot, as such, produce binding legal effects on the Member States and institutions of the European Union. On the contrary, [...] that principle, as is apparent from the wording and structure of that provision, *forms the basis of all of the objectives of the European Union's energy policy*, serving as the thread that brings them together and gives them coherence.”⁶⁴ Notwithstanding legal embodiment of the principle of energy solidarity *OPAL* judgement has triggered an avalanche of contrasting commentaries and further reflections. The concept of energy solidarity in itself has triggered critical studies testing its practicability in the constantly evolving and prone to change area of EU energy law.⁶⁵ In particular, German report notes critical views expressed in the national literature focusing on of legal uncertainty and vagueness of the “spirit of solidarity between Member States.” The *OPAL* judgement is viewed therefore in majority of the national reports as an attempt to legally frame energy solidarity and provide it with a systemic meaning within the EU energy area under Article 194 TFEU. Yet, the precise

⁶² K. Talus, *EU Energy Law and Policy*, OUP 2013.

⁶³ Case *Germany v Poland*, C-848/19 P, EU:C:2021:598, para. 38.

⁶⁴ *Ibid.*, point 43.

⁶⁵ For an exhaustive overview, see the German, French, and Croatian national reports. *Ex multis*: A. Boute, ‘The principle of solidarity and the geopolitics of energy: *Poland v. Commission* (OPAL pipeline)’, 57 *CMLRev.* (2020), p. 889; M. Iakovenko, ‘Case C-848/19 P: *Germany v Poland* and its outcomes for EU energy sector: An extended case note on the European Court of Justice judgment in the *OPAL* case’, 14 *Journal of World Energy Law and Business* (2021), p. 38; K. Huhta, L. Reins, ‘Solidarity in European Union Law and its application in the energy sector’, *International and Comparative Law Quarterly*, Vol. 72, No. 3, 29.06.2023, pp. 771–791; V. Baumgartl, ‘The EU-law principle of energy solidarity’, in: E.A. Bartl (eds.), *Sustainability into the future*, 2024, p. 161; M. Münchmeier, ‘The principle of energy solidarity: *Germany v. Poland*’, 59 *CMLRev.* (2022), p. 915; B. Blottin, F. Tesson, ‘À la recherche de solidarité énergétique’, in: M. Mezaguer, A. Millet-Devalle, N. Pigeon (eds.), *Union européenne et solidarité(s), Actes du congrès 2022 de l'Association française d'études européennes (AFEE)*, 2024, Bruylant, Bruxelles, pp. 189–212 ; I. Przybojewska, ‘Energy Solidarity Revisited’, *The European Green Deal and the Impact of Climate Change on the EU Regulatory Framework. Searching for coherence*, A. Sikora, I. Kawka (eds.), Presses universitaires Saint-Louis, Bruxelles, 2024, pp. 144–157.

contours of the principle of energy solidarity are still in the making (Portugal). Also, as noted in the Norwegian report since the EEA Agreement does not contain a provision corresponding to Article 194 TFEU, “there is some uncertainty regarding the status of the principle of energy solidarity and the objective of energy security in EEA law” and applicability of the principle of energy solidarity as formulated by the CJEU within EEA law.

Solidarity seems an adequate concept for the energy area if viewed in a twofold way as “solidarity in sharing out something that there’s not enough of” and “solidarity in sharing out a ‘burden’ something that requires investing a lot of effort to reach an objective.”⁶⁶ The two-facet dimension of the principles of energy solidarity is strongly highlighted in various national reports. As noted by the German rapporteur, the principle of energy solidarity can be viewed as comprising two facets “on the one hand, solidarity through mutual assistance in crisis situations and preparedness for it, on the other hand, taking into account the interests of other Member States when deciding on structural measures capable of improving security of supply in one Member State, but at the expense of security in other Member States.” Referring to the *OPAL* judgment, French report suggests curving out *two dimensions of the principle of energy solidarity* which encompass, on the one hand, associating solidarity with securing sources of supply and the need to deal with crisis situations, and on the other hand “as a parameter in the assessment of the legality of energy measures taken by the institutions and by States, which justifies a procedural constraint requiring the interests at stake to be taken into account.” A two-facet dimension of energy solidarity is equally present in the Croatian report whose authors insist on *vertical and horizontal dimension of solidarity*. An important question of a *dynamic interpretation* of the principle of energy solidarity is strongly articulated in the French and Polish reports. French rapporteurs argue: “[...] the construction of the internal energy market has reached a stage where the integration of national markets is sufficiently strong for the decisions of some to produce effects (including negative effects) on others, but where the tools for coordinating – or even harmonising – national energy policies are still insufficient to address these issues before measures are adopted.” In an inspirational way, Polish report argues against the modest and static interpretation of energy solidarity which would be “a reflection of the principle of solidarity in the energy policy, albeit with some interesting embodiments, like the ‘Gazprom clause’.” Rather, Polish rapporteurs propose *a dynamic and flexible* approach enabling to view energy solidarity area as “another important component substantially enriching the general principle of solidarity.” Thus, according to the Polish report “since the EU legislator has

⁶⁶ E. Sharpston, “Thinking About Solidarity and EU Law”, in: E. Kassoti and N. Idriz (eds.), *The Principle of Solidarity, Global Europe: Legal and Policy Issues of the EU’s External Action*, Asser Press, pp. 153–162.

neither created a uniform legal definition of the concept of energy solidarity [...], nor has it indicated explicitly what should be understood by [...] ‘in the spirit of solidarity’ in Article 194(1) TFEU, the notion of energy solidarity was (and to a certain extent still is) left open to interpretation.” Consequently, according to the Polish rapporteurs, principle of energy solidarity should be interpreted in a *dynamic way*, “changing with legal provisions and possible developments of the line of the jurisprudence [...] such flexibility; in particular it does not undermine the status of the energy solidarity as a legal principle. The above-mentioned vagueness of principles actually occurs frequently, and if it were to have the effect of depriving them of the legal value, it would lead to the depreciation of many fundamental principles.”

Many reports grasp the core of the *OPAL* judgment by referring to energy solidarity as an expression of a *collective responsibility* among Member States to ensure notably energy security across the Union (Croatia, Lithuania, Portugal), emerging as a *cornerstone* of energy policies (Belgium) and a tool to ensure that national energy policies do not undermine the *collective interests* of the EU, thus serving the collective interest (Denmark). Thus, principle of energy solidarity “contributes to the cohesion of the legal framework, addresses regulatory gaps, strengthens the overall integrity of the EU legal order” (Latvia). Also, the spirit of solidarity “calls for (Member States) to recognise their interdependence and support each other in ensuring reliable and affordable energy supplies” (Latvia). Polish report refers to “the legal duties related to providing assistance to Member States in trouble as regards continuity of supplies of energy and its carriers [...]. This element is a true novelty in terms of solidarity; it seems that outside the field of energy, no similar duty exists in the EU law. The most prominent examples of applying such aspect of the energy solidarity are illustrated in regulation 2017/1938.”⁶⁷ Whilst for some energy solidarity remains a “corrective tool” of a limited scope (Portugal), or a corrective tool which sets the limits to national sovereignty in the field of energy (Croatia, Slovenia), for others it is “not only a corrective tool, but also a structural element of the EU energy policy and of integration between States, acting both as a indefectible parameter in the adoption of measures in the field of energy and as a parameter for assessing their legality” (Italy). Likewise, an accent on the widespread impact of the principle of energy solidarity resonates in the Hungarian report. In the Polish report, impact of *OPAL* judgment in relation to the timeline of energy solidarity has been asserted. Whilst before the *OPAL* case, energy solidarity was considered solely *ex post* and *thus* was activated only in a crisis situation, notably concerning supplies, the Court’s interoperation in *OPAL* case changes

⁶⁷ 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).

“obliges both the EU and individual Member States to consider the interests of other Member States *ex ante*, that is, in the process of developing their energy policy.”⁶⁸ Finally, as concluded in the Romanian report the principle of energy solidarity cannot be separated from “competitiveness and implementing compensatory measures for states that produce inexpensive energy, which is then used in the economies of other Member States.”

A need to streamline the scope and substance of the principle of energy solidarity has been strongly articulated in most of the national reports, further judicial and legislative developments being indispensable through the prism of coherence and further energy integration (Lithuania). An impact of the *OPAL* ruling on the Member States’ sovereignty over their energy resources and requirement to align with EU energy solidarity when enacting national energy policies resonates strongly in the Portuguese report whose authors argue that the CJEU “effectively established a framework for assessing national measures against the backdrop of energy solidarity. This includes the obligation to conduct a solidarity assessment, ensuring that measures do not undermine other states’ energy security and are compatible with EU-wide energy objectives.” Lithuanian rapporteurs view *OPAL* judgement as establishing “solidarity test” and argue that “solidarity principle can also be seen as a form of governance with a potential consequence in the area of the allocation of the competences” between Member States and the Union. As expressed in the Danish report, energy solidarity influences projects of common interest and external energy policy, but cannot override national sovereignty in the field of energy. Legal and social and economic limits to the energy solidarity are echoed in the Romanian report referring to the limits of the integration of the electricity markets and infringement procedure against Romania.⁶⁹ Contractual limits to the energy solidarity are also highlighted in the Slovak report referring to the long-term contracts with Russia.

Against this background, the most recent case-law referred to in various reports allows to trace the substance of the principle of energy solidarity.

On the one hand, energy solidarity is relied upon by the EU court to enhance the spirit and objective of the Union’s legislation on the internal market for electricity.⁷⁰ In September 2024, General Court handed down its judgement in case T-446/21 opposing French Energy Regulatory Commission (CRE) seeking the annulment of the decision of the Board of Appeal of the European

⁶⁸ Polish report, referring to M. Krzykowski, J. Zięty, ‘Milestone for Energy Solidarity Principle – Implication of the Judgment of the General Court of 10.09.2019 (T-883/16) for energy policy’, *Przegląd Ustawodawstwa Gospodarczego*, no. 4, 2020, p. 42.

⁶⁹ 2023 Infringement INFR(2024)2194.

⁷⁰ Regulation 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54).

Union Agency for the Cooperation of Energy Regulators (ACER) of 28 May 2021 confirming ACER Decision on the proposal of the electricity transmission system operators (“TSOs”) of the “Core” capacity calculation region for the methodology for cost sharing of redispatching and countertrading.⁷¹ When rejecting the applicant’s argument in relation to the incentives derived from including internal network elements within the scope of the contested cost sharing methodology, the General Court relied on the energy solidarity which entails mutual and reciprocal rights and obligations both for the Union and for the Member States.⁷² In particular, the General Court judged that the approach consisting for the applicant to be exempted from the costs that it causes to the other TSOs on the non-critical elements of their networks with its loop flows that exceed the threshold, would be contrary to the principle of energy solidarity. It would be contrary to the principle of energy solidarity to allow TSOs that cause loop flows that pass through other bidding zones to avoid the costs of remedial actions that have been activated in the common interest in order to optimise cross-zonal capacity, while at the same time ensuring network security as efficiently as possible, to the benefit of all TSOs and, accordingly, electricity consumers.

On the other hand, as noted in the French report, the contextual interpretation of the principle of solidarity is confirmed in the judgement of the Court in case C-255/22 P, *Orlen v. Commission*.⁷³ In first instance, the legality of the Commission’s decision under Article 9 of Regulation 1/2003⁷⁴ relating to the recognition of undertakings given by the operator Gazprom to cover the risks of abuse of a dominant position on the gas supply market, was challenged by the Polish operator PGNiG. In reply to the fourth plea alleging infringement of Article 194(1) TFEU, read together with Article 7 TFEU, the General Court dismissed the arguments referring to the energy solidarity. In particular, the General Court refused to treat the application of the principle of energy solidarity by the Commission as analogous to the imposition of positive obligations on the latter going beyond the scope of the complaints directed against Gazprom, or to the imposition of more binding obligations on it.⁷⁵ The General Court judged that commitments made following a procedure based on Article 9(1) of Regulation No 1/2003 could not lead to a result which is contrary to the specific provisions of the Treaties and found, first, that the Commission had to act in compliance with the general principles of EU law,

⁷¹ Case *CRE v ACER*, T-446/21, EU:T:2024:647.

⁷² Case *Germany v Poland*, C-848/19 P, EU:C:2021:598, para. 49.

⁷³ Case *Orlen S.A. v. Commission*, C-255/22 P, EU:C:2024:790 with the intervention of Lithuania, Poland and Gazprom.

⁷⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, pp. 1–25.

⁷⁵ Case *Polskie Górnictwo Naftowe i Gazownictwo v Commission (Engagements de Gazprom)*, T-616/18, EU:T:2022:43, paras. 420–422.

and, secondly, that the Commission was required to verify whether the commitments proposed in the contentious procedure infringed, as such, the provisions of the TFEU, including Article 194(1) TFEU. Under appeal, the Court upheld the first instance judgement.⁷⁶ The Court, following Advocate General's Opinion, confirmed that the principle of solidarity referred to in Article 194(1) TFEU produces binding legal effects on the Member States and institutions of the European Union and, like general principles of EU law, it constitutes a criterion for assessing the legality of measures adopted by the EU institutions.⁷⁷ Energy solidarity forms the basis of all of the objectives of the Union's energy policy, serving as the thread that brings them together and gives them coherence.⁷⁸ However, the Court judged that "the Commission cannot accept commitments that could result in an infringement of Article 194 TFEU and thus undermine the objectives pursued by the principle of energy solidarity or the security of energy supply in the European Union, despite the fact that those commitments may respond to the competition concerns raised by the Commission on the market concerned. Consequently, the Commission, acting as competition regulator under Regulation No 1/2003, does not have the power to impose independent obligations going beyond those intended to remedy the competition issues identified in its investigation, by requiring more binding commitments in that regard." As commented in the French report, "This important clarification illustrates the potential and the limits of solidarity: while the principle can be used as a criterion of legality, it can neither constitute an autonomous ground of jurisdiction nor obstruct the *ratio legis* of other rules, particularly in competition law."

D) De facto, sporadic solidarities within the EU internal energy market – cooperation, solidarity agreements and tensions (Questions 3 and 4, Section I)

Strong and various manifestations of energy solidarity viewed as its *sporadic, de facto* or *local* dimension resonates in all the national reports which highlight both positive and negative sides of "on the ground" realities. A key term of reference in this context is cooperation in a cross-border, transnational context or a way to consolidate a regional cohesion, enhanced in particular in the moments of crisis. In many reports solidarity and collective interest are viewed as a basis for the cooperation framework (Denmark, France). Various instances of inter-State conflicts and tensions make part of this picture (Slovakia, Hungary, Portugal, Lithuania). *Ad hoc*, bilateral solidarities instruments built equally upon the EU legislation. It should be noted that already back in 1970 FIDE report, bilateral cooperation agreements between the Member States, in particular in the field of hydrocarbons, has been highlighted in relation to

⁷⁶ Case *Orlen S.A. v. Commission*, C-255/22 P, EU:C:2024:790.

⁷⁷ Case *Germany v Poland*, C-848/19 P, EU:C:2021:598, para. 45.

⁷⁸ *Ibid.*, para. 43.

directive 68/414 as a building block of the energy policy.⁷⁹ In the current legal framework among various ways to implement energy solidarity reports refer to the solidarity agreements in the meaning of regulation 2017/1938,⁸⁰ measures implemented under REPower Regulation⁸¹ and recent regulation 2024/1789 encompassing default solidarity provisions in the field of gas and hydrogen.⁸² Likewise, as part of this EU hydrogen and gas decarbonisation package EU co-legislators have decided that a demand aggregation and joint purchasing mechanism for natural gas will become a permanent voluntary tool. Regulation 2024/1789 equally provides for a consistent and timely response to the new crises at Union level, specific rules to improve cooperation and resilience, in particular concerning solidarity rules. In particular France refers also to the mutual purchases and the AggregateEU, a first-of-a-kind process for European companies to register their gas purchase needs via this mechanism, to prepare for the joint purchasing of gas at EU level.

Against this background, many reports refer to the bilateral solidarity agreements under regulation 2017/1938, which, as illustrated by the recent data, have been signed by Germany, Italy and Switzerland, Slovenia and Croatia, Denmark and Sweden, Finland and Estonia, Italy and Slovenia, Lithuania and Latvia, Estonia and Latvia, Germany and Austria, and Germany and Denmark.⁸³ In parallel, various bilateral, cross-border measures, adopted in particular in a situation of threats to security of supply are mentioned. Notably, French rapporteurs emphasise a mutual solidarity agreement between France and Germany concluded in a context of gas supply problems and reflecting “a form of cross-solidarity between electricity and gas.” In the background of this agreement Germany dealt with the halt in Russian gas imports following Russia’s invasion of Ukraine, and France was faced with the deteriorating availability of its nuclear power plants due to stress corrosion, which threatened its security of supply. For its part, Italian report highlights the relevance of transborder diversification and underscores a successful Italian strategy of

⁷⁹ V FIDE Congress Berlin 1970: *Gemeinschaftsrecht und nationale Rechte*, V. Internationaler Kongreß für Europarecht vom 23. – 26. September 1970 in Berlin, C Heymanns Verlag KG Köln Berlin Bonn München 1971, G. Flore, ‘Rapport général, Coopération entre les États membres et les Communautés européennes en matière d’énergie’, p. III/1, p. 22.

⁸⁰ 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, Article 13.

⁸¹ See Italian report on the cross-border interconnections under REPower plan with Austria, Slovenia, France.

⁸² 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 (recast), OJ L, 2024/1789.

⁸³ See: [https://energy.ec.europa.eu/topics/energy-security/security-gas-supply_en#:~:text=Regulation%20\(EU\)%202017%2F1938%20introduced%20a%20solidarity%20mechanism%20%2D,even%20in%20the%20worst%20crises](https://energy.ec.europa.eu/topics/energy-security/security-gas-supply_en#:~:text=Regulation%20(EU)%202017%2F1938%20introduced%20a%20solidarity%20mechanism%20%2D,even%20in%20the%20worst%20crises)

diversification of supply sources in both the gas and electricity sectors⁸⁴ with four regasifiers contributing to the Italian LNG capacity. In the context of implementation of the REPowerEU in Italy, new investments are aiming at enhancing cross-border interconnections with Austria, Slovenia, and France (Italy). Yet, the level of the integration within the EU internal market remains a challenge for some Member States. As noted in the Romanian report: “Romania’s energy market has developed steadily but faces challenges [...]. The country’s wholesale electricity and gas markets are heavily influenced by government interventions that go beyond the EU emergency framework. In this context, it should be noted that in April 2023, the European Commission initiated infringement proceedings against Romania for restricting electricity exports, citing violations of Union regulations that protect market freedoms and competition.”⁸⁵

Bridging energy solidarity, energy security and decarbonisation is echoed in various reports. However, enhancing solidarity within the EU internal market does not always have to be translated in intensifying cross-border flows especially in case of awareness of environmental impact. As illustrated by the Slovenian example, as a transit country, cross-border cooperation on renewable energy projects is crucial for Slovenia. Yet, precisely in the transit context Slovenia faces significant burdens from freight traffic passing through its territory to the port of Luka Koper and other EU countries. Slovenian rapporteurs assert that such a “heavy traffic strain hinders decarbonization efforts. Therefore, reducing road freight traffic is a key cross-border issue that Slovenia addresses at the inter-neighborhood, regional, and EU levels, aiming to achieve this through international cooperation.” Also, Dutch rapporteurs highlight that “cross-border interests in terms of security of supply as well as energy solidarity played a role in the (gradual) phase-out and eventual closure of the Groningen gas field.”

Important regional dimension of energy cohesion is illustrated in various reports. Regional cooperation in the framework of the Baltic Energy Market is strongly outlined in the Latvian and Lithuanian reports. “Regarding bilateral relations on a regional level, the Baltic states exemplify a situation characterized by more cooperation than tension. Notably, joint initiatives such as the shared use of the LNG terminal in Klaipėda (Lithuania) and the large-scale natural gas storage facility in Inčukalns (Latvia) highlight this collaborative approach. Additionally, coordinated efforts in decision-making concerning electricity interconnectors and the collective project for desynchronization from the BRELL network, followed by synchronization with the European electricity

⁸⁴ See imports from Algeria (TRASMED gas pipeline – Mazara del Vallo), Azerbaijan (with the TAP, Trans-Adriatic Pipeline – Melendugno), Norway (TENP – TRANSITGAS – Passo Gries). A share also comes from Libya (GREENSTREAM pipeline – Gela).

⁸⁵ (INFR(2023)2032).

transmission grid via Poland, further demonstrate their regional cooperation” (Latvia). New projects such as Green Hydrogen Corridor is equally a highlight for the Iberian electricity market (Portugal).

Bilateral tensions and constructive attempts to address them complete the picture. Slovak report refers to the cross-border challenges related to shutting down and commissioning new blocs of the Mochovce nuclear power-plant situated approximately 100 km from the Austrian border and constructive bilateral negotiations in this regard. Also, Slovak report outlines two major conflicts, first in relation to the German tariffs on cross border gas of 2024,⁸⁶ resolved in December 2024⁸⁷ and, secondly, in relation to the Hungarian ban on gas exports from 2022.⁸⁸ Hungarian report refers to the operationalization of the principle of energy solidarity inspired by the *OPAL* case in a context of bilateral discussions with Bulgaria. Italian report refers to case of the gas pipeline from Greece to Italy via Albania and the Adriatic Sea (known as the Trans Adriatic Pipeline, or TAP), a project admitted for European funding as a Project of Common Interest which triggered further litigation at the national level. Portuguese rapporteurs note tensions with Spain within the Iberian electricity market. Lithuania notes a long-lasting litigation with Belarus under the Espoo Convention and complex aspects of transboundary pollution.

III. Energy security – from ensuring security of supply to building resilience. What role for solidarity?

Part III of the general report explores internal aspects of energy security within the Union and its Member States. First, it outlines the inherent link between the principle of energy solidarity and energy security. Secondly, it refers to various manifestations of the concept of energy security as expressed at the national level. Thirdly, this section highlights new threats, forms of threats and risks for the energy security and its broad meaning going beyond security of supply, that is, encompassing the securing of energy resources, cyber resilience and preparedness, related to the technological development particularly those targeting critical energy infrastructure,⁸⁹ both at the Member State and Union’s level. In this context, several references between decarbonisation and energy

⁸⁶ See: <https://www.euractiv.com/section/energy-environment/news/germanys-gas-tariff-puts-eu-energy-solidarity-at-risk-energy-commissioner-says/>

⁸⁷ See: <https://www.reuters.com/business/energy/germany-passes-waiver-gas-storage-fee-outside-country-jan-1-2025-2024-12-20/>

⁸⁸ See: <https://www.reuters.com/world/europe/hungarys-orban-convenes-cabinet-meeting-european-energy-supply-2022-07-13/>

⁸⁹ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (OJ L 333, pp. 80–152).

security are addressed as well as a general appraisal of REPower Regulation viewed globally as an efficient legal instrument.

A) *Energy solidarity and energy security – an interaction (Questions 1 and 7, Section I)*

Whilst this report does not formulate a definition of energy security,⁹⁰ it is worth noting a conceptual attempt presented in the Polish report which builds this concept around three elements: “1) guaranteeing continuity of supplies (classic definitional element, including also technical safety of the infrastructure); 2) ensuring a liberalised and competitive energy market with affordable prices (specific definitional element); 3) compliance with requirements of environmental protection (complementary definitional element). Energy security can therefore be defined as an optimal state characterised by the joint implementation of all the above elements, which is influenced by both factual circumstances (including, e.g., the geopolitical situation) and legal factors (the shape of the relevant regulations).” Likewise, an important outline of the energy security evolution is presented in the Finnish report: “When investigating how the notion of energy security has evolved, two overall trends can be identified. First, energy security questions are increasingly handled through EU-level legislative measures, which has shifted power from Member States to the EU. Second, energy security issues increasingly focus on the security issues that emerge in the context of decarbonization and especially the increase in wind and solar energy. However, these trends have slightly shifted since Russia launched the full-scale invasion of Ukraine in 2022. The EU’s emergency instruments adopted to respond to the energy crisis, as well as the new electricity market design for instance, allow Member States with significantly more powers and options to interfere with the functioning of the internal energy markets to guarantee energy security. With these instruments so recent, it remains to be seen how widely those powers and options will be used by Member States in the future.” Regarding the scope of energy security in EU law, as recalled in the Institutional Report of the European Commission, “contrary to the notion of solidarity, security of energy supply is not contained in the *chapeau* of Article 194, but is one of the objec-

⁹⁰ For a summary of extraordinarily rich scholarly definitions of energy security which encompass dozens of different, often partially overlapping definitions for energy security, see Lithuanian report. For further discussion see, *ex multis*, K. Huhta, ‘Energy Security in the Energy Transition: A Legal Perspective’, *The Palgrave Handbook of Zero Carbon Energy Systems and Energy Transitions*, Geoffrey Wood et al. (eds.), Springer International Publishing, 2022, pp. 1–16; L. Kaschny, ‘Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy’, *Transnational Environmental Law*, vol. 12, no. 2, July 2023, pp. 270–294; *Capacity Mechanisms in the EU Energy Markets: Law, Policy, and Economics*, Leigh Hancher et al. (eds.), Oxford University Press, 2022; A. Boute, ‘Conclusion’, in: A. Boute (ed.), *Energy Dependence and Supply Security*, Oxford University Press, 2023, pp. 213–219. Globally, energy security is construed in this report as reflecting both the concept of ensuring affordable, secure and sustainable energy for Europe and its citizens (Energy Union) and as “uninterrupted availability of energy sources at an affordable price” according to the International Energy Agency (IEA).

tives for energy policy enumerated in letters a to d of Art 194 (1) TFEU.” Under Article 194 TFEU, a concept security of supply is restricted to “ensuring that the supply of energy in the Union is secure” and does not cover more general public security issues as envisaged in Articles 36, 45, 52, 202 TFEU or 67, internal security as foreseen in Articles 71, 72 or national security as in Article 4 TEU and Articles 73 TFEU or 346 TFEU.

Against this background, this section of the general report is driven by a two-fold idea according to which solidarity is reinforcing energy security through the process of the European integration (Lithuania) and triggers a collective responsibility among Member States to ensure energy security across the Union (Croatia). In the recent judgment in case *Orlen*,⁹¹ the CJEU highlighted indeed that “the EU institutions and the Member States must take into account the principle of energy solidarity, referred to in Article 194 TFEU, in the context of the establishment and functioning of the internal market and, in particular, the internal market in natural gas, *by ensuring security of energy supply* in the European Union, which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations. To that end, it is necessary to assess whether there are risks for the energy interests of the Member States and the European Union, and in particular to security of energy supply.”

In the Polish report an important concept of a legally ubiquitous nature of energy solidarity is indeed emphasised. Polish rapporteurs argue that “energy solidarity should permeate all legal acts, decisions and actions of the EU and/or the Member States influencing the energy security, construed as a triangle incorporating security of supplies (continuity of supplies), a liberalised and competitive energy market (with affordable prices) and observance of environmental requirements. Moreover, state of the energy security perceived as the aforementioned triangle should be treated as including states of energy security in different Member States and in the EU as a whole.”

National reports refer to the key EU legislative measures which translate an inextricable link between energy security and energy solidarity. Beyond the classical Governance Regulation⁹² which identifies security of supply as

⁹¹ Case C-255/22 P, para. 94.

⁹² Articles 1(2), 4(b) of the Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, (OJ L 328, pp. 1–77), as amended by the 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).

one of the five dimensions of the Energy Union, the Slovenian rapporteurs note a vital role of energy solidarity in the context of crises when energy security cannot be achieved in isolation as illustrated by the Council regulation 2022/2576.⁹³ By referring to the regulation 2017/1938 Italian rapporteur underlines how “solidarity” and “trust” constitute the “necessary components of energy security.” The role of regulation 2017/1938,⁹⁴ in particular regarding Preventive Action Plan, is underlined in the Greek report. For its part, Croatian report focuses on default solidarity mechanism to address potential supply crises under regulation 2022/1032.⁹⁵ Globally, Regulation 2017/1938 on gas security of supply aims to increase regional cooperation and solidarity among Member States.⁹⁶ Greek report underlines an internal and external dimension of energy solidarity and its link to the “three-level approach” of governance in the meaning of Regulation 2017/1938 regarding the security of gas supply encompassing the shared responsibility of natural gas undertakings, Member States, through their competent authorities, and the Commission, within their respective areas of activity and competence. Ensuring energy security framed by the energy solidarity in particular in the context of the energy crisis is not without controversies, as noted in the Slovak report. Following the Council regulation 2022/1854 and minimal windfall tax on excess revenues of energy companies,⁹⁷ Slovakia introduced a steep 70% tax,⁹⁸ which triggered a strong opposition, in particular by the largest energy company Slovnaft. An extensive assessment of the emergency and solidarity measures is presented in the German report, notably in relation to the so-called solidarity agreements in gas⁹⁹ and electricity sectors.¹⁰⁰ The German rapporteur outlines that according to the German Energy Security Act (EnSiG), whereby there is no requirement for compensation payments for supply restrictions if such a restriction is justified by the security of supply. In the light of the German report,

⁹³ 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, pp. 1–35).

⁹⁴ Articles 8 and 9 of 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, pp. 1–56).

⁹⁵ 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, pp. 17–33).

⁹⁶ CoA Special report 09/2024: <https://www.eca.europa.eu/en/publications/sr-2024-09>

⁹⁷ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, (OJ L 261I, pp. 1–21).

⁹⁸ Government Regulation of the Slovak Republic No. 38/2023 Coll. of laws, which establishes the method of determining the amount of excess income from the sale of generated electricity.

⁹⁹ In accordance with Article 13(13) of Regulation (EU) 2017/1938; see, for its content, Commission Recommendation (EU) 2018/177 of 2 February 2018 on the elements to be included in the technical, legal and financial arrangements between Member States for the application of the solidarity mechanism in accordance with Article 13 of Regulation (EU) 2017/1938 [...] (OJ 2018 L 32, p. 52).

¹⁰⁰ 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, pp. 1–21).

in view of the unpredictable costs of such compensation, solidarity is likely to deter other Member States from making use of solidarity supplies from Germany which can be regarded as contrary to the principle of loyal cooperation under Article 4(3) TEU.

Finally, energy solidarity coupled with energy security triggers variety of approaches. Danish rapporteurs admit that whilst the “spirit of solidarity between Member States” in Article 194 TFEU is crucial in the context of energy security, especially given the interconnected nature of modern energy systems, “how such solidarity is concretely implemented does not necessarily have to be determined by the EU” given that “TSOs have traditionally cooperated on the use of interconnectors.” Danish report refers thus to a bilateral solidarity agreement concluded in 2023 between the Danish Energy Agency and its Swedish counterpart (Energimyndigheten). Balancing national sovereignty and collective security interests of the Union permeates the Croatian report. Referring notably to the use of Floating Storage Regasification Units (FSRUs), Croatian rapporteurs provide a handful of examples of how national initiatives, aligned with EU frameworks, can strengthen the Union’s collective energy security while highlighting the need for other Member States to adopt similar forward-thinking measures. Croatian report refers equally to the services of the Adriatic Pipeline (Jadranski naftovod – JANAF Plc.) activated in the context of significant threats to energy security in Hungary and Slovakia. Recent international initiatives anchored in the energy security are emphasised in the Slovak report which highlights the Memorandum of Understanding on Solidarity Ring, a joint initiative of Slovakia, Bulgaria, Romania, Hungary and Azerbaijan regarding an implementation of a new gas corridor from Azerbaijan to Central and Eastern Europe. In the Portuguese report an important regional solidarity dimension is underscored given the specificity of the Iberian Electricity Market (MIBEL) where, “following the 2022 energy crisis, the European Commission approved a measure which partially finances the fuel cost of electricity producers, in order to establish a gas price cap, under the EU State Aid rules. The need to develop solutions suitable for certain national contexts is indeed acknowledged in the Communication for the Security of supply and affordable energy prices of March 2022.”¹⁰¹

B) National dimension of energy security (Question 1, Section I)

Reflecting national sensitivities and traditions, energy security is in general well pronounced both at the constitutional, legislative level of the EU Member States and within the national jurisprudence, including at the level of the constitutional courts (Lithuania, France, Belgium, Latvia, Poland, Italy). In

¹⁰¹ Communication from the Commission on Security of supply and affordable energy prices: options for immediate measures and preparing for next winter, COM(2022) 138 final.

particular, Lithuanian rapporteurs outline not only a very exhaustive legislative framework on matters pertaining to energy and energy security, but also a rich jurisprudence of the Lithuanian Constitutional Court whereby the security and reliability of the energy system is a constitutionally important objective that justifies a particular differentiated legal regulation of economic activity in this sphere on the grounds of the public interest.¹⁰² It results from the Latvian report that the concepts of energy solidarity and energy security (or security of energy supply) play a crucial role in shaping energy policy, legislative frameworks, and strategic planning. In many Member States, even if the principle of energy security is not explicitly enshrined in the Constitution, it is derived from other constitutional principles such as notably a principle of continuity which focuses on the provision of goods and services that are important for the whole of society (Greece) or related to the national security in general (Croatia). German rapporteur notes that “the case-law of the BVerfG has always attached central importance to the security of energy supply as a ‘highest Community interest’, irrespective of any special constitutional anchoring.” In the case-law of the Polish Constitutional Tribunal a broad construction of the energy security encompassing the security (continuity) of supplies, as well as the technical and environmental aspects is preponderant. Whilst Belgian rapporteurs note absence of references to the energy security at the constitutional level and very few at the legislative level, the concept of security of supply is regularly considered in the jurisprudence of the Belgian Constitutional Court and Council of State, in particular from the perspective of EIA and transboundary pollution and nuclear energy. Whilst the objective of energy security is not referred to in the Finnish Constitution, the Constitutional Committee of the Finnish Parliament has extensively addressed in its case-law balancing the energy security interests against fundamental rights enshrined in the Finnish Constitution, such as the right to property. Likewise, Dutch report points out the relevance of the concept of supply security in the national case law, viewed notably as an overriding reason of public interest. In the Slovak report a historical dimension of the Slovakia’s post-communist legacy is echoed, “resulting in long-term and almost exclusive import dependency on Russian natural gas, oil and nuclear fuel, the concept of the energy security has been high not only on legislative but also broader political agenda.” Finally, some Member States have not explicitly embraced the concept of energy security in their constitutional sphere, including in the jurisprudence of the Slovene Constitutional Court (Slovenia).

Globally, multidimensional concept of security of supply is extensively regulated at the national legislative level (Greece, Lithuania, Croatia, Denmark, Latvia, Poland, Slovakia, Hungary, Slovenia, the Netherlands, Finland) including the National Energy and Climate Plans (NECP), some Member States

¹⁰² Lithuanian Constitutional Court’s ruling of 3 April 2015: On Public Interest Services in the Electricity Sector.

expressly prioritising energy security in the NECPs (Latvia). The Portuguese report highlights alignment of energy security concept under national with EU law, Portuguese NECP2023 being linked to objectives energy sources diversification, reducing dependency from third countries, and increasing the flexibility of the national system through domestic sources. It is true that some Member States view the crux of their energy security notably in a total energy independence by 2050 (Lithuania).¹⁰³ Independence on oil import has been also on the Danish political agenda since the late 1970s and currently fossil fuels independence by 2050 is a Danish flagship project too. However, independence approach does not exclude as strong solidarity influence on the energy security at the Union's or regional level as demonstrated by the following analysis.

C) New challenges, decarbonisation, governance models – digital era and its costs (Questions 7 and 9, Section I and Questions 1 and 7, Section II)

The Portuguese report recalls that various challenges to energy security “such as terrorism, climate change, geopolitical tensions *inter alia*, which brought new concerns and actors into play, have caused the concept of energy security to evolve far beyond the traditional principle of security of supply and therefore it is likely that further regulation comes to be enacted.” Indeed, most of the national reports coincide to say that climate neutrality and intensive digitalization of the energy infrastructures and technological vulnerabilities as illustrated by the sabotages of the subsea pipelines, Russian aggression in Ukraine, are affecting or have already affected the meaning of energy security which must be seen in a wider sense than security of supply. In particular, energy security was broadened insofar it encompasses cyber resilience and cyber threats inherently linked to the overall security in the Union (Croatia). Finally, although this aspect was not addressed in the questionnaire, it is worth noting that one specific global challenge will be to be gradually and systemically addressed at the Union's level namely, the impact and environmental cost of artificial intelligence on the energy infrastructure and, by extension on the energy security.

First, regarding *new technology-related threats* (Questions 7 and 9, Section I), among various security EU related measures, NIS2 Directive,¹⁰⁴ is viewed by a majority of the national reports as the key instrument addressing new threats to security of supply. As concluded in the Greek report “in 2025, the physical

¹⁰³ A new recast of Lithuania's National Energy Independence Strategy (LNEIS) has been approved by the Seimas (Parliament) in June 26, 2024 (Seimas of the Republic of Lithuania, Dėl Nacionalinės Darbotvarkės „Nacionalinė Energetinė Nepriklausomybės Strategija“ Patvirtinimo).

¹⁰⁴ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive).

protection of an energy source and/or the infrastructures that transport and/or distribute it is no longer sufficient, but constant vigilance against ‘remote’ risks and possible malicious attacks against infrastructures is required.” Croatian rapporteurs focus on the increased reliance on digital and interconnected energy systems, which implies that “resilience must address not only physical security threats but also cyber vulnerabilities. The introduction of EU directives, such as the NIS2 Directive, reflects the urgency of enhancing cybersecurity across Member States. [...] Additionally, energy security now includes safeguarding against potential disruptions caused by geopolitical conflicts, as seen in the energy crisis triggered by Russia’s actions.” Sectoral accidents regarding the undersea pipelines are highlighted in the Danish report which underscores specific configuration of the underwater power cables and gas lines. “With an increasing amount of energy transported through this, the vulnerability to sabotage increases. Recent incidents like the Nord Stream and Balticconnector pipeline damages highlight the need to view energy security more broadly. An increased offshore wind capacity increases the vulnerability” (Denmark). According to the Danish rapporteurs responsibility for the overall electricity supply lies however with the Member State. Finally, in the Polish report a specific aspect of preparedness is raised in the light of the Council Recommendation on a Blueprint to coordinate a response at Union level to disruptions of critical infrastructure with significant cross-border relevance.

Secondly, insofar the relationship between *energy security and decarbonisation* (Questions 7 and 11, Section II), as noted in the Finnish report, “(d)ecarbonisation and security of supply are separate but related objectives of energy policy. The objective of decarbonisation is to reduce greenhouse gas emissions from the energy sector, while the objective of security of supply is to ensure uninterrupted energy supply. The two objectives can be mutually reinforcing or in tension with each other.” Against this background, Dutch report notes a contribution made by the Netherlands in the context of discussions surrounding the Critical Raw Materials Act which shows the link between security of supply and climate neutrality. “In the ‘non-paper on the Action Plan on Critical Raw Materials and the Critical Raw Materials Act’ the Netherlands has called upon the EU to focus on five areas, which also reflect this double aim of economic security and sustainability and which are: (1) the expansion of EU capacity in critical parts of the mineral value chain, including through sustainable mining and refining capacity in the EU, (2) the diversification of supply through international partnerships, (3) the support for circularity and Research & Development & Innovation, (4) analysis and monitoring and (5) sustainable value chains and just transition” (The Netherlands). The Polish report permeated by the ecological approach focuses on a need to consider environmental protection dilemma in the context of energy security by “focusing on improvement of energy efficiency (rightfully perceived as one of energy sources) and pursuing

the solutions aimed at changing the model of the linear economy to a circular one (i.e. the economy where ‘the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimized’).” Likewise, the Slovene report emphasises the sustainability dimension of energy security, Article 72 of the Slovene Constitution which proclaims the right to a healthy living environment, influencing its energy policy notably to promote renewable energy. More globally, the Slovak report recalls a long-lasting cleavage in relation to the perception of the sustainability and energy security within the Union which oscillated around the perception of renewables as both an economic and energy security opportunity in the Western Member States, and their Eastern counterparts which often prioritised the reliable and affordable fossil fuels. This divergence was gradually neutralised by the “Europeanisation” of energy security as encompassing decarbonisation. “The underlying idea is that in long term, compatible with the 2050 net-zero decarbonisation objective, energy security can be achieved by replacing imported fossil fuels with renewable energy. Moreover, the war in Ukraine has exposed Russia as unreliable energy partner, followed by the call for reduced role in the EU’s energy mix” (Slovakia).

At the EU regulatory level, it is the REPowerEU Regulation which is viewed in most of the reports as an instrument recognising the synergies of reducing reliance on fossil fuels for both climate and energy security reasons. REPowerEU Regulation is almost unanimously¹⁰⁵ viewed as a successful, efficient legal tool which was critical in the context of the war in Ukraine, thus also for terminating external dependence of the Union (Slovakia). It is true that REPowerEU promotes energy supply diversification, increases renewable energy production, and improves interconnectivity between Member States. However, as noted by Slovenian report, its implementation varies across countries due to differing capacities and commitments. Also, some skeptical comments in relation to REPowerEU have been expressed in the Italian report given its “minimal impact on the cohesion policy and even less on the policy to fight energy poverty” (Italy). Finally, for some rapporteurs, REPowerEU raises clear issues regarding the competence shift in favour of the Union (Portugal).

Thirdly, a point regarding the link between the *governance model* and *energy security* has been addressed in a number of reports (Question 9, Section I). As summarised in the Croatian report “The effects of energy security extend beyond the physical realm to encompass geopolitical, social, political, and economic dimensions, meaning that this expansive view of energy security goes beyond the traditional framework of the availability, affordability, accessibility, and acceptability. The current state of gas security supply in the EU, analyzed

¹⁰⁵ As noted in the Hungarian report, Hungary will not be eligible for any payments under the Recovery and Resilience Facility (RRF) until it has satisfactorily implemented “super milestones.”

through the example of the gas market, reveals a complex governance model shaped by shared responsibilities between Member States and the Union. The primary framework ensuring the security of gas supply is set out in Regulation 2022/1032, which emphasises obligations for companies, Member States, and the EU authorities, with provisions for solidarity mechanisms and early warning systems. However, while the Union has advanced strategies like the Energy Union to enhance collective energy security, actual responsibility for supply security remains largely in the hands of individual Member States. This fragmentation is evident in the EU's approach to gas supply, where Member States have been left to develop their own responses to disruptions, as highlighted by the recent energy crisis following Russia's invasion of Ukraine. The case of Croatia offers a significant example of how a Member State can leverage shared responsibility to enhance energy security in the EU, particularly through the use of Floating Storage Regasification Units (FSRUs).¹ As noted in the Finnish report, "The current governance model is the result of a number of considerations: the liberal market economy model, the national energy interest and the simultaneous recognition that a common internal gas market creates security benefits that individual Member State markets cannot achieve independently. The ability of the EU gas market to respond to the significant reduction of gas supplies from Russia in the 2022 energy crises is an illustration that this governance model works." Italian report concludes on a positive note by referring to the Integrated National Energy and Climate Plans (NIPEC), under Article 3 of Regulation 2018/1999 and the recently revised Italian implementing measures which are considered as fully aligned with the requirements of European governance required by Regulation 2018/1999 and show that, "although the issue of security of supply remains the responsibility of the national state, the gas energy policy has adequately responded to the need to ensure a structured, transparent and procedural process [...]. In other respects, it must be said that the governance model in the area of security of supply is a clear expression of the principles of shared responsibility of States and the Commission set out in Articles 3 and 4 of Regulation 2017/1938." Likewise, an extensive analysis of the governance model in the gas market has been outlined in the Portuguese report which argues that "the division of responsibility, particularly in the context of the gas market, presents both opportunities and challenges. From a governance perspective, a shared responsibility model enables Member States to tailor energy policies according to their specific needs, considering factors like their energy mix, economic conditions, and geopolitical context. This flexibility accommodates the diversity within the EU and respects national sovereignty. Based on the Iberian Peninsula, Portuguese rapporteurs illustrate how national or regional measures can diverge from broader EU policies, creating potential disparities in energy pricing and security across the Union. Whereas a shared responsibility model impacts the se-

curity of gas supply across the EU by making the Union vulnerable as a whole to the policies and decisions of individual Member States, Portuguese rapporteurs refer to the 2017/1938 Regulation¹⁰⁶ as precisely the instrument enhancing collective security, providing a buffer during supply disruptions, and enabling more favorable terms in gas procurement.” Prospective analysis in the Slovak report focuses on future challenges in relation to the current governance model in relation to the gas supplies given the end of the gas transit through Ukraine in 2025. Finally, many reports refer to the Special Report of the European Court of Auditors¹⁰⁷ and its recommendations to the Commission regarding the completion of the EU framework on gas affordability and the optimisation of the reporting process of Member States on security of gas supply.

IV. Principle of conferral in the energy area. A legal laboratory for solidarity, climate neutrality and energy security

Part IV of the general report addresses a complex and contentious question of the principle of conferral and division of competences between the Union and its Member States in the energy area, both from the internal and external perspective. Given the relevance of the principle of conferral, this section reflects very rich and multidimensional views expressed in the reports regarding Article 194 TFEU and embodiment of the shared competences in the meaning of Article 4(2)(i) TFEU in the field of the EU energy policy as well as relationship between Articles 192 TFEU and 194 TFEU.¹⁰⁸ The issue of shared competences is viewed by many national reports as a legal laboratory under a constant and growing influence of solidarity, climate neutrality and energy security. First, an internal perspective of the shared competences, including selected aspects of the principle of proportionality is outlined. In this section, three aspects related to division of competences are outlined, namely, the intensity of the shared competence, role of the solidarity principle and finally the relationship between environmental and energy legal bases in the treaty FUE. Secondly, a division of competences from an external relations point of view is addressed, both in the aftermath of the Russian aggression against Ukraine and regarding general phenomena of the scarcity of resources in the era of the Anthropocene.

A) Internal perspective – shared competences, energy solidarity, and proportionality (Questions 5 and 6, Section I and Question 8, Section II)

¹⁰⁶ 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, pp. 1–56).

¹⁰⁷ See: <https://www.eca.europa.eu/en/publications/sr-2024-09>

¹⁰⁸ For a historical evolution of the energy legal basis within the treaties, see the institutional report.

Whilst the Lisbon Treaty in Article 194 TFEU has added a new national competence reservation in the field of energy, Article 192(2)(c) TFEU also contains a reference to “a Member State’s choice between different energy sources and the general structure of its energy supply.” There is little doubt, that environmental measures may largely and importantly affect national choices.¹⁰⁹ However, that should not be the case of measures with energy legal basis, given the wording of Article 194 TFEU. In the light of the classical case-law, the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include, *inter alia*, the aim and content of that measure. It follows that “the choice of point (c) of the first subparagraph of Article 192(2) TFEU as a legal basis cannot be founded on other factors.”¹¹⁰ Thus, point (c) of the first subparagraph of Article 192(2) TFEU can form the legal basis of an EU measure only if it follows from the aim and content of that measure that the *primary outcome* sought by that measure is significantly to affect a Member State’s choice between different energy sources and the general structure of the energy supply of that Member State. Importantly, “the assessment of the effect of an EU measure on a Member State’s energy policy is *not a factor* that must be assessed in addition to the aim and content of that act, or by derogation therefrom.”¹¹¹ Energy legal basis in the treaty has been already discussed during the Tallinn 2012 FIDE deliberations where some skeptical opinions have been expressed regarding notably “the continued reliance upon non-EU sources of energy for the foreseeable future and the scope which the drafting gives to Member States for their own choices.” Likewise, in the institutional report presented for Tallinn 2012 FIDE Congress it was highlighted that measures which are liable to affect the energy mix in Member States “are likely to trigger debates, in particular on the delimitation between the legal bases for environment and energy policies.”¹¹² In this section, three aspects related to division of competences are outlined, namely, the intensity of the shared competence, role of solidarity principle and finally, probably the most intriguing question of the relationship between environmental and energy legal bases in the treaty.

In the context of the present debate, a meaningful thread of concerns regarding national energy sovereignty of the Member States resonates in the submitted reports (Portugal, France, Croatia, Greece, Denmark). As noted by the Slovenian rapporteur “The notion of ‘spirit of solidarity between Member States’ in Article 194 TFEU is crucial in understanding the relationship between Member States’ national energy policies and EU-level initiatives. Whilst Member States retain some autonomy in their energy policies, they are also

¹⁰⁹ Case *Poland v Parliament and Council*, C-5/16, EU:C:2018:483, para. 44.

¹¹⁰ *Ibid.*, paras. 37–40.

¹¹¹ *Ibid.*, para. 42.

¹¹² FIDE General Report, 2012, p. 32.

expected to cooperate and support each other in achieving common energy objectives.” It should be noted, in line with the Polish report, that according to Article 2(2) TFEU, Member States may take actions in the energy area only to the extent that the Union has not exercised or has decided to cease to exercise its competences. “Therefore, there is a rebuttable presumption of occupied field in favour of the EU, not the Member States. This alone indicates the EU as the leader of the energy policy” (Poland). It is true that for some rapporteurs the stability of the shared competence is not undermined (Finland, The Netherlands) and it is rather DNSH principle which could lead to limit national energy mix (Italy). However, as expressed in the Danish report, “[t]he intensity of the shared competence in the field of energy between the EU and its Member States, as defined by Article 4(2)(i) TFEU, has evolved significantly,” position which is widely shared in the French, Croatian and Portuguese reports. Likewise, the Greek report states that “[a]s to the question of whether energy policy is now primarily exercised by the EU and not by the Member States, the answer seems to be affirmative.” Yet, the Greek rapporteurs note that EU is “particularly active in the exercise of energy policy within the framework of Article 194(1) TFEU. However, it cannot be suggested that the recent case-law of the Court contributes to or indicates an ‘indirect’ extension of the competence of the European Union so as to include the three areas of Article 194(2), subparagraph 2 TFEU, areas in which the Member States retain their exclusive competence” (Greece). French rapporteurs underscore the market limits and the need for corrective measures in order to achieve a high level of competitiveness, security and sustainability. Thus, they emphasise “the subtle balance that emerges from Article 194 (TFEU) and which has resulted in the adoption of measures taken at Member State level within the limits of a framework set at EU level” (France). Whilst concerns about tensions within the area of shared competences have been voiced in many reports, interestingly, little attention has been devoted in the national reports to the respective delineation between Articles 194 TFEU and Article 114 TFEU and Article 192 TFEU respectively, subject matter extensively discussed in the aftermath of the Lisbon treaty when Article 194 TFEU was viewed, notably as *lex specialis*. To illustrate how advanced and tangible the progressive competence shift in favour of the Union in the energy area is, French report highlights the 2023 European Parliament resolution on the future Treaty reform¹¹³ which consists in “a review of the European energy policy: it wishes not only to abolish the reservation of sovereignty provided for in Article 194(2)(2), but also to confer on the Union exclusive competence for the environment, biodiversity and negotiations on climate change, which would amount to taking the Europe of energy into a new dimension” (France).

¹¹³ European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 22 November 2023, (2022/2051(INL)).

Regarding a potential impact of the principle of solidarity on the EU and national competence evolution, the principle of solidarity is viewed as an instrument meant to limit negative externalities as illustrated by the case-law of the EU Courts regarding “loop flows.”¹¹⁴ As indicated in the French report, “the internal market is increasingly interconnected, which strengthens interactions between national markets and explains why the effects of measures taken by a State cannot be limited to its borders alone.” Whilst Finnish rapporteurs dissociate energy solidarity impact from the exercise of the Union’s competence, they note that the intensification of the EU level harmonization measures results from overall “pressures emerging from the EU climate policy as well as the dramatically changed (energy) security setting in Europe.” After having referred to the constitutional principles enshrined in Article 4 (3) TEU, Article 5 TEU and Article 2 (2) TFEU, Greek rapporteurs conclude that “principle of energy solidarity somewhat limits the national sovereignty of the Member States beyond the extent it is already limited by the other general principles arising from the Treaties as well as the provisions concerning the exercise of energy policy. Nevertheless, it must be highlighted that both the principle of energy solidarity and the other cited rules occupy the same hierarchical level within the legal order and must be concurrently examined and applied.” After having admitted certain EU competence shift, Slovak rapporteurs consider “that the principle of energy solidarity, backed by the CJEU judgement shall be perceived as another potential policy frame towards common EU energy policy. In that way the energy solidarity ought to be integral part in the denationalisation of the energy security (mainly security of supply as national interest) towards more comprehensive EU-wide approach.”

Danish rapporteurs insist on the significance of energy solidarity for the shared competence evolution by noting that “[t]he EU’s role in energy policy has grown, particularly in areas where cross-border issues are prominent, such as energy security and market integration. The CJEU has reinforced the importance of energy solidarity, which supports a more predominant exercise of competence by the EU.” Portuguese rapporteurs claim that energy solidarity principle “will have an impact in the national sphere when applying measures under EU energy policy in fields where these are liable to harm other states’ interests or Union interests. This impact is however limited.” However, Portuguese rapporteurs rule out the applicability of the principle of energy solidarity “when enacting measures under Article 194(2) paragraph 2 TFEU concerning Member States’ energy mix and determining the exploitation of Member States’ resources.” Drawing upon the examples of the EU measures adopted in the context of the Russian aggression against Ukraine and recent energy crisis, Portuguese rapporteurs conclude

¹¹⁴ Cases *CRE c. ACER*, T-446/21, EU:T:2024:647 and *RTE v ACER*, T-472/21, EU:T:2024:648; *Polskie sieci elektroenergetyczne S.A. v. ACER*, T-484/21, EU:T:2024:652; case *BNetzA v. ACER*, T-485/21, EU:T:2024:653.

clearly that, “[i]n essence, the principle of solidarity was often a legal justification for these EU-led responses.” Similarly, Greek rapporteurs differentiate in the light of the *OPAL* judgement between the unquestionable scope of applicability of the energy solidarity in relation to the four objectives of Article 194 (1) TFEU and the three sectors of “reserved” competence under Article 194(2) subparagraph 2 TFEU where “the principle of energy solidarity cannot limit the aforementioned exclusive competence of the Member States,” unless Member States agree otherwise. Although energy solidarity “is too vague to justify MS autonomy in energy mix [...] it could lead to a competence creep of the EU that would further erode Member States reserve under 194(2)TFUE” (Portugal).

A challenging question concerning *the relationship between Articles 192 and 194 TFEU* was equally addressed in many reports with a particular emphasis on the scope of national sovereignty in determining national energy mix in the meaning of Article 194(2) TFEU (Question 8, Section II). Tracing the scope of the national competences seems to reside in the choice of technologies (France, Finland). According to the Finnish report, “The ability of Member States to draw the main lines of energy policy, such as whether to include nuclear energy or fossil fuels in the national energy mix, seems to be protected by Article 194(2) TFEU.” Likewise, Danish report insists that Member States retain significant autonomy in the light of the treaties. Similarly, French rapporteurs focus on the national sovereignty in the field of the energy technologies. In particular, they argue that “EU legislation could not impose, under qualified majority rule and relying on Articles 192 and/or 194, the phasing out of specific assets or technologies, even on the basis of environmental criteria designed to be transparent and non-discriminatory, as this would ‘significantly affect’ Member States’ choice of supply. Regulation 2019/631 on emissions from light-duty vehicles nevertheless imposes a ban on new internal combustion engine vehicles on European roads from 2035, which implies a gradual elimination of liquid fuels from Member States’ energy mixes in the transport sector, suggesting that qualified majority voting can impose sectoral constraints on the energy mix.” However, as noted by France, it is precisely in the context of the 2030, 2040 climate neutrality measures and renewables targets where a potential “significant” impact on Member States’ ability to choose between different energy sources might be tangible. This means that in the absence of a restructuring of governance, providing additional degrees of freedom for Member States, and in the absence of a renewable energy target structure capable of seamlessly integrating other low-carbon energy production, there would be a risk of political deadlock detrimental to the success of the transition.” In the light of the Croatian report, the mutual relation between Articles 192 and 194 TFEU remains highly contentious. Concerning delineation of the Union’s and national exclusive competence under Article 194(2) TFEU Greek rapporteurs note that “the legal question of whether the principle of solidar-

ity could also apply as a limiting factor to the Member States' competence stipulated in Article 194(2) subparagraph 2 was not raised before the Court for its consideration in the *OPAL* case. Nevertheless, in our opinion, the principle of solidarity cannot be used as a tool to limit the exclusive competence of the Member States, stipulated in Article 194(2) subparagraph 2 TFEU.”

It seems that the most categorical view in relation to the two discussed legal bases has been expressed in the Polish report which simply states that “in reality both Article 192(2) letter c) TFEU, as well as Article 194(2) subparagraph 2 TFEU remain dead letter. Firstly, no legal act has ever been issued on the basis of the former provision (never the unanimous special legislative procedure has actually been applied for measures matching the substance of this provisions; they have been enacted with the use of ordinary legislative procedure requiring only majority of votes in the Council). This state of affairs may be surprising, in particular in light of the obvious overlapping between the EU environmental policy and its energy policy. Secondly, it is actually pretty hard to find the measures placed within the sphere of the energy policy (and invoking Article 194 as the legal basis) that would not have a serious impact on determination of conditions for exploiting its energy resources, choice between different energy sources and the general structure of energy supply of the Member States.” Lithuanian rapporteurs share comments in relation to the limits of decarbonisation at the EU level and Member States competence to regulate energy mix. Contentious issues are tangible as illustrated by the Portuguese report in the context of a relationship between Articles 192 and 194 TFEU which refers to the “erosion of national sovereignty” underlining in parallel that some EU measures in the field of renewable energy are regarded as having already affected Member States discretion.

Finally, tensions between *solidarity* and *proportionality*, coupled with subsidiarity, arise also in particular from the perspective of the limits of the EU competences under the energy legal basis, both Article 194 and 122 TFEU. It is worth recalling, that in the recent mobility package judgement, the CJEU emphasised that where the EU measure concerned has consequences in all Member States and requires that a balance between the different interests involved is ensured, taking into account the objectives of that measure, the attempt to strike such a balance, taking into account the particular situation of all Member States, cannot, in itself, be regarded as contrary to the principle of proportionality.¹¹⁵

Whilst some reports addressed proportionality principle in a classical way (Denmark) some highlighted meaningful debates at the national level (France).¹¹⁶

¹¹⁵ Cases *Republic of Lithuania e.a. v. Parliament and Council* C-541/20 (Joined Cases C-541/20, C-542/20, C-543/20, C-544/20, C-545/20, C-546/20, C-547/20, C-548/20, C-549/20, C-550/20, C-551/20, C-552/20, C-553/20, C-554/20, C-555/20), EU:C:2024:818, para. 246.

¹¹⁶ As referred to in the French report, when examining the proposal for a directive on renewable energy, energy performance of buildings and energy efficiency (COM (2022) 2022), French

A novel approach to the principle of proportionality has been thus suggested in the French report whose authors argue that “application of the principle of proportionality in energy disputes, in conjunction with the principle of solidarity, should be adapted and focus not so much on the necessity of the measure taken by the Union (in the sense of knowing whether it does not go beyond what is necessary), but rather on *the balancing of the interests involved*, namely, the extent to which the imperatives of security of supply and network interdependence outweigh (or do not outweigh) the preservation of national discretion in determining the overall structure of energy supply. This approach consists, in other words, of adapting to energy a relatively constant case law, according to which the assessment of the principle of proportionality, with regard to competences, requires examining whether legislation does not exceed the limits ‘of what is appropriate and necessary’ and that ‘the disadvantages caused must not be disproportionate to the aims pursued.’”¹¹⁷ In its report, Slovenia argues that in applying “EU energy measures, it is essential to consider the specific characteristics of each Member States, including their size, constitutional frameworks, industry and market characteristics, economic structures, geographical locations, and social conditions. These factors can influence the impact of EU energy policies on Member States. Therefore, it is essential to allow *for flexibility* in EU energy measures to accommodate the needs of different Member States. Any EU energy measure should be preceded by thorough impact assessments that consider the varying consequences for different Member States. This could help identify potential negative impacts and develop mitigating strategies.” Greek rapporteurs highlight that “the principle of proportionality together with the principle of energy solidarity should always be considered when adopting secondary EU legislation concerning energy. Nevertheless, in order to achieve the Just and Green Transition, an appropriate balance ought to be struck between the individual national interests and the Union’s goals. In addition, we believe that the principle of equality is also applicable in the same context and will therefore be an important factor which will contribute to taking into account the particularities of each Member State.” As noted in the Latvian report, “Solidarity is crucial for addressing collective challenges, such as energy security and climate change, that transcend national borders. Nevertheless, its application should be focused on core issues, ensuring that solidarity supports collective EU goals without overextending its influence into areas where national divergences are more significant. Balancing solidarity and proportionality in this way will foster a more cohesive and resilient energy

Senate adopted a resolution stating that the proposal infringed Article 194(2) TFEU, see: *Efficacité énergétique. Proposition de résolution n° 835 (2021–2022) de MM. Daniel Gremillet et Pierre Laurent*, déposée au Sénat le 27 juillet 2022, available at <https://www.senat.fr/leg/exposes-des-motifs/ppr21-835-expose.html>; “Sans nier l’importance et le rôle des énergies renouvelables dans la transition énergétique et climatique, on peut observer que plusieurs mesures adoptées par la Commission apparaissent particulièrement volontaristes et interrogent sur le caractère réaliste et opportun de leur mise en application dans le contexte géopolitique actuel.”

¹¹⁷ French report referring to Case *Etimine*, C-15/10, EU:C:2011:504, para. 124.

policy while respecting the specific needs of Member States. The principle of proportionality plays a key role in balancing conflicting private and public interests in the energy sector. Proportionality can also serve as a legal tool to enhance regulatory dialogue between environmental and energy law, promoting better integration of environmental principles into energy regulation.”

B) External dimension – a virtually exclusive EU competence? Scarcity of sources and the Union’s external policy (Question 8, Section I and Question 10, Section II)

In accordance with Article 21(1) TEU, solidarity is one of the principles governing the Union’s external action and, in the mind of Article 24(2) and (3) TEU, it appears among the provisions on the common foreign and security policy as “mutual political solidarity” of the Member States.

Consequently, as pointed out in the Italian report, “the principle of solidarity is intimately connected with the EU’s external energy policy.” The external dimension of the Union’s competences in the energy area has triggered very vivid comments among the national reports, but a generally shared view is that a general, meaningful trend in external relations, notwithstanding facultative mixity of international agreements, is indeed the EU only approach.

As recalled in the Finnish report, “Solidarity considerations have been part of the EU energy policy for decades, also in the context of third country supply of energy products. One example of this is the TEN-E framework that lays down conditions for joint investments in light of security of supply considerations. Another one is the more recent Regulation 2017/1938, which in the context of energy solidarity turned the abstract principle into operational rules.” Having outlined the most meaningful EU measures, Finnish rapporteurs consider that “[t]hese examples show how energy solidarity has slowly penetrated EU action in relation to energy supply from third countries. The most recent energy crisis acted as a catalyst in this area and pushed the Member States to take action that represents, in the words of the Schuman Declaration of May 1951 concrete achievements which [...] create a *de facto* solidarity.”

As summarized in the Polish report: “Energy solidarity conforms and contributes to the reinforced role of the EU in the energy policy, also in its external aspect. An exemplary legal instrument embodying such trend is the regulation enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders.¹¹⁸ The interplay of the principle of energy solidarity and the goal of ensuring energy security entails increased

¹¹⁸ Polish report referring to the 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, pp. 1–35).

role of the EU in relations with third countries (and energy enterprises from third states) pertaining to supply of energy and its carriers. It is applicable not only in the context of measures directly related to security of supplies, but also the ones in connection with market liberalization (proceedings instituted by the European Commission against Gazprom may be a good example in case of the latter aspect).” The Croatian rapporteurs note that “[t]he relationship between energy solidarity and energy security in external relations is complex. Solidarity ensures that energy security is not merely a matter of individual Member States’ policies but is instead embedded within a broader framework of mutual support and common interests. This approach enhances the EU’s ability to act cohesively in its external energy dealings, ensuring that the Union is not vulnerable to external threats due to the energy dependencies of individual states.”

In its careful response, French rapporteurs indicate that “France has never explicitly taken a position in favour of developing the EU’s external competence in energy matters” and add that “[i]n proceedings before the Court of Justice, where the issue was the nature of the EU’s external competence in an area where its internal competence was shared, France systematically fought the argument of exclusive competence and tried to play down the scope of Article 3(2) TEU and the *AETR/ERTA* doctrine.” Whilst French report confirms a delicate but firm need to keep *compétences partagées* intact, it notes the EU soft law influence (REPower communication) as an indirect way to enhance the Union’s external competence. Referring to the *COTIF* judgement, Croatian report admits a growing role of the Union’s role in external policy in particular through the prism of security of supply. For its part, the Portuguese report addresses in a comprehensive way external dimension of the Union’s competences and energy solidarity. Portuguese rapporteurs indicate that “in relation to the TEN-E Regulation [...] revised in 2020 to include Projects of Mutual Interest [...] solidarity is among the positive externalities that may justify cost allocation and financial assistance to these projects. Similarly, projects with third countries that establish priority corridors should be eligible for the status of Projects of Common Interest (infrastructure projects connecting Member States.” Thus, energy solidarity “can be understood to be a dimension of energy security and has gained increased prominence in EU energy policy and law since the Russian energy crisis. Recent acts of EU solidarity through its external competences may be identified in reaction to the Russian crisis, such as sanctions, expressly based on solidarity, and joint gas procurement” (Portugal). Bulgarian rapporteur considers that “energy solidarity implies all Member States to seek common grounds for their respective external projects, including such based on security of supply considerations. The divergences in priority and interests of particular members states have shown that the only viable solution is to seek a common approach, on EU level. From legal perspective, this would inevitably imply increased EU action instead of local competen-

cies.” Lithuanian rapporteurs refer to a meaningful Joint Communication of External Energy Engagement in a Changing World and EU Energy Diplomacy.

Finally, a practical dimension of solidarity as unity in both internal and external relations has been raised by Slovak rapporteurs who referred the end of gas transit via Ukraine expressing a clear need to speak with one voice regarding “US sanctions to Gazprombank, which collects payment from their contractors, including Hungary and Slovakia. This would mean, that from 1 January 2025, the contractual obligations cannot be fulfilled, or the sanctions will be broken. This raises the issue of energy solidarity between the EU MSs and energy security of the EU itself, if some of the MS are either not able to ensure and pay for their energy supplies, or are negotiating on their own with Russia, contradictory to the EU goals and strategy.”

A general *problem of scarcity of natural resources* (Question 10, Section II) characterises the era of the Anthropocene. As noted in the scholarship, “accelerated exploitation of natural resources takes its toll in decreased resource quality and increased spending of energy and waste generation, and excessive use of the environment is conducive to aggravation of other environmental problems.”¹¹⁹ The question of “Gulliver in chains” has been addressed in the national reports along two lines, namely from a more ecological stance (Poland, The Netherlands) compared to the Union’s competence in the field of external relations (France). In particular, Polish report addresses this question by proposing horizontal solutions focused on tightening the resource extraction: “By tightening the resource extraction and use, we may kill two (and actually more) birds with one stone, because the aforementioned environmental problems may, at least to a great extent, be attributed to excessive resource extraction and use – not to forget that, as numerous incidents with Russia have shown with ruthless clarity, it is not always wise to solve the problem of lack of or limited deposits of certain resources in the territory of the EU by resorting to increasing import dependence. In addition, preventing and counteracting the problem of scarcity of resources may bring positive effects not only in terms of the environment, but also for the economy; sooner or later the problem in question would result in supply-demand imbalances and rising prices of resources, but also commodities and services provided with the use of such resources. Therefore, combating scarcity of resources construed in such way is a task worth taking from environmental, but also economic point of view – which is another feature distinguishing scarcity of resources among the wide array of environmental problems experienced nowadays” (Poland).

In the Dutch report a relevant reference to the critical raw material and its

¹¹⁹ G. Bridge, ‘Material Worlds: Natural Resources, Resource Geography and the Material Economy’, *Geography Compass*, vol. 3, issue 3, 2009, p. 1224.

legal basis is made: “The legal basis of the Critical Raw Materials Act is Article 114 TFEU, the internal market legal basis, which has not been contested by the Netherlands. In fact, as appears from the national raw materials strategy, according to the Netherlands, the EU has an important role to play by “entering into raw materials partnerships by means of trade agreements or by concluding independent partnerships.” Furthermore, trade agreements may, in the view of the Netherlands, “ ‘include undertakings to reduce or prevent trade-restrictive measures for critical raw materials (e.g. duties and quotas), promote sustainable extraction and improve market access for European businesses’. The relationship between the EU and the Netherlands can be described as mutually reinforcing through the support of EU raw materials partnerships on the one hand, and the enhancement of the network of diplomatic missions and the examining of the role of Dutch businesses in international supply chains on the other.” For the Portuguese rapporteurs, a strong emphasis on the temporary nature of the coordination measures following the Russian aggression in Ukraine is made, while admitting a huge impact of measures adopted under Article 122 TFEU. Finally, concluding remarks are expressed in the French report which contains a reference to the concept of “a virtually exclusive competence of the EU, based on action that is mainly coordinated by the EU, implying greater energy solidarity between the Member States.” French rapporteurs admit that “there is currently a gradual shift in external competences from the Member States to the European Union. This change in the roles of the Member States and the EU can be explained by the increasingly strong interaction between European energy policy and other European policies that are experiencing remarkable growth on the international scene, as well as by the gradual reduction in the Member States’ room for manoeuvre in the energy field, due to the geopolitical context. This is particularly visible in the area of security of supply, where recent crises have prompted the EU to assert itself more as a strategic player, while Member States have agreed to relax their prerogatives” (France). “In short, the diversification of partners and energy sources, the development of energy diplomacy, the deployment of infrastructures, the energy transition and the fight against climate change are all areas of action that strengthen the EU’s role on the international stage. As a result, security of supply is moving out of the hands of the Member States (without excluding them).”

V. Green transition and fairness – an elephant in the room?

A) *Towards climate neutrality. Solidarity as fairness? (Questions 1, 2, and 4, Section II)*

Ambitions characterising the green agenda of the European Union are strongly articulated at the level of the Union’s policy and legislation and echoed in all

the respective national reports. As summarised in the German report, the climate neutrality objectives constitute a key dimension of the European energy transformation in line with the Paris Agreement. National reports confirm an extensive impact of the EU measures adopted in the aftermath of the European Green Deal, notably “Fit for 55” and their implementation at the national level. Decarbonisation is “not only an ecological imperative, but also a strategic one” (Croatia) and mutually reinforcing link between decarbonisation and energy security is not questionable (Denmark). Thus, “efforts must be made at national and European level, to find new solutions to ensure the green transition while respecting energy solidarity and energy security” (Italy). However, among rich and complex aspects of the Union’s path to the climate neutrality one controversial and outstanding aspect is almost unanimously voiced in all the reports, namely the social question and fairness of the green transition. As highlighted in the Italian report “the measures to be taken to tackle climate change must be studied through the prism of sustainable development, that is, ensuring the availability of energy at an affordable price,” and “the social tensions of energy development appear to be the order of the day.” Austrian report notes forcefully that “[v]ery early, Austrian unions have publicly drawn attention to societal challenges posed by the energy transition, arguing that EU climate policies have hitherto overlooked the social dimension the process.” Romanian rapporteurs recall Draghi report which stated that “energy should not be seen as end in itself, but should play a dual role: fostering and enhancing economic competitiveness in an unstable international context and protecting citizens from poverty.” Thus, regarding an interplay between climate neutrality, energy solidarity and security, social question and distribution of costs of climate neutrality, including energy poverty concept is the core aspect of the present debate. Fairness in the green transition echoes both the energy trilemma, referred to in the Lithuanian report regarding energy security, affordability, and sustainability¹²⁰ and is closely related to the two aspects of energy solidarity highlighted in the Portuguese report – solidarity between Member States and solidarity between a State and consumers. Indeed, Latvian underscores the social dimension of the decarbonisation process, emphasising the necessity of fairness and support for vulnerable populations to ensure that the transition to sustainable energy does not exacerbate inequalities or lead to energy poverty. Finally, as noted in the French report, public support for the green transition in a broad sense is crucial.

Two major inequality-diversity aspects as worth being mentioned in this context. First, a social inequality truth echoed in a Danish report admitting that the high costs of electricity expansion, including electric cars, heat pumps and solar cell systems is accessible to the wealthy part of the population whereas “the poorer part of the population often does not have the opportunity to take

¹²⁰ See: <https://www.ramboll.com/insights/resilient-societies-and-liveability/the-energy-trilemma-what-is-it-and-how-does-it-influence-eu-energy-policy>

part in these investments.” Second, economic and geopolitical diversity among the Member States, which, as referred to in the Portuguese report, implies that many Eastern European countries, “with their dependence on coal and less developed renewable energy infrastructure, face higher costs and social challenges in the transition compared to wealthier Western European nations.” This diversity among Member States is viewed as a potential challenge to energy solidarity. Likewise, German rapporteur notes that there is no linear social dimension of the green transition since the energy transition impacts different regions and populations unevenly, depending on their energy mix and economic context. Efforts to enhance energy solidarity must consider these variances to avoid exacerbating inequalities.

Against this background, it should be noted that there is no unanimity regarding the role and link between energy solidarity within the green transition and in particular in the energy sector. For a part of rapporteurs, it seems challenging to envisage a climate-neutral future for the EU that does not encompass a spirit of solidarity (Lithuania). Thus, energy solidarity “is evolving beyond its traditional focus on crisis response to encompass broader commitment to collective action towards climate neutrality” (Portugal) and “remains crucial in ensuring coherence in the transition towards a climate neutral future” (Denmark). However, regarding specifically energy sector, it is unquestionable, as stated in the Polish report that the energy solidarity is separated from the green transformation. In particular, regarding social and fundamental rights dimension, “the energy solidarity is related to counteracting the energy poverty (protection of vulnerable energy recipients). However, such protection does not amount to a specific ‘right to energy’” (Poland). French report asserts that the principle of energy solidarity is rarely linked to the objectives of reducing emissions and achieving climate neutrality, indicating that while energy solidarity has been primarily developed in the context of crisis management and security of supply, it lacks a strong connection to ecological transition and decarbonisation efforts. Conceptualising policy lines of decarbonisation is obviously not without controversies. Selected national reports refer to the “environmental terrorism” as a path toward “more climate-sustainable solutions, but as a fear of the application in the coming years of requirements for homes and vehicles that are very difficult to comply with: a fear that also affects market trends in the two corresponding sectors, with further repercussions on the entrepreneurial choices related to them” (Italy). Globally, the importance of social fairness as component of accompanying measure in the planning and implementation of energy policies is thus highlighted as essential to the legitimacy of the transition process, but its legal mechanics varies.

In the light of the submitted reports, national legal conceptualisations or mechanisms addressing fairness in the green transition are mostly situated

outside energy legal schemes. Whilst rapports are unanimously voice the relevance of social question of energy transition, divergent methods regarding a legal borderline between climate, energy and social aspects have impact on the Member State's legal framework and equally their position in the EU legislative process. In many instances social dimension is separated from the energy transition and energy poverty concept is not defined in national law. Regarding the "separation approach," Latvia's approach to the social dimension and fairness of the green transition in the energy sector is reflected in its separation of energy security from social components, which are addressed through the energy affordability pillar. Latvian policy recognises that energy security and affordability are interconnected but distinct areas of focus. Finnish rapporteurs note that distinction between climate and social policy, including solidarity aspects of the EU Social Climate Fund was object of an extensive discussion in the Finland, including a parliamentary debate before the Grand Committee of the Finnish Parliament.¹²¹ In particular, "[t]he transfer of funds across Member States raised objections, as did the possibility of financing direct income support schemes, which was not considered appropriate for the EU the package." Ultimately, Finland voted against the establishment of the Social Climate Fund. Regarding the social dimension of energy transition, "Finland has not seen combatting energy poverty as a goal of energy policy. Instead, energy poverty is addressed through the social welfare system." Finnish rapporteurs admit some impact of the social dimension of the EU energy legislation on the national energy policy, notably "in the field of voluntary energy efficiency agreements to promote energy efficiency in rental dwellings." Likewise, "Finnish energy legislation was exceptionally amended to include measures to address social issues during the energy crisis. In addition to tax benefits and direct income support for low-income households, payment periods for electricity bills were extended." In the Netherlands, the impact of targeted policies addressing energy poverty in relation to the green transition is relatively limited and national policy is primarily aimed at addressing poverty in a general sense through the means of social policy such as social benefits for people with a limited income and access to social housing and the sustainability of social housing. Whilst in Denmark, a proportion of households experiencing heating deficiencies was estimated at the level of 3% and the concept of energy poverty is absent in, Danish report confirms schemes both at the level of renewable energies and social policy.

B) Social dimension of the green transition – energy poverty, DNSH, State aid (Questions 3, 4, and 5, Section II)

Focusing more on the concept of energy poverty, a very strong social dimen-

¹²¹ Opinion 11/2022 of the Grand Committee of the Finnish Parliament, available at: https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/SuVL_11+2022.aspx

sion of the green transition in the energy sector in the light of French report is primarily focused on addressing the social impacts of energy costs and ensuring equitable access to energy, especially clean energy, for vulnerable populations. It has been reinforced by recent socio-political movements, such as the *gilets jaunes* crisis, which highlighted public concern over rising energy prices and the social ramifications of energy policies. French legislation contains a concept of concept of “fuel poverty” and there is an increasing awareness of the need to consider social justice in energy transitions, which includes promoting initiatives to combat energy poverty and enhancing public participation in energy project planning and implementation. Romania’s report outlines targeted mechanism for compensating energy prices for households. An interesting link between the “do no significant harm” (DNSH) principle in the meaning of the EU Taxonomy Regulation and social impact, is established in the Dutch report whose authors consider further that if extended to the social impact, “the current legal framework provides for measures to address energy poverty and the impact of measures related to rare earth mining on indigenous peoples and their cultures.” Also, in the Portuguese rapporteurs consider that DNSH “may come to play an even more significant role in the EU energy law and policy,” and recall that similar formulation is enshrined in the Portuguese Constitution. Whilst discussing the strategic dimension of decarbonisation at the EU level, Croatian rapporteurs, note a rise of the litigation before the EU Courts in relation to the principle of the “do no significant harm” in the meaning of the taxonomy regulation 2020/852.¹²² These cases build upon the mechanism of a request for internal review under the so-called Aarhus Regulation¹²³ like in case of *Clientearth v Commission* (T-215/23) or direct annulment action under Article 263 TFEU against the Commission’s delegated regulation notably regarding economic activities in certain energy sectors, like in case *Austria v Commission* (T-625/22). In particular, a breach of DNSH criterion is raised regarding the classification of nuclear energy as environmentally sustainable which might have a horizontal impact in relation to further decarbonisation strategies at the Union’s level. A particular energy solidarity emphasis in the Greek report is made in relation to the Public Service Obligations (PSOs) in national law which differentiates between PSOs imposed for social reasons and PSOs imposed to strengthen social cohesion and ensuring that all consumers receive product and services of equal quality. Thus, a particular role of State aid and in particular Services of General Economic Interest (SGEI) under Article 106(2) TFEU is confirmed as a way

¹²² Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, pp. 13–43).

¹²³ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

forward to ensure fairness of the green transition “for the purpose of protecting vulnerable customers, of ensuring security, including security of supply, regular supply, quality and supply prices, as well as for ensuring environmental protection, including energy efficiency, energy from renewable sources and climate protection” (Greece). Portuguese legislation is presented as mirroring the Union’s approach, in particular insofar various measures such as social tariffs for electricity and natural gas, which provide discounts to vulnerable consumers have been implemented. The concept of energy security in Portugal “includes social components, recognizing that ensuring affordable energy access is vital for the country’s energy security and social stability.”

Against this background, as illustrated by the “Fit for 55” package, the EU legislation has gone through a revolutionary phase. Indeed, climate neutrality objective has been the most powerful concept reshaping the EU secondary law, potentially since Jacques Delors Commission internal market reforms. Regarding affordability of energy, EU law recognises the social and justice dimensions of the energy transition. Through initiatives like the “Clean Energy for All Europeans” package EU law is meant to ensure that vulnerable populations are protected during the energy transition. These measures include promoting energy efficiency, supporting renewable energy adoption, and providing financial assistance to low-income households. Fairness in green transition it has mainly been captured in the EU legislation by the Just Transition Mechanism (in particular Just Transition Fund)¹²⁴ and Social Climate Fund (SCF).¹²⁵ The new Energy Efficiency Directive lays down the definition of energy poverty, and the Member States are required to assess and address energy poverty in their national energy and climate plans. Also; sectoral transition measures under the energy efficiency and gas legislation contain measures addressing social and justice concerns. As summarised by the European Commission in the Institutional Report, “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 generally 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

¹²⁴ See: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en, cf. Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund (OJ L 231, pp. 1–20) and also outline of the Common Provisions Regulation: https://commission.europa.eu/funding-tenders/find-funding/funding-management-mode/common-provisions-regulation_en, cf. Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, pp. 159–706).

¹²⁵ Regulation 2023/955 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 (OJ L 130, pp. 1–51).

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’ Communication” which refers to the Social Climate Fund intended to 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.”

On the one hand, the Just Transition Fund (JTF) referred to in all the reports is globally very positively viewed from a financial support perspective in most of the national reports which emphasise its focus on the regional cohesion and phasing out of selected energy technologies, including the projects which aim to ease the transition to the green economy for the local population employed in the carbon intensive sectors. Italian rapporteur notes a narrow impact of JTF in Italy which is limited to only 2 of the 107 territorial provinces. On the other hand, whereas the Climate Social Fund (CSF) is addressed very selectively, it raises more legal issues as noted in the Finnish report. It is worth noting that Social Climate Fund legal basis encompasses Articles 91(1), point (d), 192(1), Article 194(2), and Article 322(1), point (a) TFEU. The concept of energy poverty is present both in the Social Climate Fund Regulation¹²⁶ and Energy Efficiency Directive,¹²⁷ ensures that vulnerable populations are protected from the rising energy costs associated with carbon pricing and the broader decarbonisation process. Thus, EU law approach integrating fairness and socially driven measures into the environmental and energy legal acts requires further reflection insofar the legal instrumentalism is concerned. Unquestionably, there is a broad support regarding the adequacy in addressing the social costs of green transition, fairness and energy poverty through the EU budgetary and State aid measures. However, there was little references to the purely budgetary aspects and the Union’s financial measures. And yet, a true elephant in the room is the Union’s and Member States’ budgetary capacity to make this approach a sufficiently viable policy line, especially once the NGEU budgetary means of the Union will reach their limits.

VI. Union’s emergency legal framework – solidarity and its limits (Questions 1 and 2, Section III)

¹²⁶ Regulation 2023/955 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 (OJ L 130, pp. 1–51).

¹²⁷ Energy Efficiency Directive 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 (recast) (OJ L 231, pp. 1–111).

In the light of the submitted reports, the Union's legal framework in the field of emergency under Article 122 TFEU has globally triggered positive comments confirming its cohesiveness, responsiveness and sufficiency. Croatian rapporteurs recall that recent energy crisis has highlighted Union's energy dependence and unquestionable necessity for energy solidarity. The adequacy and efficiency of this legal instrument is further demonstrated by an extensive list of the EU law measures as presented in the Institutional Report. In many instances of the national reports, concerns in relation to the delicate balancing between the Union's and Member States shared competences as well internal, institutional balance related concerns are strongly voiced. As well known, adoption of the Article 122 TFEU measures has triggered contrasting analytical responses in the scholarship.¹²⁸ However, this part of the report outlines another thread of discussion related Article 122 TFEU in its crisis management role and focuses on the new litigation triggered by the Union's emergency measures as demonstrated by the new cases before the national and EU Courts.

As highlighted by the German rapporteur: "The limit on the sustainability of the legal basis of Article 122 TFEU appears to have been reached in the case of profit recovery measures as provided for in Council Regulation (EU) 2022/1854." In particular, the levy of *excess profits* "is used to generate budgetary resources for the Member States and reflects the sense of equity in terms of 'crisis gains'." However, those aspects seem to be out of the scope of the emergency competence under Article 122 TFEU (Germany). Against this background, solidarity contribution is clearly being tested in various contexts. Belgian rapporteurs underline a new, currently pending preliminary ruling submitted by the Belgian Constitutional Court in case C-358/24 *Varo Energy Belgium* regarding selected aspects of validity and interpretation of the Council Regulation 2022/1854 on an emergency intervention to address high energy prices which relate to the temporary solidarity. The case follows an annulment appeal which was filed before the Belgian Constitutional Court against Belgian legislation "establishing a temporary solidarity contribution by the oil sector," legislation which aims to partially implement Regulation 2022/1854. With the solidarity contribution, the Belgian legislator targeted the energy companies that have benefited from excess profits due to the energy crisis and price increases since the beginning of 2022 and intended to make them contribute, and this in support of households suffering from the consequences of the crisis and facing high prices. As articulated in the Italian report, a constitutionality of national

¹²⁸ *Ex multis*, L. Hancher and A. De Hauteclocque, 'Strategic Autonomy, REPowerEU and the Internal Energy Market: Untying the Gordian Knot', *Common Market Law Review*, Vol. 61, 2024, p. 80; M. Chamon et al., 'The use of Article 122 TFEU Institutional implications and impact on democratic accountability – Study requested by the AFCO committee', September 2023; K. Huta, L. Reins, 'Solidarity in European Union Law and its application in the Energy Sector', *International and Comparative Law Quarterly*, Vol. 72, Issue 3. For more reading, see German, Croatian, French reports.

legislation in relation to the Council regulation 2022/1854 on an emergency intervention to address high energy prices¹²⁹ has been equally raised before the Italian Constitutional Court. On the appeal, the Regional Administrative Court of Lazio¹³⁰ raised the incidental question of the constitutionality of the solidarity contribution introduced by Law No. 197/2022, allegedly in conflict, pursuant to Article 117 of the Italian Constitution with the constraints deriving from the Council Regulation 2022/1854, which instituted a temporary solidarity contribution based on the taxable profits made in the 2022 tax year by companies and permanent establishments active only in the oil, gas, coal and refining sectors. In Greece, the Council of State has equally reviewed the constitutionality of the national legislation on extraordinary levy on the excess profits of electricity companies.¹³¹ In Germany, the BVerfG has confirmed constitutionality of the German transposition without addressing the issues of EU law.¹³² However, the dispute does not seem to be closed given an investment procedure based on brought by company established in UK which is still pending against the German transposition legislation.¹³³ As noted in the Croatian report, implementation of the Council Regulation 2022/1854 has triggered several challenges including constitutional issue of non-retroactivity. In particular, the Croatian law implementing Regulation (EU) 2022/1854 specifies that these measures apply retroactively from December 2022 to June 2023 which triggered doubts in relation to a potential breach of legal certainty and principle of non-retroactivity enshrined in Article 90(4) of the Croatian Constitution.

More generally, regarding the legality of the EU emergency framework, French and Lithuanian reports recall direct actions under Article 263 TFEU, still pending before the EU Courts. In case *ExxonMobil*, T-802/22, the applicant requests annulment of Articles 14, 15, and 16 of the Council Regulation 2022/1854, insofar as those provisions mandate a solidarity contribution the companies at stake which conduct activities in the crude petroleum, natural gas, coal, and refinery sectors. Lithuanian rapporteurs refer equally to the case C-675/22, *Poland v Council*, in which Poland requests annulment of the Council Regulation 2022/1369 on coordinated demand-reduction measures for gas¹³⁴ by raising notably that Article 122(1) TFEU was not a correct legal

¹²⁹ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, (OJ L 261I, pp. 1–21).

¹³⁰ Lazio Regional Administrative Court Order No. 773/2024 of 16.01.2024.

¹³¹ Greek Council of State decisions No. 185-188/2024, which ruled that the provisions of Article 37 of Law 4936/2022 on the imposition of an extraordinary levy on the excess profits of electricity companies do not contravene the Greek Constitution in the light of public interest justifications.

¹³² Federal Constitutional Court, 28 November 2024 – 1 BvR 460/23, 1 BvR 611/23, GewArch 2025, 21 = EnWZ 2025, 33 m.

¹³³ Klesch Group Holdings Ltd. and Raffinerie Heide GmbH, ICSID Case No ARB/23/49.

¹³⁴ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas (OJ L 206, 8, pp. 1–10).

basis. Poland submits that the main objective of the contested regulation is to have a significant effect on the conditions for exploiting energy resources and alleges a breach of the principle of energy solidarity.

VII. Conclusions

In his *Investigations*, L. Wittgenstein considered that, in order to understand the meaning of a word or a concept “one cannot guess how a word functions. One has to look at its use and learn from that.”¹³⁵ The ubiquitous resonance of solidarity in the EU constitutional context, translated further into the sectoral measures confirms its relevance for the EU legal order notwithstanding its initial elusiveness and limited justiciability. Given an inherent tension between compliance and particularism which remains embedded in the European project,¹³⁶ solidarity, including energy solidarity, constitutes an instrument of coherence, a tool upholding unity of EU law. As demonstrated by the submitted reports, energy solidarity, energy security and climate neutrality have triggered a profound evolution of EU law and strongly affected national legal orders and jurisprudence. If viewed from a constitutional perspective of the shared competences between the Union and its Member States, energy and environmental measures require a mindful consideration in order to either respect the current treaty limitations or to open a constructive debate on the potential evolution of the Union’s competence. Energy solidarity as a legal principle is articulated at various levels of EU law, within the framework of international relations as well as hard and soft law initiatives in the EU energy market and beyond. At this operational level the whole range of targeted solidarities both at the legal and political level translate an abstract concept into the concrete actions. Finally, given the ongoing digitalisation of the Union’s economy, as already flagged in some reports, classical content of solidarity and security coupled with the green transition will necessarily evolve in order to encompass new threats and new aspects of the European resilience both internally and externally. Overall, mapping joint efforts and responsibilities, in parallel with tensions and national sensitivities, will continue to inform the development of the concepts of solidarity and energy solidarity in EU law, which remain in the state of constant evolution.

¹³⁵ L. Wittgenstein, *Philosophical Investigations*, (1953/1996), Basil Blackwell, Oxford.

¹³⁶ M. Varju, V. Czina, ‘Between Compliance and Particularism. Member State Interests and European Union Law’, in: M. Varju (ed.), *Between Compliance and Particularism*, Springer 2019, pp. 1–20.

INSTITUTIONAL REPORT

*Odile Beynet and Tibor Scharf**

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

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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 Wallonnie, 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 I, 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* 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 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

introduces 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.europa/remits-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 strict. If 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 compared 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. Member 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* 29, summer 2024, <https://heinonline.org/HOL/Contents?handle=hein.journals/coljeul29&id=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&id=1&size=2&index=&collection=journals>, page 550

¹⁷¹ Study requested by the AFCO 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:1973:109 EU-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 deducted 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-Tfourthwith 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 AFCE 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 AFCE 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/AEU*, 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 Rahmensetzungen 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 raise 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 AFCD 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.

NATIONAL REPORTS

AUSTRIA

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Introductory remarks

The report at hand will be structured in the following manner: the questionnaire received consists of three sections. In the view of the rapporteur it seems useful to introduce subdivisions within them. It is also understood that only those points will be raised and analyzed, which are pertinent to either the Austrian legal situation (both dogmatic and applicable law) or the rapporteur's. The structure of the report will reflect the two considerations mentioned above.

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

1. The *OPAL* judgement

The *OPAL* judgement¹ is undoubtedly of major significance for the development of EU law as a whole and especially for the field of energy law. It may thus be beneficial to lay down the rapporteur's reading of the case, on which the arguments detailed below shall be built:

The facts pertinent to this judgement point back to the year 2009 and will be laid down briefly: the Commission issued a decision that the Federal Network Agency (Bundesnetzagentur) of Germany may grant an exemption from the rules on third-party access and tariff regulation contained in Article 36 para. 2 of Directive 2009/73/EC² with regard to the *OPAL* pipeline. In 2016, the Commission approved certain amendments to the aforementioned exemption. The General Court subsequently annulled the Commission's decision of 2016 based

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¹ European Union, Court of Justice, Case C-848/19 P *Federal Republic of Germany v. Republic of Poland et al.*, 15 July 2021, ECLI: EU:C:2021:598.

² European Union, Parliament and Council, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, OJ L 211, 2009, p. 94.

on an action for annulment. The judgement C-848/19 P refers to the Grand Chamber judgement of the Court dismissing Germany's appeal against the General Court's judgement. The OPAL pipeline is essentially as the terrestrial extension of the Nord Stream 1 gas pipeline.

The main question of law debated before the ECJ refers to the legal force of the principle of solidarity in EU-law and its content: The Federal Republic of Germany argued that Article 36 of the Directive 2009/73/EC would constitute the only provision applicable to a review of the legality of the Commission's decision. In this line of thinking, solidarity in EU-law should be interpreted narrowly and would be confined to safeguarding security of energy supply.³ The Republic of Poland, conversely, did not dispute the applicability of Article 36 of the Directive 2009/73/EC, however disputed limits to the principle of solidarity, which would render the principle inapplicable to the case at hand.

The ECJ anchors the entirety of its judgement in Article 194 TFEU, holding 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 one of the fundamental principles of EU law."⁴ Importantly, the principle of solidarity is deemed to be closely linked to the principle of sincere cooperation contained in Article 4 para. 3 TEU.⁵ These principles have to be read in conjunction, as stressed by the ECJ and applied to the case at hand.⁶ Thus, the principle of solidarity serves as a guiding principle with regard to the interpretation of secondary EU law⁷ and governs the whole of EU energy policy.⁸

Applied to the facts at hand, the principle of energy solidarity, read in conjunction with the principle of sincere cooperation, requires that the Commission verify whether there is a danger for the security of gas supply on the markets of another Member State. By not examining the impact that the decision regarding the issue could have had on the gas markets of the Member State(s) liable to be affected, and by not conducting an analysis of the interests involved in the light of the principle of solidarity, it is the view of the Court that the Commission had breached the principle mentioned above. Pointing to the future, the Court holds that the EU and its Member States have a general obligation to consider the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect their interests, as regards, for instance,

³ European Union, Court of Justice. Case C-848/19 P *Federal Republic of Germany v. Republic of Poland et al. (OPAL)* 15 July 2021, ECLI: EU:C:2021:598, para. 28

⁴ *Ibid.*, para. 38.

⁵ *Ibid.*, para. 41.

⁶ *Ibid.*, para. 52.

⁷ *Ibid.*, para. 44.

⁸ *Ibid.*, para. 47.

security of supply, its economic and political viability.⁹ This part of the holding echoes the build-up of the principle of loyalty or of sincere cooperation, binding Member States and the Union itself together.

The ECJ further notes that “this does not mean that EU energy policy must never have negative impacts for interests of a Member States.” The obligation arising from the principle of solidarity requires EU institutions and Member States “to take into account, [in the context of the implementation of that policy,] the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict.”¹⁰

2. The principle of solidarity

The principle of solidarity has for a long time been one of the leading principles in EU constitutional law, although its exact contours have not been clear. The notion of “solidarity” can refer to three distinct and different legal concepts: (1) There is the concept of “solidarity” as a value of the European Union (contained in Article 2 TEU), (2) the concept of solidarity as component of an objective of the Union (mentioned multiple times in Article 3 TEU, for example, “solidarity between generations,” or again “solidarity between peoples”) and (3) the solidarity as a legally binding principle of EU law. The differentiation between the three concepts will prove pertinent and useful with regard to the notion of “solidarity” and the question as to whether the principle of solidarity is to be regarded as forming part of the Union’s constitutional identity.

In the aftermath of the *OPAL* judgement, the principle of solidarity attracted renewed attention.¹¹ Nonetheless, the principle of solidarity has been around for as early the 1960s in the jurisprudence of the ECJ, as analyzed by Advocate General Campos Sánchez-Bordona in his opinion in *OPAL*.¹² In the opinion of the rapporteur, the above-mentioned distinction would be useful in analyzing the various provisions, as to whether they refer to a principle, a value, or a value-imbuéd objective.

⁹ Ibid., para. 71.

¹⁰ Ibid., para. 73.

¹¹ Cf. recent Austrian publications with regard to the matter at hand: Andreas Müller, ‘Proliferation der Solidarität im Unionsrecht. Oder: der auszog, die europäische Integration zu retten’, *ZÖR*, vol. 77, no. 2, 2022, p. 343; Walter Obwexer, ‘Der Grundsatz der Solidarität im Unionsrecht’. *Festschrift Reinhold Beiser*, edited by Verena Hörtnagl-Seidner, Thomas Kühbacher, Gunter Mayr, Peter Pülzl, and Nikolaus Zorn, Linde Verlag Ges.m.b.H., 2024, p. 385.

¹² Opinion AG Campos Sánchez-Bordona, Case C-848/19 P *Federal Republic of Germany v. Republic of Poland et al. (OPAL)* 15 July 2021, ECLI: EU:C:2021:598, paras. 65–72; see also Esin Küçük, ‘Solidarity in the EU: What is in a Name?’, *Nordic Journal of European Law*, vol. 6, no. 2, 2023, p. 1.

With regard to the principle of solidarity, for a substantial period of time, there has been a quasi-understanding as to the existence of the principle itself, albeit with unclear contours.¹³ It is submitted that blurred contours are nothing unusual for a principle of constitutional law in general, be it Member States' constitutional law, or EU constitutional law.

However, there is some clarity to be gained from the judgement itself: The ECJ characterizes the principle of solidarity as an obligation "to take into account," and thus explicitly not as an "obligation of result" (emphasis added). For the achievement of a specific result, there may be a need to work with other principles or to have a policy decision by the legislative or the executive branch of the EU, as applicable. This point will be illustrated in the paragraphs that follow by linking the principle of solidarity to the principle of loyalty from a theoretical point of view.

In the view of the rapporteur, it seems rather surprising that the ECJ did not make use of the principle of sincere cooperation or loyalty in the case at hand. The principle of loyalty though is mentioned as being closely linked to the principle of subsidiarity. According to the view expressed here, loyalty and solidarity can indeed be classified as two different legal principles of Union law, which however are not only closely linked to each other, but also overlap¹⁴: The term "loyalty" originates from French constitutional law and goes back to the concept of *loi*; following Hatje, the concept of *loyauté* is therefore originally intended to denote an affirmative attitude towards the state, its leadership and the laws.¹⁵ *Loyauté* therefore does not denote mere passive acceptance of the political and social distribution of power and any lawful order of the state derived from this, but rather encompasses an affirmative attitude towards the lawful order of the state structure. The concept of *loyauté* contains a static element in an almost necessary and structural way. Any change to the lawful order would be accompanied by a (sometimes) difficult transformation or transfer of loyalties.

At this point, both from a conceptual point of view and from the perspective of Union law in particular, the static element of the principle of loyalty referred to is completely absent from that of solidarity; if solidarity is to be understood as a "principle of standing up for one another," this principle establishes material claims and obligations aimed at reciprocal ideal and material dynamic support. In Haltern's definition, loyalty refers to a given existing lawful order.

¹³ Ibid.

¹⁴ In this sense: Federico Casolari, 'The Odd Couple: A Legal Reflection on the Interaction between Loyalty and Solidarity in the EU Legal System', *Nordic Journal of European Law*, vol. 6., no. 2, 2023, p. 84.

¹⁵ Armin Hatje, *Loyalität als Rechtsgrundprinzip in der Europäischen Union*, Nomos, Baden-Baden 2001, p. 15.

However, the principle of solidarity should be understood as having a dynamic component on the basis of the above-mentioned meaning, placing solidarity in correspondence with responsibility and political action. According to Haltern, the scope of political action can extend to the revolutionary creation of a new lawful order.¹⁶

There is another noteworthy correspondence between the principle of solidarity and the principle of sincere cooperation: both the principle of loyalty in Article 4 para. 3 TEU and the principle of solidarity connect the Union and the Member States in a “star-shaped” manner within the framework of the implementation of their respective competences and in this way to provide a “network of legal systems and legal areas” with a corresponding superstructure. However, as pertinently remarked by Herlin-Karnell, the principle of solidarity is aimed at reducing dominance at creating a power center characterized by non-domination vis-à-vis the constituent Member States.¹⁷

In the view of the rapporteur, the value of solidarity, as mentioned in Article 2 TEU, should be viewed as a building block of the Unions’s constitutional framework and does form part of the Union’s constitutional identity; in the judgement *Poland v. Parliament and Council* (= the “Rule of law conditionality” judgement), the Court expressly states: “The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down in the Treaties.”¹⁸

The Court here expressly refers to values and not to objectives or principles – with the (possible) interpretative exception that the last part of the sentence may be construed as limiting the powers of the EU by making use of the principle of conferral and the principle of subsidiarity. In the view of the rapporteur, the principle of subsidiarity therefore does not form part of the EU’s core constitutional identity, but rather of the Union’s constitutional order in the wider sense. There may be a reason for this: A “regular” infringement of a given principle – be it the principle of solidarity – should not amount to an infringement of a value of the Union, since, from a systemic point of view, such infringements are supposed to be persistent and of an aggravating nature, going against the societal consensus at the very root of the European legal order.

¹⁶ Ulrich Haltern, ‘Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende’, *AöR* 128 (2003) 511, 528.

¹⁷ Ester. Herlin-Karnell, ‘The Constitutional Concept of Solidarity in EU-Law: Some Reflections on the Interrelationship between Solidarity, Constituent Power, and Non-Domination’, *Nordic Journal of European Law*, vol. 6, no. 2, 2023, pp. 131, 135.

¹⁸ European Court of Justice, C-157/21, *Republic of Poland v. European Parliament and Council of the European Union*, ECLI: EU:C:2022:98, point 145.

3. The principle of solidarity in energy law and policy

The application of the principle of solidarity in energy law and policy hinges on the wording of Article 194 TFEU; from a dogmatic and policy-related perspective though, the principle of solidarity stems from foreign and security policy in the wider sense, and encompasses financial security.¹⁹

Its field of application is wide-ranging, thus only a few fields of application shall be mentioned here: the principle of (energy) solidarity applies to the functioning of the internal market and its external dimension,²⁰ and it applies to preventive and emergency measures as well.²¹ Solidarity governs the functioning of the energy market, the interconnection of energy networks as well as energy efficiency and energy saving, exhibiting a strong linkage with environmental protection provisions.²² Huhta and Reins pertinently remark that, while the fields of application of the principle of solidarity (also termed principle of energy solidarity) pertain to specific domains, the *OPAL* judgement rendered these non-exhaustive.²³

The complex and policy-dependent contours of the principle of solidarity in general and the principle of energy solidarity in particular cannot be overstated.²⁴ In the view of the rapporteur, the general principle of solidarity, and a *maiore ad minus*, its specific application to energy law however cannot override existing principles of EU constitutional law, such as the principle of subsidiarity²⁵ or the principle of conferral, as embodied in Article 5 TEU.

Since the principle of solidarity is closely linked to the principle of sincere cooperation, it is suggested that the path of a cohesive interpretation of the reach of the principle of solidarity should be pursued. Also, the principle of solidarity can be paired with the principle of effectiveness, as suggested by

¹⁹ In this sense Carl Frederik Bergström, 'EU Rulemaking in Response to Crisis: The Emergence of the Principle of Energy Solidarity and Its Use', *Nordic Journal of European Law*, vol. 6, no. 2., 2023, pp. 100, 110.

²⁰ European Court of Justice, C-157/21, *Republic of Poland v. European Parliament and Council of the European Union*, ECLI: EU:C:2022:98. point 69.

²¹ For an overview with regard to its application in the field of emergency measures: Stefan Storr, 'EU-Notfallmaßnahmen im Energierecht – Möglichkeiten und Grenzen eines neuen Rechtsinstruments', *Rdu-UT*, vol. 31, no. 5a, 2023, p. 31.

²² Opinion AG Campos Sánchez-Bordona, Case C-848/19 P *Federal Republic of Germany v. Republic of Poland et al. (OPAL)* 15 July 2021, ECLI: EU:C:2021:598. para. 77.

²³ Kaisa Huhta and Leonie Reins, 'Solidarity in European Union Law and Its Application in the energy Sector', *ICLQ*, vol. 72, no. 3, 2023, pp. 771, 785.

²⁴ In this sense Mykola Iakovenko, 'Case C-848/19 P: Germany v. Poland and its outcomes for the energy sector: An Extended Case Note on the ECJ judgement in the *OPAL*-case', *Journal of World Energy and Business*, vol. 14, no. 6, 2021, pp. 436, 444.

²⁵ For further discussion see: Carl Frederik Bergström, p 110.

Buschle and Talus,²⁶ while respecting the confines of the system of distribution of competences between Member States and the Union, as laid down in the Treaties.

The following sub-section will address potential trade-offs between the overarching concept of “solidarity” (i.e. as a value, an objective, and a principle) and other principles of EU constitutional law, such as subsidiarity or the principle of conferral, as well as systemic questions relating to the principle of solidarity within the Treaties. Finally, energy solidarity and its application in the Austrian legal system shall be discussed.

4. Trade-offs, conflicts and interpretation

4.1. The *Hinkley Point C* judgement and its application in EU constitutional law

In the following paragraphs, the *Hinkley Point C* judgement²⁷ will be discussed with regards to its being of tremendous importance for EU Constitutional Law, as well as a prime example for well-balanced judicial restraint. In contrast, its relevance in State Aid law has been the subject of extensive discussion.²⁸

In 2013, the UK planned to implement State aid measures to support the Hinkley Point C nuclear power station, for which it received a Commission decision authorizing the implementation of the measures as intended.²⁹ Austria brought an action for annulment against this decision, which ultimately was dismissed by the General Court.³⁰ The case at hand deals with the subsequent appeal to the ECJ.

At this point, it is important to note that the Commission’s decision is not based on Article 107 para. 3 litt. b, which requires State aid to “promote the

²⁶ Dirk Buschle and Kim Talus, ‘One for All and All for one? The General Court ruling in the OPALcase’, *Oil, Gas & Energy Law Intelligence*, vol. 17, no. 5, 2019, pp. 1, 8; OGEL 17(2021).

²⁷ European Union, Court of Justice, Case. C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742.

²⁸ For example: Dóra Lovas, ‘Relevance of the Court Decision on the Hinkles Point Nuclear Power Plant in Relation to Paks II’, *Studia Iuridica Lublinensia*, vol. 30, no. 2, 2021, p. 306; Susanne Kingston, ‘State aid and the European Green Deal: The Implications of Case C-594/18 *Austria v. Commission* (*Hinkley Point C*)’, *University college Dublin working Papers in Law, Criminology and Socio-Legal Studies*, no. 6, Mar. 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808040; with Constitutional Law implications: Leigh Hancher, ‘Euratom, State aid and environmental protection: Hinkley Point’, *Common Market Law Review*, vol. 58, no 5, 2021, p. 1491.

²⁹ European Union, Commission, Commission Decision (EU) 2015/658 of 8 October 2014. OJ C 69, 2014. p. 60.

³⁰ European Union, General Court. Case T- 356/15, *Republic of Austria v. European Commission*, 2 September 2018. EU: T: 2018: 439.

execution of an important project of common European interest,” but rather on the same paragraph’s litt. c, which sets another requirement altogether: according to this provision, State aid may be considered to be compatible with the internal market, if the aid envisaged is to “facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.” For the sake of brevity, only two of the four main questions raised shall be addressed here. Namely, the appellant argues that: (1) the construction of a new nuclear plant contravenes the common European interest and that (2) the principle of protection of the environment, the precautionary principle, the “polluter pays” principle, and the principle of sustainability preclude the grant of State aid for the construction or operation of a nuclear power plant.

The first two sentences of the Advocate General’s opinion succinctly sums up the stakes in the case at hand: “This case can be described as the legal side of a dispute between Member States that are in favour of nuclear power and those that are not. Both sides claim that they pursue their course with a view to protecting the environment.”³¹ Since the Euratom-Treaty provides Member States with an opportunity to be consulted and not with an opportunity to block the deployment of nuclear power sources on a Member State’s territory, and such projects may require some form or other of public aid, there is an argument to be made that the TFEU’s State Aid provisions may serve the cause.³²

The Court holds that Article 107 para. 3 litt. c “does not make the compatibility of aid dependent on its pursuing an objective of common interest.”³³ In the view of the rapporteur, the Advocate General’s opinion in *Hinkley Point C* will help determine not only the outcome in the case at hand, but also the argumentation with regard to other questions raised in this report; the opinion points to the lack of competence and democratic legitimacy to rule on the issue of nuclear energy as a whole,³⁴ or to the issue of a (possible) preponderance of provisions with equal legal rank and force within the system of the EU-Treaties.

With regard to the second argument raised by the appellant, the Court, in a nutshell, holds that the requirement to preserve and improve the environment, expressed in both the Charter and the FEU Treaty, as well as provisions

³¹ Opinion of AG Hogan, European Union, Case. C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742, para. 1.

³² Leigh Hancher, ‘Euratom, State aid and environmental protection: Hinkley Point’, *Common Market Law Review*, vol. 58, no 5, 2021, pp. 1491–1492.

³³ European Union, Court of Justice, Case. C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742, paras. 20, 26.

³⁴ Opinion of AG Hogan. Case. C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742, paras. 41–43.

of secondary EU law on the environment, are applicable to the nuclear energy sector, and that State aid, which contravenes provisions of environmental law or general principles of EU law cannot be declared compatible with the internal market.³⁵

The consequences of the Court's holding in this regard is truly important, as it now is perfectly clear that, as Hancher remarks, State aid law cannot and should not circumvent environmental law.³⁶ The responsibility to verify the compliance of a given project in the context of Article 107 TFEU with EU environmental law (both secondary and primary written law, as well as principles) reverts to the Commission. The Court goes on to reaffirm the importance of the objective of "security of energy supply" as mentioned in Article 194 para. 1 and holds security of energy supply to be one of the fundamental objectives of EU policy in the field of energy. Provisions of secondary law however "are not to 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, and does not preclude that choice from being nuclear energy."³⁷ The appeal was thus dismissed.

In the view of the rapporteur, it can be assumed that the objective of "security of energy supply" is of higher importance in relation to other objectives mentioned in Article 194 TFEU, such as "the functioning of the energy market," even though it is connected to these. In other words, there may exist situations, where the EU legislator would rather pursue the fundamental objective of securing energy supply to the detriment of the market in the field of energy law and policy. Then, there would be an obligation to revert to, for instance, a functioning energy market as soon as possible, politically and financially feasible.

Furthermore, the permissibility of nuclear energy does not rest on Article 194 TFEU alone, but rather on the Euratom-Treaty; Member States do not – and in the view of the rapporteur, did not have for a long time – the absolute right to resort to Article 194 para. 2 TFEU to circumvent or neutralize other provisions of the Treaties, such as environmental law.³⁸ The following sub-section will briefly address principles and objectives in with regard to competences and general EU-law, drawing conclusions that may be pertinent for conflicts arising between various principles and various objectives.

³⁵ European Union, Court of Justice, Case. C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742, paras. 45 and 100.

³⁶ Leigh Hancher, 'Euratom, State aid and environmental protection: Hinkley Point', *Common Market Law Review*, vol. 58, no 5, 2021, pp. 1491, 1513.

³⁷ European Union, Court of Justice, Case. C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742, para. 48.

³⁸ In this sense also Leigh Hancher, 'Euratom, State aid and environmental protection: Hinkley Point', *Common Market Law Review*, vol. 58, no. 5, 2021, pp. 1491, 1515.

4.2. Objectives and principles

The function of the values and objectives of the European Union can be seen as threefold. First, the objectives of the European Union should be thought of as the concretization of its competences. With reference to the link between objectives and competences in Union law, a number of important legal acts of the Union's secondary legislation are based on a system of competences that can be classified as final, namely, objective-oriented.

Second, the objectives of the European Union – with reference to the principle of loyal cooperation in Article 4 para. 3 TEU – are to be understood as a concretization of the obligations of the Member States. Last but not least, the objectives of the Union serve as a means of interpretation within the framework of systematic and teleological interpretation. Article 3 (1) TEU establishes a necessary link between values and objectives, since this provision states that it constitutes an objective of the Union to promote its values.³⁹

For the purpose of this report, one feature is of particular relevance: almost every action or omission by the Union carries the risk of a conflict of values and objectives, especially in view of the wide range of objectives set out in Article 3 TEU. According to some authors, Union law contains a general hierarchy of values and objectives. Those values and objectives that are both enshrined within the system of the Treaties in the area of competences granted to the EU and legally enforceable through the granting of individual rights would take precedence over other rules of EU law. According to this view, priority should therefore be derived on the basis of the precision of the objectives in the system of EU treaties and the enforceability of primary law claims and/or secondary law instruments. In any case, those objectives of the Union that are economic in nature, such as the objective of establishing and maintaining the internal market and economic and monetary union, satisfy the requirements mentioned here.⁴⁰

In the view of the rapporteur, however, conflicts of values and objectives are to be resolved by the institutions of the Union by weighing objectives as against one another under the guidance of the values as enshrined in the Treaties. This seems to adhere to the view of the Court, when it is stated that the institutions of the Union must necessarily be granted broad discretion in resolving such conflicts.⁴¹

³⁹ Cf. Alina Lengauer, 'Die Ziel- und Wertordnung der Europäischen Union', in: *Recht – Religion – Kultur, Festschrift für Richard Potz zum 70. Geburtstag*, edited by Brititte Schinkele et al., 2014, pp. 401, 406.

⁴⁰ Jürgen Basedow, 'Zielkonflikte und Zielhierarchien im Vertrag über die Europäischen Gemeinschaften', in: *Festschrift für Ulrich Everling* vol. I, edited by Ole Due et al., 1995, pp. 49–50.

⁴¹ For an overview cf. Alina Lengauer, 'Die Ziel- und Wertordnung der Europäischen Union. Lengauer', in: *Recht – Religion – Kultur, Festschrift für Richard Potz zum 70. Geburtstag*, edited by Brititte Schinkele et al., 2014, pp. 401, 407.

Since, according to the view expressed here, balancing and weighting between the objectives of the Union is a matter for political decision-making, this process is not subject to judicial review by the ECJ. Therefore, the objectives laid down in Article 3 are not, on their own, directly applicable to a given case. They rather serve as an interpretative standard for a direct norm of Union law. It is submitted that the very same mechanism is to be applied when dealing with a conflict between principles in EU law; such conflicts are abundant, and the application of one given principle cannot be absolute. Thus, the principle of solidarity, paired with the principle of sincere cooperation or loyalty would nonetheless have to be reconciled with the principle of conferral and the principle of subsidiarity. Only once the contours and domain of application of possibly conflicting principles has been established, proportionality comes into play.

Furthermore, the objectives set out in Article 3 TEU, as set out in Article 3(6), do not confer any competences on the Union beyond those conferred on it by the Treaties. Therefore, Article 3 TEU cannot in itself be regarded as conferring competence. In addition, the values and objectives of the Union are to be used as a benchmark and point of reference for teleological-systematic interpretation; they are therefore suitable for guiding Union legislation and the application of law.

The Republic of Austria and the Federal Republic of Germany have signed a Treaty with regard to the common use of the natural gas storage facility Haidach and 7 Fields.⁴² The Treaty pursues three main aims: (1) there is to be shared responsibility for filling the storage facilities between the two Member States. Haidach and 7 Fields are located in Austria, though mainly connected to the German gas transportation network; (2) the transit of gas via Germany to Tyrol and Vorarlberg will be maintained in the event of a gas shortage; (3) Austrian companies that have stored gas in Haidach or 7 Fields can therefore also transport stored gas via Germany to Vorarlberg and Tyrol in case of emergency, provided there are no technical reasons preventing the transit. In addition, Austria and Germany will make sure that access to the quantities stored in the Haidach and 7 Fields storage facilities stored for the purpose of ensuring security of supply, will be accessible in the event of an energy shortage or gas shortage situation.⁴³

⁴² Abkommen über Solidaritätsmaßnahmen zur Gewährleistung der sicheren Gasversorgung, 2021, <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011801>. Treaty between the Government of the Republic of Austria and the Government of the Federal Republic of Germany.

⁴³ Synopsis provided by: German Ministry for Economic Affairs, <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2023/02/20230217-deutschland-und-oesterreich-unterzeichnen-bilaterales-abkommen-zu-erdgasspeicheranlagen-haidach-und-7fields.html>. Accessed 12 Aug. 2024.

5. Shared competence, solidarity and security of supply

5.1. Shared competence in the field of energy policy and the principle of solidarity

The area of shared competence in the field of energy law and policy shall be analysed below by referencing the rapporteur's remarks from above. It is submitted that competences in general, be they exclusive, shared or other, cannot be regarded without reference to the values of the EU-Treaties enshrined in Article 2 TEU. First and foremost, the values of "democracy" and the "rule of law" will guide the arguments presented below.

Democracy, together with its sub-principles, that is, democratic legitimacy and the principle of division of powers, underpins the EU's legal order as a whole. The rapporteur would like to draw on the argument from above in the context of the analysis of the Advocate General's opinion in *Hinkley Point C*.⁴⁴ Generally, within the area of shared competence, both the Union and the Member States may legislate; Article 2 para. 2 TFEU stipulates that Member States shall exercise their competence if the Union has not (yet) exercised competence in a given field. Member States may retake their competence if the Union ceases to exercise its competence. Thus, Article 2 para. 2 TFEU lays down the functioning of shared competence. Protocol No. 25 on the exercise of shared competence to the TFEU⁴⁵ states that the exercise of the Union's competence relates only to the elements governed by the (legislative) act and therefore supersedes the competence of the Member States only with regard to the elements of a given (legislative) act, and does not encompass the entire area of competence.

Article 4 para. 1 TFEU lays down the general rule governing the area of shared competence: "The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 or 6." This provision is to be regarded as both defining the area of shared competence⁴⁶ and constituting a general rule with regard to the exercise of competence. Also, this provision explicitly refers to the principle of conferral.

⁴⁴ Opinion of AG Hogan, Case C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742, para. 1.

⁴⁵ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115, 307, 2008

⁴⁶ Ulrich Häde, 'Kommentar Article 4 AEUV', *Frankfurter Kommentar zu EUV, GRC und AEUV*, edited by Mathias Pechstein et al., 2017, para. 1.

Finally, the exercise of shared competence is determined by the principle of subsidiarity,⁴⁷ the principle of solidarity and numerous other principles governing (constitutional) EU-law. Article 194 para. 1 TFEU stipulates that European energy policy shall pursue the functioning of the internal market “in a spirit of solidarity,” thus referencing the value, the objective and the principle of solidarity. Whereas the intensity of EU-legislation in the field of energy has increased, the provision of Article 2 para. 2 TFEU is counterbalanced by Article 194 para. 2 TFEU. This argument is reinforced by the holding of the Court in the *Hinkley Point C* judgement, stating that the provisions of secondary law however “are not to 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 [...]”⁴⁸

At this point, it may be important to note that values and objectives in and of themselves do not confer (legislative) competence on the Union or the Member States; rather, these legal concepts serve as benchmarks and guidelines for interpretation. The objective to “ensure security of energy supply in the Union” can be regarded as contextual and addressed to the Union legislator.

5.2. The matrix: Energy security internally and externally

Article 194 para. 1 litt. B TFEU tasks Union policy with ensuring “security of energy supply in the Union.” The objective of “security of energy supply” is of fundamental importance, as stated by the Court and already analyzed; it may be useful to recall the succinct observation by Vaclav Smil: “No terrestrial civilization can sever its dependence on solar energy; its incessant flow sustains the biosphere and powers the photosynthetic production of our food. Every civilization is thus, fundamentally, solar but the modern world has modified this in two important ways: it depends on fossilized stores of solar energy extracted as coals and hydrocarbons (crude oil and natural gas), and it increasingly relies on electricity, which it generates by burning fossil fuels, harnessing solar radiation [...] using the Earth’s warmth [...] and by nuclear energy.”⁴⁹

The relative importance of the objective of “security of energy supply” (i.e., relative to the other principles enunciated in Article 194 TFEU) is illustrated

⁴⁷ For a very clear, almost step-by-step analysis cf. Christian Calliess, ‘Kommentar zu Article 4 AEUV’, *Kommentar zu EUV und AEUV mit Europäischer Grundrechtecharta*, edited by Christian Calliess and Matthias Ruffert, Verlag C.H. Beck München, 2022, paras. 14–16.

⁴⁸ European Union, Court of Justice, Case. C-594/18 P *Republic of Austria v. European Commission* (Judgement *Hinkley Point C*), 22 September 2020. ECLI: EU: C: 2020: 742. para. 48.

⁴⁹ Vaclav Smil, *Energy*, Oneworld Publications, 2017, p. 99.

by the Court's judgement in the Inter-Environnement Wallonie-case⁵⁰; in this judgement, the ECJ held that the objective of security of electricity/energy supply constitutes an imperative reason of overriding public interest,⁵¹ which then is capable of overriding environmental considerations and requirements.

In the aftermath of the annexation of the Crimean peninsula, policy reports stressed the supply threat that would stem from the Russian Federation in case there were substantial political disputes; these reports made the argument for prioritizing security of energy supply before tackling a number of other objectives.⁵² Due to the war in Ukraine, the EU's imports of natural gas have shifted towards US liquefied gas⁵³ and the three states with Caspian coastlines, namely, Azerbaijan, Kazakhstan, and Turkmenistan.⁵⁴ Whereas the European Union itself and Member States' governments have over the years aimed at reducing dependency on hydrocarbons, both for environmental and geopolitical reasons, there remains dire necessity to import those into the European Union. Due to the factual, social, economic and political importance of a stable and affordable inflow of energy in modern (European) societies, it is safe to argue that the concept of "security of energy supply" has hitherto remained fluid, contextual and circumstance-related. Since a precise definition proves elusive,⁵⁵ this report will now attempt to identify a few core elements of the concept.

From the very beginning of industrialization and the introduction of hydrocarbons as a main source of energy, a societal need to guarantee security of supply, or "reliability," was present.⁵⁶ Reliability, in turn, would suggest that access to energy is an essential element of the principle of security of energy

⁵⁰ European Union, Court of Justice, Case C-411/17 Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL v. Council of Ministers, 29 July 2019. ECLI: EU: C: 2019: 622.

⁵¹ Ibid., para. 155.

⁵² Simone Tagliapietra, 'Towards a European Energy Union: the Need to Focus on Security of Energy Supply', *FEEM Working Paper*, no. 095, Nov. 2014, JSTOR, <https://jstor.org/stable/resrep01105>; Alan Riley, 'Prioritization in EU Energy Policy: Energy Security First, then Energy Union', *Atlantic Council*, June 2015, p. 2, <https://www.atlanticcouncil.org/in-depth-research-reports/report/prioritization-in-eu-energy-policy-energy-security-first-then-energy-union/>; Leo Lehr, 'Der Geist der Energiesolidarität auf dem gerichtlichen Prüfstand: Politische Leitlinie oder doch Rechtsinstrument?', *Jahrbuch Regulierungsrecht*, 2021, p. 109.

⁵³ John M. Roberts and Ariel Cohen, 'Why the EU needs US liquefied natural gas', The Atlantic Council Global Energy Center, July 2024, <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/why-the-eu-needs-us-liquefied-natural-gas/>

⁵⁴ John M. Roberts and Julian Bowden, 'Caspian contributions to energy security in Europe', The Atlantic Council Global Energy Center, July 2024, <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/caspian-contributions-to-energy-security-in-europe/>

⁵⁵ See also Ilina Cenevska, 'Environmental Protection meets Security of Energy Supply – Case C-411/17 Inter-environment Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministres, Court of Justice of the European Union', *Transnational Environmental Law*, Vol. 10, no. 2, 2021, pp. 365, 370.

⁵⁶ Inigo Del Guayo, 'The Evolution of Principles of Energy Law', *Journal of Energy and Natural Law*, *Journal of Energy & Natural Resources Law*, vol. 40, no. 1, 2022, pp. 43, 52.

supply, supplemented by the necessity of energy to be affordable in economic terms and sustainable with regard to protecting the environment.⁵⁷

E-Control Austria explicitly acknowledges difficulties surrounding a precise definition of the concept of security of energy supply; nonetheless, the following definition is currently in use: “Security of supply means that electricity consumers can obtain electricity of a defined quality at the time they needed and at cost-oriented and transparent prices. In other words, security and quality of supply comprise two components of equal importance: Firstly, the physical availability of electrical energy in sufficient quantities and at any given time, and secondly, a price that energy consumers can afford. In view of the fact that energy prices have a decisive influence on economic growth and the competitiveness of (Austrian) industry in general, energy prices and the prosperity of the population are linked to a considerable extent.”⁵⁸ Therefore, demand for energy must be matched by a corresponding supply in order to satisfy societal needs,⁵⁹ and a holistic approach to the concept of security of energy supply is thus required.

Access to (reliable) energy supply and affordability, which are two of the three elements constituting the objective of security of energy supply, point to a considerable external dimension. The external dimension also results from the requirement to procure a considerable amount of energy consumed in the EU from outside the EU, and renders the question of external competence – in view of Article 194 para. 2 TFEU – especially thorny.

Article 122 para. 1 TFEU grants competence to the Union “in particular if severe difficulties arise in the supply of certain goods, notably in the area of energy.” On the basis of this provision, the Union legislator can only take action in the event of acute and present difficulties, whereby the Union’s security of energy supply, the concept of “reliability,” requires careful and long-term planning due to the necessity to have considerable infrastructure in place and in view of considerable societal and economic disruption in case of a severe break-down. The Court thus regards Article 122 TFEU as *lex specialis* in the event of serious difficulties in the supply of energy products.⁶⁰

⁵⁷ Ibid.

⁵⁸ E-Control, <https://www.e-control.at/industrie/strom/versorgungssicherheit> (unofficial translation). Accessed 21 Aug. 2024.

⁵⁹ Cf. also Leer, who argues that capacity limitations to the OPAL pipeline may have induced higher natural gas prices for consumers than would have been otherwise the case; Leo Lehr, ‘Der Geist der Energiesolidarität auf dem gerichtlichen Prüfstand: Politische Leitlinie oder doch Rechtsinstrument?’, *Jahrbuch Regulierungsrecht*, 2021, p. 109.

⁶⁰ European Union, Court of Justice, Case C-490/10, *European Parliament v. Council of the European Union*, 18 Apr. 2012. ECLI:EU:C: 2012:525.

Article 216 TFEU expressly provides for the Union to conclude agreements with third countries “where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties [...]”. In the view of the rapporteur, the principle of division of powers in the EU’s constitution, inextricable linked to the value of democracy, assigns foreign and security policy to the Member States (and here, mainly to the executive branch of government), and only in a limited fashion, to the Union as a whole. Due to the importance of hydrocarbon energy in the area of security policy, it is of paramount importance to respect the legal and practical boundaries as laid down in the Treaties.

Section II: Energy solidarity, energy security and green transition

1. Introductory remarks

The third element of security of energy supply as suggested in this report is the requirement of having a reliable supply of energy that is both affordable and sustainable. Due to the crucial societal, political and economic role of hydrocarbons (and energy in general) in European societies, each and every objective, possibly with the exception of energy security as already argued, needs to be weighed against others; thus, in the view of the rapporteur, it is for the Union’s legislature to tip the scales towards one or the other objective.

2. Green transition and social sustainability

The concept of “energy transition” is a process-oriented concept, rather than a policy aim or goal; it refers to the process that the current energy system is required to undergo in order to meet the challenges posed, in particular, by man-induced greenhouse gases attributable to the energy sector.⁶¹ Alongside security of energy supply and market compatibility, the principle of sustainability is deemed to be one of the guiding principles of both energy and environmental law and policies of the European Union.⁶² Thus, not only renewable energy sources need to fulfil the criterion of sustainability, at the very same time, also the process of managing the transition from fossil energy sources to more environmentally friendly energy sources has to prove sustainable.⁶³

⁶¹ Vaclav Smil, *Energy Transitions: History, Requirements, Prospects*, Bloomsbury Publishing, 2010, p. VII.

⁶² Class Friedrich Germelmann, ‘Die Energieunion – Eine neue Perspektive für die europäische Energiepolitik’, *EuR*, vol. 51, no. 1, 2016, p. 3.

⁶³ Ioanna Mersinia and Sirja-Leena Penttinen, ‘Examining Different Aspects of the Energy Transition’, in: *Energy Transitions: Regulatory and Policy Trends*, edited by Ioanna Mersinia and Sirja-Leena Penttinen, Intersentia, 2017, p. 2.

Sustainability is to be understood as not only environmentally sustainable, but also with regard to the functioning of a humane society and economy. The rapporteur would like to emphasize the Court's decision in the *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*-case.⁶⁴ The Council of Ministers of the Kingdom of Belgium enacted legislation providing for the restarting of industrial production of energy at the nuclear power station DOEL I (which had previously been shut down) and the deferral by ten years of the planned shut-down of another nuclear power station, DOEL II. The Court gave its assent to these measures without an EIA, and held that the need to ensure the security of energy supply may amount to an "exceptional case" within the meaning of Article 2 para. 4 of the EIA-directive.⁶⁵ Furthermore, the Court held that the objective of security of electricity/energy supply constitutes an imperative reason of overriding public interest⁶⁶ within the meaning of Article 6 para. 4 of the Habitat-directive.⁶⁷ The rapporteur would therefore subscribe to the wide definition of the term of energy security submitted by Cenevska, who points to the overriding importance of this objective, a risk of energy shortage should be both reasonably probable and sufficiently urgent for the exception mentioned above to work as intended.⁶⁸

Moving away from a situation of immediate shortage, there undoubtedly is a need to have measures in place, which do not leave substantial portions of the population deprived of energy. Furthermore, from a general perspective, it may be useful to transpose insights from the process of promoting and mandating renewable energy sources throughout the EU to the challenges at hand: Solorio and Jörgens point to adaptational pressures which may lead to a contestation of or non-compliance with Europeanization, and then to concerns with high electricity prices, costly infrastructure investments and the competitiveness of domestic industries.⁶⁹

⁶⁴ European Union, Court of Justice, Case C-411/17 *Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL v. Council of Ministers*, 29 July 2019. ECLI: EU: C: 2019: 622.

⁶⁵ European Union, Parliament and Council, Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment (codification), OJ L 26, 2012, p. 1.

⁶⁶ European Union, Court of Justice, Case C-411/17 *Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL v. Council of Ministers*, 29 July 2019. ECLI: EU: C: 2019: 622, para. 155; please see also Theodoros G. Iliopoulos and Daan Bijmens, 'Fear of the Dark? The CJEU adds electricity shortage to the reasons justifying an ex post regularization of projects without an EIA', *Maastricht Journal of European and Comparative Law*, vol. 27, no. 1, 2020, p. 120.

⁶⁷ European Union, Council, Directive 92/43/EEA on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 1992, p. 7.

⁶⁸ Iliana Cenevska, 'Environmental Protection meets Security of Energy Supply – Case C-411/17 *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministres, Court of Justice of the European Union*', *Transnational Environmental Law*, vol. 10, no. 2, 2021, pp. 365, 374.

⁶⁹ Israel Solorio and Helge Jörgens, 'Contested energy transition? Europeanization and authority turns in EU renewable energy policy', *Journal of European Integration*, vol. 42, no.1, pp. 77, 84–86.

In a broader perspective, the set of policies laid down in “Fit for 55”⁷⁰ and “REPowerEU”⁷¹ are strategically identical, with the main differentiation that “REPowerEU” could be deemed a reaction to the war raging in Ukraine and the subsequent disentanglement of European gas and petroleum supply from suppliers within or under the control of the Russian Federation; “REPowerEU” thus has as its primary policy aim the rapid reduction of dependency on Russian hydrocarbons, and second, to secure long-term flow of sustainable, affordable and secure supply of fossil fuels and – preferably – renewable energy to European markets.⁷² By necessity, the second goal entails the acceleration of transition to renewable energy sources and overlaps with the policies advocated for in “Fitfor55.” The “REPowerEU”-plan also contains explicit references to the principle of solidarity, which, in the context at hand, is not a normative one, but rather political and aspirational.⁷³

Very early, Austrian unions have publicly drawn attention to societal challenges posed by the energy transition, arguing that EU climate policies have hitherto overlooked the social dimension of the process.⁷⁴ Austria has transmitted the National Energy and Climate Plan 2021–2030 on to the European Commission, and last updated the NECP on 20th August 2024.⁷⁵ The NECP contains substantial measures to mitigate social consequences of the transition process and aims to reach the goal of inclusion of all societal groups and “leaving no one behind.”⁷⁶ A portion of the NECP is devoted to the social and economic context of the energy transition and the strategies employed by the federal government and the governments of the constituent states (German Bundesländer). Federally adopted measures target initial and continuing

⁷⁰ Consilium. General Secretariat of the Council, the body of staff responsible for assisting the Council of the EU and the European Council, 2024, <https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55/>. Accessed 29 Aug. 2024.

⁷¹ European Commission, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repower-eu-affordable-secure-and-sustainable-energy-europe_en. Accessed 29 Aug. 2024.

⁷² Leigh Hancher and Adrien de Hauteclocque, ‘Strategic Autonomy, REPowerEU and the Internal Market: Untying the Knot’, *CMLR*, vol 61, no 1, 2024, pp. 55, 63.

⁷³ Cf. also: Kaisa Huhta and Leonie Reins, ‘Solidarity in European Union Law and Its Application in the energy Sector’, *ICLQ*, vol. 72, no. 3, 2023, pp. 771, 783.

⁷⁴ Consequently, economically deprived household would have to shoulder an increase of transportation costs amounting to 373,- Euro and an increase of heating costs of 429,- Euro per year (Österreichischer Gewerkschaftsbund, <https://www.oegb.at/der-oegb/europabuero-und-eu/2021/eu-vernachlaessigt-in-der-klimapolitik-soziale-massnahmen>, Accessed 29 Aug. 2024.)

⁷⁵ Bundesministerium für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie (BMK), https://www.bmk.gv.at/themen/klima_umwelt/klimaschutz/nat_klimapolitik/energie_klimaplan.html. Accessed 29 Aug. 2024.

⁷⁶ Bundesministerium für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie (BMK), Integrierter nationaler Energie-und Klimaplan für Österreich: Aktualisierung gemäß Artikel 14 der Verordnung (EU) 2018/1999 des Europäischen Parlaments und des Rates über das Governance-System für die Energieunion und für den Klimaschutz, 30 Aug. 2024, p. 14. https://www.bmk.gv.at/themen/klima_umwelt/klimaschutz/nat_klimapolitik/energie_klimaplan.html. Accessed 29 Aug. 2024.

professional training and active labour market policy, whereas the constituent states have a broad competence to enact further measures aiming at reducing the inequalities tied to the transition to clean energy. The Austrian Just Transition Plan (JTP) has been adopted by the European Commission on 3rd August 2022,⁷⁷ identifying the Austrian JTP-region consisting of specific areas in four provinces.⁷⁸ Specific projects are already under way.⁷⁹

Finally, a recent reform of taxation, the “Öko-Soziale Steuerreform” is deemed to facilitate a just transition from fossil fuels to clean energy.⁸⁰

3. Relationship to other treaty provisions

Projects of “common interest” identified under Article 171 para. 1 TFEU constitute an important field of application of the principle of solidarity; while projects related to energy infrastructure in general and projects related to remedying to energy bottlenecks in particular are, unsurprisingly, primary examples for projects of mutual interest, it is submitted that the interests of the Member States involved as well as those of all Member States and the Union as a whole, must be taken into account.⁸¹ Following the definition of the principle of solidarity suggested above, the rapporteur would not argue that “common interest” would constitute a pre-determined category which necessarily fulfils the interests articulated by all Member States involved.

Article 192 para. 2 litt. c enables the Council to act unanimously with a special legislative procedure and consultative requirements to enact measures which significantly affect a Member State’s choice between different energy sources and the general structure of its energy policy. In the view of the rapporteur, both from a legal and a factual point of view, a Member State’s right to determine the conditions for exploiting its energy resources and its choice between different energy sources and the general structure of its energy supply cannot be viewed as a right or competence which may prevail absolutely. Drawing on the arguments presented above, Article 192 para. 2 litt. C TFEU should be viewed either as a superfluous legal norm or as an exception to be made use of in extremely rare circumstances: the first alternative relates to a general choice, such as the choice to ban coal as a source of energy within a Member

⁷⁷ European Commission, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4862. Accessed 29 Aug. 2024.

⁷⁸ Austrian JTP-region: Carinthia, Lower Austria, Upper Austria, Styria.

⁷⁹ ÖIR, <https://www.oir.at/en/project/just-transition-plan-austria-2021-2027-case-studies-to-assess-the-effects-by-the-transition-processes-towards-a-climate-neutral-economy/>. Accessed 29 Aug. 2024.

⁸⁰ Veronika Marhold et al., ‘Klimagerechtigkeit in Österreich’, *Juridikum*, vol. 1, 2022, p. 106.

⁸¹ Christian Calliess, ‘Kommentar zu Article 171 AEUV’, in: *Kommentar zu EUV und AEUV mit Europäischer Grundrechtecharta*, edited by Christian Calliess and Matthias Ruffert, Verlag C.H. Beck München, 2022, pp. 1789–1790, para. 10.

State, or again nuclear energy. The second alternative would represent a legal, immediate and definitive intervention in the general structure of energy supply of a Member State.⁸² Thus, the field of application is to be deemed as an extremely narrow one, as emergency measures have recently been based on Article 122 TFEU and have potential to be based on it in the future.

4. External competence

The *OTIF* judgement⁸³ is undoubtedly one of the most relevant cases in the field of external competence of the EU in recent years; nonetheless, it may be useful to recall some of its factually defining features as well as the main holdings of the Court: The Council of the EU adopted Decision 2014/699/EU,⁸⁴ which establishes the EU's position regarding amendments to the COTIF convention at the 25th session of the OTIF Revision Committee, while the Republic of Germany and the Republic of France contested the legality of the aforementioned decision, by referring to the principle of conferral laid down in Article 5 para. 2 TFEU.

The Court emphasized that the principle of conferral, though to be respected, does not necessarily apply to the present case.⁸⁵ The provision which is going to form the basis of this judgement, and thus the one to be taken into account is Article 216(1) TFEU. Article 216 TFEU stipulates that the Union possesses competence to conclude agreements with third countries or international organizations in four alternatives, among others that the agreement must be “necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties.”⁸⁶ Thus, the Council's Decision 2014/699/EU aims to establish the EU's position at the OTIF convention and falls within the scope of the common transport policy.

The rapporteur holds a critical view of the *OTIF* judgement, and in particular, of the holding related to grating the EU competence in the external field without the necessity of having exercised a given competence internally. This

⁸² Wolfgang Kahl, ‘Kommentar zu Article 192 AEUV’, *EUV/AEUV Kommentar*, edited by Rudolf Streinz, Verlag C.H. Beck München, 2018, para. 34.

⁸³ European Union, Court of Justice, Case C-600/14 *Germany et al. v. Council*, 5 Dec. 2017. ECLI:EU:C:2017:935.

⁸⁴ European Union, Council, Council Decision 2014/699/EU establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments of the Convention concerning International Carriage by Rail (COTIF), OJ L 293, 2014, p. 26

⁸⁵ European Union, Court of Justice, Case C-600/14 *Germany et al. v. Council*, 5 Dec. 2017. ECLI:EU:C:2017:935. para. 44.

⁸⁶ European Union, Court of Justice, Case C-600/14 *Germany et al. v. Council*, 5 Dec. 2017. ECLI:EU:C:2017:935. para. 45.

conclusion endangers the value of democracy, the democratic legitimacy of the EU's decision-making process and the system of checks and balances of the European constitution itself, so that a high amount of caution is to be exercised in this field.⁸⁷

Energy policy in general is strongly intertwined with Member States' societies, economies and – finally, (national) security policies. National security, however, remains, according to Article 4 para. 2 TEU, the sole responsibility of Member States. Finally, it may be useful to extend the already presented reflections to the constitutional build-up of the Union, both at the “federal” level and the Member States' level, so as to allow for a decision-making process that is both democratic and accountable.

Section III: The EU's crisis management in the field of energy and its limits

In a broad perspective, it is safe to assume that the EU's crisis management involves a number of actors: It involves via Article 122 TFEU the Union itself, then the common foreign and security policy in a coordinated fashion, markets and media, foreign allies and adversaries, and finally the source or instigator of the crisis. In the view of the rapporteur, Article 122 TFEU offers an excellent tool to deal with a disruptive economic situation, severe difficulties of supply, and finally with any other kind of difficulties or serious threats with such. Article 122 TFEU contains one of the earliest expressions of the principle of solidarity in EU law.⁸⁸

Thus, it is very true that a legislative response to (almost) any kind of crisis may be cumbersome and sometimes slow; this is especially true for the EU, which, as a substantially federal entity, has to take into account interests of peoples (represented within the European Parliament) and of Member States (represented within the Council). From the point of view of comparative constitutional law, however, it is mainly and substantially the duty of the executive branch of government (and, consequently, not of the legislative branch) to respond to a situation of crisis.

Taking into account the specificities of the Union's constitutional arrangements, it falls within the competence to the European Council (and the Commission) within the wide scope of executive competences, to formulate

⁸⁷ For an overview of the judgement's critical reception: Monika Niedźwiedź, 'Case C-600/14 Germany v. Council (OTIF)', *Polish Review of International and European Law*, vol. 8, no. 2, 2019, pp. 141, 161. Niedźwiedź argues that the OTIF judgement does not do away with “mixity,” since this is one of the features of the system of governance of the EU.

⁸⁸ Clemens Richter, 'Commentary to Article 122 TFEU', *European Union Treaties – A Commentary*, edited by Rudolf Geiger et al., pp. 585–586.

and implement an adequate response. The rapporteur would suggest that this approach matches the approach of Member States' constitutions, which, in turn, usually grant emergency competences to the executive branch of government with a certain amount of consultation of representatives of the legislative branch. Finally, the approach suggested would conform with and respect the "fundamental structures" of the Member States as enshrined in Article 4 para. 2 TEU.

BELGIUM

*Frederik Vandendriessche**
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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

(i) *General*

It seems useful to start by defining the terms “energy solidarity” and “energy security,” or at least what we understand them to mean.

Energy solidarity could be broadly described as follows:

Energy solidarity is the expression of mutual assistance between states when one of them faces a critical energy supply disruption; it extends to deeper energy cooperation when states decide to pool their energy resources, and integrate their energy systems.¹

Energy security is an evolving concept, and its scope is expanding and has not reached a universal definition. However, energy security is emerging as a cornerstone of energy policies and frameworks around the world, and a widely accepted definition of energy security is based on the notion of an uninterrupted energy supply. The energy becomes secure when a country has energy reserve, balanced supply and demand, and balanced energy trade.²

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¹ C. Banet, ‘Legal mechanisms to ensure energy solidarity in international and EU law’, in: C. M. Bailliet, *Research Handbook on International Solidarity and the Law*, UK: Edward Elgar Publishing, 2024, pp. 399–420.

² T. R. Bajracharya, S. R. Shakya and A. Sharma, ‘Dynamics of energy security and its implications’, in: M. Asif (ed.), *Handbook of Energy and Environmental Security*, Academic Press, 2022, pp. 13–25.

In this paper we understand and apply this concept at the level of states, in particular Belgium. “Internal” energy solidarity measures (e.g. energy poverty) are currently not the subject of this paper.

We can say with certainty that the concepts of energy solidarity and energy security, as already approximately defined, are not part of the Belgian Constitution.

Throughout the Belgian Electricity Act of 29 April 1999,³ the concept of security of supply appears at some places. For example, the government is required by this Act to carry out a prospective study to assess the security of electricity supply. In addition, the government must monitor the country’s security of supply situation on an ongoing basis, in particular with a view of the following winter period. Also, the Federal Energy Regulator (CREG) should monitor investments in generation and storage capacity from a security of supply perspective.

The concept of energy solidarity is not reflected in the Belgian Electricity Act.

(ii) *Case law*

a. *A lifetime extension of nuclear power plants and security of supply*

The concept of “security of supply” seems to return from time to time in Belgian case law. We discuss hereunder the two most prominent set of cases that relate to the concepts of security of supply.

A first good example is the appeal for annulment brought before the Constitutional Court against the Act of 28 June 2015⁴ concerning the extension of the operating lives of the nuclear power plants Doel 1 and 2. By preliminary ruling of 22 June 2017,⁵ the Constitutional Court referred nine preliminary questions to the Court of Justice concerning the interpretation and application of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

³ Act of 29 April 1999 on the organisation of the electricity market, *Belgian State Gazette* 11 May 1999.

⁴ Act of 28 June 2015 amending the Act of 31 January 2003 on the gradual exit from nuclear energy for industrial electricity production with a view to ensuring security of supply in the field of energy, *Belgian State Gazette* 6 July 2015.

⁵ Constitutional Court 22 June 2017, no. 82/2017.

In particular, the Constitutional Court asks whether the provisions of the above-mentioned conventions and directives apply to the extension of the operating life of Doel 1 and Doel 2 (nuclear power plants) and, if so, whether security of supply constitutes an overriding reason in the general interest justifying their non-application. The Court also asked whether, if the treaties and directives were applicable and if security of supply could not constitute an overriding reason in the general interest justifying a derogation from the obligations, the effects of the Act of 28 June 2015 could be maintained in order to avoid legal uncertainty.

The ECJ ruled⁶ that the project required a cross-border environmental impact assessment under Directive 2011/92/EU. This assessment should have been carried out prior to the adoption of the Law of 28 June 2015. An exemption can only be granted if it can be shown that there is a reasonable likelihood of a risk to security of supply and that the project is urgent.

According to the Court, the Habitats Directive must also be interpreted in the same way and an appropriate assessment is also required.

As regards the maintenance of legal effects, the Court states that EU law does not preclude assessments from being carried out by way of regularisation. In addition, EU law must be interpreted as meaning that a national court may, if national law so permits, exceptionally maintain the effects of a measure where that measure is justified by overriding reasons relating to the need to avoid serious and real risks to security of supply which cannot be dealt with by other means and alternatives. Such enforcement may not last longer than strictly necessary.

Following the preliminary ruling of the Court of Justice, the Constitutional Court, in its judgment of 5 March 2020 No 34/2020, annulled the Law of 28 June 2015 on the grounds that it violated the principle of equality and the right to protection of a healthy environment, in conjunction with the Habitats Directive (92/43/EEC)⁷ and the EIA Directive (2011/92/EU).⁸ The Constitutional Court ruled that the Law of 28 June 2015 and the works necessary to carry out the life extension (the “LTO works”) “together constitute one and the same ‘project’ within the meaning of the first indent of Article 1(2)(a) of Directive 2011/92/EU.”⁹ An EIA with transboundary consultation is therefore required,

⁶ ECJ 29 July 2019, nr. C-411/17.

⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *Pb.L.* 22 July 1992, no. 206, 0007-0050.

⁸ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, *Pb.L.* 28 January 2012, nr. 26, pp. 1–22.

⁹ Constitutional Court 22 June 2017, no. 82/2017, B.18.2.

covering both the life extension and the inextricably linked LTO works. However, in view of the real and serious risk to security of supply, the effects of the above-mentioned Act have been maintained until 31 December 2022. Such maintenance of the effects should give the Belgian State the opportunity to remedy the unconstitutionality established and to prepare a preliminary environmental impact assessment with cross-border public consultation.

Other judgments of the Constitutional Court¹⁰ have often referred to this case law.

b. Gas transmission pipelines and security of supply

In a series of cases before the Council of State, the licence granted to Fluxys (the Belgian gas transmission system operator) to build gas transmission pipelines on private land in the territory of several municipalities was challenged. The Council of State rejected the appeals, taking into account, *inter alia*, the following references to the concept of elements of the security of electricity supply:

[...] Considering that the statement of reasons for the contested Royal Decree sufficiently explains why the gas transmission pipeline which it declares to be in the public interest is in the public interest; in that it states that it is intended to supply a power station whose output will be fed back into the national grid for the benefit of the entire community and will therefore contribute to increasing *the country's electricity supply*; in that it relies in that regard on various documents in the file which show, in particular, that, following the grant of the only licence for the construction and operation of the Marchienne-au-Pont TGV unit, S.A. MARCINELLE ENERGIE, at the instigation of its majority shareholder, ENEL TRADE S.P.A., has redirected the activities of this TGV unit towards the exclusive supply of electricity to consumers in the region; that this reasoning is also based on studies carried out by neutral parties specialised in this field; a CREG study of 27 September 2007 entitled "On the undercapacity of electricity production in Belgium" shows that the project in question makes it possible to limit the risk of a shortage of electricity in Belgium between 2010 and 2012, without, however, reducing it to a level considered acceptable; furthermore, the final report of the GEMIX group of 30 September 2009 entitled "What is the ideal energy mix for Belgium in 2020 and 2030?" Also included in the file is the GEMIX group's final report of September 2009 entitled "What is the ideal energy mix for Belgium in 2020 and 2030?," which highlights a worsening of the shortage of electricity production capacity in Belgium by 2020, taking into account the commissioning of the S.A. MARCINELLE ENERGIE power plant. MARCINELLE ENERGIE; that these documents show that it is in the general interest to *ensure sufficient electricity production capacity at na-*

¹⁰ Constitutional Court 25 February 2021, no. 30/2021; Constitutional Court 14 October 2021, no. 141/2021.

tional level, which must be increased in relation to current production capacity and changes in demand in order to guarantee a constant supply at reasonable prices; that the public utility of the planned pipeline is therefore justified by the public utility nature of the electricity production unit which it is intended to supply; [...] ¹¹ [emphasis added]

The concept of “energy solidarity” does not yet seem to be reflected in the case law of the Belgian courts.

Question 4

For relevant case law, see Question 1 (ii).

For the purpose of this question, we will furthermore look at two very concrete examples where the concept of “security of supply” have been central, namely (i) the extension of nuclear power plants and (ii) the capacity remuneration mechanism (hereafter ‘CRM’).

(i) *Nuclear power plants*

Belgium currently has seven nuclear units: four units at the Doel (Flanders) nuclear power plant and three units at the Tihange (Wallonia) nuclear power plant. In 2003, after a long parliamentary debate, the Nuclear Decommissioning Act¹² was adopted. The original Act was limited in scope and consisted of ten articles regulating three aspects. First, it stipulated that no new nuclear power plant for industrial electricity generation could be built and/or put into operation. Second, it stipulated that existing power plants should be decommissioned 40 years after industrial operation. Thirdly, it provided that in the event of a threat to the security of electricity supply, the King could, after consulting the CREG (federal regulatory authority), take the necessary measures by decree, after consultation with the Council of Ministers. The CREG’s opinion must relate to the impact of the evolution of production prices on security of supply.

Much of the parliamentary and public debate concerned the impact of the closure of nuclear power plants on security of supply. The issue of security of supply continues to dominate the debate and, 20 years after the law was passed, has already led to the life extension of the three oldest nuclear units, which were the first to be closed. In 2022, the complete phase-out of nuclear power in 2025 came under fire again. On 31 October 2021, the federal govern-

¹¹ Council of State 27 March 2014, nr. 226.902; Council of State 27 March 2014, nr. 226.904; Council of State 26 June 2014, nr. 227.913; Council of State 26 June 2014, nr. 227.914.

¹² Act of 31 January 2003 phasing out nuclear energy for industrial production, *Belgian State Gazette* 28 February 2003.

ment was informed of the evaluation report of the Directorate-General for Energy, which included the results of the CRM auction (see (ii)).¹³ According to this report, security of supply for 2025–2026 would be guaranteed if all the capacities selected in the CRM auction were available. The two new gas power plants (Awirs and Vilvoorde) were considered essential in the context of this evaluation.

At the end of December 2021, in view of the uncertain licensing path for the two new CRM gas plants, the Directorate-General for Energy of the Federal Public Service Economy and the Federal Agency for Nuclear Control (hereafter ‘FANC’) were asked to carry out an analysis of the extension of the life of Doel 4 and Tihange 3, including the so-called activation of Plan B.¹⁴ According to the analysis of the Directorate-General for Energy and the Federal Public Service Economy, the long-term extension of the life of Doel 4 and Tihange 3, including the so-called activation of Plan B, was not feasible. According to both bodies, the long-term decommissioning of Doel 4 and Tihange 3 is possible under the following conditions, which must be fulfilled in chronological order: (i) the government decides in favour of the long-term exploitation of Doel 4 and Tihange 3, (ii) Engie Electrabel is willing to make the necessary investments, and (iii) the FANC considers that safe operation is technically and legally possible.

On 18 March 2022, the federal government announced that it would nevertheless take the necessary steps to extend the life of the Doel 4 and Tihange 3 reactors until 2035.¹⁵ By extending the operation of the youngest nuclear reactors by 10 years,¹⁶ the federal government aims to ensure *energy security* beyond 2025. To this end, a law¹⁷ amending the law of 31 January 2003 on the phasing-out of nuclear energy for industrial electricity production was adopted on 11 October 2022. The purpose of this law is to authorise the operation of the Doel 4 and Tihange 3 nuclear reactors for the next 10 years, taking into account the results of the environmental impact assessment, the public consultation, the consultation of the competent authorities and the cross-border consultations.

¹³ See AD Energy Administration evaluation report: *First CRM auction: evaluation report on security of supply and impact on electricity prices*, 30 November 2021, accessible at <https://economie.fgov.be/sites/default/files/Files/Energy/Report-in-supply-security-affordability-and-sustainability.pdf>

¹⁴ See FANC, ‘Listing and analysis of necessary actions for activation Plan B. Long-term Operation Doel 4 & Tihange 3’, 17 January 2022, pp. 1–13, consultable at https://fanc.fgov.be/nl/system/files/2022-01-17_fanc-report_action-points_lto_d4_t3_en.pdf

¹⁵ It concerns an extension of 2 GW of nuclear capacity.

¹⁶ Also called Long Term Operation or LTO. This abbreviation is usually used as a reference for a project to extend the life of a nuclear reactor.

¹⁷ Act of 11 October 2022 amending the Act of 31 January 2003 on the phasing-out of nuclear energy for industrial electricity production, *Belgian State Gazette* 3 November 2022.

On 9 January 2023, the federal government and ENGIE Electrabel signed a head of terms agreement providing for the restart of the Doel 4 and Tihange 3 nuclear power plants by November 2026 in order to maintain a nuclear generation capacity of 2 gigawatts for another 10 years. Following interim steps on 29 June 2023 (“Updated Head of Terms”) and 21 July 2023 (“Framework Agreement”), this led to a binding agreement on 13 December 2023¹⁸ to extend the operating life of the nuclear reactors concerned. The main elements of this agreement are contained in the Act of 26 April 2024 amending the Act of 31 January 2003 on the gradual phasing-out of nuclear energy for industrial electricity production.¹⁹

(ii) *CRM*

Another example of legislation based on the concept of “security of supply” is the already mentioned CRM legislation. The main purpose of the CRM is to facilitate the phase-out of nuclear power. Indeed, the planned closure of nuclear power plants by the end of 2025 requires a significant amount of additional generation capacity, which is mainly expected to come from the construction of new (flexible) gas-fired power plants. The CRM should make investment in such gas-fired power plants (as well as in other forms of flexibility) attractive again.

The introduction of the CRM was already announced in the Interfederal Energy Pact of 11 December 2017 (p. 9): “During the nuclear phase-out period (2022-2025), a support mechanism will be introduced. Its objective is to facilitate the construction or extension of the operation of gas-fired power plants with a total capacity in the order of 5 GW (excluding cogeneration).” The principle of the CRM was finally adopted by the Act of 22 April 2019.²⁰ The Act of 15 March 2021 gave the CRM its final form in Article 7 *undecies* of the Electricity Act of 29 April 1999.

The CRM is based on a system of “reliability options.” Specifically, two types of subsidy tenders are organised: one four years before the planned delivery year (T-4) “to give suppliers of new capacity sufficient time to participate and compete effectively with other capacity” and one year before (T-1) “to refine sufficient capacity.”²¹ The main criterion is the need for subsidy of the candidate capacity suppliers. The selected capacity suppliers conclude a capacity contract with the transmission system operator. Under this contract, the

¹⁸ See: <https://economie.fgov.be/nl/themas/energie/bronnen-en-dragers-van-energie/kernenergie/verlenging-van-de-levensduur>

¹⁹ *Belgian State Gazette* 5 June 2024.

²⁰ Act 22 April 2019 amending the Act of 29 April 1999 on the organisation of the electricity market to establish a capacity compensation mechanism, *Belgian State Gazette* 16 May 2019.

²¹ *Parl.St.* Kamer 2018-19, nr. 54-3584/001, 25.

selected capacity supplier is entitled to a fixed fee per MW per year (determined by the outcome of the tender). In addition, the capacity supplier in question will also receive income from the sale of the electricity it produces on the regular market. The duration of the capacity contract (and thus the fixed annual fee) depends on whether or not certain investment thresholds are reached.

However, the essential feature of a system based on reliability options is the capacity provider's repayment obligation if the day-ahead market price for electricity ("reference price") rises above a predetermined strike price, in order to avoid windfall profits. This repayment obligation applies whether or not the electricity was actually produced and sold by the capacity provider. In particular, this creates a natural incentive for the capacity supplier to produce when the market price is high (implying high demand) and thus contribute to security of supply.

Section II: Energy solidarity, energy security and green transition

Question 4

The Just Transition Fund is the first pillar of the Just Transition Mechanism. The Commission provides support to Member States having identified the territories expected to be the most negatively impacted by the transition towards climate-neutrality. The Just Transition Fund supports the economic diversification and reconversion of the territories concerned. This means (i) up- and reskilling of workers, (ii) investments in Small and Medium-sized Enterprises, (iii) creation of new firms, (iv) research and innovation, (v) environmental rehabilitation, (vi) clean energy, (vii) job-search assistance, (viii) transformation of existing carbon-intensive installations.

This EU funding only supported Wallonia, one of the three Belgian regions, to transition away from fossil fuels and heavy industry. Flanders and Brussels did not receive any funding.²² The European Commission has set a number of criteria to determine which regions are eligible for money from the Transition Fund. One of the criteria takes into account the carbon emissions of industry, but also the "gross value added" of that industry. Based upon these criteria, it was decided that Wallonia would receive the available funds.

²² European Commission, 'EU Cohesion Policy: Almost €183 million for a just climate transition in Belgium', 21 December 2022, https://ec.europa.eu/regional_policy/whats-new/newsroom/21-12-2022-eu-cohesion-policy-almost-eur183-million-for-a-just-climate-transition-in-belgium_en#:~:text=The%20Commission%20has%20adopted%20the,a%20fair%20climate%20transition%20in

Tournai, Mons, and Charleroi will receive JTF support to move towards clean energy production, namely by the replacement of fossil fuels by renewable hydrogen and biomethane.²³ As much as €40 million will be dedicated to renewable energy, and about €68 million to energy efficiency. Decarbonisation of the regional industry will also be supported, with grants to co-finance investments for their economic reconversion and the purchase of related high-performing technological materials. It will also contribute to the decontamination of former industrial sites, which will then be suitable for new economic settlements while also avoiding further soil consumption. Furthermore, the Fund will allocate around €14 million for research and innovation activities.

Section III: The EU's crisis management in the field of energy and its limits

In response to the energy crisis, in 2022, the EU has significantly enhanced its legal toolbox of crisis management measures. In particular, Article 122(1) TFEU has become one of the most widely used legal bases ensuring the Union's reactivity and resilience. **Did the use of this legal basis raise any concerns or reaction in the legal order in your Member State?**

An annulment appeal was filed before the Belgian Constitutional Court against the law 16 December 2022 “establishing a temporary solidarity contribution by the oil sector.”²⁴ This law introduces a temporary solidarity contribution for 1) registered petroleum companies operating in the refining sector and having refining capacity in Belgium, and 2) registered petroleum companies designated as primary participants for diesel, gas oil and petrol products in the year 2022. With this solidarity contribution, the legislator wants the energy companies that have benefited from excess profits due to the energy crisis and price increases since the beginning of 2022 to contribute, and this in support of households suffering from the consequences of the crisis and facing high prices. With the temporary solidarity contribution, the legislator aims to partially implement Regulation (EU) 2022/1854,²⁵ which was based on Article 122(1) TFEU.

Before ruling on the substance of the remaining pleas of the applicants, the Court considers it necessary to refer nine questions to the Court of Justice of the European Union (C-358/24) for a preliminary ruling.

²³ See the full list of projects: <https://europe.wallonie.be/sites/default/files/2024-01/Liste%20projets%20FTJ.pdf>

²⁴ *Belgian State Gazette* 22 December 2022.

²⁵ Council Regulation (EU) 2022/1854 of 6 October 2022 “on emergency intervention in response to high energy prices.”

The Constitutional Court first questions the Court of Justice of the European Union on the validity of the provisions of Regulation (EU) 2022/1854 relating to the temporary solidarity contribution, in so far as they were adopted on the basis of Article 122(1) of the Treaty on the Functioning of the European Union, which empowers the Council to adopt measures appropriate to the economic situation (first preliminary question).

If those provisions of Regulation (EU) 2022/1854 are valid, the Court then wishes to know whether the temporary solidarity contribution introduced by the Law of 16 December 2022 constitutes an “equivalent national measure” within the meaning of Regulation (EU) 2022/1854 (second question referred for a preliminary ruling). In the event of an affirmative answer to the first two questions referred for a preliminary ruling, the Court asks three questions concerning the conformity of provisions of Regulation (EU) 2022/1854 with primary European Union law. Specifically, the Court wishes to know whether the Regulation:

- infringes the principle of equality and non-discrimination (Articles 20 and 21 of the Charter of Fundamental Rights of the European Union) in so far as it permits the adoption of a national measure applicable both to registered petroleum companies operating in the crude oil and refining sectors and in the distribution sector and to the extent that it permits the adoption of a national measure applicable to the registered oil companies designated as primary participants in the year 2022 for diesel, gas oil and petrol products, while that measure does not apply to non-primary participants, to primary participants for other product categories, such as lamp oil and paraffin, nor to the companies operating in the coal and natural gas sectors (third preliminary question);
- the freedom to choose an occupation and the right to work, the freedom to conduct a business, the right to property (Articles 15, 16 and 17 of the Charter of Fundamental Rights of the European Union) as well as the freedom of establishment and the free movement of services (Articles 49 and 56 of the Treaty on the Functioning of the European Union), in so far as it authorises a national measure which fixes the amount of the temporary solidarity contribution on the basis of a flat-rate amount per cubic metre of products released for consumption between 1 January 2022 and 31 December 2023 (seventh preliminary question);
- infringes the general principle of legal certainty and the non-retroactivity of laws by allowing the amount of the contribution to be calculated on the products released for consumption between 1 January 2022 and 31 December 2023, whereas the regulation and the law did not enter into force until 8 October 2022 and 22 December 2022 respectively (eighth preliminary question).

In addition, the Court asks whether the temporary solidarity contribution from the law of 16 December 2022:

- constitutes a prohibited tax of equivalent effect to a customs duty (fourth preliminary question);
- constitutes a discriminatory domestic tax (fifth preliminary question);
- constitutes new state aid that had to be notified to the European Commission (sixth preliminary question).

Finally, the Court asks whether it could definitively uphold the effects of the law if, on the basis of the answers provided by the Court of Justice of the European Union, it were to conclude that the contested law violates European law in order to avoid budgetary difficulties and enable the objectives of Regulation (EU) 2022/1854 to be achieved (ninth preliminary question).

BULGARIA

*Oleg Temnikov**

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

Under Bulgarian law, the concept of energy solidarity is rather still developing at the moment and it is primarily rooted in EU law and the European Union's energy policy framework, and the need for a secure, sustainable, and integrated energy market. Thus, the concept of energy solidarity derives from and follows essentially EU law and its respective local implementation.

Energy security (including security of supply), on the other hand, is much deeply embedded in Bulgarian law. Energy security is a fundamental concern for Bulgaria, given its historical dependency on a limited number of energy sources, particularly natural gas. The local legislation¹ thus tries to incentivize and prioritize diversification of energy sources and suppliers to enhance security of supply. In particular, the Bulgarian National Energy Strategy² outlines objectives for energy security, including increasing energy efficiency, promoting renewable energy, and developing interconnections with other countries to mitigate risks associated with supply disruptions. As to the regulatory framework, under Bulgarian law, the Energy and Water Regulatory Commission (EWRC) plays a key role in ensuring that energy security measures are enforced. This includes monitoring supply contracts, overseeing market operations, and establishing regulations that foster a competitive energy market. Bulgarian law also includes provisions for crisis management in the energy sector.

However, both energy solidarity and energy security are not yet recognized as forming part of the national constitutional framework. Although the Con-

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¹ For example, the Energy Act (*Закон за енергетиката*), which explicitly provides that energy security is among the objectives of the Act (Article 2, para. 1, item 2).

² The Energy Strategy of the Republic of Bulgaria to 2020 for reliable, efficient and cleaner energy (*ЕНЕРГИЙНА СТРАТЕГИЯ НА РЕПУБЛИКА БЪЛГАРИЯ ДО 2020 Г. За надеждна, ефективна и по-чиста енергетика*), adopted by a Decision of the National Assembly of the Republic of Bulgaria of 1.06.2011 on the adoption of the Energy Strategy of the Republic of Bulgaria until 2020, Published in Official Journal issue No. 43 of 7.06.2011; amended and supplemented, issue No. 101 of 7.12.2018.

stitutional Court had the opportunity to comment on these principles,³ they were predominantly addressed in the light of EU law and obligations arising out of it.

Similarly, the case law of ordinary courts (administrative jurisdictions and civil/commercial jurisdictions) tend to focus on the specific provisions of Bulgarian law than on the general principles in this respect, identified by the CJEU.

Question 2

As elaborated in detail in the answers to Question 1, Bulgarian courts have not yet had the occasion and/or adopted the approach to use the EU law principle of energy solidarity and the objective of energy security in a particularly conceptualized manner, but rather as isolated references to specific provisions of EU law and/or local laws. This may be due to, on the one hand, the particularly technical natures of proceedings usually pending in front of Bulgarian courts, as well as on the understanding that both the principle of energy solidarity and the objective of energy security are rather political notions than legal principles.

In my personal view, energy solidarity and energy security shall be viewed, nowadays, as essential building blocks of the Union's legislative and constitutional frameworks, and thus, be applied both in the internal and external context.

Question 3

The recent developments in EU energy policy outline numerous tensions between energy solidarity and other objectives such as Sustainability, Affordability and Security. These tensions are inherent to the energy policy of the Union, but they could be wisely reconciled through strategic planning, investment in diversified energy sources, and financial support mechanisms. From legal perspective, however, their reconciliation seems more problematic and conceptual. Energy solidarity has the potential to drive legal effects that support the green transition, ensuring cooperation among Member States. Integrating social and fundamental rights dimensions into energy policies may reinforce the commitment to a just and equitable energy transition for all EU citizens.

³ Ruling No. 6 of 11.05.2023 of the Constitutional Court of the Republic of Bulgaria in case No. 3/2023 (on the competence of the Constitutional Court to rule on issues in the field of nuclear energy).

Question 4

In Bulgaria, cross-border and bilateral tensions regarding energy projects have occurred in the context of supply crises (notably in relation to Russian natural gas supply) and environmental aspects of the development of nuclear projects. However, these occasions have been addressed mainly politically, without particularly remarking intervention of the judiciary.

Question 5

Balancing solidarity and proportionality in EU energy law is a particularly complex challenge, and the approach taken can significantly impact how effectively energy policy is implemented across diverse Member States and how EU Energy Union will develop and function. From Bulgarian perspective, while a common denominator could provide important baseline protections and could potentially promote EU cohesion, it is even more crucial to account for the divergences between Member States in terms of energy needs, economic capacities, and geopolitical factors. This is particularly relevant for newer Member States and/or Member States with dependence from external powers. In this respect, a balanced approach allowing flexibility and tailored implementation within a common framework seems to be the most effective way to achieve both solidarity and proportionality in EU energy law. This would ensure that all Member States can contribute to and benefit from collective energy goals while addressing their unique challenges and circumstances.

Question 6

Definitely, the development of the different objective and goals of EU energy policy leads to a shift towards a predominant exercise of the competence by the EU. The nature of the Union (being constituted by a relatively large number of smaller states) and the nature of the energy sector (implying physical and local considerations) imply that the energy policies of Members States will be more and more interlinked and, in this respect, susceptible to coordination by the EU. As in any other area of collaboration, as potential tensions may arise, political and legal principles seem to be the only way to ensure fair, efficient and durable collaboration.

Question 7

The concept of security in EU energy law as well as under Bulgarian domestic law is multi-faceted, encompassing different concerns like supply reliability,

market stability, environmental sustainability, geopolitical considerations, other regulatory frameworks (e.g. competition, data protection etc.), consumer protection, and technological resilience. These components should be coordinated to work together to create a comprehensive approach to energy security, addressing both current challenges and future needs in an evolving energy landscape.

One of the major challenges in front of EU law is how to design its principles and legal framework to address specificities of Member States. This is particularly relevant in the Energy sector, where both interests and challenges are quite variate across the Union. This is visible even in the context of the understanding of the scope of security of supply, which as evidenced by recent developments, is understood differently across Member States, including to encompass also new concepts like cyber security or risk resilience.

Question 8

It seems most practical to consider this question from the perspective that energy solidarity implies all Member States to seek common grounds for their respective external projects, including such based on security of supply considerations. The divergences in priority and interests of particular Members States have shown that the only viable solution is to seek a common approach, on EU level. From legal perspective, this would inevitably imply increased EU action instead of local competencies.

Question 9

From Bulgarian perspective, the recent challenges arising out of the Russian aggression in Ukraine seem to have shown that the current EU energy policy set-up was quite effective in terms of security of supply (since substitute gas deliveries were insured), but quite inefficient in terms of solidarity and market efficiency.

Section II: Energy solidarity, energy security and green transition

Question 1

The interplay between energy solidarity and the EU's goal of climate neutrality by 2050 is a complex issue, particularly given the significant economic and political differences among Member States. From the perspective of newer Member States, especially such which economies have been widely exposed to the energy influence of external powers, it seems that the energy solidarity is exactly one of the tools to mitigate potential catastrophic effects on national

economies, arising out of the climate neutrality objective. Energy solidarity can and should be relied upon to ensure coherence in the EU's transition to a climate-neutral economy.

Question 2

The adoption of the “Fit for 55” measures has particularly affected Member States with more fossil fuels dependent energy sectors, such as Bulgaria. Bulgaria faces challenges in transposing the revised EU directives into national law, particularly in aligning its energy policies with the ambitious targets set out in “Fit for 55.” This requires significant legislative changes and resource allocation, in particular in the context of phasing-out coal generation. The need to balance environmental objectives with energy security concerns has led to debates in Bulgaria about the pace of transition. Stakeholders have expressed concerns regarding the economic impacts of rapid shifts away from fossil fuels, especially in regions reliant on coal.

Question 3

Definitely, the “do no significant harm” principle will play a central role in the future of the energy sector across Member States.

Under Bulgarian law, the principle of “do no significant harm” is perceived in several legal areas. Most importantly, in the field of Environmental Protection the legislation emphasizes the need for environmental assessments (EIA) and strategic environmental assessments (SEA) for projects that may significantly affect the environment. The goal is to ensure that development projects do not cause significant harm to the environment. Similar considerations are provided for in the biodiversity protection, which aligns with the “do no significant harm” principle by requiring that any projects impacting natural habitats undergo thorough assessments to ensure they do not significantly harm protected areas or species.

Question 4

The European Green Deal and related policies emphasize the need for a just transition, which includes support for regions and sectors that will face significant economic changes due to the shift to renewable energy. However, it seems that the practical application of these policies is still questionable. In particular, as it concerns the CEE, many have felt threatened, or at least adversely affected by this transition.

Under Bulgarian law, the concept of energy security does encompass social components, particularly concerning access to affordable energy. The government's energy policies acknowledge the need to protect vulnerable populations from energy poverty, ensuring that all citizens have reliable and affordable access to energy. In this respect, various National strategies incorporate measures aimed at addressing energy poverty, such as subsidies for low-income households and programs that promote energy efficiency improvements in homes.

As it concerns the Just Transition Fund, because of the local political crisis and inability to adopt the territorial plans, Bulgarian is among the less benefitting jurisdictions. Inevitably, this has increased the distrust in the initiative by stakeholders.

Question 5

In my view, there is potential for energy solidarity scrutiny within the state aid procedures under Article 106 TFEU, particularly in light of collective EU goals related to energy security and sustainability. Obviously, state aid measures that promote cross-border cooperation, enhance renewable energy deployment, or address social equity can be reconciled with the concept of energy solidarity. However, this would require establishing clear criteria, ensuring transparency, and involving stakeholders.

Question 6

The relationship between Articles 170–172 TFEU and Article 194 TFEU is characterized by a shared commitment to fostering interconnected and efficient energy infrastructure while ensuring energy security and sustainability. The concepts of energy solidarity and projects of common interest are closely intertwined, in particular in the CEE and newly joined Member States in view of their needs to reinforce collective security and cooperation among Member States.

Question 7

The decarbonization and security of energy supply are interlinked and of major importance for their efficient implementation. Efforts to decrease fossil fuel reliance are essential for enhancing energy security at the EU level, as they lead to greater diversification and resilience of energy systems.

However, in particular from the perspective of CEE Member States, a careful and strategic approach is necessary to conduct the transition, ensuring that the shift to renewable energy sources is managed in a way that maintains supply stability and affordability, but at the same time does not risk creating greater dependence towards other international players (e.g. China). The EU's policy frameworks should be further improved to address these challenges.

Question 8

The relationship between Article 192(2)(c) TFEU and Article 194 TFEU could be viewed as a balance between Member States' autonomy in determining their energy mix and the need for compliance with EU environmental and energy policy objectives. While there are limits to this freedom, particularly as EU laws evolve to address climate change and energy solidarity, Member States still retain significant margins to manage their energy resources. The ongoing challenge will be to navigate these dynamics in a way that respects both national sovereignty and collective European goals. This topic is particularly sensitive for Member States like Bulgaria, where the shift would imply affecting major local nuclear and coal capabilities, which have been perceived by the public opinion as the current guarantors of energy security.

Question 9

In line with EU law, Bulgaria has implemented several legal and policy frameworks to address climate change and guide its energy mix towards more sustainable sources. Bulgaria's National Climate Strategy outlines the country's commitments and actions to reduce greenhouse gas emissions and enhance resilience to climate change impacts. It serves as a guiding document for integrating climate considerations into energy policies.

The Energy Act and the Renewable Energy Sources Act establish the legal framework for the development and integration of renewable energy sources (RES) into Bulgaria's energy mix. These acts provide different incentives for investments in RES, however they have substantially modified during the years.

Several other legal tools are also relevant in this respect, such as Environmental Protection Act and respective secondary legislation, the National Strategy for Energy Efficiency etc.

Question 10

After the Russian invasion of Ukraine, it seems that the EU will have to act even more actively as a key player in term of external energy policy.

Question 11

One of the primary goals of REPowerEU is to reduce reliance on a single source of energy. For Bulgaria, this means actively seeking alternative energy suppliers and routes in order to avoid Russian influence and dependence. In this context, Bulgaria has sought funding from REPowerEU to finance reforms in its energy sector. This includes investments aimed at increasing energy efficiency, expanding renewable energy capacity, and modernizing energy infrastructure. Although overall REPowerEU was poised to have a positive and transformative impact on Bulgaria's energy landscape, until now the practical implementation of the selected projects were substantially delayed.

Section III: The EU's crisis management in the field of energy and its limits

Question 1

In my view, while Article 122 TFEU offers the necessary speed for immediate crisis management, Article 194 TFEU provides a comprehensive legal basis for a coherent and sustainable energy policy. A combined approach that leverages the strengths of both articles can enhance the EU's ability to respond effectively to energy crises while ensuring alignment with long-term energy goals. This strategy would support both immediate needs and the overarching aim of building a resilient and sustainable energy system across the Union.

Question 2

While Article 122 TFEU provides an efficient tool for immediate crisis management in energy supply, it is limited by its scope, the temporary nature of measures, and potential legal challenges related to alignment with national legislation. Thus, it could be efficient for short-term responses but may not be sufficient for addressing long-term energy security challenges. A balanced approach that incorporates both immediate crisis measures and long-term strategic planning, as provided by Article 194 TFEU, is essential for ensuring a resilient energy system. In Bulgarian contexts, legal uncertainties and alignment issues highlight the importance of careful implementation and

coordination between EU and national legal frameworks in order to ensure long-term solutions, less affected by temporary political or international relations' considerations.

Question 3

While the current legal frameworks provides some useful tools for managing energy crises, they may not be sufficiently efficient to handle the complexities of climate change-related challenges, including natural disasters. Exploring Article 222 TFEU could be an opportunity to enhance the EU's crisis management capabilities by fostering greater integration between civil protection measures and energy security responses. However, this approach would require, most likely, evolution in policy and CJEU case law.

CROATIA

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

The concepts of energy solidarity and energy security are absent from the Croatian constitutional framework. The Constitution of the Republic of Croatia does not address these notions, but speaks more broadly of national security in general. In addition, the Constitutional Court has not yet voiced its views on the matter. Moreover, the issues of energy solidarity and energy security have not yet been addressed in the national jurisprudence.¹

Question 2

Unlike the rule of law, which is a value expressly listed in Article 2 TEU, energy solidarity is not mentioned in the Treaties as such, but has been declared by the Court as a “specific expression” of the fundamental principle of solidarity in EU law. By recognizing energy solidarity as a principle of EU law, the Court has elevated it to the status of primary law, that is, of the same legal force as the Treaties.

It seems that energy solidarity should primarily be viewed as a corrective tool which sets limits to national sovereignty in the field of energy. It is a principle aimed to address asymmetric risks that Member States face in relation to security of energy supply, due to their differing geographic, economic and social circumstances. This principle limits their national sovereignty and requires them to consider interests of other Member States and of the EU as a whole when making policy choices in the energy sector. Nevertheless, it would be difficult to equate the status of the principle of energy solidarity with the rule

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¹ Search of the Supreme Court’s database and the IUS-INFO search engine have not revealed any national jurisprudence on the notions of “energy solidarity” and “energy security.”

of law conditionality. Rule of law as interpreted by the Court has outgrown the clear boundaries of the scope of application of EU law and has been applied in areas traditionally governed by Member States, when their actions can jeopardize the rule of law, due to the significance of this principle for the EU legal order. The principle of energy solidarity is, due to its very nature, closely linked to the energy sector and can therefore hardly have such broad application out of the context of this sector.

Question 3

As the Court of Justice emphasized in its judgment in *OPAL*, the principle of solidarity “forms the basis of all of the objectives of the European Union’s energy policy, serving as the thread that brings them together and gives them coherence.”² Generally speaking, it is not unthinkable that different objectives of the EU’s energy policy listed in Article 194 TFEU can come in conflict with one another. Short-term security of supply for a Member State which is heavily reliant on gas as an energy source might not align with the urgent need to transition away from fossil fuels. The principle of energy solidarity aims to bridge this divide by taking into account different needs and capacities of different Member States. However, further clarifications regarding its implementation is required after the *OPAL* case.³

Solidarity as a principle rests upon the social aspects of policy choices and therefore makes their assessment relevant at the EU level. The EU has striven to integrate the social aspects of its energy policy into its legal framework as it has adopted measures to facilitate the green transition for the most vulnerable citizens, regions and Member States, such as the Just Transition Fund (JTF), the Modernization Fund and legislation to address energy poverty.

Question 4

Two instances come to mind regarding this question – the case of the planned hydroelectric plant at the source of the Una River, and the recent political back-and-forth between Croatia, Hungary and Slovakia regarding oil transport.

The Una is a river shared by Croatia and Bosnia and Herzegovina. In 2015, a private investor received a location and building permit from the Zadar County to build a small-scale hydroelectric near the source of the said river.

² Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598, p. 43.

³ Same in Mykola Iakovenko, ‘Case C-848/19 P: *Germany v Poland* and its outcomes for EU energy sector: an extended case note on the European Court of Justice judgment in the *OPAL* case’, *Journal of World Energy Law and Business*, 2021, 14, pp. 436–446, p. 446.

The issuing of the permits went unnoticed until 2024, when the investor began preparatory works for the construction of the power plant. Local environmental protection organizations (Zelena akcija, Greenpeace Croatia, WWF Adria) and residents began to protest the construction on site, and they demanded for the issued permits to be revoked due to environmental destruction of the surroundings and the river. There was an international dimension to this, due to the river being shared with Bosnia and Herzegovina. After a lengthy back-and-forth between competent authorities, the Croatian State Inspectorate stopped the construction because the effect of the proposed construction on the surrounding area was not established prior to the issuing of the location and building permits.⁴

The second example has no direct ecological ramifications but is a good example of the concept of energy security and solidarity being invoked with other Member States. In July 2024, Ukraine stopped the transport of crude oil from Russia through Ukraine to Slovakia and Hungary. This was a significant blow to the energy security of both Hungary and Slovakia, who complained to the European Commission about this development.⁵ Croatia offered the services of the Adriatic Pipeline (Jadranski naftovod – JANAF Plc.), which has the ability to compensate the Hungarian and Slovakian deficit.⁶ Slovakia and Hungary were sceptical regarding the Croatian offer due to perceived unaffordable prices of oil transport through the JANAF pipeline, but even the Vice-President of the European Commission Valdis Dombrovkis endorsed this solution.⁷ The resolution of this energy problem is still pending.

Question 5

Given the vast differences between the Member States' energy mix, as well as their economic, geographical and social circumstances, EU's energy policy does not strive to achieve complete harmonization and unification. Instead, it is built upon taking those differences into account when, for example, setting the rules for the implementation of the EU's renewable energy target. It would therefore seem counterintuitive to set a common denominator for assessing the proper balance between solidarity and proportionality in all Member States. Despite the fact that a uniform benchmark offers benefits such as legal

⁴ Index, 'Zabranjena izgradnja hidroelektrane na Uni', 2024, <https://www.index.hr/vijesti/clanak/zabranjena-izgradnja-hidroelektrane-na-uni/2591672.aspx>, accessed 4 Sept. 2024.

⁵ Tportal, 'Slovačka i Mađarska krajnje sumnjičave prema ponudi nepouzdanе Hrvatske', 2024, <https://www.tportal.hr/vijesti/clanak/slovačka-i-mađarska-krajnje-sumnjicave-prema-ponudi-nepouzdanе-hrvatske-20240802>, accessed 5 Sept. 2024.

⁶ Ibid.

⁷ Poslovni dnevnik, Siniša Malus, 'I Dombrovkis podržao opskrbu preko Janafa: "Članice su se već pitale..."', 2024, <https://www.poslovni.hr/hrvatska/i-dombrovkis-podrzao-opskrbu-preko-janafa-clanice-su-se-vec-pitale-4452114>, accessed 5 Sept. 2024.

certainty and predictability, it would most likely not achieve equality of treatment because all Member States are not in a comparable situation. Taking into account divergences between Member States therefore seems to be a more appropriate solution.

Question 6

The intensity of the shared competence between the European Union (EU) and its Member States in the field of energy, pursuant to Article 4(2)(i) TFEU, has evolved significantly with the deepening integration of the EU. The growing complexity of the energy sector, particularly the realities of an interconnected grid, cross-border energy flows, and the increasing importance of energy security, has prompted a more predominant exercise of competence by the EU in practice. The Court has played a key role in interpreting the scope of EU competence in the energy field, particularly through the development of the principle of energy solidarity. This principle is encapsulated in Article 194 TFEU, which refers to the need to ensure the functioning of the energy market, security of energy supply, promotion of energy efficiency and renewable energy sources, and the promotion of interconnection of energy networks.⁸ In 2021, the Court issued its highly anticipated ruling in the *OPAL* case. This case was significant as the Court was tasked with determining whether the principle of energy solidarity, as recognized by the General Court in its September 2019 judgment, would be upheld as a principle of EU primary law. The General Court took a stance, asserting that the principle of energy solidarity is a principle of EU law. It found that the Commission had breached this principle, and thereby Union law, by neglecting to consider Poland's energy security concerns when assessing the amendment to the *OPAL* exemption.⁹ Germany subsequently appealed this ruling. Advocate General Campos Sánchez-Bordona in his March 2021 Opinion reinforced the General Court opinion that energy solidarity is a justiciable principle that “entails rights and obligations both for the European Union and for the Member States.”¹⁰

The Court in its ruling confirmed the position of the General Court suggesting that the objectives of Article 194 cannot be fully achieved at the national level alone and offer more precise guidance on the content of the principle. The interpretation suggests that although the TFEU refers only to a “spirit of solidarity between Member States,” the solidarity obligation actually encom-

⁸ Article 194 TFEU.

⁹ Case T-883/16 *Poland v European Commission*, ECLI:EU:T:2019:567, para. 83.

¹⁰ Case T-883/16 *Poland v European Commission*, ECLI:EU:T:2019:567, para. 70, see more in: Javad Keypour, Mariana Dutra Trindade, and Maria Terletska, ‘Reassessing EU Energy Solidarity: Legal Implications and Challenges in the Aftermath of the CJEU’s Final Decision in the *OPAL* Case C-848/19 P’, *European Studies – The Review of European Law, Economics and Politics*, vol. 10, no. 2, 2023, pp. 78–97, <https://doi.org/10.2478/eustu-2023-0013>

passes both a horizontal dimension (between Member States) and a vertical dimension (between Member States and the Union). In light of the case at hand, the Court primarily concentrated on the vertical aspect, affirming that “acts adopted by EU institutions, including those by the Commission under that policy, must be interpreted and their legality evaluated in light of the principle of energy solidarity.”¹¹ The Court clearly asserts that energy solidarity extends beyond the specific energy security issues of the case, applying to all the objectives outlined in Article 194(1) of the TFEU, while emphasizing that solidarity serves as “the thread that unites [these objectives] and provides them with coherence.”¹²

Energy solidarity, as interpreted by the Court, suggests a shared responsibility among Member States to ensure energy security across the Union. Using the example of electricity market, where interconnected grids necessitate coordination at the EU level to maintain system stability, prevent blackouts, and ensure efficient use of resources it is obvious that the Court has underscored the need for cooperation and mutual assistance among Member States, especially in times of crisis, reinforcing the notion of “energy solidarity.” We must acknowledge that there is a growing need for coordinated EU-level action to ensure that the energy market operates efficiently and that all Member States benefit from secure and sustainable energy supplies.

The “spirit of solidarity between Member States” in Article 194 TFEU, particularly in the context of energy security and in accordance with the Court jurisprudence must be considered as a binding principle that goes beyond mere moral obligation. The principle implies that Member States must take into account the interests of the Union as a whole when formulating their national energy policies. This not only includes avoiding actions that would jeopardize the energy security of other Member States but also entails a duty to cooperate in achieving common objectives, such as decarbonization and the transition to renewable energy sources. The principle of solidarity thus becomes a legal and normative framework through which Member States’ energy policies are aligned with the broader objectives of the Union, contributing to the progressive centralization of energy governance at the EU level.

Question 7

The concept of “security” in the field of EU energy law, particularly in the context of the crisis following Russia’s war of aggression against Ukraine, has

¹¹ Case C-848/19 P – *Germany v Poland* ECLI:EU:C:2021:598 , para. 44

¹² *Ibid.*, para. 43; Anatole Boute, “The Principle of Solidarity and the Geopolitics of Energy: *Poland v. Commission* (OPAL Pipeline)”, *Common Market Law Review*, vol. 57, 2020, pp. 898–914.

broadened to encompass several critical components. These include not only the traditional concerns around the security of energy supply but also the growing importance of cyber resilience and preparedness against potential cyber threats, particularly those targeting critical energy infrastructure.

Given the increasing reliance on digital and interconnected energy systems, resilience must address not only physical security threats but also cyber vulnerabilities. The introduction of EU directives, such as the NIS2 Directive, reflects the urgency of enhancing cybersecurity across Member States. This directive expands the scope of cybersecurity measures to cover a wide range of sectors and services critical to the functioning of the EU's internal market, including energy. It mandates a systematic approach to managing cyber risks, ensuring that both key and essential entities adopt sufficient protective measures.¹³ Additionally, energy security now includes safeguarding against potential disruptions caused by geopolitical conflicts, as seen in the energy crisis triggered by Russia's actions.

Croatia's response to the evolving concept of energy security, especially in the context of increased cyber threats and geopolitical tensions, aligns with the broader EU framework, as reflected in the Law on Cybersecurity. Croatia has recognized the importance of safeguarding critical infrastructure, including the energy sector, through legislative and organizational reforms designed to enhance cybersecurity and resilience. The Croatian law reflects the urgency of implementing the EU's NIS2 Directive, which mandates stronger cybersecurity measures across Member States. This law emphasizes the protection of critical infrastructure, including energy networks, from cyber incidents that could cause cascading effects across sectors. Specifically, Croatia is focusing on establishing a regulatory framework that addresses both technical and organizational aspects of cybersecurity, ensuring that energy systems are resilient against a wide range of threats, including those stemming from cyberattacks.

A central element of Croatia's response is the planned establishment of a National Cybersecurity Center under the Security-Intelligence Agency (SOA). This center will coordinate cybersecurity efforts across critical sectors, including energy, and will be responsible for managing large-scale cyber incidents.¹⁴ The SK@UT system, already in place, further highlights Croatia's proactive stance. This national system is designed to detect advanced cyber threats and protect critical infrastructure, with a particular emphasis on the energy and transportation

¹³ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance).

¹⁴ Article 63, Law on Cybersecurity, Official Gazette 14/24.

sectors.¹⁵ Croatia's approach also involves a coordinated effort at the national level to align with EU-wide cybersecurity initiatives. This includes participating in the EU-CyCLONE network, which facilitates crisis management in the event of large-scale cyber incidents across the EU.¹⁶ By integrating these national efforts with broader EU strategies, Croatia aims to bolster its preparedness and resilience against threats to its energy security, while ensuring that its response is consistent with the constitutional, economic, and geopolitical specificities of the country. We can conclude that Croatia's legislative and operational efforts demonstrate a commitment to strengthening its energy security through enhanced cybersecurity measures, aligning with EU directives and taking into account the increasing digitalization of energy infrastructure.

Question 8

The principle of energy solidarity within the EU, as enshrined in Articles 122 and 194 of the Treaty on the Functioning of the European Union (TFEU), significantly shapes the Union's external energy policy, particularly in relation to projects of common interest. This principle creates a legal obligation for both the Union and its Member States to ensure that national energy policies and actions do not undermine the security of supply for other Member States, thereby reinforcing the EU's unity in external energy relations.¹⁷

Energy solidarity, in essence, requires pooling of energy sovereignty, where Member States align their national interests with the broader goals of the Union. This alignment is crucial in external energy policy, especially concerning the EU's strategy to diversify supply routes and reduce dependence on single suppliers, notably Russia. The recent energy crisis, triggered by Russia's 2022 invasion of Ukraine, demonstrated the importance of energy solidarity in practice. By jointly implementing sanctions and coordinating gas purchases, the EU exemplified how solidarity can act as a binding force in its external relations, mitigating risks associated with energy dependency and geopolitical manipulation.¹⁸

The EU's external competence in energy has been shaped by the need to balance national sovereignty with collective security. In the case of projects of common interest, such as cross-border energy infrastructure, the principle

¹⁵ See: <https://www.skaut.hr/>, accessed 12 Sep. 2024.

¹⁶ Article 61, Law on Cybersecurity, Official Gazette 14/24.

¹⁷ Kaisa Huhta, Leonie Reins, 'Solidarity in European Union Law and Its Application in the Energy Sector'. *International and Comparative Law Quarterly*, vol. 72, 2023, pp. 771–791.

¹⁸ Michael Carnegie LaBelle, 'Breaking the Era of Energy Interdependence in Europe: A Multidimensional Reframing of Energy Security, Sovereignty, and Solidarity', *Energy Strategy Reviews*, vol. 52, 2024, article 101314.

of energy solidarity ensures that decisions are made with a view to strengthening the Union's overall security of supply. This was evident in the case of the Nord Stream 2 pipeline, where energy solidarity concerns led to legal challenges and policy shifts that prioritized the security of the Union as a whole over individual Member States' interests.¹⁹

The relationship between energy solidarity and energy security in external relations is complex. Solidarity ensures that energy security is not merely a matter of individual Member States' policies but is instead embedded within a broader framework of mutual support and common interests. This approach enhances the EU's ability to act cohesively in its external energy dealings, ensuring that the Union is not vulnerable to external threats due to the energy dependencies of individual states.²⁰ Energy solidarity not only influences the EU's internal energy policies but also extends to its external relations, shaping how the Union engages with third countries to secure energy supplies. Energy solidarity has to be instrument in enabling the EU to exercise its external competence in energy, promoting projects that enhance security of supply while reducing dependence on single suppliers. The experience of recent energy crises underscores the necessity of this approach, as it fosters resilience and collective action in the face of external energy threats.

Question 9

The effects of energy security extend beyond the physical realm to encompass geopolitical, social, political, and economic dimensions, meaning that this expansive view of energy security goes beyond the traditional framework of the availability, affordability, accessibility, and acceptability.²¹ The current state of gas security supply in the EU, analysed through the example of the gas market, reveals a complex governance model shaped by shared responsibilities between Member States and the Union. The primary framework ensuring the security of gas supply is set out in Regulation (EU) 2022/1032, which emphasizes obligations for companies, Member States, and the EU authorities, with provisions for solidarity mechanisms and early warning systems.²² However, while the Union has advanced strategies like the Energy Union to enhance collective energy security, actual responsibility for supply security remains largely

¹⁹ Matúš Mišík, Andrej Nosko, 'Each One for Themselves: Exploring the Energy Security Paradox of the European Union', *Energy Research & Social Science*, vol. 99, 2023, article 103074, <https://doi.org/10.1016/j.erss.2023.103074>

²⁰ Tomas Maltby, 'European Union Energy Policy Integration: A Case of European Commission Policy Entrepreneurship and Increasing Supranationalism', *Energy Policy*, vol. 55, 2013, pp. 435–444.

²¹ Daniel K. Jonsson, Bengt Johansson, André Månsson, Lars J. Nilsson, Måns Nilsson, and Hannes Sonnsjö, 'Energy Security Matters in the EU Energy Roadmap', *Energy Strategy Reviews*, vol. 6, 2015, pp. 48–56.

²² 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.

in the hands of individual Member States. This fragmentation is evident in the EU's approach to gas supply, where Member States have been left to develop their own responses to disruptions, as highlighted by the recent energy crisis following Russia's invasion of Ukraine.²³

The case of Croatia offers a significant example of how a Member State can leverage shared responsibility to enhance energy security in the EU, particularly through the use of Floating Storage Regasification Units (FSRUs). Croatia, recognizing the need to reduce its dependence on Russian gas, established an LNG terminal on the Island of Krk, which began operations in 2021. This FSRU facility has a capacity of 2.6 bcm, playing a crucial role in diversifying energy sources for both Croatia and the wider Balkan region²⁴

Croatia's proactive approach not only increased its own energy security but also positioned it as a key regional supplier, facilitating gas supply to countries like Slovenia, Hungary, and Serbia.²⁵ In response to the Russian invasion of Ukraine, Croatia further expanded the capacity of the Krk terminal to 6.1 bcm, ensuring a stronger energy buffer for the region.²⁶ This development demonstrates how shared responsibility in the EU's gas security model can be effective when individual Member States take decisive steps in line with broader Union strategies. Thus, Croatia's experience exemplifies how national initiatives, aligned with EU frameworks, can strengthen the Union's collective energy security while highlighting the need for other Member States to adopt similar forward-thinking measures.

Finally we must emphasize that the Regulation (EU) 222/1032 introduces a default solidarity mechanism to address potential supply crises in individual Member States. This mechanism can be activated when a Member State experiences a severe gas shortage that endangers essential services, such as electricity supply, and is unable to meet the gas needs of its "protected customers" or maintain the necessary volumes for electricity security, even after implementing the crisis measures under Regulation 2017/1938. Additionally, Member States with LNG facilities are included in the solidarity obligations, expanding

²³ Tina Soliman Hunter, 'War-Induced Energy Insecurity in Europe: What Role for Liquefied Natural Gas After Russia's Invasion of Ukraine?', *The Journal of World Energy Law & Business*, vol. 17, no. 1, Feb. 2024, pp. 54–68, p. 58.

²⁴ Bankwatch Network, 'The Energy Sector in Croatia' (2020), <https://bankwatch.org/beyond-fossil-fuels/the-energy-sector-in-croatia>, accessed 12 Sep. 2024.

²⁵ Ivan Smalja et al., 'Potential of Croatian Liquefied Natural Gas (LNG) Terminal in Supplying Regional Natural Gas Markets', *Rudarsko-geolosko-naftni zbornik i autori (The Mining-Geology-Petroleum Engineering Bulletin)*, 2020, pp. 93–101, p. 95.

²⁶ Stuart Elliott, 'Croatia to Expand Capacity of Floating LNG Import Terminal to 6.1 bcm/year: PM', <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/natural-gas/062122-croatia-to-expand-capacity-of-floating-lng-import-terminal-to-61-bcmyear-pm>, accessed 12 Sep. 2024.

the support network available during a crisis.²⁷ In conclusion, a more integrated approach, granting the Union greater authority in strategic planning and crisis management, could help address the evolving energy landscape and geopolitical challenges. Such an evolution does not necessarily require a complete centralization of power but rather a more cohesive system that better balances national sovereignty with the collective security interests of the Union.

Section II: Energy solidarity, energy security and green transition

Question 1

The 2050 climate neutrality objective has been firmly set in the Climate Change Law as the legally binding target for the EU's green transition. Ever since the adoption of the Green Deal and the "Fit for 55" package, the EU's climate neutrality objective has become a foundation for comprehensive legislative changes throughout almost all sectors of EU law in order for its achievement to be operationalised. Given that the climate neutrality objective represents the cornerstone of all EU's environmental policies, which should in accordance with Article 11 TFEU be integrated into all other EU's policies, the climate neutrality objective also influences energy policy. Having in mind that fossil fuel resources are relatively scarce on the territory of the EU in relation to EU's energy needs, energy security goals of the EU overlap with its environmental goals and the increased use of renewable energy sources.

When looking at EU's renewable energy legislation, energy solidarity can be identified as the underlying principle on the basis of which the entire system is organized. The Renewable Energy Directive gives liberty to Member States to set their own national contributions in line with their national circumstances, in order to reach the overall EU's renewable energy target. This solution reflects the principle of solidarity and acknowledges that not all the Member States have equal potential for renewable energy generation.

Should the principles of energy security and energy solidarity come in conflict with the EU's climate neutrality objective in a situation in which they would require increased use of fossil fuels, the proportionality analysis would have to be performed. Given the overarching importance of the climate neutrality objective in the EU's legal framework and the requirements of Article 11 TFEU, it is to be expected that it strong preference should be given to its prevalence.²⁸

²⁷ Alberto Vecchio, 'Changing the Flow: The European Response to the Russian Weaponization of Gas', *European Papers*, vol. 9, no. 1, 15 Apr. 2024, pp. 39–52.

²⁸ For a view on possible convergence between energy solidarity and climate solidarity, see Dirk

Question 2

The “Fit for 55” legislative package has had a profound impact on the development and application of energy law in Croatia. Despite significant effort which has been put into the implementation of the relevant EU legislation, several challenges are still present. Apart from the regional issues involving energy security and energy solidarity which have been described above, it is also worth mentioning Croatia’s internal difficulties in reaching its renewable energy targets which are the result of its legislative framework. Croatian law places heavy administrative burden upon renewable energy projects. Furthermore, the national regulator (HERA) has significantly postponed the adoption of the decision on the amount of the unit fee for connecting to the grid, which prevents new renewable energy projects from entering the market and thereby reduces Croatia’s energy security.²⁹

Question 3

Article 11 TFEU mandates that “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.” In the energy sector, Article 194 TFEU states that EU’s energy policy shall be developed “in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment.” The “do no significant harm” principle (DNSH), developed in EU secondary law requires that EU financial mechanisms such as the Next Generation EU or the Just Transition Fund are used to finance only those projects which are in line with this principle. In other words, the standard of environmental protection imposed by EU secondary legislation is potentially much higher than the one imposed by the Treaty. Perhaps some further guidance on the scope of the DNSH principle will be shed by the Court in some of the currently pending cases, such as T-215/23 and T-625/22. Undeniably, the DNSH principle has a significant impact on the energy sector, especially in regard to infrastructure projects, energy efficiency improvements and the choice of energy sources.

In Croatian legal framework, there is no autonomous principle which would correspond to the DNSH principle under EU law.

Buschle, Kim Talus, ‘One for All and All for One? The General Court Ruling in the OPAL Case’, *Oil, Gas & Energy Law Intelligence*, 2019, Vol. 17, issue 5, p. 11.

²⁹ RES Croatia, ‘Can Parliament unblock the development of renewable energy sources (RES) in Croatia?’, <https://oie.hr/en/moze-li-hrvatski-sabor-odblokirati-razvoj-oie-u-hrvatskoj/>, accessed 5 Nov. 2024.

Question 4

Croatia's Integrated National Energy and Climate Plan for the period 2021–2030 does not address energy poverty in the context of energy security, but in the context of the internal market. However, Croatia has implemented social support schemes to assist with electricity, gas, and household costs for citizens suffering from energy poverty. Nevertheless, energy poverty still remains a pressing issue, especially in the elderly population.

Regarding the financing under the Just Transition Fund, Croatia has been allocated €179 million.³⁰ Due to heavy dependence on greenhouse gas-intensive industries two Croatian counties have been designated as eligible for financing. The Istria County, which hosts a cement factory and the Croatian only coal power plant, Plomin II (scheduled for closure in 2033) is one of them. The other one is the Sisak-Moslavina County, where an oil refinery, a fertilizer company and a steel plant are situated and from which approximately one-fourth of Croatia's emissions originate. Several projects are currently underway which aim to ease the transition to the green economy for the local population employed in those carbon intensive sectors. It has been envisaged that in Istria 200 workers will be re-qualified due to the financing from the JTF and that approximately 300 green jobs will be created.³¹ In Kršan Municipality a project involves the refurbishment and conversion of a former coal separation building into an entrepreneurial and innovation incubator.³² In the Sisak-Moslavina County, a project called the "Vertical Farm – Great Opportunity!" has been established at the Sisak Industrial-Craft School to educate and share techniques with local farmers and to engage younger generations in sustainable farming practices.

Question 5

Even though state aid can be controversial in the context of the energy sector, recent actions and acts by the European Commission, such as the Temporary Crisis and transition Framework,³³ have shown a way forward.

³⁰ Ministry of Regional Development and EU Funds, 'Kohezijska politika Europske unije: Hrvatskoj 179 milijuna eura za pravednu klimatsku tranziciju', <https://razvoj.gov.hr/vijesti/kohezijska-politika-europske-unije-hrvatskoj-179-milijuna-eura-za-pravednu-klimatsku-tranziciju/5105>, accessed 5 Nov. 2024.

³¹ Ibid.

³² Institute for European Energy and Climate Policy, 'Just Transition workshop: hearing the citizens of Croatia', https://ieecp.org/2023/07/25/just-transition-workshop-hearing-the-citizens-of-croatia/?utm_source=chatgpt.com, accessed 5 Nov. 2024.

³³ Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ C 101 17.3.2023, p. 3.

A good example is the European Commission decision from October 2023 to approve the €2.5 billion Czech scheme to help manufacturing companies to decarbonize their production processes and improve their energy efficiency to foster the transition to a net-zero economy, in line with the Green Deal Industrial Plan. Companies aiming to reduce greenhouse gas emissions need to either electrify their production processes or switch from the use of fossil fuels to renewable hydrogen or renewable hydrogen-derived fuels to be eligible, and the Commission found that the Czech scheme is in line with the conditions set out in the Temporary Crisis and Transition Framework.³⁴

Question 6

Regulation 2022/869³⁵ is a major step in the right direction regarding setting up trans-European energy infrastructure. It represents a continuation of ideas established in Regulation 347/2013.³⁶ It is emphasized that while projects of common interest in electricity and gas have strongly contributed to security of supply (the infrastructure is now better connected and supply resilience has improved substantially since 2013), in many cases the cross-border cost allocation did not result in reducing the financing gap of the projects, and while the majority of permitting procedures have been shortened – in some cases the process is still long.³⁷ With regard to the accomplishment of energy solidarity goals, Regulation 2022/869 emphasizes the need for energy solidarity in assessment of projects of common interest, enabling investments with a cross-border impact, and when evaluating the eligibility of projects for EU financial assistance – so it can be concluded that energy solidarity is one of the main driving goals of the Regulation.³⁸

³⁴ European Commission, ‘State aid: Commission approves €2.5 billion Czech scheme to support the decarbonisation and energy efficiency of industrial processes to foster the transition to a net-zero economy’, 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4788, accessed 7 Sept. 2024.

³⁵ Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013, PE/2/2022/REV/1, OJ L 152, 3.6.2022, pp. 45–102.

³⁶ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 Text with EEA relevance OJ L 115, 25/04/2013, pp. 39–75.

³⁷ Regulation 2022/869, p. 5.

³⁸ Articles 4, 16 and 18 of Regulation 2022/869.

Question 7

Russia's invasion of Ukraine has clearly proved (at least to those that did not realize it up until that point) that decarbonization is not only an ecological imperative, but also a strategic one. In 2022, the EU imported 62.5% of the energy it consumed,³⁹ most of those imports being fossil fuels. When we consider that a significant amount of fossil fuel imports come from countries with questionable democratic track records – it becomes clear that decarbonization is closely intertwined with security of energy supply.

So, if security of energy supply must be a priority of the EU, neither the EU or any of the Member States has the leeway to abandon any type of non-fossil energy source. Maybe it is time for some Member States, such as Germany, to rethink their nuclear phase-out programs.⁴⁰

Question 8

The relationship between Article 192(2)(c) and Article 194 TFEU was always extremely contentious, and this only increased and became clearer in the last few years. If implemented in a strict sense, Article 192(2)(c) leaves little room for the autonomy of Member States to set their individual energy mix. The fact that Article 194 TFEU allows for the Member States to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of their energy supply means little when the Council has the authority to adopt measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

Question 9

The two most important legal tools with regard to climate related considerations in the context of energy needs are the Environmental Protection Act⁴¹ (EPA) and the Renewable Energy Sources and High-Efficiency Cogeneration Act⁴² (RESHECA). EPA prescribes that energy should be used in a way that

³⁹ Clean Energy Wire, 'Germany, EU remain heavily dependent on imported fossil fuels, 2024', <https://www.cleanenergywire.org/factsheets/germanys-dependence-imported-fossil-fuels>, accessed 7 Sept. 2024.

⁴⁰ Federal Office for the Safety of Nuclear Waste Management, 'The Nuclear Phase-Out in Germany, 2022', https://www.base.bund.de/EN/ns/nuclear-phase-out/nuclear-phase-out_node.html#:~:text=The%20last%20three%20nuclear%20power%20plants%20in%20Germany%20were%20shut,planned%20for%2031%20December%202022, accessed 9 Sept. 2024.

⁴¹ Official Gazette No 80/13, 153/13, 78/15, 12/18, 118/18.

⁴² Official Gazette No 138/2021, 83/2023.

is most beneficial to the environment (Article 3), and explicitly states that one of the goals of environmental protection is rational energy-use and the encouragement of renewable energy use (Article 7). RESHECA establishes the framework for promoting the use of renewable energy in a sustainable manner, regulates the planning and encouragement of the production and consumption of electricity produced in production facilities that use renewable energy sources and high-efficiency cogeneration, determines measures to encourage the production of electricity using renewable energy sources and high-efficiency cogeneration, the implementation of the system for encouraging the production of electricity from renewable energy sources and high-efficiency cogeneration is regulated, as well as financial support for electricity produced from renewable energy sources and high-efficiency cogeneration for own needs (Article 1). The main goal of RESHECA is to promote the production of electricity and heat from renewable energy sources and high-efficiency cogeneration, to promote the production of electricity and heat from renewable energy sources and high-efficiency cogeneration at the point of consumption, to increase the shares in the total final consumption of energy produced from renewable energy sources using incentive mechanisms and regulatory framework for the use of renewable energy sources and high-efficiency cogeneration and to fulfil the objectives of the Republic of Croatia and contribute to the objectives of the European Union in accordance with the international obligations of the European Union for decarbonization (Article 2).

Question 10

The EU holds a shared competence with Member States under Article 194 of the Treaty on the Functioning of the European Union (TFEU). However, recent crises, such as Russia's invasion of Ukraine, have shown that the EU can act decisively under shared competence, even without Member States' explicit actions. This dynamic is particularly illustrated by the EU's unilateral action during the 2022 energy crisis, when it invoked Article 122 TFEU to implement emergency measures. The Council Regulation (EU) 2022/2576 allowed for coordinated gas procurement and a dynamic price cap, even though energy policy typically remains under national control.⁴³

The Court of Justice of the European Union (CJEU) has reinforced this notion through its case law, including the *COTIF* judgment, where the Court ruled that the EU could act autonomously in areas of shared competence when

⁴³ Claudia Wiesner, Michèle Knodt, *The War Against Ukraine and the EU*, Palgrave Macmillan, 2024, p. 146.

necessary to achieve its objectives.⁴⁴ This has provided the legal framework for the EU to take more assertive steps in energy policy, especially in the face of external crises.

Thus, while Member States retain sovereignty over their energy policies, the EU's role in external energy policy, particularly in securing supply, is growing. This expansion, driven by emergency measures under Article 122 TFEU, highlights the evolving nature of EU competence in energy security, where the need for collective action is overriding traditional national prerogatives.

Question 11

Croatia has submitted REPowerEU projects worth €2.9 billion. This includes one new reform, four scaled-up reforms, and five new and three scaled-up investments drawing on existing measures.⁴⁵ Also, this includes three existing investments, including one scaled-up investment, transferred from the original plan.⁴⁶

To finance this increased ambition, Croatia has asked for a share of its Brexit Adjustment Reserve to be transferred to the plan, amounting to €7.2 million. These funds would be added to Croatia's REPowerEU grant of €269 million.

The new reform aims at increasing green skills and competences in the construction sector for non-EU workers, while the scaled-up reforms encourage the uptake of renewable energy sources by introducing a new self-consumption system, envisage new activities contributing to raising citizens' awareness on the green transition and provide additional funds for the development of additional green urban renewal strategies.⁴⁷

The new investments will increase the transmission and distribution capacities of the electricity network, establish a hydrogen-based economy through the North Adriatic Hydrogen Valley, strengthen the use of renewable energy sources in transport and heating, expand the capacity of the LNG Terminal on the Island of Krk and strengthen the gas transmission network towards Slovenia and Hungary. The scaled-up investment aims to support sustainable

⁴⁴ Eleftheria Neframi, 'Article 216(1) TFEU and the Union's Shared External Competence in the Light of Mixity: *Germany v. Council* (COTIF)', *Common Market Law Review*, vol. 56, no. 2, 2019, pp. 489–520

⁴⁵ European Commission, 'Croatia's Recovery and Resilience Plan, 2024', https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/country-pages/croatias-recovery-and-resilience-plan_en#repowereu-measures-in-croatias-plan, accessed 10 Sept. 2024.

⁴⁶ Ibid.

⁴⁷ Ibid.

transport, the energy efficiency and post-earthquake reconstruction of buildings and energy poverty.⁴⁸

The use of REPowerEU funds for hydrocarbon energy projects has been criticized, as Croatia is a part of a small minority of Member States that will use those funds to support fossil fuel projects such as LNG Terminal on the Island of Krk and the strengthening of the gas transmission network towards Slovenia and Hungary.⁴⁹

Section III: The EU's crisis management in the field of energy and its limits

Question 1

See the answer to Question 6, Section I.

Question 2

The recent energy crisis has highlighted the European Union's (EU) energy dependence and the necessity for energy solidarity, especially during periods of crisis. Article 122 of the Treaty on the Functioning of the European Union (TFEU) provides a legal basis for the adoption of crisis management measures within the EU, permitting Member States to enact specific measures in the event of severe difficulties in the supply of energy products. However, there are notable legal and operational limits to this framework, particularly in terms of the duration and scope of measures, the efficiency of emergency instruments, and legal issues within national jurisdictions such as Croatia.

Council Regulation (EU) 2022/1854 aims at addressing the unprecedented surge in energy prices by capping market revenues for energy producers and redistributing excess revenues to mitigate consumer costs.⁵⁰ Regulation (EU) 2022/1854 allows the EU to adopt measures in response to energy supply difficulties and imposes caps on market revenues for energy producers. However, the scope and duration of such measures are inherently limited. For example, the Croatian law implementing Regulation (EU) 2022/1854 specifies that these

⁴⁸ Ibid.

⁴⁹ Rescoop, 'REPowerEU Tracker – Croatia, 2024', <https://www.rescoop.eu/policy/financing-tracker/repowereu-tracker/croatia-repowereu>, accessed 11 Sept. 2024.

⁵⁰ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261, pp. 1–21) and 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, pp. 1–35).

measures apply retroactively from December 2022 to June 2023.⁵¹ In Croatia, the implementation of Regulation (EU) 2022/1854 has faced several legal challenges. The stakeholders have expressed concerns over the retroactive nature of these regulations, arguing that it creates regulatory uncertainty and violates constitutional principles, such as Article 90(4) of the Croatian Constitution,⁵² which prohibits retroactive legislation. From a security of supply perspective, the crisis management instruments under Article 122 TFEU and Regulation (EU) 2022/1854 were more targeted and timely compared to the classic EU energy legislation. The emergency measures directly addressed the immediate price shocks by capping revenues, redistributing funds, and protecting vulnerable consumers. However, these instruments have limitations. For example, in Croatia, the application of these measures to certain market participants, such as intermediaries who do not directly produce energy but facilitate its sale, has been contested. Critics argue that the inclusion of these intermediaries creates unnecessary complications and extends the scope of the regulation beyond its intended limits. According to the stakeholders' opinion, this retroactive application also creates regulatory risks for market participants, particularly those involved in renewable energy projects, who require stable and predictable regulatory environments to secure financing.⁵³

In contrast, classic EU energy legislation, such as the Renewable Energy Directive and the Electricity Market Directive, provides a more stable and predictable framework for ensuring long-term energy security. These directives promote the development of renewable energy sources and the liberalization of energy markets, which are crucial for the EU's long-term energy resilience. However, these measures lack the immediacy required to respond to acute crises, which is where the emergency framework under Article 122 TFEU proves more effective in the short term. Moreover, the Croatian government's decision to impose a revenue cap on certain energy producers has raised questions about fairness and proportionality. Smaller producers and intermediaries have argued that the revenue cap disproportionately affects them, as they do not benefit from economies of scale like larger energy producers. This has led to claims that the regulation violates the principle of proportionality, a core tenet of EU law.⁵⁴

⁵¹ Article 3, Law on the Implementation of Council Regulation (EU) 2022/1854 on emergency intervention to resolve the issue of high energy prices, Official Gazette 71/2023.

⁵² The Constitution of the Republic of Croatia, Official Gazette No. 56/1990 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

⁵³ Results of public consultation with the interested public on Instructions for the implementation of the Law on the implementation of Council Regulation (EU) 2022/1854 on urgent intervention to solve the issue of high energy prices - entities that sell/resell electricity, https://www.hera.hr/hr/docs/2023/savjetovanje-2023-07_01.pdf, accessed 12 Sep. 2024.

⁵⁴ Results of public consultation with the interested public on Instructions for the implementation of the Law on the implementation of Council Regulation (EU) 2022/1854 on urgent intervention to solve the issue of high energy prices - entities that sell/resell electricity, https://www.hera.hr/hr/docs/2023/savjetovanje-2023-07_01.pdf, accessed 12 Sep. 2024.

In conclusion, while energy solidarity and emergency measures under Article 122 TFEU are critical in times of crisis, they are subject to important legal and operational limits. The retroactive application of such measures, the potential for market distortions, and the extension of emergency measures beyond their initial scope all raise significant legal and economic concerns. In Croatia, these issues are particularly pronounced, highlighting the need for careful balancing between crisis management and long-term energy security.

DENMARK

*Bent Ole Gram Mortensen**

About Denmark

The Kingdom of Denmark includes Denmark, Greenland, and the Faroe Islands. This chapter only discusses the legislation in Denmark.

Denmark has 5.9 million inhabitants and an annual (2023) energy consumption of approx. 696 petajoules (PJ)¹ corresponding to a gross energy consumption per inhabitant of 117 gigajoules (GJ). The energy intensity (gross energy consumption/GDP) is 268 GJ/m. DKK.²

The Yom Kippur War in 1973 and the Iranian revolution in 1979 gave rise to oil import problems and a jump in prices. At that time, Danish power plants were primarily oil-based but were now rebuilt for coal, the extraction of hydrocarbons from the Danish part of the North Sea was started, and a series of other energy policy measures was initiated.

It was not until the aftermath of the oil crisis of the 1970s that Denmark got laws on energy supply, first regarding electricity supply,³ then regarding heat supply including gas.⁴ In the same period, Denmark got its first overall energy policy⁵ and a construction law on natural gas supply.

Since then, a number of energy plans have shifted Denmark towards a more diversified energy supply. In the 1970s and 1980s, oil was replaced by coal for electricity production, and the share of combined heat and power production (CHP) was increased.

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¹ 1 PJ = 10¹⁵ joule = 278 gigawatt-hours.

² *Danske nøgletal 2022* [Danish Key Figures 2022]. Danish Energy Agency. Available at: <https://ens.dk/service/statistik-data-noegletal-og-kort/noegletal-og-internationale-indberetninger>, accessed 16 November 2024.

³ Danish Act no. 54 of 25 February 1976 on electricity supply.

⁴ Danish Act no. 258 of 8 June 1979 on heat supply.

⁵ Handelsministeriet [Ministry of Commerce]: Dansk Energipolitik 1976 [Danish Energy Policy 1976]. Expansion of district heating and natural gas for residential heating based on municipal heating planning. Tightened energy standards for buildings and subsidies for e.g. re-insulation of homes, energy inspection, etc.

For a short period of time, Denmark was a net exporter of energy due to the extraction of oil and gas in the Danish part of the North Sea. In recent centuries, Denmark has been dependent on the import of energy. Only in the years 1997 to 2012 was Denmark a net exporter with a peak in 2004 at 155%.⁶ Since then, domestic production of oil and gas has fallen. In general, the Danish fields must be described as mature. As a part of a political agreement of 3 December 2020 it has been decided to end oil and natural gas production in 2050.⁷

In these years, Denmark, like so many other countries, is going through the electrification of large parts of its energy consumption. The share of electric passenger cars is thus increasing sharply, just as the use of electricity for home heating has been increasing, partly in the form of heat pumps, partly in the form of an increased use of large heat pumps in the district heating sector, which is the largest form of heating in Denmark. On 1 January 2022, district heating was the most widespread form of heating for buildings with 55.3%. This is followed by natural gas with 17.7%, oil boilers with 9.6%, electric stoves/electrical panels with 6.0%, and heat pumps with 5.4%.⁸ In the coming years, natural gas and oil boilers will have their share of building heating reduced, which will be taken over by district heating (heat networks) and individual heat pumps.

For some years to come, Denmark will be self-sufficient in natural gas following an upgrade of the installations on the Tyra field in the North Sea. At the same time, natural gas consumption will probably decrease in the future due to the conversion of many homes to other forms of heating. Furthermore, an increasing proportion of the distributed natural gas comes from biogas, which has been upgraded to the calorific value of natural gas from the North Sea. The total degree of energy self-sufficiency in 2022 was 60% and slightly increasing mainly due to increased production of renewable energy. The renewable energy⁹ share of total observed energy consumption was 41.5% in 2022, and the share for electricity supply 81%.¹⁰ These are good numbers for

⁶ *Energy Statistics 2022*. Danish Energy Agency. https://ens.dk/sites/ens.dk/files/Statistik/energy_statistic_2022.pdf, accessed 28 September 2024.

⁷ See: [https://kefm.dk/Media/0/3/Nords%C3%B8aftale%20\(2\).pdf](https://kefm.dk/Media/0/3/Nords%C3%B8aftale%20(2).pdf)

⁸ Statistics Denmark, 'Fjernvarme og naturgas mest udbredt opvarmning [District heating and natural gas most widely used heating]', <https://www.dst.dk/da/Statistik/nyheder-analyser-publ/nyt/NytHtml?cid=37833>, accessed 29 September 2024.

⁹ Renewable energy is defined as solar energy, wind power, hydropower, geothermal power, biomass (straw, wood chips, firewood, wood pellets, waste wood, liquid biofuels, and renewable wastes unless otherwise stated), biogas and heat pumps. *Energy Statistics 2022*. Danish Energy Agency, https://ens.dk/sites/ens.dk/files/Statistik/energy_statistic_2022.pdf, accessed 28 September 2024.

¹⁰ *Danske nøgletal 2022* [Danish Key Figures 2022]. Danish Energy Agency, <https://ens.dk/service/statistik-data-noegletal-og-kort/noegletal-og-internationale-indberetninger>, accessed 30 September 2024.

an EU country without either hydropower or nuclear power. Nuclear power is not included among the production technologies used in Denmark. However, electricity is imported from both Sweden and Germany, which includes electricity generated in nuclear power plants. In general, it is not assumed that nuclear power plants will be established in Denmark in the foreseeable future. Apart from political opposition, the technology will hardly be economically competitive.

Regarding electricity interconnectors Denmark is well connected other countries (Germany, the Netherlands, Norway, Sweden, UK). The interconnectors have a capacity of more than 50% of domestic production capacity. However, Denmark is no longer self-sufficient in electricity 24/7.¹¹ Regarding natural gas Denmark has interconnectors to Germany and Sweden and is via Baltic Pipe connected to Norway and Poland. Furthermore, the Danish gas fields in the North Sea are connected to the Netherlands.

The Danish government has presented plans for a major expansion of renewable energy facilities both on land and at sea. If these expansion plans are implemented – which is quite dubious – Denmark will be able to produce several times its current electricity consumption. A prerequisite is that the majority of the planned production can be exported, either as electricity or as Power to X (PtX).

PtX starts as electrolysis to hydrogen, a gas that has received a lot of political attention in Denmark. However, the development of an actual hydrogen industry has been delayed. No government decision has yet been taken on the establishment of a hydrogen network in the western part of Denmark with a view to possible export to Germany. Likewise, the energy company Ørsted, which is half-owned by the Danish state, has chosen to significantly reduce its involvement in PtX.

Danish legislation

Neither the concepts of energy solidarity nor energy security are enshrined in the Danish Constitution.¹² Rights in relation to energy and the environment are not contained in the Constitution at all.

¹¹ The risk of experiencing interruptions in the Danish electricity system as a result of power shortages is expected to increase in the coming years due to a decrease in adjustable capacity (thermal power plants) and increased Danish consumption.

¹² The Constitutional Act of Denmark of 5 June 1953 (originally from 1849). Available in an English translation at: <https://www.thedanishparliament.dk/-/media/sites/ft/pdf/publikationer/the-constitutional-act-of-denmark.pdf>, accessed 10 November 2024.

Danish energy legislation dates back to the energy crises in the 1970s. The main goal of the first energy strategy, the *Danish Energy Policy 1976*,¹³ became the security of energy supplies to safeguard Denmark during international energy crises. The same year the Danish Energy Agency was established, and the Act on Energy Policy Measures adopted.¹⁴ It was in the same period that the structure with sector-specific supply laws for first electricity supply, then heat supply and finally natural gas supply was determined. Later, a special law on the promotion of renewable energy was issued.

Danish energy policy has traditionally been governed by energy policy agreements that have been concluded with a wide range of parties in the Danish parliament. The broad support has ensured a certain stability in relation to the energy policy pursued.

The multidimensional elements of the principle of energy solidarity and the objective of energy security and their impact on the EU and national constitutional frameworks

Energy security and solidarity are embedded in political agreements and legislative and regulatory frameworks that guide national energy policy. Danish courts are expected to use an EU-compliant interpretation for instance in accordance with the *OPAL* case.¹⁵ Danish courts have not yet specifically interpreted these concepts:

1. *Energy security* in Denmark focuses on ensuring a stable and reliable supply of energy. This applies both in relation to the import of primary sources (fossil fuels, biomass) and electricity and in relation to domestic production of energy.¹⁶ Today, Denmark's energy security strategy includes diversifying energy sources including limiting the dependency of imported oil, increasing energy efficiency, and promoting renewable energy. The Danish National Energy and Climate Plan (NECP) from 2019 outlines measures regarding among others energy efficiency, energy security, the development of renewable energy sources and decarbonization.¹⁷ The political goal for Denmark is to be independent of fossil fuels by 2050 by completely switching to renewable energy sources such as wind, solar and biomass.

¹³ Ministry of Trade, *Danish Energy Policy* (May 1976).

¹⁴ With the primary objective of limiting dependence on imported oil. Act. No 194 of 28 April 1976. Available at: <https://www.retsinformation.dk/eli/lta/1976/194>, accessed 17 November 2024.

¹⁵ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598.

¹⁶ Anita Rønne, 'Energy Security as Denmark's Heavy-Handed Regulation Loosens', in: Barry Barton et al. (ed.), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment*, Oxford University Press, 2004, pp. 253–278, <https://doi.org/10.1093/acprof:oso/9780199271610.003.0010>

¹⁷ Available at: <https://www.kefm.dk/media/7095/denmarks-national-energy-and-climate-plan.pdf>, accessed 17 November 2024.

Denmark is expected to increase its domestic electricity production based on solar and especially wind, so that Denmark in the coming years, it is expected to turn into a net exporter of electricity. However, it is still a valid question how in the future Denmark will secure the electricity supply in periods when wind and sun cannot supply sufficient energy due to the weather. The total capacity of the thermal power plants is expected to decrease.

2. The principle of *energy solidarity* is reflected in Denmark's commitment to the EU's energy policies and its participation in regional energy cooperation initiatives. In May 2023, the Danish Energy Agency and the corresponding Swedish authority signed an agreement on solidarity for gas supply between Denmark and Sweden. The Baltic Pipe project also had an element of energy solidarity securing Poland's access to Norwegian gas.

In the Danish supply sector, the legislation lays down various types of requirements for security of supply for end users of energy. That includes natural gas. However, EU legislation means that not all gas customers are guaranteed to be supplied with gas if a crisis occurs in the gas system. Non-protected customers are not guaranteed to have their gas needs covered if a serious supply crisis occurs and the crisis level "emergency" is declared in the Danish gas system. If that happens in the Danish gas system, the Danish gas TSO (Energinet) may interrupt completely or partially the gas supply to non-protected customers.¹⁸ Each year, the gas consumers who will be unprotected for the coming year are designated on the basis of the gas supply security order.¹⁹

Danish companies and permanent establishments with activities within the crude oil, natural gas, coal and refinery sectors are obliged for 2023 to report and pay a temporary solidarity contribution/tax.²⁰

The *OPAL* case, specifically the ruling by the General Court of the EU, has significant implications for the principle of solidarity in EU law, particularly in the energy sector. By recognizing energy solidarity as a "specific expression" of the broader principle of solidarity, the Court has effectively elevated the importance of considering mutual support and cooperation among Member States in energy-related decisions.²¹

¹⁸ See Executive Order No. 1349 of 27 November 2023 on safeguarding the security of gas supply.

¹⁹ The list of unprotected customers for the period 1 October 2024 to 30 September 2025 can be found here: <https://energinet.dk/media/woba3ypn/liste-ikke-beskyttede-kunder24-25.pdf>, accessed 18 November 2024.

²⁰ See Act No 502 of 16 May 2023. Available in Danish at: <https://www.retsinformation.dk/eli/lt/2023/502>, accessed 19 November 2024. A description of the bill in English can be found at: <https://kpmg.com/dk/en/home/insights/2023/02/taxation-of-windfall-profits.html>, accessed 19 November 2024.

²¹ For a review of the EU principle of energy solidarity and the *OPAL* case, see Kaisa Huhta, Leonie Reins, 'Solidarity in European Union Law and its Application in the Energy

Danish law may need to incorporate the principle of energy solidarity more explicitly. This could involve revising existing energy regulations to ensure they align with the EU's emphasis on mutual support and cooperation among Member States.

Energy solidarity can act as a mechanism to ensure that national energy policies do not undermine the collective interests of the EU. This means that while Member States retain sovereignty over their energy policies, they must also consider the broader impact on other Member States and the EU as a whole. In times of energy crises, the principle of solidarity can guide actions to ensure mutual support and resource sharing, preventing any one state from bearing the brunt of shortages or disruptions alone. Further, it can encourage harmonization of energy policies across Member States, promoting a more integrated and resilient energy market within the EU. The EU's response to the energy crisis triggered by the Russian invasion of Ukraine is a prime example. The EU adopted several measures to ensure energy solidarity among Member States.

Ensuring energy security often requires strategic reserves and national measures, which can conflict with the goal of a fully integrated and liberalized energy market. The transition to renewable energy sources can lead to higher short-term costs, impacting affordability for consumers, especially vulnerable populations. Member States may prioritize national interests over collective EU goals, leading to conflicts in policy implementation.

A particular area of conflict exists in connection with the establishment of renewable energy (RE). Establishing RE plants does not necessarily promote biodiversity and nature protection in general. Denmark is already a country with a limited share of nature. The majority of the land area (approx. 60%) is used for agriculture. Land is therefore a limited resource.

The principle of energy solidarity is a legally binding principle that must inform EU institutions and Member States in their energy decisions. However, this does not mean that the interests of individual Member States can be entirely disregarded. The principle of proportionality requires that EU measures are appropriate, necessary, and do not exceed what is needed to achieve the objectives of the EU treaties. This means that while solidarity is crucial, measures must also be fair and balanced, considering the specific circumstances of each Member State.

Sector', *International & Comparative Law Quarterly*, Vol. 72, Issue 3, July 2023, pp. 771–791, <https://doi.org/10.1017/S002058932300026X>. Available at: <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/solidarity-in-european-union-law-and-its-application-in-the-energy-sector/0EC1052D4AA0C20B7547D9A70FE4DB09>

The intensity of the shared competence in the field of energy between the EU and its Member States, as defined by Article 4(2)(i) TFEU, has evolved significantly. This evolution is for instance evident in the context of energy solidarity. The EU's role in energy policy has grown, particularly in areas where cross-border issues are prominent, such as energy security and market integration. The CJEU has reinforced the importance of energy solidarity, which supports a more predominant exercise of competence by the EU.

The notion of the “spirit of solidarity between Member States” in Article 194 TFEU is crucial in the context of energy security, especially given the interconnected nature of modern energy systems. However, how such solidarity is concretely implemented does not necessarily have to be determined by the EU. TSOs have traditionally cooperated on the use of interconnectors. In the area of gas supply, a bilateral solidarity agreement has been concluded in 2023 between the Danish Energy Agency and the Swedish counterpart (Energimyndigheten).²²

Further, one must not forget that the responsibility for the overall electricity supply lies with one or more national TSO(s) – in Denmark Energinet. In connection with a grid failure, it is essential to be able to re-establish the power supply independently. Over the past 25 years, the eastern part of Denmark (Sjælland and Bornholm) has experienced breakdowns in the electricity supply in several cases, which are either due to breakdowns in the neighboring country (Sweden) or in an interconnector between Denmark and Sweden.

The concept of “security” in the field of EU energy law and national law is multifaceted, especially in light of recent geopolitical events and the increasing digitalization of energy infrastructure. Ensuring the uninterrupted availability of energy sources at an affordable price is a fundamental aspect. This includes diversifying energy sources and routes to reduce dependency on single suppliers, as emphasized by the EU's REPowerEU plan.²³

The resilience of critical energy infrastructure is crucial. This involves protecting infrastructure from both physical and cyber threats, ensuring rapid recovery from disruptions, and adapting to real-time requirements and cascading effects. The EU's collective stance on energy security, particularly in response to geopolitical threats, underscores the importance of solidarity and coordinated action.

²² See press release (in Danish) at: <https://ens.dk/presse/danmark-og-sverige-indgaar-solidaritetsaftale-om-gas-vi-kan-ikke-haandtere-energikrisen-alene>, accessed 19 November 2024.

²³ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:230:FIN>, accessed 19 November 2024.

Utility companies in the EU are already largely exposed to attempted cyberattacks. The digitalization of energy systems increases vulnerability to cyberattacks. The EU has implemented measures to enhance cybersecurity, including the Network and Information Systems (NIS) Directive, which sets security requirements for critical infrastructure. With the implementation of NIS2, security is further strengthened. Denmark is unfortunately late with this implementation.²⁴

A particular challenge is the many underwater power cables and gas lines. With an increasing amount of energy transported through this, the vulnerability to sabotage increases. Recent incidents like the Nord Stream and Balticconnector pipeline damages highlight the need to view energy security more broadly.²⁵ An increased offshore wind capacity increases the vulnerability.

The principle of energy solidarity significantly influences the EU's external energy policy, particularly in relation to Projects of Common Interest (PCIs) and the broader objectives of energy security and diversification of supply routes. The principle of energy solidarity ensures that these projects are prioritized and supported, as they contribute to the collective energy security of the EU.

The objective of security of supply strengthens the EU's external competence in the field of energy. The EU's ability to negotiate and implement energy agreements with third countries is bolstered by the need to ensure a stable and secure energy supply for all Member States. The EU's legal framework, including the TEN-E Regulation, supports the development of PCIs and other strategic projects.

The current state of security of gas supply in the EU, from a governance perspective, reflects a complex interplay between national and Union-level responsibilities. The EU's governance framework for gas security is primarily based on Regulation (EU) 2017/1938, which emphasizes regional cooperation, risk assessments, and joint preventive and emergency measures.

The shared responsibility model has led to enhanced cooperation among Member States, particularly through regional groups that assess common supply risks and develop joint measures. This cooperation is crucial for managing cross-border energy flows and ensuring collective security.

²⁴ See regarding Danish cyber security law in the area of electricity supply in Bent Ole Gram Mortensen, 'Informationssikkerhedsret på elforsyningsområdet' [Cyber security law regarding electricity supply] in: Søren Sandfeld Jakobsen (ed.), *Informationssikkerhedsret* [Cyber security law], 2021, pp. 175–197.

²⁵ Also telecommunication cables in the Baltic Sea have been damaged, recently in November 2024 (C-Lion1 between Finland and Germany and BCS East-West Interlink between Lithuania and Sweden).

The recent crisis underscored the importance of diversifying supply routes and sources. The EU's dependence on Russian gas was significantly reduced, with increased imports from Norway, the US, and other reliable partners. However, the vulnerability of lack of infrastructure became apparent. There was a lack of LNG receiving facilities and the gas storages were not sufficiently filled before the winter. Emergency measures, such as the coordinated gas demand reduction and the establishment of gas storage targets, became crucial in managing the crisis. Denmark had a particular challenge, as the majority of the gas from the Danish part of the North Sea could not be brought ashore due to renovation of the Tyra field.

Regional cooperation in ensuring gas supply, such as the Baltic States Cooperation and the Visegrád Group Cooperation seems to have been successfully.

The general interplay between climate neutrality, energy solidarity, and security of energy of supply

The 2050 climate neutrality objective is a concept that is reshaping the meaning of energy solidarity and energy security in both EU and national law. However, energy solidarity remains a crucial element in ensuring coherence and unity in the transition towards a climate-neutral future. Here is how these dynamics interplay:

The 2050 climate neutrality objective, enshrined in the European Climate Law, should be driving significant changes in energy policies and practices. However, it remains to be seen whether there will be the political will in the Member States when negative consequences such as reduced security of supply and higher prices become apparent. In Denmark, the focus is on renewable electricity produced on weather-dependent plants such as solar and wind. This focus can result in a deterioration of the otherwise high Danish degree of security of electricity supply.

The “Fit for 55” package includes comprehensive reforms to key legislative instruments such as the EU Emissions Trading System (EU ETS), the Renewable Energy Directive (RED), and the Energy Efficiency Directive (EED). These reforms aim to align EU policies with the new climate targets of reducing greenhouse gas emissions by at least 55% by 2030.

The package reinforces the principle of energy solidarity by promoting cooperation among Member States to achieve collective climate goals. This includes joint efforts in renewable energy projects and cross-border infrastructure developments.

Measures under “Fit for 55” enhance energy security by diversifying energy sources and supply routes. The emphasis on renewable energy and energy efficiency reduces dependency on fossil fuels and external suppliers, thereby strengthening the EU’s energy resilience.

Denmark has been a leader in renewable energy, particularly wind power. However, the expansion of the electricity grid cannot currently keep up with the need. The grid connection of several solar parks has thus been delayed. Denmark already has a large interconnector capacity. If existing expansion plans for offshore wind are carried out, Denmark will produce far more electricity than the current consumption. That is that either export opportunities must be won for the electricity produced, or new buyers, such as, for instance, PtX. In the latter case, the establishment of a Danish hydrogen infrastructure for export to Germany and the Netherlands could be appropriate.

Denmark has already several strategies to address the challenges related to grid stability in its renewable energy integration such as strengthening the grid and using the big Danish district heating system to take off excess electricity

The principle of “do no significant harm” have had an impact on Danish law. The Danish Environmental Protection Act emphasizes the prevention of environmental harm and the promotion of sustainable development. Denmark’s Climate Act sets ambitious targets for reducing greenhouse gas emissions and includes mechanisms hopefully to ensure that climate actions do not cause significant harm to other environmental objectives.

Denmark requires in accordance with *acquis communautaire* EIAs for projects that may have significant environmental impacts. Unfortunately, there are several examples of Danish environmental permits being rejected in connection with complaints to the Boards of Appeal. This is due to insufficient EIA and has led to delays or postponement of RE projects. In connection with the application of EIA for permits for oil and gas in the North Sea, it has emerged that the Danish application of the EIA rules has not been in accordance with the EIA directive.

The EU recognizes energy poverty as a significant issue, affecting millions of households. The European Green Deal and the “Fit for 55” package include measures to address energy poverty by ensuring access to affordable, reliable, and sustainable energy.

The Just Transition Fund (JTF) is an instrument designed to support regions and workers most affected by the transition to a green economy. It aims to mitigate the social and economic impacts of the transition, providing financial

support for reskilling, job creation, and economic diversification. The Social Climate Fund (SCF) complements the JTF by providing targeted support to vulnerable households and small businesses to cope with the costs associated with the green transition, such as higher energy prices. Denmark has received approximately €89 million from the JTF to support its green transition, particularly in regions like North and South Jutland.²⁶

In Denmark the concept of energy poverty is not included in energy legislation. Energy poverty is not a concept defined in Danish law. In an answer to a question asked by a committee of the Danish parliament, the then minister stated on 10 December 2019 that the proportion of households in Denmark who state that they cannot heat the house sufficiently is 3%.²⁷ The figure is low compared to the EU average. But rising energy prices and general inflation can change this. As pointed out by the IEA, Denmark had in 2022 “one of the highest average household annual energy expenditures after the United States and the Netherlands.”²⁸

However, some schemes exist. The closest neighbours to renewable energy plants can receive compensation for any loss in value of their properties. Furthermore, some of the neighbours have a claim that the developer buys their real estate.²⁹

As part of social benefits, it is possible to get a subsidy to pay for the heating of your home.

The costs for expansion of the electricity network are distributed among all electricity consumers. However, it is typically the more affluent part of the population that invests in electric cars as well as heat pumps and solar cell systems at their own houses. Furthermore, grid expansion at slightly higher voltage levels is conditioned by the establishment of larger solar parks. The underprivileged part of the population often does not have the opportunity to take part in these investments.

State aid measures in the energy sector are primarily assessed under Article 107 TFEU, which aims to prevent distortions of competition. However, the principle

²⁶ See: https://pact-for-skills.ec.europa.eu/stakeholders-and-business/funding-opportunities/just-transition-fund-jtf-denmark-north-and-south-jutland_en, accessed 19 November 2024.

²⁷ Answer to question 88, journal No 2019-4551. Available in Danish at: <https://www.ft.dk/samling/20191/almdel/kef/spm/88/svar/1617446/2122273/index.htm>, accessed 17 November 2024.

²⁸ International Energy Agency, *Denmark 2023. Energy Policy Review*, p. 12. Available at: https://iea.blob.core.windows.net/assets/9af8f6a2-31e7-4136-94a6-fe3aa518ec7d/Denmark_2023.pdf, accessed 18 November 2024.

²⁹ Regarding the Danish schemes, see Frederik Waage, ‘Compensating neighbors to windmills, solar energy panels and other sources of renewable energy in Denmark’, in: Carina Risvig Hamer et al. (eds.), *Festskrift til Bent Ole Gram Mortensen*, 2022, pp. 449–458.

of energy solidarity can influence this assessment, particularly in situations where State aid is necessary to ensure energy security and resilience across Member States. For instance, during the recent energy crisis triggered by geopolitical tensions, the EU adopted several legal instruments that relied heavily on the concept of solidarity to manage the crisis effectively. The EU's cohesion policy aims to reduce disparities between regions by funding projects that promote economic, social, and territorial cohesion. This policy is a practical manifestation of solidarity, ensuring that less developed regions receive support to catch up with more prosperous areas.

Reconciling State aid measures with energy solidarity involves balancing the need to correct market failures and promote competition with the imperative of ensuring a stable and secure energy supply for all Member States. This can be seen in the EU's approach to coordinated demand-reduction measures and the acceleration of renewable energy deployment, which are designed to enhance energy security while maintaining solidarity among Member States.³⁰

The concept of energy solidarity, as enshrined in Article 194 TFEU, underpins the EU's approach to energy policy, ensuring that Member States support each other in times of energy crises. This principle is crucial when considering PCIs under Articles 170–172 TFEU and Regulation (EU) 2022/869, which governs the guidelines for trans-European energy infrastructure.

PCIs are key infrastructure projects that enhance the EU's energy networks, contributing to market integration, security of supply, and sustainability. These projects are selected based on their ability to meet the EU's energy policy objectives, including the principle of energy solidarity.

The revised TEN-E Regulation (Regulation (EU) 2022/869) aligns with both Articles 170–172 and Article 194 TFEU by ensuring that energy networks are interconnected across Member States, facilitating energy flow and enhancing security of supply and by prioritizing projects that contribute to energy solidarity, such as cross-border interconnectors that help prevent energy isolation of Member States.

Decarbonization and energy security are seen as mutually reinforcing factors. Reducing reliance on fossil fuels through increased use of renewable energy sources not only helps mitigate climate change but also enhances energy security by diversifying energy supply and reducing the EU dependence on

³⁰ See Guidelines on State aid for climate, environmental protection and energy 2022 (2022/C 80/01). Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0218\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0218(03)), accessed 20 November 2024.

imported fuels. Renewable energy such as wind and solar power is typically domestic energy. Biomass on the other hand can be imported.

Independency of oil import has been on the Danish political agenda since the late 1970s. Production of electricity from renewables accounted for 81.4% of Danish domestic electricity supply in 2022. The main part was from wind energy.³¹ Denmark's Energy Strategy 2050 aims for 100% independence from fossil fuels by 2050.

According to a political decision, Denmark's domestic extraction of fossil fuels must also end in 2050. The oil and gas markets are, however, international markets, and the issue of the end of Danish oil and gas extraction in 2050 may have negative consequences for the EU's security of supply. Whether that should be the case is probably doubtful. Partly, the EU's degree of self-sufficiency in 2050 is not yet known, and partly the Danish fields in the North Sea are already mature, so the remaining production capacity in 2050 will hardly be particularly large in relation to the EU's needs.

Relationship Between Article 192(2)(c) TFEU and Article 194 TFEU

Article 192(2)(c) TFEU allows the EU to adopt measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply, but only through a special legislative procedure requiring unanimity in the Council. This provision is primarily used for environmental policy measures that have substantial impacts on national energy policies.

Article 194 TFEU outlines the EU's energy policy objectives, including ensuring the functioning of the energy market, security of supply, promoting energy efficiency, and the development of renewable energy. Importantly, Article 194(2) TFEU explicitly states that these measures should 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.

However, while Article 194(2) TFEU grants Member States significant autonomy over their energy mix, this freedom is not absolute. The EU can and do influence national energy policies through environmental legislation (Article 192(2)(c) TFEU), through internal market rules, state aid rules and even the principle of energy solidarity.

³¹ Energy Statistics 2022. Danish Energy Agency, https://ens.dk/sites/ens.dk/files/Statistik/energy_statistic_2022.pdf, accessed 28 September 2024.

Despite these limits, Member States retain considerable discretion in determining their energy policies such as decide on the proportion of different energy sources in their national energy mix, determine the conditions under which their energy resources are exploited, including regulatory and fiscal measures and design the overall structure of their energy supply systems.

Denmark has introduced the Danish Climate Act to address climate-related considerations in its energy mix. It sets legally binding targets for reducing greenhouse gas emissions. It aims for a 70% reduction by 2030 compared to 1990 levels and achieving climate neutrality by 2050. It is doubtful whether the 2023 target can be reached. Further the Act establishes the Danish Council on Climate Change, which provides independent advice and monitors progress.

Denmark's Energy Strategy 2050 outlines the country's long-term vision for a fossil-free energy system. It includes measures to increase the share of renewable energy, improve energy efficiency, and phase out coal and oil. The Danish government has set ambitious targets for expanding offshore wind capacity. Also the achievement of these goals is questionable.

Member States retain significant autonomy over their national energy policies, including the choice of energy mix and the exploitation of energy resources. However, these policies must align with EU objectives and regulations. While the EU negotiates many international energy agreements, Member States can still enter into bilateral agreements with third countries, provided these agreements do not conflict with EU law.

Denmark has an old focus on renewable energy sources, especially wind power, together with domestic extraction of fossil fuels reducing dependency on imported fossil fuels.

The limits of the Union's energy crisis managements tools

Measures to ensure the functioning of the internal energy market can indirectly affect national energy policies. For example, regulations promoting cross-border energy trade and network interconnections can influence national energy strategies.

The EU's state aid control can limit how Member States subsidize different energy sources, ensuring that such subsidies do not distort competition within the internal market.

The principle of energy solidarity can act as a limit on national energy policies, ensuring that actions taken by one Member State do not negatively impact the energy security of others.

Energy solidarity is a fundamental principle in the EU's energy policy. However, energy solidarity primarily applies to situations where Member States must support each other to ensure energy security. This includes sharing resources and coordinating responses to supply disruptions.

While energy solidarity is a guiding principle, it must operate within the legal frameworks established by the EU treaties. This means it cannot override national sovereignty in energy policy decisions unless explicitly provided for in EU law.

The effectiveness of energy solidarity depends on the willingness and capacity of Member States to cooperate. In practice, this can be challenging due to differing national interests and energy policies.

Article 122 TFEU provides a legal basis for the EU to take measures in response to severe economic difficulties, including energy crises. However, there are limits. Measures adopted under Article 122 TFEU are intended to be temporary and specific to the crisis at hand. They are not meant to establish permanent changes to EU law.

While the EU treaties provide a solid foundation for energy crisis management, there is potential to enhance this framework by revitalizing other treaty instruments like Article 222 TFEU. Combining these instruments with existing energy policy measures can create a more comprehensive and flexible response to both immediate and long-term energy challenges.

FINLAND

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

The principle of energy solidarity or the objective of energy security is not mentioned in the Finnish Constitution (731/1999). Energy, in general, is not mentioned in the Constitution. Overall, the energy solidarity principle is of such recent origin, that it is yet to play a broader role in national legal frameworks or in the case law of the national courts.

Those aspects of energy solidarity that relate to the protection of vulnerable consumers have been considered in the practice of the Constitutional Committee of the Finnish Parliament, which oversees the conformity of legislative proposals with the Constitution before they are adopted and enter into force. The Committee examined the constitutionality of subsidizing the electricity bills of customers living in electrically heated houses as well as the temporary extension of payment periods for consumer electricity contracts, and found in both cases that the interventions were justified.¹ The concept of energy security was not present in the Committee's practice during the energy crisis, but over the years it has weighed energy security interests against various fundamental rights enshrined in the Finnish Constitution, such as the right to property.² However, these assessments focus on how the Constitution should be interpreted in the context of energy, not how energy security or the solidarity principle are placed in the Finnish constitutional setting.

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¹ Constitutional Law Committee's opinion 102/2022, paras. 4–13. Available at: https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/PeVL_102+2022.aspx

² See for instance, Constitutional Law Committee's opinion 19/1994. Available at: https://www.eduskunta.fi/FI/vaski/Lausunto/Documents/pevl_19+1994.pdf

Question 2

In general, solidarity has no well-established definition in EU law. Legal scholarship has characterized it in a diversity of ways depending on the context³: it has been referred to as a principle, an obligation, a “constitutional value,”⁴ an “idea”⁵ and “political rhetoric,”⁶ and it has been characterized on the basis of its functions.⁷ The energy solidarity suffers from similar definitional ambiguity, which the Court did little to rectify in its *OPAL* ruling.

Due to this conceptual unclarity, no direct impacts of the principle, such as legislative reforms on its basis, can be identified in Finland. Furthermore, there is no corresponding explicit expression of solidarity in Finnish national law. However, recent research has demonstrated that solidarity in the energy sector is often used as an expression of the internal market approach and, in relation to that, as a description of risk-sharing between Member States.⁸ Considering the highly integrated Nordic electricity market for example, this kind of internal market thinking where energy resources are pooled between countries and both the benefits and risks of this cooperation are shared, can be considered a reflection of solidarity thinking. However, no explicit references to this can be found in Finnish legislation.

Question 3

Article 194 TFEU does not give the four objectives of EU energy policy an order of priority. In other words, there is no hierarchy between ensuring the functioning of the energy market, ensuring security of energy supply, promoting energy efficiency and energy saving and the development of new and renewable forms of energy and promoting the interconnection of energy networks. The provision also does not make one energy policy objective conditional upon the other, nor does it take a stand on whether these objectives are

³ K. Huhta and L. Reins, ‘Solidarity in EU Law and Its Application in the Energy Sector’, *International and Comparative Law Quarterly* 72(3) (2023), pp. 771–791.

⁴ P. Hilpold, ‘Understanding Solidarity within EU Law: An Analysis of the “Islands of Solidarity” with Particular Regard to Monetary Union’, *Yearbook of European Law* 34 (2015), p. 257; A. Biondi, E. Dagilytė and E. Küçük, ‘Introduction’, in: A. Biondi, E. Dagilytė and E. Küçük (eds.), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar, 2018).

⁵ M. Ross and Y. Borgmann-Prebil, ‘Promoting European Solidarity: Between Rhetoric and Reality?’, in: M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford University Press, 2010), p. 1.

⁶ P. Hilpold, ‘Understanding Solidarity within EU Law...’, 257; A. Biondi, E. Dagilytė and E. Küçük (eds.), *Solidarity in EU Law...*

⁷ P. Van Cleynenbreugel, ‘Typologies of Solidarity in EU Law: A Non-Shifting Landscape in the Wake of Economic Crises’, in: A. Biondi et al. (n 10); F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015).

⁸ K. Huhta and L. Reins, ‘Solidarity in EU Law...’

complementary or trade-off. Instead, it highlights that these objectives should be pursued through the internal market approach and in a spirit of solidarity between Member States. While these policy objectives are often presented as complimentary in various EU policy documents, tensions, trade-offs and conflicts are apparent.⁹ However, solely on the basis of the *OPAL* ruling, it is not yet possible to determine how the energy solidarity principle will, in practice, play out in this setting. In principle, Article 194 TFEU together with the *OPAL* ruling reads as necessitating the EU and the states to approach the governance of the energy sector in line with internal market principles and reliance on their neighbours.¹⁰

Question 4

No disputes between Finland and surrounding Member States can be identified that would focus on tensions between environmental and economic objectives.¹¹ However, coordinated action can be identified. The Finnish and Estonian governments concluded an agreement on solidarity measures to ensure the security of supply of gas in 2022.¹² The Agreement sets out the practical arrangements for solidarity measures, which consist of the supply of natural gas from one contracting party to the other in the event of supply disruptions, as required by Regulation (EU) 2017/1938. The aim of these measures is to ensure continuity of gas supply to protected customers such as households and essential social services.¹³ In practice, solidarity measures would involve the procuring gas in one country and transporting it to the other through the Balticconnector gas pipeline, which runs under the Baltic Sea and connects the Finnish and Estonian gas systems.¹⁴

⁹ See for instance, European Commission, A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy, COM(2018) 773 final, pp. 8–10; European Commission, The European Green Deal, COM(2019) 640 final, p. 6; European Commission, RePowerEU Plan, COM(2022) 230 final, pp. 12–15.

¹⁰ K. Huhta, 'Energy Security in the Energy Transition: A Legal Perspective', in: G. Wood et al. (eds.), *Handbook of Zero Carbon Energy Systems and Energy Transitions* (Palgrave, 2022); K. Huhta, 'Too important to be entrusted to neighbours? The dynamics of security of electricity supply and mutual trust in EU law', *European Law Review* 43(6) (2018), pp. 920–933. Also see case C-848/19 P *Germany v Poland*.

¹¹ However, there have been other kinds of conflicts. See, for instance: <https://www.acer.europa.eu/sites/default/files/documents/Individual%20Decisions/ACER%20Decision%2017-2022%20on%20Svenska%20kraftn%C3%A4t%E2%80%99s%20request%20for%20a%20derogation%20from%20the%2070%25%20requirement.pdf>

¹² Agreement between the Government of the Republic of Finland and the Government of the Republic of Estonia on Solidarity Measures to Safeguard the Security of Supply of Gas, Helsinki and Tallinn, signed on 4 and 25 April 2022, in force 9 November 2023, Finnish Treaty Series 68-69/2023.

¹³ Articles 2(5) and 13 of Regulation (EU) 2017/1938.

¹⁴ Agreement between the Government of the Republic of Finland and the Government of the Republic of Estonia on Solidarity Measures to Safeguard the Security of Supply of Gas, Helsinki and Tallinn, signed on 4 and 25 April 2022, in force 9 November 2023, Finnish Treaty Series 68-69/2023.

Question 5

EU law gives no guidance on this question. It is clear, however, that the energy solidarity principle cannot be considered absolute but must be weighed against other relevant rules and principles. In fact, in its *OPAL* ruling, the Court held that “policy requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures 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.”¹⁵ The Court also held that: “The application of the principle of energy solidarity does not however mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict.”¹⁶ The principle thus requires a balancing exercise where the interest sought by the measure and the negative impact it may have on a specific Member State must be evaluated and balanced against each other.¹⁷

Question 6

The number and depth of legislative instruments for the energy sector in the EU have progressively increased and intensified over the last nearly four decades. In particular, the most recent years – after the drastic geopolitical changes in Europe – have resulted in several consecutive legislative packages for electricity, gas, security of supply, and decarbonization. Overall, this continues the trend in which the EU level harmonization in energy law has progressively intensified since secondary legislation was first adopted in the 1990s. However, the progressively intensifying and increasing EU-level energy sector legislation, and the corresponding increase in the use of EU-level powers, cannot be directly contributed to the energy solidarity principle, but rather to the pressures emerging from EU climate policy as well as the dramatically changed (energy) security setting in Europe. Therefore, the emergence of the energy solidarity principle does not alone indicate a further delegation of power to the EU in the energy policy sphere.

¹⁵ Judgment, para. 73.

¹⁶ Judgment, para. 77.

¹⁷ K. Talus and D. Buschle, ‘One for all and all for one? The General Court ruling in the *OPAL* case’, *OGEL Energy Law Journal* 5 (2019), pp. 1–12.

Question 7

Energy security has never had a legally binding definition in EU law that would cover all energy sources and all segments of the energy value chain (e.g., availability of primary energy sources, access to energy networks for final consumers etc.). Instead, energy security has had different meanings depending on the substantive (electricity, consumers, primary sources) and temporal contexts. For instance, the energy security questions, and the corresponding EU-level legislation, were significantly different during the oil crisis of the 1970s than what they have been since the increase in renewable energy sources in the energy mix, which has made availability and prices more volatile and hence influenced the uninterrupted availability of affordable energy. When investigating how the notion of energy security has evolved, two overall trends can be identified. First, energy security questions are increasingly handled through EU-level legislative measures, which has shifted power from Member States to the EU. Second, energy security issues increasingly focus on the security issues that emerge in the context of decarbonization and especially the increase in wind and solar energy.

However, these trends have slightly shifted since Russia launched the full-scale invasion of Ukraine in 2022. The EU's emergency instruments adopted to respond to the energy crisis, as well as the new electricity market design for instance, allow Member States with significantly more powers and options to interfere with the functioning of the internal energy markets to guarantee energy security. With these instruments so recent, it remains to be seen how widely those powers and options will be used by Member States in the future.

Question 8

Solidarity considerations have been part of the EU energy policy for decades, also in the context of third country supply of energy products. One example of this is the TEN-E framework that lays down conditions for joint investments in light of security of supply considerations. Another one is the more recent Regulation 2017/1938,¹⁸ which in the context of energy solidarity turned the abstract principle into operational rules.¹⁹

Over recent times and in particular post-February 2022 attack on Ukraine and the energy crises that followed, the solidarity references, and arguably real

¹⁸ 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 (OJ L 280, 28.10.2017, pp. 1–56).

¹⁹ K. Talus and D. Buschle, 'One for all and all for one?...', pp. 1–12.

action, has multiplied. Many of the joint measures taken under Article 122 TFEU to alleviate the crises have been *de facto* illustrations of energy solidarity. These included joint efforts in seeking additional sources of liquefied natural gas under the so-called Solidarity Regulation.²⁰ Similarly, conditioning the reduction of Russian gas on solidarity grounds and security of supply of other Member States²¹ under the new Regulation (EU) 2024/1789 on gas and hydrogen markets is a further illustration of the impact of solidarity in the context of third countries, even when measures could affect the national energy rights under Article 194 TFEU.

In a similar manner, the Member States agreed on economic sanctions on Russia²² even if the impact of such measures banning certain energy products from Russia impacted the Member States security of supply in an asymmetric manner. National interests were set aside in order to speak with one voice.

These examples show how energy solidarity has slowly penetrated EU action in relation to energy supply from third countries. The most recent energy crisis acted as a catalyst in this area and pushed the Member States to take action that represents, in the words of the Schuman Declaration of May 1951, “concrete achievements which [...] create a *de facto* solidarity.”

Question 9

It is true that in line with the principle of conferral, competences not conferred upon the Union in the Treaties remain with the Member States²³ and, as a result, Member States retain significant competences on energy security on national level. However, Article 194 TFEU gives the EU a strong mandate to adopt measures to achieve energy security and, consequently, it is not accurate to say that ‘security of supply remains Member States’ responsibility’. As with other EU’s energy policy objectives, the Member States’ and EU competences in securing gas supply are partially overlapping and partially focus on different aspects of security of supply. The EU measures are restricted by the national energy rights under Article 194(2) TFEU.

²⁰ 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, pp. 1–35).

²¹ Article 6(7) of 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 (OJ L, 2024/1789, 15.07.2024).

²² An overview of energy related sanctions is available at: https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine/sanctions-energy_en

²³ Article 4 TEU.

The current governance model is the result of a number of considerations: the liberal market economy model, the national energy interest and the simultaneous recognition that a common internal gas market creates security benefits that individual Member State markets cannot achieve independently. The ability of the EU gas market to respond to the significant reduction of gas supplies from Russia in the 2022 energy crises is an illustration that this governance model works.

Section II: Energy solidarity, energy security and green transition

Question 1

It has been acknowledged that to achieve the EU's 2050 climate neutrality objective, societies must decarbonize across various scales, sectors, policy domains and timeframes,²⁴ which requires massive efforts in the energy sector. These efforts, and the resulting changes in the ways in which energy is produced and consumed, is bound to change the energy mix and the structure of the European energy supply, irrespective of the EU's competence limitations set out in Article 194 TFEU.²⁵ According to the case law, the competence limitation does not prevent the EU from adopting climate change mitigation measures that affect the energy supply of Member States under other provisions of the Treaty, nor does it guarantee that measures adopted in the EU will have no effect on the energy supply of Member States. Rather, because of its nature as an exception to the rule, the case-law suggests that the limitation of competence should be interpreted strictly to cover only measures specifically aimed at affecting the Member States' energy rights, leaving room for the adoption of climate change mitigation measures that also affect national energy policies.²⁶ The fundamental structural changes necessary for climate change mitigation are also bound to influence and reshape the relevant energy security questions, and affect the notion of solidarity.

²⁴ J. Skea et al. (eds.), 'Summary for Policymakers: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC, 2022), available at: <https://www.ipcc.ch/report/ar6/wg3>, p. 21; K. Huhta and S. Romppanen, 'Comparing legal disciplines as an approach to understanding the role of law in decarbonizing societies', *Transnational Environmental Law* 12(3) (2023), pp. 649–670.

²⁵ K. Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector', *International & Comparative Law Quarterly* 4 (2021), pp. 991–1010.

²⁶ Case T-370/11, *Poland v Commission*, EU:T:2013:113, paras. 11–13 and 17; Case C-5/16, *Poland v Parliament and Council*, EU:C:2018:483, paras. 43–46.

Question 2

The legislative package has deepened the integration of energy and climate law. The package shows that the strengthening of climate change objectives has become a major driver in the development of energy legislation, as evidenced by the amendments to the Renewable Energy Directive and the Energy Efficiency Directive. It also shows that energy policy issues are increasingly being integrated into legal instruments in other policy areas, such as environment and transport policies.²⁷ The package was not primarily an energy package and therefore the development of energy security or solidarity was not among the main objectives of the proposals. Nevertheless, some of the legislative proposals mention increased energy security as one of the (co)benefits of adopting the measures.²⁸ From a solidarity perspective, the most important development in the package was the establishment of the Social Climate Fund, which redistributes emissions trading revenues between Member States to support those most vulnerable and affected by the expansion of the emissions trading system.²⁹ In Finland, few legal issues have arisen in relation to the concepts of energy solidarity or security. However, the solidarity aspects of the Social Climate Fund caused political and even some legal debate during the negotiations of the package. The transfer of funds across Member States raised objections, as did the possibility of financing direct income support schemes, which was not considered appropriate for the EU.³⁰ In the end, Finland voted against the establishment of the Fund.³¹

Question 3

The “do no significant harm” (hereafter ‘DNSH’) principle is one of the many tools available for integrating environmental considerations into other policy areas. The principle can be utilized in EU energy legislation where there is a need to integrate comprehensive sustainability criteria and screening procedures to assess the negative environmental impacts of interventions. Based on the past application of the principle, it could be used, for example, to exclude

²⁷ K. Huhta, ‘The “Fit for 55”-package in the Context of EU Energy Law and Policy’, *OGE* 1 (2022), www.ogel.org

²⁸ For example, COM(2021) 557 final, p. 8; COM(2021) 558 final, p. 17.

²⁹ See Articles 3, 10, and 14, and Annex I of Regulation (EU) 2023/955.

³⁰ P. Leino-Sandberg, ‘Ilmastotoimia koskeva sosiaalirahasto – onko energiaköyhyyden torjunta ilmastopolitiikkaa vai sosiaalipolitiikkaa? [Social Fund for Climate Action – Is the fight against energy poverty climate policy or social policy?], *2035Legitimacy project blog*, 2 December 2021, available at: <https://2035legitimacy.fi/ilmastotoimia-koskeva-sosiaalirahasto-onko-energiakoyhyden-torjunta-ilmastopolitiikkaa-vai-sosiaalipolitiikkaa/>; Opinion 11/2022 of the Grand Committee of the Finnish Parliament, available at: https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/SuVL_11+2022.aspx

³¹ See the voting results at: <https://data.consilium.europa.eu/doc/document/ST-8690-2023-INIT/EN/pdf>

environmentally harmful actions from the scope of an intervention, to improve its environmental performance beyond compliance, or to provide benefits only to actors or projects with the best environmental performance.³² However, the principle is currently rarely used in EU energy legislation.³³ This can be seen as an opportunity to broaden the scope of the principle, but also as an indication that the principle is not as necessary or appropriate in energy legislation. One limit to the proliferation of the principle is that legislation already provides for specific sustainability for certain measures, such as meeting sustainability criteria for the use of biofuels to meet renewable energy targets.³⁴ Nevertheless, the DNSH principle could play a more important role in energy legislation in the future, given the scope for its expansion and its ability to streamline environmental considerations in energy policy. There are no national concepts similar to the DNSH principle in Finnish law. However, Finnish legislation has applied the DNSH principle beyond finance and public funding in the temporary legislative act known as the Priority Act. The Act provides that the authorities must give priority to the spatial planning and project authorization processes and related appeals of certain green transition projects over other pending processes. The Act makes access to the priority process conditional on compliance with the DNSH principle, which the developer demonstrates by completing a DNSH assessment form.³⁵

Question 4

EU energy law recognizes the social and justice dimensions of the energy transition. The new Energy Efficiency Directive lays down the definition of energy poverty, and the Member States are required to assess and address energy poverty in their national energy and climate plans.³⁶ Also sectoral transition measures under the energy efficiency³⁷ and gas legislation³⁸ contain measures addressing social and justice concerns. However, the impact of these measures in Finland has been limited. In general, Finland has not seen combatting energy poverty as a goal of energy policy. Instead, energy poverty is addressed through the social welfare system. Despite this, some impact of

³² European Commission, Joint Research Centre, M. Beltrán Miralles, T. Gourdon, I. Seigneur et al., ‘The implementation of the “Do No Significant Harm” principle in selected EU instruments – A comparative analysis, Publications Office of the European Union, 2023’, pp. 41–42. Available at: <https://data.europa.eu/doi/10.2760/18850>

³³ See Article 5 of Regulation (EU) 2022/869 and Recitals 65 and 105 of Directive (EU) 2023/1791.

³⁴ For example, Article 7(1) of the Renewable Energy Directive.

³⁵ Act temporarily amending the Act on the processing of environmental protection and water matters by the Regional State Administrative Agencies, also known as the Priority Act (1144/2022). See also related Acts 1145/2022, 1146/2022, and 1147/2022.

³⁶ Articles 3(3)(d) and 24 of the Energy Union Governance Regulation; Energy Efficiency Directive, Article 2(52).

³⁷ Energy Efficiency Directive, Article 24.

³⁸ Gas Directive, Article 27.

the social dimension of EU energy legislation in the national energy policy can be seen in the use of voluntary energy efficiency agreements to promote energy efficiency in rental dwellings, which is a measure adopted to meet the obligations of the Energy Efficiency Directive.³⁹ Moreover, Finnish energy legislation was exceptionally amended to include measures to address social issues during the energy crisis. In addition to tax benefits and direct income support for low-income households, payment periods for electricity bills were extended.⁴⁰ The sections of the National Security Strategy relating to energy security focus on ensuring the continued availability of fuels, heat and electricity generation, and the operability and adequacy of network capacity. Social issues are not discussed together with energy security.⁴¹ In Finland, the main objective of the EU just transition funding is to support regions negatively affected by the phasing out of the energy use of peat in economic and social development and nature restoration.⁴² The first calls for proposals have been completed and just transition funding is currently supporting approximately 1,000 projects.⁴³

Question 5

The legal reasoning used by the Court in *Hinkley Point* to justify the relevance of environmental considerations in the State aid assessment is based on the more general principle that the Commission should not authorize aid for measures that are in breach of EU law.⁴⁴ Given that the Court confirmed in *OPAL* that the principle of energy solidarity imposes binding obligations on Member States and the Commission, the application of the same legal reasoning as in the *Hinkley Point* case would lead to a prohibition on authorizing aid for measures that violate the principle of energy solidarity.⁴⁵ Although this has not yet been confirmed by the Court, in a recent opinion Advocate

³⁹ Finnish National Energy and Climate Plan (2024), pp. 86–90. Available at: <https://urn.fi/URN:ISBN:978-952-327-527-0>

⁴⁰ Ministry of Economic Affairs and Employment of Finland, *Selvitys korkeahintaisten määräraakaisten sähkönnmyyntisopimusten piirissä olevien kuluttajien aseman helpottamisesta* [Report on Easing the Position of Consumers with High-Priced Fixed-Term Electricity Contract]. Publications of the Ministry of Economic Affairs and Employment 2023:10 (2023), p. 16. Available at: <https://urn.fi/URN:ISBN:978-952-327-862-2>

⁴¹ Government Resolution of 2 November 2017, The Security Strategy for Society, pp. 63–64. Available at: https://turvallisuuskomitea.fi/wp-content/uploads/2018/04/YTS_2017_english.pdf

⁴² The Finnish regional and structural policy programme (2023), pp. 130–137. Available at: <https://rakennerahastot.fi/documents/91635434/120111163/Uudistuva+ja+osaava+Suomi+2021-2027+ohjelma.pdf/deb0126a-d68f-bc5d-5f2e-dac95d97a451/Uudistuva+ja+osaava+Suomi+2021-2027+ohjelma.pdf?t=1684927591791>

⁴³ Number retrieved from the public register of cohesion policy projects. Available at: <https://eura2021.fi/hanketietopalvelu?report=Hanketiedot>

⁴⁴ Case C-594/18 P, *Austria v Commission*, EU :C2020 :742, paras. 44–47; Case C-390/06, *Nuova Agricast*, EU:C:2008:224, paras. 50–51.

⁴⁵ Case C-848/19 P, *Germany v Poland*, EU:C:2021:598, paras. 44–45 and 49.

General Rantos has considered that arguments based on energy solidarity may be relevant in other areas of competition law, suggesting that the same may be true for State aid law as well.⁴⁶ Arguments against the granting of State aid on the basis of the energy solidarity principle could, for example, arise if the supported activity undermines the energy security of another Member State or makes it difficult to achieve the Union's decarbonization objectives. In order to reconcile State aid measures with the principle of energy solidarity, the negative effects of the State aid measure on the energy policies of other Member States and the Union should be duly considered and balanced.⁴⁷

Question 6

Articles 170–172 form the legal basis for contributing to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures, while Article 194 TFEU sets out the objectives and legal basis for the EU's energy policy. Both areas fall under shared competences and the adoption of legislation in both areas follows the same procedure. However, two key differences emerge in the wording of these provisions. First, Articles 170–172 TFEU and 194 TFEU have different kinds of competence limitations. Article 194(2) TFEU limits the EU's competence to adopt measures that 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.⁴⁸ Article 172 TFEU subjects projects of common interest to the approval of the Member State concerned.⁴⁹ Secondly, while Article 194 TFEU explicitly refers to the spirit of solidarity and energy security, Articles 170–172 TFEU do not mention these concepts at all.

Question 7

Decarbonization and security of supply are separate but related objectives of energy policy. The objective of decarbonization is to reduce greenhouse gas emissions from the energy sector, while the objective of security of supply is to ensure uninterrupted energy supply. The two objectives can be mutually

⁴⁶ Opinion of the Advocate General Rantos in Case C-255/22 P, *Orlen v Commission*, EU:C:2024:466, paras. 44–63. See also Case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo v Commission*, ECLI:EU:T:2022:43, paras. 417–420.

⁴⁷ See Case C-594/18 P, *Austria v Commission*, EU:C:2020:742, paras. 43 and 73.

⁴⁸ Article 194(2) TFEU. K. Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU...'

⁴⁹ Article 172(2) TFEU. K. Huhta, 'Case T-295/20 Aquind: Clarifying the division of powers in the EU energy sector', *European Energy and Environmental Law Review* 32(3) (2023), pp. 155–162.

reinforcing or in tension with each other.⁵⁰ Recent EU policy documents, such as the RePowerEU plan, recognize the synergies of reducing reliance on fossil fuels for both climate and energy security reasons. The Plan acknowledges that energy efficiency measures and the promotion of renewable energy sources contribute to the security of energy supply.⁵¹ However, while the concept of decarbonization is relatively straightforward, the concept of security of supply has several dimensions that can be in tension with each other.⁵² Such tensions can be seen in the EU's recent policy of promoting renewable electricity generation to diversify energy sources. This has the side effect of increasing exposure to the variability of electricity supply, which is a security of supply concern.⁵³ Energy security concerns therefore not only drive decarbonization, but also limits the possibilities to reduce the use of fossil fuels. This is also reflected in the REPowerEU plan, which includes short- and medium-term measures that rely on fossil fuels to ensure resource adequacy, such as delaying the phase-out of coal, diversifying natural gas imports, and investing in the related infrastructure.⁵⁴

Question 8

Article 192(2)(c) TFEU provides for an energy sovereignty exception to the use of the ordinary legislative procedure for the adoption of measures under EU environmental policy, while Article 194 TFEU concerns EU energy policy in general. The relationship between the two articles is that of two different legal bases applying to different policy areas.⁵⁵ As confirmed by the Court, restrictions under one of the articles do not prevent the adoption of measures under the other. Even if the wording of these Treaty provisions appears to limit the EU's ability to adopt measures affecting national energy policies, case law shows that usually this is not the case.⁵⁶ In practice, secondary legislation, for example the Renewable Energy Directive, has a profound impact on the energy mix and structure of energy supply in Member States.⁵⁷ The interpretation of the principle of energy solidarity adopted in *OPAL* requires Member

⁵⁰ C. Cassen and F. Gracceva, 'Energy Security in Low-Carbon Pathways', in P. Lombardi and M. Gruenig (eds.), *Low-carbon energy security from a European perspective* (Academic Press, 2016), pp. 189–193.

⁵¹ European Commission, REPowerEU Plan, COM(2022) 230 final, pp. 3–4 and 6–7.

⁵² C. Cassen and F. Gracceva, 'Energy Security in Low-Carbon Pathways...', pp. 189–193.

⁵³ See e.g. European Commission, 'Energy Storage – Underpinning a decarbonised and secure EU energy system', SDW(2023) 57 final, pp. 7–14.

⁵⁴ European Commission, REPowerEU plan, COM(2022) 230 final, p. 2.

⁵⁵ K. Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU...', pp. 998–999.

⁵⁶ Case T-370/11, *Poland v Commission*, EU:T:2013:113, para 13; Case C-5/16 *Poland v Parliament and Council* EU:C:2018:483, paras. 44–47; K. Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU...', pp. 1000 and 1007–1008.

⁵⁷ See Article 3 of the Renewable Energy Directive.

States to consider and balance the negative effects of their energy policies on other Member States and the common interest of the Union, at least when implementing EU energy policy.⁵⁸ This could in some cases limit the scope of national energy policies. For example, member states may need to avoid policies that have too negative an impact on the energy security of other member states or on the Union's decarbonization policy. Whether this is the case is still to be confirmed by the European courts. Although EU law sets limits to national energy policies, Member States are still free to decide within these limits. The ability of Member States to draw the main lines of energy policy, such as whether to include nuclear energy or fossil fuels in the national energy mix, seems to be protected by Article 194(2) TFEU.⁵⁹ Even secondary legislation gives Member States discretion to make finer choices within common policies, such as which renewable energy sources are used to meet obligations under the Renewable Energy Directive.⁶⁰

Question 9

The Finnish Climate Change Act sets the goal of achieving climate neutrality by 2035 and reducing total emissions by at least 90 per cent by 2050.⁶¹ According to the Finnish National Climate and Energy Strategy, the decarbonization of the energy sector plays a key role in achieving this goal.⁶² Finland has banned the use of coal for power by law from May 2029,⁶³ and numerous legal instruments aim to facilitate and incentivize the use and development of clean and renewable energy sources, while discouraging the use of fossil fuels.⁶⁴ The Finnish legal framework includes a specific act and government decree that regulate the granting of state subsidies in the energy sector, although Finland does not currently offer large amounts of subsidies for decarbonization.⁶⁵ Instead, clean energy is currently being promoted through reforms to spatial planning and

⁵⁸ Case C-848/19 P, *Germany v Poland*, ECLI:EU:C:2021:598, para. 73.

⁵⁹ Case C-594/18 P, *Austria v Commission*, EU:C:2020:742, paras. 48–49; K. Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU...', p. 1008.

⁶⁰ Article 3 of the Renewable Energy Directive.

⁶¹ Finnish Climate Change Act (2022/423), Section II. Available at: <https://www.finlex.fi/fi/laki/ajantasa/2022/20220423>

⁶² Finnish Ministry of Economic Affairs and Employment Energy, Carbon neutral Finland 2035 – national climate and energy strategy, Publications of the Ministry of Economic Affairs and Employment 2022:55. Helsinki: 2022, p. 9. Available at: <https://urn.fi/URN:ISBN:978-952-327-843-1>

⁶³ The Act on the Prohibition of the Use of Energy of Coal (406/2019). Available at: <https://finlex.fi/fi/laki/ajantasa/2019/20190416>

⁶⁴ Finnish National Energy and Climate Plan (2024), p. 21. Available at: <https://urn.fi/URN:ISBN:978-952-327-527-0>

⁶⁵ Act on operating aid for electricity produced from renewable energy sources (1396/2010), available at: <https://www.finlex.fi/fi/laki/ajantasa/2010/201013>; Government Decree on the general conditions for granting energy aid for the period 2023–2027 (262/2023), available at: <https://www.finlex.fi/fi/laki/alkup/2023/20230262>; National Energy and Climate Plan (2024), pp. 115–116, Available at: <https://urn.fi/URN:ISBN:978-952-327-527-0>

project permitting legislation, such as the Offshore Wind Energy Promotion Bill, which is currently in preparation.⁶⁶ This applies not only to renewables, but also to nuclear energy, as the Nuclear Energy Act is currently being revised to speed up the commissioning of new nuclear plants and the introduction of small and modular reactors.⁶⁷ In the transport sector, Finland promotes the use of biofuels and other renewable fuels through a legally mandated blending obligation.⁶⁸ The use of fossil fuels and peat is discouraged through the emissions trading and taxation. The emissions trading scheme applies to the electricity and heating sectors, with the new schemes for transport and housing being phased in, and energy taxation legislation imposes a carbon dioxide tax on fuels and electricity.⁶⁹

Question 10

There are several dimensions to this question. First, after decades of liberal market economy approach to energy markets, the EU has moved towards a more strategic government lead industrial policy type of approach. This is within the EU context labelled as “strategic autonomy.” A range of recent legal initiatives and instruments, including the Net-Zero Industry Act⁷⁰ and Critical Raw Materials Act⁷¹ reflect this new approach. They both relate to security of supply and the effort to reduce reliance on (certain) third countries, Russia and China in particular. This development shifts more power and responsibility to EU level decision-making. It is not directly a question of external competences but has a strong link with this area and relates directly to the EU policies that address resource scarcity and dependence on external supplies.

⁶⁶ See Ministry of Economic Affairs and Employment of Finland, Draft bill on promotion of offshore wind power in the exclusive economic zone sent out for comments, 24 May 2024, available at: <https://tem.fi/en/-/draft-bill-on-promotion-of-offshore-wind-power-in-the-exclusive-economic-zone-sent-out-for-comments>

⁶⁷ See Ministry of Economic Affairs and Employment of Finland, *Ydinenergiälain kokonaisuudistus* [Overall reform of the Nuclear Energy Act], available at: <https://tem.fi/hanke?tunnus=TEM032:00/2023>

⁶⁸ Act on Promoting the Use of Renewable Fuels in Transport (446/2007), available at: <https://www.finlex.fi/fi/laki/ajantasa/2007/20070446>

⁶⁹ Emissions Trading Act, available at: <https://finlex.fi/fi/laki/ajantasa/2023/20231270>; Act on Excise Duty on Electricity and Certain Fuels (1260/1996), available at: <https://www.finlex.fi/fi/laki/ajantasa/1996/19961260>; Act on Excise Duty on Liquid Fuels (1472/1994), available at: <https://www.finlex.fi/fi/laki/ajantasa/1994/19941472>

⁷⁰ Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe’s net-zero technology manufacturing ecosystem (OJ L, 2024/1735, 28.6.2024).

⁷¹ Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials (OJ L, 2024/1252, 3.5.2024).

Second, security of energy supply falls under the shared competence between EU and its Member States. In these cases falling under the shared competence area, the final agreement requires ratification at national level in accordance with the national constitutional requirements. In practice, this often leads to the Council seeking unanimity already for the decision authorizing the negotiations. In the past, this has created hurdles to the successful conclusion of such agreements, the most notable example being the Transatlantic Trade and Investment Partnership (TTIP) which ended in 2016. With this example, as well as others, in mind, the relevant question in this respect is whether the EU framework is fit for purpose? Where such agreements concern or have a direct link with security of supply, internal politics may compromise the realization of common objectives.

Question 11

REPowerEU funding in Finland has led to increased public spending to achieve medium- and long-term decarbonization targets in the energy system. Finland has applied for RePowerEU funding to finance its environmental permitting reforms, R&D projects for clean energy and material flows, and investments in new and innovative clean energy technologies. A separate smaller investment component of the plan aims to promote offshore wind energy in the autonomous region of Åland.⁷² So far, investment support under the programme has been granted to utility-scale solar energy and energy storage projects.⁷³ This is in addition to the investment components of the original Recovery and Resilience Plan, which support innovative clean energy and infrastructure projects.⁷⁴ None of the measures included in the REPowerEU chapter relate to the diversification of fossil fuel energy supply, and energy security is not explicitly mentioned in the Finnish REPowerEU chapter. However, these measures relate to those objectives of the RePowerEU plan that aim to ensure energy security by promoting the deployment of renewable energy technologies.⁷⁵ From a cohesion policy perspective, the RRF and its RepowerEU chapter complement the measures of cohesion policy programmes. Although the Finnish Cohesion Policy programmes include measures to support the transformation of the energy system, the measures are more tailored to local and regional needs. The RRF funding focuses on larger reforms and investments that have

⁷² Finnish Recovery and Resilience Plan (2023), pp. 84–87, available at: <https://data.consilium.europa.eu/doc/document/ST-15836-2023-ADD-1/en/pdf>

⁷³ Ministry of Economic Affairs and Employment of Finland, RRF energy investment aid projects granted aid, available at: <https://tem.fi/en/rrf-energy-investment-aid-projects-granted-aid>

⁷⁴ Finnish Recovery and Resilience Plan (2023), pp. 1–5, 9–10, and 23, available at: <https://data.consilium.europa.eu/doc/document/ST-15836-2023-ADD-1/en/pdf>

⁷⁵ For example, European Commission, REPowerEU plan, COM(2022) 230 final, pp. 6–12.

a national relevance.⁷⁶ The measures of the RepowerEU chapter adhere to this division by focusing on national energy transition priorities.

Section III: The EU's crisis management in the field of energy and its limits

Question 1

Article 122 TFEU is the most suitable legal basis for adopting crisis measures during a crisis, while Article 194 TFEU is more appropriate for ensuring energy security on a long-term basis outside of crisis situations. Article 194 TFEU, as the specific legal basis for energy policy, should be relied on as the rule and Article 122 TFEU as the exception. However, this rule of thumb still leaves significant scope and justifications for relying on Article 122 TFEU under crisis situations such as the measures adopted to address the energy crisis after the full-scale Russian invasion of Ukraine in 2022.

The legal instruments adopted as a response to the crisis were based on the REPowerEU Communication⁷⁷ and the REPowerEU Plan.⁷⁸ On the basis of these 2022 initiatives, five legislative measures were adopted:

1. Council Regulation on coordinated demand-reduction measures for gas.⁷⁹
2. Council Regulation on emergency intervention measures to mitigate the effects of high energy prices.⁸⁰
3. Council Regulation to enhance solidarity through better coordination of gas purchases and to introduce mechanisms to protect citizens and the economy and against excessively high prices.⁸¹

⁷⁶ The Finnish Partnership Agreement 2021-2027, pp. 17–18. Available at: <https://rakennerahastot.fi/documents/91635434/120111163/Suomen+kumppanuussopimus+2021-2027.pdf/b4e38d4e-f0b3-e8c8-8104-b376d905f0bc/Suomen+kumppanuussopimus+2021-2027.pdf?t=1652253818492>

⁷⁷ European Commission, 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, REPowerEU: Joint European Action for more affordable, secure and sustainable energy, 8.03.2022, COM(2022) 108 final.

⁷⁸ European Commission, 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, REPowerEU Plan, COM(2022) 230 final, 18 May 2022.

⁷⁹ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L206/1.

⁸⁰ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L261/1.

⁸¹ Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders [2022] OJ L335/1.

4. Council Regulation laying down a framework to accelerate the deployment of renewable energy.⁸²
5. Council Regulation establishing a temporary market correction mechanism to limit episodes of excessively high gas prices which do not reflect world market prices.⁸³

These five instruments use Article 122 TFEU as their legal basis and, as required by the wording of Article 122 TFEU, all have been adopted by the Council alone, rather than by Council and Parliament under the joint legislative procedure or by the Commission on a delegated basis under a Council-Parliament measure.⁸⁴

Question 2

The meaning and scope of energy solidarity seems to be different depending on whether the reference is to solidarity within the meaning of Article 194 TFEU and within the meaning of Article 122 TFEU. In addition to the clear procedural differences in how legislation is adopted, measures under Article 122 TFEU are also limited in substantive and temporal scope. Recent legal research also shows other clear differences between the two legal bases, which highlights the limits and possibilities of Article 122 TFEU.⁸⁵ First, research shows that solidarity within the meaning of Article 122 TFEU is less politically charged origins than the solidarity notion developed in *OPAL*. Second, solidarity “in the *OPAL* ruling and under Article 194 TFEU seems to impose rights and obligations upon the Member States and EU institutions, whereas solidarity in the emergency instruments and under Article 122 TFEU can also require action from private undertakings in the form of the solidarity contributions.”⁸⁶

Question 3

The secondary legal instruments that pursue energy security on the basis of solidarity can, under existing legal bases, be adopted under Articles 194 TFEU (for permanent and long-term measures), Article 122 TFEU (for temporary

⁸² Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36.

⁸³ Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices [2022] OJ L335/45.

⁸⁴ K. Huhta and L. Reins, ‘Solidarity in EU Law...’

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

short-term measures) and Article 222 TFEU (in cases of a terrorist attack or natural or man-made disasters), which does not exclude natural disasters caused by climate change. In addition, the Treaties allow the EU to take action if it is necessary within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.⁸⁷ The Critical Infrastructures Directive,⁸⁸ which also applies to energy, is an example of an instrument relevant to energy security that has been adopted on the basis of this general competence provision. Taken together, these four legal bases offer sufficient tools to manage crises in the EU.

⁸⁷ Article 352 TFEU.

⁸⁸ Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, OJ L 345, 23/12/2008, pp. 75–78.

FRANCE

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Questions 1–3 et 6¹

Application du principe de solidarité par les États-membres et par l'Union européenne – Compétences partagées – Subsidiarité – Tensions avec les autres objectifs européens de la politique énergétique.

Moteur de l'intégration européenne, la solidarité – qui se décline dans les traités européens sous la forme d'un principe, d'une valeur ou même d'un esprit – traduit l'« étroite dépendance réciproque »² qui se crée et se développe entre les États membres. Appliquée au secteur de l'électricité et du gaz, la solidarité européenne prend des formes différentes en fonction du niveau d'intégration de la politique énergétique européenne. Récemment définie par la Cour de justice à la faveur de l'affaire *OPAL*, cette notion doit être appréhendée dans une perspective dynamique. La construction du marché intérieur de l'énergie atteint un degré où l'intégration des marchés nationaux est suffisamment forte pour que les décisions des uns puissent produire des effets (y compris négatifs) sur les autres mais où les outils de coordination – voire d'harmonisation – des politiques nationales de l'énergie restent insuffisants pour appréhender ces questions avant que les mesures ne soient adoptées. Dans cette configuration particulière, on mesure toute l'utilité de la solidarité au sens de l'article 194 TFUE que la Cour de justice a défini comme l'obligation pour les États membres et les institutions de prendre en compte les effets de leurs mesures sur les intérêts des acteurs du secteur. En d'autres termes, ce principe oblige les États à intégrer dans leur processus d'adoption des décisions les externalités négatives que leurs mesures sont susceptibles de générer. Si le recours à ce principe restera vraisemblablement insuffisant pour corriger ces externalités,

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¹ Questions traitées par Guillaume Dezobry, maître de conférences en droit public à l'Université d'Amiens, Avocat chez EY Avocat, Paris.

² R. Mehdi, Préface, in *Solidarité et droit de l'Union européenne: un principe à l'épreuve*, E. Brosset, R. Mehdi et N. Rubio (dir.), Aix-en-Provence, DICE Éditions, 2021, p. 13.

l'obligation de les prendre en compte – et donc de les caractériser – devrait permettre de les limiter en partie.

Pour comprendre la place du principe de solidarité dans la politique énergétique de l'Union, il convient de revenir sur quatre éléments structurants.

Le marché intérieur de l'énergie et la solidarité de fait. Dans le secteur de l'énergie, la création du marché intérieur s'est traduite par le couplage des zones de prix qui sont interconnectées entre elles afin de développer les échanges entre ces zones, créant une solidarité de fait entre les différents acteurs du secteur de l'énergie. Par son fonctionnement, le marché intérieur de l'énergie participe à une convergence des prix. De manière schématique, les prix du pays le moins cher vont augmenter et les prix du pays le plus cher vont diminuer. Une solidarité croisée peut alors être observée entre, d'une part, les producteurs du pays le moins cher et les consommateurs du pays le plus cher qui vont y gagner et, d'autre part, les consommateurs du pays le moins cher et les producteurs du pays le plus cher qui vont y perdre.

Une bonne illustration peut être trouvée dans le partage de la compétitivité du parc nucléaire français avec le reste du marché intérieur, qui est décrit dans le rapport Champsaur à travers l'effet sur les prix: « Si le système électrique français était isolé du reste de l'Europe, les prix de marché reflèteraient effectivement les coûts de production français, et notamment ceux du nucléaire. Cependant, du fait des interconnexions avec les autres pays européens et de l'intégration des marchés, le raisonnement doit être étendu à l'échelle de la zone interconnectée et la dernière centrale de production nécessaire pour satisfaire la demande des pays interconnectés est alors la plupart du temps une centrale au charbon ou au gaz. »³

Au-delà du jeu du marché, en interconnectant les réseaux électriques, on crée une interdépendance physique entre les réseaux, de sorte que les incidents rencontrés au sein d'un réseau peuvent avoir des conséquences sur les autres réseaux. On rappellera que les incidents intervenus au début des années 2000 sur les réseaux allemand et italien ont provoqué l'un des plus grands black-out de l'histoire du système électrique européen. Cette interdépendance, ou solidarité de fait, a notamment eu pour effet de contribuer au développement d'une gestion plus intégrée des réseaux et à l'adoption de règles communes applicables à l'ensemble des acteurs du marché intérieur de l'électricité.

Le marché intérieur de l'énergie et les trois objectifs de la politique énergétique. Si le marché intérieur de l'énergie s'est développé de manière progressive depuis l'ouverture à la concurrence des marchés du gaz et de l'électricité, son

³ Rapport Champsaur, p. 6.

fonctionnement n'a toutefois pas permis d'atteindre les objectifs poursuivis par la politique énergétique européenne et qui sont présentés classiquement sous la forme du « trilemme énergétique. » La politique énergétique doit en effet permettre d'atteindre un haut niveau en matière de :

- **Sécurité d'approvisionnement.** Elle est traditionnellement définie comme la capacité d'un système énergétique à satisfaire la demande. Elle repose, d'une part, sur le bon dimensionnement des infrastructures énergétiques qui doivent permettre d'acheminer l'énergie que demandent les consommateurs et, d'autre part, sur l'adéquation des capacités, c'est-à-dire un niveau de capacité installée suffisant afin de produire l'énergie demandée.
- **Durabilité.** La durabilité énergétique consiste à utiliser les ressources énergétiques de manière à répondre aux besoins actuels tout en préservant l'environnement, réduisant les émissions de carbone et favorisant les énergies renouvelables.
- **Compétitivité.** Le système énergétique doit permettre aux consommateurs européens de bénéficier d'une énergie à un prix compétitif.

Les limites du jeu du marché et la nécessité de prendre des mesures correctives.

Force est de reconnaître que le seul jeu du marché n'a pas permis d'atteindre les objectifs précédemment mentionnés et que des mesures complémentaires ont dû être adoptées pour corriger ces insuffisances ou ces défaillances.⁴

La question du niveau auquel les mesures devaient être prises pouvait se poser : l'énergie faisant partie des compétences partagées, une intervention au niveau de l'Union ou des États membres était possible.

L'article 194 TFUE ne permet pas de trancher cette question. Les deux alinéas du paragraphe 2 de l'article 194 semblent se neutraliser : alors que le premier renvoie à l'intervention du législateur européen,⁵ le deuxième rappelle que les mesures susceptibles d'être prises au niveau de l'Union « n'affectent pas le droit d'un État membre de déterminer les conditions d'exploitation de ses ressources énergétiques, son choix entre différentes sources d'énergie et la structure générale de son approvisionnement énergétique, sans préjudice de l'article 192, paragraphe 2, point c). »

Au final, l'équilibre subtil qui se dégage de l'article 194 s'est traduit par l'adoption de mesures plutôt prises au niveau des États membres dans les limites d'un cadre fixé au niveau de l'Union.

⁴ M. Lamoureux, « La politique de l'énergie : l'esprit de solidarité a-t-il été incarné ?, » in *Solidarité et droit de l'Union européenne : un principe à l'épreuve*, préc., p. 116.

⁵ L'article 194 § 2 alinéa 1 du TFUE précise notamment que : « le Parlement européen et le Conseil, statuant conformément à la procédure législative ordinaire, établissent les mesures nécessaires pour atteindre les objectifs visés au paragraphe 1. »

Ainsi, dès les années 2010, les inquiétudes d'un certain nombre d'États membres liées à la sécurité d'approvisionnement en matière d'électricité se sont traduites par la mise en place de mécanismes de capacité nationaux. Ces initiatives se sont développées de manière désordonnée et sans aucune coordination risquant de (re)fragmenter les marchés nationaux. Avec un peu de retard, le droit de l'Union est venu encadrer la marge de manœuvre des États de deux manières : en premier lieu, en harmonisant les méthodologies permettant de caractériser un risque pesant sur la sécurité d'approvisionnement ; en second lieu, en encadrant l'architecture de ces dispositifs afin de limiter les distorsions de concurrence.

De même, s'agissant de la durabilité, la volatilité et le niveau des prix sur les marchés de l'électricité et du gaz n'ont pas permis d'engager les investissements suffisants pour décarboner le mix énergétique européen. Là encore, des dispositifs nationaux ont été adoptés pour favoriser le développement de nouvelles capacités décarbonées et en particulier renouvelables. Le droit de l'Union est venu limiter la marge de manœuvre des États membres en encadrant les dispositifs de soutien qui pouvaient être mis en place.

Enfin, concernant la compétitivité, les crises successives qui ont marqué l'Europe ces dernières années ont montré que le jeu du marché n'offrait pas une protection suffisante pour les consommateurs qui ont été exposés à des prix de l'énergie extrêmement élevés sans corrélation avec les coûts supportés par les opérateurs. Dans un cadre défini au niveau de l'Union, les États membres ont pu intervenir directement sur les prix afin de limiter les effets de la crise et de protéger les consommateurs.

Le principe de solidarité pour limiter les externalités négatives. Bien que la marge de manœuvre des États membres soit de plus en plus réduite à mesure que le marché intérieur de l'énergie s'intègre, l'adoption des mesures étatiques se fait de manière non coordonnée et sans outil permettant d'assurer une cohérence d'ensemble des politiques énergétiques des États membres. La planification – qui redevient un élément clé des politiques énergétiques nationales dans cette période de transition – reste faite au niveau des États et de manière insuffisamment coordonnée à l'échelle européenne.

Dans le même temps, le marché intérieur est de plus en plus interconnecté ce qui renforce les interactions entre les marchés nationaux et explique que les effets des mesures prises par un État ne peuvent être limités à ses seules frontières.⁶

⁶ B. Bottin et F. Tesson, « À la recherche de l'esprit de solidarité énergétique, » in *Union européenne et solidarité(s)*, M. Mezaguer, A. Millet-Devalle et N. Pigeon (dir.), Bruylant 2024, p. 203.

Les récentes décisions du Tribunal de l'Union dans les affaires T-446/21, T-472/21, T-484/21, T-485/21⁷ sont révélatrices des défis qu'il convient de surmonter pour approfondir l'Europe de l'énergie. Ces affaires portent sur les mesures correctives devant être mises en place par les gestionnaires de réseau de transport pour traiter le problème dit des boucles de flux (« *loop flows* »). De manière très schématique, lorsque sur un marché national les investissements dans les moyens de production ont été concentrés dans une zone et que les consommations sont localisées dans une autre zone, le risque que l'électricité ne puisse être acheminée en totalité par le réseau de transport interne est élevé. Une congestion interne se crée,⁸ ce qui se traduit par un phénomène de *loop flows* : pour aller des lieux de production aux lieux de consommation, l'électricité va emprunter un chemin qui contourne la congestion et passe par les réseaux de transport des États voisins. À titre d'illustration, les capacités de production éoliennes en Allemagne sont concentrées au nord alors que la consommation a principalement lieu au sud. Les capacités de transport entre le nord et le sud du pays étant structurellement insuffisantes, l'acheminement de l'électricité passe par les pays limitrophes, ce qui génère des surcoûts pour les gestionnaires de réseau concernés et donc pour les consommateurs.

Dans son arrêt du 25 septembre 2024, le Tribunal est venu préciser qu'il

serait contraire au principe de solidarité énergétique de permettre aux GRT émettant des flux de boucle transitant par d'autres zones de dépôt des offres de se soustraire aux coûts des actions correctives, activées dans l'intérêt commun afin d'optimiser la capacité d'échange entre zones, en assurant, en même temps, aussi efficacement que possible, la sécurité du réseau, ce dont profite l'ensemble des GRT ainsi que, partant, les consommateurs d'électricité.⁹

La position du Tribunal est intéressante à deux égards :

En premier lieu, le juge confirme que le principe de solidarité fournit une base juridique pour appréhender les externalités négatives liées à la mise en œuvre, par les États membres, de leur politique énergétique.

En second lieu, le juge montre aussi les limites de ce principe qui ne permettra pas de corriger ces externalités. Il faudra pour cela que des dispositifs soient mis en place à l'échelle de l'Union pour prévoir les modalités selon lesquelles ces externalités pourraient être corrigées.

⁷ Trib UE, 25 septembre 2024, *CRE c. ACER*, aff. T-446/21 ; Trib UE, 25 septembre 2024, *RTE c. ACER*, aff. T-472/21 ; Trib UE, 25 septembre 2024, *Polskie sieci elektroenergetyczne S.A. c. ACER*, aff. T-484/21 ; Trib UE, 25 septembre 2024, *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA)*, aff. T-485/21.

⁸ Si cette congestion est le résultat d'un sous-investissement dans le réseau de transport de cet État, on parlera de congestion structurelle.

⁹ T-446/21, § 130.

On notera enfin que :

- À ce jour, le principe de solidarité énergétique au sens de l'article 194 TFUE n'a pas été reconnu ou appliqué par les juridictions françaises.
- De notre point de vue, il n'y a pas de tensions particulières en lien avec d'éventuelles contradictions dans les objectifs poursuivis. Chaque objectif de la politique énergétique intègre comme une donnée les objectifs des autres.¹⁰

Questions 4 et 9¹¹

Actions coordonnées entre États membres en réponse à une crise sur les marchés européens – Achats mutualisés de gaz.

Actions bilatérales. Confrontés à des problèmes d'approvisionnement en gaz pour l'Allemagne et en électricité pour la France, les deux États membres ont conclu un accord de solidarité réciproque. Plus précisément, l'Allemagne devait faire face à l'arrêt des importations de gaz russe à la suite de l'invasion de l'Ukraine par la Russie et la France était confrontée à la disponibilité dégradée du parc nucléaire en raison du phénomène de corrosion sous contrainte, ce qui menaçait sa sécurité d'approvisionnement.

C'est dans ce contexte que les deux pays se sont rapprochés afin de prévoir plusieurs mesures traduisant une forme de solidarité croisée électricité/gaz. La Commission de régulation française (CRE) a souligné à cet égard que :

La diminution des livraisons de gaz russe vers l'Europe à la suite de l'invasion de l'Ukraine par la Russie fait peser un risque important sur la sécurité d'approvisionnement de l'Union européenne. L'Allemagne, dont la Russie était jusqu'ici la première source d'approvisionnement en gaz, est particulièrement concernée. Dans ce cadre, les chefs d'État et de gouvernement français et allemand ont annoncé début septembre leur volonté de mettre en place des mesures de solidarité réciproques concernant la sécurité d'approvisionnement électrique et gazière en prévision de l'hiver 2022/2023.¹²

Achats mutualisés. En application du règlement 2022/2576 du 19 décembre 2022 renforçant la solidarité grâce à une meilleure coordination des achats de gaz, à des prix de référence fiables et à des échanges transfrontières de gaz, un dispositif d'achats mutualisés de gaz a été mis en place. Ce règlement – adopté sur le fondement de l'article 122 TFUE – permet aux fournisseurs de

¹⁰ Voir ci-dessous réponse à la question 7, section II.

¹¹ Question traitée par Guillaume Dezobry.

¹² CRE, Délibération du 7 octobre 2022 portant décision concernant la création d'un terme dans le tarif de transport de gaz applicable à la capacité de sortie physique au point d'interconnexion réseau Obergailbach.

gaz et aux consommateurs de bénéficier d'achats groupés de gaz, ce qui permet d'assurer un approvisionnement à un prix plus compétitif que celui que ces acteurs obtiendraient s'ils achetaient de manière individuelle. Il est intéressant de souligner qu'une plateforme (AggregateEU) a été mise en place pour la mise en œuvre des achats mutualisés.¹³

Questions 2 et 5

Interprétation, portée et effet de la notion de solidarité au sens de la jurisprudence dite « OPAL » (*Germany vs Poland*, C-848/19 P),¹⁴ – notamment au regard de la dimension constitutionnelle du droit de l'UE – Articulation du principe de solidarité au regard du principe de proportionnalité et des spécificités des États membres.

Analyse de la signification du principe de solidarité au sens de la jurisprudence OPAL. L'affaire *OPAL* a été remarquée et commentée par la doctrine française en droit de l'Union et en droit de l'énergie.¹⁵ Saisi du contrôle de la légalité d'une décision d'exécution de la Commission qui autorisait l'utilisation accrue du gazoduc *OPAL* au profit de l'Allemagne (et au détriment de besoins stratégiques de la Pologne), le Tribunal, puis la Cour, ont, pour la première fois, reconnu et mis en œuvre le principe de solidarité inscrit à l'article 194 TFUE pour apprécier l'examen de la conformité d'une décision au regard de ce principe. Partant d'une affirmation générale, suivant laquelle « l'esprit de solidarité entre les États membres [mentionné à l'art. 194 TFUE] constitue une expression spécifique, dans le domaine de l'énergie, du principe de solidarité, qui constitue lui-même, l'un des principes fondamentaux du droit de l'Union (Trib. UE, 10 sept. 2019, *Pologne c. Commission*, aff. T-883/16), » le juge de l'Union a veillé à articuler le principe de solidarité énergétique avec d'autres matérialisations de la solidarité dans les politiques sectorielles, notamment le droit de l'ELSJ (sécurité – justice),¹⁶ afin de mieux préciser et singulariser ce principe en matière énergétique.

¹³ AggregateEU – questions and answers (europa.eu).

¹⁴ Questions traitées par Stéphane de La Rosa, Professeur à l'Université Paris-Est Créteil, Chaire Jean Monnet.

¹⁵ CJUE, 15 juillet 2021, *Allemagne c. Pologne*, aff. C-848/19 P. V. not. B. Blottin et V. Bouhier, « Énergie, » in *Annuaire de droit de l'Union européenne*, Paris, éd. Panthéon-Assas, 2021 ; B. Blottin et F. Tesson, « À la recherche de l'esprit de solidarité énergétique, » in *Union européenne et solidarité(s)*, (dir. A. Millet-Devalle et al.), Bruxelles, Bruylant, 2024, p. 189–210.

¹⁶ Significatif est, à cet égard, le fait que la Cour se réfère à l'usage du principe de solidarité dans les contentieux liés à la relocalisation de demandeurs de protection internationale, par exemple CJUE, 6 septembre 2017, *Slovaquie et Hongrie c. Conseil*, aff. C-643/15 ; CJUE, 2 avril 2020, *Commission c. Pologne*, aff. C-715/17.

L'interprétation de la solidarité dans l'affaire *OPAL* présente une double dimension.

D'un côté, la solidarité est associée à la sécurisation des sources d'approvisionnement et à la nécessité de faire face à des situations de crise. Tel est le sens du raisonnement lorsqu'il est affirmé que

[le principe de solidarité] doit être pris en compte par les institutions de l'Union ainsi que par les États membres, dans le cadre de l'établissement ou du fonctionnement du marché intérieur et, notamment, de celui du gaz naturel, en veillant à assurer la sécurité d'approvisionnement énergétique dans l'Union, ce qui implique non seulement de faire face à **des situations d'urgence**, lorsqu'elles se produisent, mais également d'adopter des mesures visant à prévenir les situations de crise.¹⁷

À cette fin, il [serait] nécessaire « d'évaluer l'existence de risques pour les intérêts énergétiques des États membres et de l'Union, et notamment pour la sécurité d'approvisionnement en énergie » (pt. 69). Cette première approche de la solidarité doit être reliée au contenu de l'article 122 TFUE, lequel reconnaît à la Commission la possibilité de prendre « dans un esprit de solidarité entre les États membres, des mesures appropriées à la situation économique, en particulier si de graves difficultés surviennent dans l'approvisionnement en certains produits, notamment dans le domaine de l'énergie. »

Ainsi conçue, la solidarité intervient comme un principe qui justifie et légitime des mesures d'urgence, le cas échéant dérogatoires par rapport au marché intérieur de l'électricité et du gaz. Cette acception se retrouve, par exemple, dans les motifs du règlement n° 2022/1854 du Conseil du 6 octobre 2022 sur une intervention d'urgence pour faire face aux prix élevés de l'énergie.¹⁸ Ce texte, dans « un esprit de solidarité entre États membres, » introduit une « contribution de solidarité, » « de nature temporaire pour faire face à la situation exceptionnelle et urgente que connaît l'Union en raison de la flambée des prix de l'énergie (...) l'application de la contribution solidarité à l'ensemble de l'exercice fiscal devrait permettre, pour la période concernée, de mettre les bénéfices excédentaires au service de l'intérêt public en atténuant les conséquences de la crise énergétique » (pt. 64). La légalité du règlement 2022/1854 au regard de l'article 122 § 1 TFUE et sa conformité par rapport au principe de sécurité juridique sont d'ailleurs soulevées dans le cadre d'affaires pendantes,¹⁹

¹⁷ CJUE, 15 juillet 2021, *Allemagne c. Pologne*, aff. C-848/19 P., § 69.

¹⁸ Règlement (UE) 2022/1854 du Conseil du 6 octobre 2022 sur une intervention d'urgence pour faire face aux prix élevés de l'énergie, JO L 261I du 7 octobre 2022.

¹⁹ Voir les affaires pendantes, *Varo Energy Belgium NV, EG Retail (Belgium) BV, Gilops Group NV, Van Raak Trading NV, Kuwait Petroleum (Belgium) NV/Ministerraad (Eerste Minister)*, aff. C-358/24 ; et aff. T-802/22, *ExxonMobil Producing Netherlands et Mobil Ergas c. Conseil*.

où la Cour sera sûrement conduite à se prononcer sur la légalité de ce règlement au regard du principe de solidarité énergétique, entendu dans le cadre spécifique des situations d'urgence et de gestion de crise. L'opinion des auteurs du présent rapport est de considérer que, sous l'angle de l'article 122 § 1 TFUE, le principe de solidarité doit revêtir une signification spécifique et renforcée, permettant de justifier une interprétation plus souple de principes tels que la sécurité juridique, la confiance légitime ou encore la proportionnalité. La difficulté demeure toutefois de bien identifier et justifier une situation d'urgence eu égard au caractère fluctuant des prix de l'énergie et des tensions géopolitiques. Une approche contextualisée de l'urgence se justifie sous cet angle : de fortes variabilités de prix entraînant des prix de l'énergie inabordables pour certains consommateurs ainsi que le risque de remise en cause de l'interdépendance des réseaux (difficulté pour un distributeur d'un État à pouvoir se fournir auprès d'un réseau fournisseur dans un autre État) sont des motifs de nature à caractériser l'urgence énergétique au sens de l'article 122 § 1.

D'un autre côté, et de manière plus générale, l'arrêt *OPAL* envisage le principe de solidarité comme un paramètre intervenant dans l'appréciation de la légalité des mesures énergétiques prises par les institutions et par les États, qui justifie une contrainte procédurale nécessitant de prendre en compte les intérêts en présence ; c'est à ce titre que la Cour affirme que

le principe de solidarité énergétique comporte une obligation générale, pour l'Union et les États membres (...), de tenir compte des intérêts de tous les acteurs susceptibles d'être concernés, en évitant de prendre des mesures qui pourraient affecter leurs intérêts, s'agissant de la sécurité d'approvisionnement, de la viabilité économique et politique et de la diversification des sources d'approvisionnement, et ce afin d'assumer leur interdépendance et leur solidarité de fait. (pt. 71)

Ainsi conçue, la solidarité est envisagée comme un critère assez complexe pour apprécier la légalité d'une mesure prise par les institutions ou par les États dans le champ du droit de l'Union. Bien que formulée de manière générale, elle impose de pondérer, de manière précise, les intérêts en présence : intérêts des États *vs* enjeux d'interdépendance et de sécurité d'approvisionnement pour certains États ; marge de manœuvre des États dans les choix énergétiques au titre de la viabilité économique *vs* contraintes de diversification et d'interdépendance.

D'autre part, la formule « qui pourrait affecter, » sous-entend également que la solidarité peut également être utilisée en lien avec le principe de proportionnalité et peut servir comme critère de légalité pour examiner une mesure (p. ex. un règlement d'exécution de la Commission, des mesures prises par un régulateur sectoriel de l'énergie) qui, bien que motivée par des motifs tels que

la diversification énergétique ou le besoin de sécurisation de long terme de l'approvisionnement, va au-delà de ce qui est nécessaire et porte atteinte à un impératif de solidarité fonctionnelle entre les États sur le marché de l'énergie. En ce sens, la solidarité intervient, au titre de l'examen de la légalité d'une mesure, pour justifier un acte visant à remédier à des défaillances dans le marché de l'énergie, notamment sous l'angle des risques pour la sécurisation ou l'interdépendance entre les réseaux.²⁰

Confirmation récente de l'interprétation contextuelle du principe de solidarité. L'appréciation de la portée et des conséquences de ce principe doit être mise en perspective avec un arrêt récent de la Cour, *Orlen SA* du 26 septembre 2024.²¹ Cette affaire porte sur l'examen de la légalité d'une décision de la Commission prise, dans le cadre de la politique de concurrence, sur le fondement de l'article 9 du règlement 1/2003 et portant plus précisément sur la reconnaissance d'engagements de l'opérateur *Gazprom* pour couvrir des risques d'abus de position dominante sur le marché de l'approvisionnement en gaz. À l'appui de sa contestation dirigée à l'encontre la décision de la Commission, considérée comme étant trop « faible » par rapport au périmètre des engagements retenus et non proportionnée au regard l'ampleur de l'atteinte de la concurrence, l'opérateur polonais invoque une atteinte du principe de solidarité, en lien avec la jurisprudence *OPAL*.

Devant le Tribunal de l'Union, l'invocabilité autonome du principe de solidarité pour contraindre la Commission à modifier l'acceptation d'engagements a été écartée : si les objectifs poursuivis par d'autres dispositions du traité (tels que l'énergie) peuvent être pris en compte dans la détermination de l'existence d'une restriction de concurrence, il n'en demeure pas moins que la solidarité ne peut aller jusqu'à contrecarrer l'application des règles générales issues du règlement 1/2003.²² Ce raisonnement, également suivi par l'Avocat général Rantos, a récemment été confirmé par la Cour :

rien ne permet de considérer que le principe de solidarité figurant à l'article 194, paragraphe 1, TFUE ne saurait, comme tel, produire d'effet juridique contraignant pour les États membres et les institutions de l'Union. Au contraire, ce principe, ainsi qu'il découle du libellé et de la structure mêmes de cette disposition, sous-tend l'ensemble des objectifs de la politique de l'Union en matière d'énergie, en les regrouvant et en leur donnant une cohérence. (pt. 91)

²⁰ Voir en ce sens, M. Lamoureux, « La politique de l'énergie : l'esprit de solidarité a-t-il été incarné ? »

²¹ CJUE, 26 septembre 2024, *Orlen S.A. c. Commission*, aff. C-255/22 P) avec l'intervention de la Lituanie, Pologne et de l'entreprise Gazprom.

²² Trib UE, aff. T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo S.A. contre Commission européenne*, pt. 420.

Dès lors, les actes adoptés par les institutions de l'Union, y compris par la Commission au titre de cette politique, doivent être interprétés, et leur légalité appréciée, à la lumière du principe de solidarité énergétique (la cohérence avec *OPAL* doit être ici relevée).²³

Aussi, si ce principe, à l'instar des principes généraux du droit de l'Union, constitue un critère d'appréciation de la légalité des mesures adoptées par les institutions de l'Union, y compris les actes pris en matière de concurrence, son autorité ne s'étend pas à la possibilité d'exiger de la Commission, en tant que régulateur de la concurrence, d'imposer des obligations indépendantes et allant au-delà de celles visant à remédier aux problèmes de concurrence constatés lors de son enquête, en exigeant sur cette base des engagements plus contraignants. Cette précision importante illustre les potentialités et les limites de la solidarité : si le principe peut être utilisé comme un critère de légalité, il ne peut ni constituer un titre autonome de compétence ni faire obstacle au *ratio legis* d'autres normes, notamment en droit de la concurrence.

Articulation avec le principe de proportionnalité. L'interprétation du principe de solidarité, à la lumière des développements jurisprudentiels récents, ouvre un questionnement plus général par rapport au principe de proportionnalité et à la marge de manœuvre des États. La problématique doit être reliée avec l'article 194 § 2 TFUE, qui affirme que les mesures prises par l'Union sur le fondement de la compétence partagée « n'affectent pas le droit d'un État membre de déterminer les conditions d'exploitation de ses ressources énergétiques, son choix entre différentes sources d'énergie et la structure générale de son approvisionnement énergétique. » À la connaissance des auteurs du rapport, la Cour n'a pas eu encore à se prononcer sur la portée de cette disposition, qui peut potentiellement limiter l'exercice de la compétence de l'Union et justifier une approche plus stricte du principe de proportionnalité (au sens de la théorie des compétences et de l'art. 5 TUE), consistant à voir si une mesure ne va pas au-delà de ce qui est nécessaire. Il faut toutefois noter que le Sénat français, lors de l'examen de la proposition de directive concernant les énergies renouvelables, la performance énergétique des bâtiments et l'efficacité énergétique (COM, 2022) a adopté une résolution indiquant que la proposition portait atteinte à l'article 194 § 2.²⁴

²³ Voir aff. C-255/22 P, prec. : « la Commission ne pourrait pas accepter des engagements qui risqueraient de s'avérer contraires à l'article 194 TFUE et de mettre ainsi en péril les objectifs poursuivis par le principe de solidarité énergétique ou la sécurité d'approvisionnement énergétique de l'Union, malgré le fait que ces engagements puissent répondre aux préoccupations concurrentielles de la Commission sur le marché concerné. Néanmoins, cela ne signifie pas que la Commission, agissant en tant que régulateur de la concurrence dans le cadre de la procédure prévue par le règlement n° 1/2003, détiendrait la compétence. »

²⁴ Proposition de résolution n° 835 (2021–2022) de Daniel Gremillet et Pierre Laurent, déposée au Sénat le 27 juillet 2022 : <https://www.senat.fr/leg/exposes-des-motifs/ppr21-835-expose.html>

Pour les auteurs du présent rapport, la mise en œuvre du principe de proportionnalité dans les contentieux énergétiques, en lien avec le principe de solidarité, devrait être adaptée et se concentrer non pas tant sur la nécessité de la mesure prise par l'Union (au sens de savoir si elle ne va pas au-delà de ce qui est nécessaire), mais plutôt sur la pondération des intérêts en présence, consistant à voir dans quelle mesure des impératifs liés à la sécurité des approvisionnements et à l'interdépendance des réseaux l'emportent-ils (ou non) sur la préservation de la marge nationale pour déterminer la structure générale de l'approvisionnement énergétique. Cette approche consiste, en d'autres termes, à adapter à l'énergie une jurisprudence relativement constante, suivant laquelle l'appréciation du principe de proportionnalité, au titre des compétences, nécessite d'examiner si une législation ne dépasse les limites « de ce qui est approprié et nécessaire » et que « les inconvénients causés ne doivent pas être démesurés par rapport aux buts visés » (CJUE, 21 juillet 2011, *Etimine*, C-15/10, pt. 124).

Articulation avec la solidarité conçue comme une valeur au sens de l'art. 2 TUE. La reconnaissance de la justiciabilité du principe de solidarité en matière d'énergie, entendu dans l'une ou l'autre des acceptions ci-dessus, soulève un enjeu de cohérence avec la solidarité conçue comme une valeur au sens de l'article du 2 TUE, qui énonce, pour rappel, que « les valeurs fondatrices de l'Union et communes aux États membres comprennent celles de respect de la dignité humaine, de la liberté, de la démocratie, de l'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, dans une société caractérisée par le pluralisme, la non-discrimination, la tolérance, la justice, la solidarité et l'égalité entre les femmes et les hommes. »

Dans l'affaire *Hongrie et Pologne c. Parlement et Conseil*, portant sur la légalité du règlement 2020/2092 relatif à un régime général de conditionnalité pour la protection du budget de l'Union, la Cour a souligné, en se référant explicitement à l'arrêt *OPAL*, que le budget de l'Union est l'un des principaux instruments permettant de concrétiser, dans les politiques et les actions de l'Union, le principe de solidarité, mentionné à l'article 2 TUE, lequel constitue lui-même l'un des principes fondamentaux du droit de l'Union et, d'autre part, que la mise en œuvre de ce principe, au moyen de ce budget, repose sur la confiance mutuelle entre les États membres dans l'utilisation responsable des ressources communes inscrites audit budget.²⁵

L'interprétation de la solidarité comme valeur, développée dans le cadre des contentieux de l'« État de droit, » nous semble toutefois devoir être dissociée de sa signification en matière énergétique. Dans ce cas, la solidarité intervient comme un motif de justification pour mettre en exergue l'interdépendance des États au

²⁵ CJUE, 13 mars 2019, *Pologne c. Parlement européen et Conseil*, aff. C-128/17, pt. 129.

titre du budget de l'Union – auquel ils sont tous contributeurs – et justifier, en retour, la nécessité de préserver cette « valeur » par la garantie d'indépendance des juridictions nationales, juges de droit commun au titre de l'article 19 TUE. Dans le cadre de l'énergie, la solidarité renvoie à des exigences fonctionnelles au sein du marché intérieur de l'énergie, qui s'expliquent notamment par l'interdépendance des réseaux, le besoin de sécuriser les approvisionnements, le besoin de prise en compte de l'approvisionnement d'autres États. Elle nécessite, aussi, une approche plus contextuelle et au « cas par cas » dans l'appréciation de la légalité des textes, à savoir une démarche empirique qui ne répond pas complètement à l'approche globale de la solidarité au titre des valeurs.

Question 6

Analyse du contenu de la compétence énergie au sens de l'article 194 TFUE – cf. q. 2, 5 (section I) et 10 (section II)

Question 7

Interprétation de la notion de « sécurisation de l'approvisionnement dans le contexte des crises énergétiques » – cf. q. 8 (section I), 2, 7 (section II).

Question 8²⁶

Volet externe de la politique énergétique de l'Union – projection du principe de solidarité à l'échelle externe dans l'exercice des compétences externes de l'Union ?²⁷

Positionnement national par rapport au volet externe des projets d'intérêt commun. Les projets d'intérêt commun ont, de l'avis même du législateur européen, largement contribué à la sécurité des approvisionnements, en particulier dans le secteur de l'électricité et du gaz, comme le rappelle le règlement (UE) 2022/869 concernant des orientations pour les infrastructures énergétiques transeuropéennes,²⁸ texte que la France a pleinement soutenu à l'occasion de

²⁶ Question traitée par Alan Hervé, Professeur à Sciences Po Rennes.

²⁷ Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 amending Regulation (EU) n° 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ L 109, pp. 14–31). Voir aussi Memorandum of Understanding on a Strategic Partnership in the field of energy, concluded by President von der Leyen and President Aliyev in Baku on 18 July 2022.

²⁸ Règlement (UE) 2022/869 du Parlement européen et du Conseil du 30 mai 2022 concernant des orientations pour les infrastructures énergétiques transeuropéennes, modifiant les règlements (CE) n° 715/2009, (UE) 2019/942 et (UE) 2019/943 et les directives 2009/73/CE et (UE) 2019/944, et abrogeant le règlement (UE) n° 347/2013, JO L 152 du 3.6.2022, p. 45–102.

son adoption par le Conseil. Le législateur reconnaît ainsi : « l'Union devrait faciliter les projets d'infrastructure reliant les réseaux de l'Union aux réseaux de pays tiers qui sont mutuellement bénéfiques et nécessaires à la transition énergétique et à la réalisation des objectifs en matière de climat. »²⁹ Parmi les quatre projets d'intérêt commun impliquant la France, deux d'entre eux impliquent des pays tiers,³⁰ en l'occurrence la Norvège et le Royaume-Uni, qui n'occupent pas une place centrale dans ces projets.³¹

Le renforcement d'une compétence énergétique externe de l'Union dans le domaine énergétique sur la base de ces quelques projets ne paraît pas évident pour la France. Cette dernière n'a du reste jamais pris explicitement position en faveur du développement de la compétence externe de l'UE en matière énergétique. Elle s'est toujours soigneusement abstenue de commenter cette question, que ce soit à l'occasion de la signature du mémorandum d'accord entre la présidente de la Commission Ursula von der Leyen et le président Aliyev en 2022 – ce texte ne pouvant au demeurant être considéré comme un accord externe de l'Union – ni lorsque la Commission et le haut représentant ont présenté leur « stratégie énergétique externe de l'UE. »³² Lors de l'adoption des directives de négociation du traité sur la charte de l'énergie en 2019, la France a tenu à souligner que la compétence de l'UE était en ce domaine partagée avec celle de ses États membres. À l'occasion des procédures menées devant la Cour de justice et où était en jeu la question de la nature de la compétence externe de l'UE dans un domaine où sa compétence interne était de nature partagée, la France a systématiquement combattu la thèse de l'exclusivité de la compétence et tenté de minimiser la portée de l'article 3 § 2 TUE et de la doctrine AETR.³³

Limitation de la portée du principe de solidarité dans une dimension externe. Les interlocuteurs contactés au sein de plusieurs administrations centrales françaises – Affaires étrangères, Trésor – tendent majoritairement à considérer que la question de la sécurité des approvisionnements, en tant que question sécuritaire, continue de relever de la seule compétence nationale, conformément à ce que rappelle l'article 4 TUE. Ceux-ci font également remarquer que, depuis l'agression russe en Ukraine de février 2022, plusieurs États membres ont négocié et conclu leurs propres accords énergétiques, en particulier dans le domaine des approvisionnements gaziers, ou encouragé

²⁹ Idem, consid. 20.

³⁰ Voir l'annexe du Règlement délégué 2022/564 de la Commission préc.

³¹ En l'occurrence, le projet *Northern light* qui regroupe des initiatives en matière de captage et de transport de CO₂ vers un site situé sur le plateau continental norvégien et le projet *Dartagnan*, auquel participe notamment le Royaume-Uni, destiné à créer un hub d'exportation de CO₂ multimodal.

³² *Stratégie énergétique extérieure de l'UE dans un monde en mutation*, JOIN/2022/23 final, 18 mai 2022.

³³ Voir notamment la position de la France à l'occasion de l'Avis 3/15, *Traité de Marrakech sur l'accès aux œuvres publiées*, ECLI:EU:C:2017:114, pts. 49–50.

des entreprises nationales à passer des contrats de moyen et long terme. Si d'éventuels accords de l'UE dans le domaine énergétique avec des pays tiers ne sont pas d'emblée rejetés, ils continueront de relever *a minima* d'une compétence partagée entre l'Union et ses États membres, et le principe de solidarité, en dépit de la reconnaissance juridictionnelle de sa juridicité, ne saurait avoir pour effet de modifier la répartition des compétences voulue par les rédacteurs des traités.

Section II : Energy solidarity, energy security and green transition

Question 1

Solidarité énergétique et transition écologique.³⁴

Hérité de l'Accord de Paris et du droit international du climat et de l'environnement, l'objectif de neutralité climatique constitue effectivement un concept qui s'est peu à peu matérialisé dans le droit français, à l'instar de sa consécration dans le cadre européen, en particulier dans le cadre de la législation nationale énergie-climat de 2019 au titre de laquelle la France a affiché son objectif de diviser par 6 ses émissions de gaz à effet de serre par rapport au niveau de 1990, au moyen de sa stratégie nationale bas carbone. Cet engagement a vu sa portée juridique renforcée à l'occasion de contentieux portés devant les juridictions françaises et mettant en cause l'inaction climatique de l'État français.

Force est cependant d'observer que le principe de solidarité énergétique n'est que très peu mobilisé dans cette perspective et pas réellement mis en relation avec l'objectif de réduction des émissions. Le concept de solidarité énergétique s'est surtout développé au plan européen à l'occasion de crises, en particulier lors de la crise gazière, et plus largement dans le contexte sécuritaire lié à un risque d'une rupture des approvisionnements énergétiques (voir notamment le règlement 2017/1938). La solidarité est beaucoup moins mobilisée dans le contexte de la réduction des émissions liée à la recherche d'une neutralité climatique. Dans le cadre de la législation française, nous ne sommes pas parvenus à établir un lien tangible entre les concepts de solidarité et de neutralité climatique. Nous n'avons pas non plus trouvé de lien effectif entre l'objectif de neutralité climatique et la sécurité énergétique, ces deux thématiques ayant été jusqu'à présent abordées de façon séparée, comme le révèle notamment la rédaction du Code français de l'énergie.

³⁴ Question traitée par Alan Hervé, Professeur à Sciences Po Rennes.

Question 2

Conséquence de l'agenda « Fit for 55 »³⁵ dans les droits nationaux de l'énergie, notamment sous l'angle de la sécurisation et de la solidarité.³⁶

Loi « énergie-climat ». Au plan européen, la France a globalement défendu et soutenu les mesures du Pacte vert proposées par la Commission au titre de l'ajustement à l'objectif 55. Mais la transposition effective de ce nouvel objectif dans le droit national accuse encore un certain retard, la législation énergie-climat adoptée par la France en 2019 – La loi n° 2019-1147 relative à l'énergie et au climat – demeurant encore en ce domaine le texte de référence.

Ainsi, aux termes de l'article L. 100-4 du Code de l'énergie :

I. – Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : / 1° De réduire les émissions de gaz à effet de serre de 40 % entre 1990 et 2030 et d'atteindre la neutralité carbone à l'horizon 2050 en divisant les émissions de gaz à effet de serre par un facteur supérieur à six entre 1990 et 2050. La trajectoire est précisée dans les budgets carbone mentionnés à l'article L. 222-1 A du code de l'environnement. Pour l'application du présent 1°, la neutralité carbone est entendue comme un équilibre, sur le territoire national, entre les émissions anthropiques par les sources et les absorptions anthropiques par les puits de gaz à effet de serre, tel que mentionné à l'article 4 de l'accord de Paris ratifié le 5 octobre 2016. La comptabilisation de ces émissions et absorptions est réalisée selon les mêmes modalités que celles applicables aux inventaires nationaux de gaz à effet de serre notifiés à la Commission européenne et dans le cadre de la convention-cadre des Nations unies sur les changements climatiques, sans tenir compte des crédits internationaux de compensation carbone (...).

Il résulte de ces dispositions que le législateur a pour l'heure fixé un objectif de réduction de 40 % des émissions de gaz à effet de serre en 2030 par rapport aux niveaux de 1990. La loi n° 2019-1147 relative à l'énergie et au climat prévoyait qu'avant le 1^{er} juillet 2023, puis tous les cinq ans, une loi devait être présentée pour « déterminer les objectifs et fixer les priorités d'action de la politique énergétique nationale pour répondre à l'urgence écologique et climatique. » Mais, le législateur n'est pas à ce jour parvenu à adopter une nouvelle loi rehaussant les objectifs français conformément à l'ajustement à l'objectif 55 – qui n'apparaît pas être en soi, compte tenu de l'état de sa formulation en droit européen,

³⁵ https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals_en

³⁶ Question traitée par Alan Hervé, Professeur à Sciences Po Rennes.

susceptible d'être invoqué directement devant les juridictions françaises – et les obligations imposées par le législateur demeurent en conséquence en deçà de ceux fixés au plan européen.

Contentieux des GES. En tout état de cause, les juridictions administratives françaises ont d'ores et déjà été amenées à préciser la portée de cet objectif législatif de réduction des émissions, en liaison avec les obligations internationales et européennes françaises. À l'occasion d'une affaire dite *Commune de Grande-Synthe*, le Conseil d'État français a ainsi reconnu la nature contraignante de ces engagements. La haute juridiction administrative a notamment enjoint au Gouvernement français de prendre toutes mesures supplémentaires utiles pour assurer la cohérence du rythme de diminution des émissions de gaz à effet de serre avec la trajectoire de réduction de ces émissions retenue au titre du cadre réglementaire et législatif français.³⁷ Le juge administratif n'est pas encore allé jusqu'à imposer des sanctions financières comme le lui demandait le requérant dans le cadre de cette affaire – en l'occurrence des astreintes réclamées par la commune de Grande Synthe – mais les mesures d'exécution adoptées ou annoncées par le Gouvernement n'en demeure pas moins sous sa surveillance.

Dans le même sens, la responsabilité de l'État liée au respect des engagements en matière de réduction des émissions de gaz à effet de serre entre 2015 et 2018 a également été examinée par le tribunal administratif de Paris. Par un jugement du 14 octobre 2021, devenu définitif, le tribunal a enjoint au Premier ministre et aux ministres compétents de prendre, au 31 décembre 2022, toutes les mesures utiles de nature à réparer le préjudice écologique et à prévenir l'aggravation des dommages, à hauteur de la part non compensée d'émissions de gaz à effet de serre au titre du premier budget carbone, soit 15 Mt CO₂-eq.³⁸

Sur le plan interne, le concept de solidarité énergétique est ponctuellement employé dans une logique territoriale, notamment dans la perspective de l'accès à l'énergie, en particulier aux énergies propres, pour certains territoires qui en sont dépourvus. Le législateur³⁹ a en outre confié aux régions la responsabilité de la planification de la transition énergétique, et aux municipalités

³⁷ Voir notamment CE aff. 467982, Commune de Grande Scynthe/Emissions des gaz à effet de serre, 10 mai 2023.

³⁸ Saisi de l'exécution de son jugement du 14 octobre 2021 par lequel il avait ordonné la compensation du dépassement du plafond des émissions de gaz à effet de serre fixé par premier budget carbone (2015–2018), le tribunal administratif de Paris considère que la réparation du préjudice écologique a été tardive mais est désormais complète. Le Tribunal constate ainsi une récente diminution des émissions françaises de GES (pour l'année 2023). Voir TA de Paris, 4^e Sect., 1^{er} ch., 14 octobre 2021, n° 1904967, 1904968, 1904972, 1904976 et TA de Paris, 4^e Sect., 1^{er} ch., 22 décembre 2023, n° 2321828/4.

³⁹ Voir notamment la Loi no 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte.

l'animation de celle-ci. Mais nous n'avons pas identifié de contentieux internes mobilisant le concept de solidarité énergétique ou imposant des obligations contraignantes au nom de ce dernier.

Il en va différemment de la notion de sécurité énergétique, qui s'exprime notamment à travers le souci de sécurité des approvisionnements. Le législateur a de longue date consacré en vertu de ce dernier des pouvoirs exceptionnels. L'article L. 143-4 du code de l'énergie dispose ainsi « [qu'en] cas de crise grave sur le marché de l'énergie, de menace pour la sécurité ou la sûreté des réseaux et installations électriques, ou de risque pour la sécurité des personnes, des mesures temporaires de sauvegarde peuvent être prises par le ministre chargé de l'énergie (...) sans que ces mesures puissent faire l'objet d'une indemnisation. »⁴⁰ Des contentieux récemment portés devant les juridictions administratives ont aussi pu mettre en évidence des mesures adoptées sur le fondement de cette disposition dans le contexte de la crise énergétique consécutive à la guerre en Ukraine et destinées à assurer la sécurité des approvisionnements.⁴¹ Mais là encore, nous n'avons pu identifier de mesures ou de contentieux spécifiquement lié à l'ajustement à l'objectif 55.

Question 3

Principe « *do no significant harm* »⁴² et conséquences en droit de l'énergie.⁴³

Principe dans le plan national de relance au titre de la facilité. Le principe *do not significant harm* (DNSH ou *l'absence de préjudice important*) commence en tant que tel à être diffusé en droit français, principalement à travers des documents produits par l'administration française à l'occasion de mesures de transposition ou de mise en œuvre du droit de l'Union européenne et lorsque ce dernier impose aux États membres la prise en considération de ce principe. Ainsi, conformément à ce que prévoit le règlement établissant une facilité pour la reprise et la résilience, les États membres ont été dans l'obligation de fournir une évaluation DNSH pour chaque mesure de leur plan national de relance. Le plan français de 2021, qui intègre une composante « *Énergies et technologies vertes*, » réalise à cet égard une évaluation précise du principe *do*

⁴⁰ Voir plus largement les articles L. 143-1 à L-143-8 du Code de l'énergie intéressant l'ensemble des mesures de sauvegarde susceptibles d'être adoptées en cas de crise.

⁴¹ Conseil d'État, 9^e ch., 6 décembre 2023, n° 469094.

⁴² Voir Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, pp. 13–43). Applicable in the context of the post-Covid recovery, the mandatory respect of the “do no significant harm” principle is also essential under the RRF Regulation (Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, pp. 17–75)).

⁴³ Question traitée par Alan Hervé, Professeur à Sciences Po Rennes.

not significant harm.⁴⁴ Sont ici concernées des mesures liées à la rénovation énergétique des bâtiments publics, des logements sociaux, à la transition écologique et à la rénovation des petites et moyennes entreprises, à la rénovation énergétique des bâtiments privés, à la réforme de la politique du logement et de la réglementation thermique des bâtiments. Sur le plan climatique, l'impact environnemental et en particulier climatique est ici présenté par les autorités françaises comme positif dans la plupart des cas, et plus rarement comme neutre.

Dans ses orientations techniques sur l'application du principe consistant « à ne pas causer de préjudice important » au titre du règlement établissant une facilité pour la reprise et la résilience, la Commission, s'inspirant de l'article 17 du règlement taxonomie,⁴⁵ considère comme « causant un préjudice important à l'atténuation du changement climatique » une activité qui génère des émissions importantes de gaz à effet de serre ou qui entraîne une augmentation des incidences négatives du climat actuel et de son évolution attendue sur elle-même ou sur la population, la nature ou les biens. Ce principe, qui trouve aussi des déclinaisons dans les domaines de l'utilisation durable et de la protection des ressources aquatiques et marines, l'économie circulaire, la prévention et la réduction de la pollution ainsi que la protection et la restauration de la diversité et des écosystèmes n'est pas véritablement étranger au droit français de l'environnement et peut en effet s'appliquer dans le cadre du droit de l'énergie.

Charte de l'environnement en droit constitutionnel. La notion d'absence de préjudice important fait écho à plusieurs dispositions de la Charte de l'environnement qui a depuis 2005 valeur constitutionnelle en droit français et à laquelle le juge administratif, et dans une moindre mesure le juge constitutionnel, ont donné plein effet, ainsi que le législateur, y compris dans le domaine de l'énergie.⁴⁶ La Charte est également invocable dans les rapports de droit privé, ou elle bénéficie d'un effet horizontal. L'article 3 de la Charte de l'environnement est sans doute la disposition qui se rapproche le plus directement de la notion d'absence de préjudice important ce qu'il pose un principe de prévention, qui impose à toute personne de prévenir les atteintes qu'elle est susceptible de

⁴⁴ Plan rendu public en juin 2024 et disponible à l'adresse : https://www.economie.gouv.fr/files/directions_services/plan-de-relance/PNRR%20Francais.pdf

⁴⁵ Règlement (UE) 2020/852 du Parlement européen et du Conseil du 18 juin 2020 sur l'établissement d'un cadre visant à favoriser les investissements durables et modifiant le règlement (UE) 2019/2088, JO L 198, 22 juin 2020, p. 13–43.

⁴⁶ Le Conseil constitutionnel reconnaît la pleine valeur constitutionnelle de la Charte de l'environnement. Par ailleurs, il a admis à l'appui d'une question prioritaire de constitutionnalité l'invocabilité des articles 1 à 4 de la Charte de l'environnement (décision QPC n°2011-116 du 8 avril 2011). La nature du contrôle exercé par le juge constitutionnel, comme le juge administratif, variera cependant en pratique en fonction des dispositions de la Charte, en fonction notamment de la présence ou non d'une clause de renvoi à la Charte de la part du pouvoir réglementaire ou du législateur.

porter à l'environnement et, à défaut, d'en réduire les conséquences. L'article 4 pose quant à lui un principe de réparation, au titre duquel toute personne doit contribuer à la réparation des dommages qu'elle cause à l'environnement, dans les conditions prévues par la loi. Celui-ci a d'ailleurs favorisé l'émergence de la notion de préjudice écologique (voir ci-dessous). L'article 5 définit quant à lui le principe de précaution qui là encore fait partiellement écho à celui du préjudice important. La Charte de l'environnement a été à l'appui de nombreux recours engagés sur des questions en lien avec les ressources énergétiques, qui ont ensuite été à l'origine de changements législatifs. Il en est allé ainsi au début dans la décennie 2000 à propos de plusieurs recours administratif contre des permis de recherche de gaz de schiste, aboutissant à la loi n° 2011-835 du 13 juillet 2011 visant à interdire l'exploitation de ce dernier.

Préjudice écologique. L'idée de « préjudice écologique, » qui entre en résonance avec celle de l'absence de préjudice important, tend à voir sa valeur renforcée au fil du temps. D'abord consacré par le juge judiciaire à l'occasion du procès Erika,⁴⁷ ce principe a ensuite été repris en 2016 dans le code civil français qui prévoit que : « Toute personne responsable d'un préjudice écologique est tenue de le réparer. »⁴⁸ Pour être réparable, le préjudice écologique doit toutefois consister en une atteinte « non négligeable » aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement. Faute de précision, c'est au juge qu'il reviendra d'apprécier la gravité du préjudice pour fonder une éventuelle réparation. Le principe de l'absence de préjudice important, qui doit être pris en considération au moment de concevoir une action des pouvoirs publics, tel qu'apparu dans le droit européen, ne semble pas en l'état, à la différence du préjudice écologique, susceptible de fonder un contrôle juridictionnel ou de justifier une action en responsabilité. Mais on retrouve dans les deux cas une exigence de gravité qui vient de fait limiter la portée de la notion et de la règle juridique. De même, à l'instar du principe de l'absence de préjudice important, la notion de préjudice écologique n'a pas pour fonction de réparer des personnes. Elle renvoie à l'idée d'un préjudice purement environnemental qui doit pouvoir être appréhendé, évalué et réparé indépendamment de l'existence de préjudice personnel, sans qu'il soit nécessaire de démontrer l'existence de préjudice subis par des sujets de droit. D'autre part, le droit civil français ne subordonne pas la réparation de ce préjudice à la commission d'une faute. Le débiteur de cette obligation peut être « toute personne, » y compris potentiellement une personne publique, le Tribunal de Paris ayant considéré à l'occasion de l'affaire *Commune de Grande-Synthe* déjà évoquée que l'État français était, à raison de sa carence à respecter les objectifs qu'il s'était fixés en matière de réduction des gaz à effet de serre, responsable d'un préjudice écologique. Certes, dans le cadre du droit français,

⁴⁷ Cass. Crim. 25 septembre 2012, pourvoi n° 10-82938.

⁴⁸ Article 1246 du Code civil.

le préjudice écologique sert essentiellement à sanctionner, plutôt qu'à prévenir des atteintes à l'environnement comme cela semble être le cas de la notion d'absence de préjudice important. Il n'en demeure pas moins que ces deux notions ont en commun d'obliger toute personne de tenir compte des possibles conséquences environnementales de leurs actions.

Question 4

Notion de « pauvreté énergétique »⁴⁹ – champ, portée, conséquences en droit interne.⁵⁰

La dimension sociale de la politique énergétique est une préoccupation ancienne de la part des autorités françaises, qui s'est renforcée ces dernières années dans le contexte de la transition énergétique et de la crise de l'énergie. La prise de conscience de l'impact social d'une hausse du coût de l'énergie s'est du reste accrue consécutivement à la crise des « gilets jaunes, » qui trouve en partie son origine dans l'augmentation du prix des carburants automobiles issue de la hausse de la taxe intérieure de consommation sur les produits énergétiques (TICPE), découlant elle-même de la loi du 17 août 2015 relative à la transition énergétique.⁵¹ Cet épisode a durablement marqué les esprits et les autorités françaises qui demeurent prudentes à l'égard de toute idée de taxation du carbone, même dans l'optique d'un financement de la transition, à raison des conséquences sociales et politiques susceptibles d'être provoquées par ce type de fiscalité écologique parfois perçue, à tort ou à raison, comme punitive et injuste socialement.

Définition interne de la précarité énergétique. La notion de précarité énergétique fait par ailleurs l'objet d'une définition légale, qui se concentre essentiellement sur les questions spécifiques du logement. La loi du 10 juillet 2010 portant engagement national pour l'environnement précise ainsi « [qu'] est en situation de précarité énergétique toute personne qui éprouve dans son logement des difficultés particulières à disposer de la fourniture d'énergie nécessaire à ses besoins élémentaires en raison de l'inadaptation de ses ressources ou conditions d'habitations. » Cette même loi a prévu la mise en place d'un observatoire national de la précarité énergétique destiné à analyser ce

⁴⁹ Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 (OJ L 130, pp. 1–51) and 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 (recast) (OJ L 231, 20.9.2023, pp. 1–111).

⁵⁰ Question traitée par Alan Hervé, Professeur à Sciences Po Rennes.

⁵¹ Loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte. Cette loi prévoyait notamment d'indexer les taxes intérieures de consommation d'énergies fossiles sur un prix de référence du CO₂.

phénomène et à apprécier et évaluer les dispositifs aménagés par les pouvoirs publics pour lutter contre la précarité énergétique.

Le plan national intégré énergie-climat⁵² que la France a communiqué à la Commission en juin 2024 fait état des différents dispositifs aménagés au titre de la lutte contre la précarité. Cette politique s'appuie au demeurant sur une série de mesures préventives couplées à des aides versées au ménage en situation de précarité. Au titre des premières on trouve des dispositifs tels que le soutien à la rénovation énergétique des bâtiments – tel que dispositif dit MaPrimeRénov⁵³ – et des secondes des aides aux ménages en situation de précarité (aides aux paiements des factures ou encore chèque énergie). Afin de limiter la hausse des prix de l'énergie consécutive à la guerre en Ukraine, le gouvernement français a choisi de mettre en place un bouclier tarifaire. Ce dispositif, qui a pris fin en juin 2023 s'agissant du gaz et devrait s'appliquer jusqu'au début de l'année 2025 pour l'électricité, a permis de plafonner pour les consommateurs concernés par les tarifs réglementés – et également pour les entreprises – le prix de l'énergie, avec une prise en charge partielle des factures par les pouvoirs publics. Certaines mesures destinées à lutter contre l'inflation peuvent parfois avoir un effet contestable sur le plan écologique et même social. Il en va ainsi par exemple de la remise sur les prix du carburant (« remise carburant à la pompe ») décidée par le Gouvernement en 2022 et appliquée sans condition de ressource, avant d'être remplacée début 2023 par une indemnité carburant ciblant les ménages les plus modestes. L'ensemble de ces aides pourraient toutefois faire l'objet de mesures de réduction conséquentes compte tenu du contexte budgétaire français fin 2024.

Fonds transition juste. La France bénéficie de 1,03 milliard d'euros au titre du Fonds pour une transition juste (FTJ). Ce chiffre est sensiblement moins élevé que celui d'autres États membres comme la Pologne, l'Allemagne ou encore la Roumanie qui sont les premiers bénéficiaires du FTJ en termes de montant (respectivement 3,8 milliards, 2,5 milliards et 2,1 milliards d'euros). L'Agence nationale de la Cohésion des Territoires (ANCT) joue un rôle crucial dans la mise en œuvre des fonds européens en France de par son rôle d'autorité de coordination française de la politique de cohésion, et donc du FTJ. Rattachée au Ministère de la Cohésion des territoires, lui-même sous l'égide du Ministère de la Transition écologique, elle assure la coordination entre l'État et les autorités dites de gestion, à savoir principalement les régions et les autorités déconcentrées de l'État. Dans le cadre du Fonds pour une transition juste, les

⁵² https://commission.europa.eu/document/download/ab4e488b-2ae9-477f-b509-bbc194154a30_fr?filename=FRANCE%20%96%20FINAL%20UPDATED%20NECP%202021-2030%20%28French%29.pdf

⁵³ Aide de l'État à destination des propriétaires qui souhaitent réaliser des travaux de rénovation énergétique au sein de leur logement, qu'ils habitent ce dernier ou qu'ils le proposent à la location. <https://www.economie.gouv.fr/particuliers/prime-renovation-energetique#>

équipes de l'ANCT ont œuvré pour faciliter la compréhension et la mise en œuvre de ce fonds, en apportant un soutien juridique et technique aux autorités de gestion. Un autre acteur impliqué au niveau national est Régions de France. Cette institution de représentations auprès des pouvoirs publics français et des institutions européennes, agit en tant que porte-parole des Régions françaises.

En accord avec la Commission européenne, dix territoires de six régions françaises ont été retenus en coordination entre l'État et les régions françaises selon plusieurs critères, dont leur niveau d'émissions de gaz à effet de serre (GES) et le nombre d'emplois liés aux industries polluantes. L'enveloppe française est répartie entre les conseils régionaux de ces territoires pour la mise en œuvre des mesures économiques (70 %) et l'État pour les mesures du volet emploi et compétences (30 % soit 309 M€). Les territoires sélectionnés représentent 500 000 emplois et 70 % des émissions de CO₂ françaises (énergie et industrie). Au sein de ces territoires, le FTJ ciblera les secteurs considérés comme en déclin (production d'électricité à base de charbon, cokéfaction et raffinage) ou en transformation (métallurgie, chimie, fabrication de produits minéraux non métalliques). Ces secteurs rassemblent 230 000 emplois directs et indirects dans les territoires visés par le FTJ (données de 2018). À l'horizon 2029, l'objectif est d'accompagner ou de former 78 000 chômeurs de ces territoires vers des secteurs de diversification plus verts (énergies renouvelables, économie circulaire, etc.), ce qui illustre la dimension sociale de ce Fonds. Les territoires visés sont ceux du Nord-Pas-de-Calais (32 % de l'enveloppe totale du fonds), de la Normandie, (axe Seine et Bresle) (15 %), le territoire du Pacte de Cordemais (7 %), le Rhône-Isère (11 %), les Bouches-du-Rhône (20 %) et le Grand-Est (15 %).

Le Fonds pour transition juste étant un instrument nouveau, il suscite des questionnements de la part des autorités de gestion notamment en ce qui concerne l'éligibilité de certains projets au financement de ce fonds. Cette dernière difficulté est particulièrement bien illustrée pour le cas français à travers la question du nucléaire. Le règlement 2021/1056 établissant le Fonds pour une Transition Juste précise en son article 9 que le démantèlement ou la construction de centrales nucléaires sont exclus du champ d'application du FTJ dans les États membres. Cette restriction pose toutefois un défi particulier pour la France qui considère cette source comme un pilier de sa transition vers la neutralité climatique.⁵⁴ Certaines régions estiment ainsi que les financements provenant du FTJ devraient permettre de soutenir des industries dont une partie de l'activité est liée au secteur nucléaire. D'autres soulèvent la question de l'exclusion ou non de l'hydrogène dit jaune du financement de ce fonds, du

⁵⁴ Avec 56 réacteurs, le nucléaire représente 70 % de la production électrique française sur les 20 dernières années, et pèse plus d'un tiers de l'ensemble du mix énergétique français.

fait que ce procédé de production de l'hydrogène fasse lui-même intervenir de l'énergie nucléaire.

Question 5

Articulation du régime de contrôle des aides d'État avec l'examen de soutiens financiers à la politique énergétique sur le fondement de l'article 106 TFUE – Usage de l'article 106 au regard du principe de solidarité énergétique – affaire *Hinckley Point* case (C-594/18).⁵⁵

Dans l'arrêt dit *Hinkley Point*, la Cour de justice affirme qu'une aide d'État en faveur d'une activité économique appartenant au secteur de l'énergie nucléaire, « dont l'examen révélerait qu'elle viole des règles du droit de l'Union en matière d'environnement, ne saurait être déclarée compatible avec le marché intérieur en application de [l'article 107, paragraphe 3, sous c), TFUE]. » La solution s'inscrit dans une jurisprudence bien établie selon laquelle : « il résulte de l'économie générale du traité FUE que la procédure prévue à son article 108 ne doit jamais aboutir à un résultat qui serait contraire aux dispositions spécifiques du traité. Dès lors, une aide d'État qui, par certaines de ses modalités, viole d'autres dispositions du traité FUE ne peut être déclarée compatible avec le marché intérieur par la Commission. »⁵⁶

Solidarité et paramètre de contrôle des aides d'État. La solution est tirée d'arrêts qu'il est loisible de résumer selon la logique suivante : la Commission intègre dans son contrôle de compatibilité avec le marché intérieur des aides d'État le respect du droit de l'Union. Cela questionne assurément la question en droit de l'Union de la pertinence du principe d'« indépendance des législations » bien connu en droit administratif français selon lequel la légalité des autorisations délivrées au titre d'une législation ne saurait être contestée sur le fondement d'une autre législation. La question sera en droit de l'Union celle des normes de référence à l'aune desquelles la compatibilité des aides d'État est appréciée. La jurisprudence sur laquelle se fonde cette solution identifie la diversité des normes de référence, parmi lesquelles figurent des principes du droit de l'Union comme le principe d'égalité de traitement (CJUE, 14 oct. 2020, *Nuova Agricast*, aff. C-67/09), mais également les principes du droit de l'environnement comme ceux de précaution, du pollueur-payeur et de durabilité (CJUE, 22 sept. 2020, *Autriche c. Commission*, aff. C-594/18). Rien ne s'oppose à ce que, parmi ces principes, figure le principe de solidarité énergétique d'au-

⁵⁵ Question traitée par Francesco Martucci, Professeur à l'Université Paris II Panthéon Assas.

⁵⁶ Trib. UE, 9 juin 2021, *Dansk Erhverv c/ Commission*, T-47/19, pt. 60 ; également, antérieurement : CJCE, 3 mai 2001, *Portugal / Commission*, C 204/97, Rec. p. I-3175, pt. 41 ; CJCE, 12 décembre 2002, *France / Commission*, C-456/00, Rec. p. I-11949, pt. 30 ; CJCE, 19 septembre 2002, *Espagne / Commission*, C-13/00, Rec. p. I-7601, pt. 78.

tant plus celui-ci a été consacré comme l'une des composantes « du principe de solidarité, qui constitue lui-même l'un des principes fondamentaux de l'Union » (aff. *OPAL* et les réponses ci-dessous).

Solidarité énergétique et article 106 § 2 TFUE. Une autre piste serait également envisageable puisque la solidarité en matière énergétique s'exprime également par le truchement des services d'intérêt économique général. En conséquence, l'article 106, paragraphe 2, TFUE peut constituer la base juridique idoine pour permettre à la Commission d'apprécier la compatibilité des aides d'État dont l'objectif est la solidarité énergétique. *Mutatis mutandis*, les solutions dégagées à propos des tarifs réglementés de l'énergie s'avèrent éclairantes. Ainsi, dans les affaires *Federutility* puis *Anode* (CJUE, 20 avril 2010, *Federutility*, aff. C-265/08 ; CJUE, 7 septembre 2016, *ANODE c. Premier ministre*, aff. C-121/15), la Cour a souligné que (*Anode*, pt. 43) :

l'article 106, paragraphe 2, TFUE vise à concilier l'intérêt des États membres à utiliser certaines entreprises en tant qu'instrument de politique économique ou sociale avec l'intérêt de l'Union au respect des règles de concurrence et à la préservation de l'unité du marché intérieur (...) les États membres sont en droit, dans le respect du droit de l'Union, de définir l'étendue et l'organisation de leurs services d'intérêt économique général. Ils peuvent en particulier tenir compte d'objectifs propres à leur politique nationale (...) à cet égard, dans le cadre de l'appréciation que les États membres doivent mener, aux termes de la directive 2009/73, pour déterminer si, dans l'intérêt économique général, il y a lieu d'imposer aux entreprises opérant dans le secteur du gaz des obligations de service public, il appartient aux États membres d'opérer une conciliation entre l'objectif de libéralisation et les autres objectifs poursuivis par cette directive.

Au regard de cette analyse, le principe de solidarité pourrait être associé à un motif d'intérêt général dès lors qu'il est utilisé pour des objectifs distincts de l'ouverture du marché (sécurisation, répartition des coûts des énergies renouvelables, accessibilité tarifaire). Au-delà des motifs, une approche assez souple du principe de proportionnalité pourrait favoriser un examen de la compatibilité sur le terrain de l'article 106/2 et laisser une marge de manœuvre aux États pour prendre en compte des objectifs propres, par exemple, pour la France, le maintien d'une capacité importante de production d'énergie nucléaire.

Question 6⁵⁷

Compétence « réseau » de l'Union (art. 170 à 172 TFEU) – articulation de la réglementation relative au réseau (règl. 2022/869) avec la compétence énergie.

⁵⁷ Question traitée par Stéphane de La Rosa, Professeur à l'Université Paris Est Créteil.

Portée du règlement n° 2022/869. Le règlement n° 2022/869 du 30 mai 2022, fondé sur la politique des réseaux, identifie une méthodologie commune pour les réseaux en matière d'électricité – le REGRT pour l'électricité et le REGRT pour le gaz élaborent des projets cohérents de méthode par secteur, y compris en ce qui concerne la modélisation du réseau et du marché de l'énergie. En adoptant ce règlement transversal, il s'est agi de doter l'Union d'instruments pour identifier et accélérer la mise en œuvre des projets d'infrastructure clés, afin de répondre aux défaillances du marché pour les investissements dans les infrastructures énergétiques transfrontalières, notamment en raison de l'asymétrie des avantages et des coûts entre les États membres, de circonscrire l'importance trop grande accordée aux priorités nationales dans les décisions d'investissement dans les infrastructures et la nécessité d'aligner les projets d'infrastructure transfrontaliers sur les priorités européennes en matière d'infrastructures afin de créer des synergies, et, enfin, de répondre à l'insuffisance du financement basé sur le marché pour répondre aux besoins d'investissement dans les infrastructures énergétiques transfrontalières (voir SWD(2020) 346 final). Pour parvenir à ces fins, le règlement renforce les critères d'éligibilité des projets d'intérêt commun, notamment en imposant des critères de durabilité obligatoires, en facilitant les procédures d'élaboration ou encore en excluant certains opérateurs des projets en cas de fraude ou de liens corruptifs avec des États tiers.

Base juridique. L'article 170 du traité sur le fonctionnement de l'Union européenne prévoit que l'Union contribue à l'établissement et au développement de réseaux transeuropéens, y compris dans le domaine des infrastructures énergétiques. L'Union devra promouvoir l'interconnexion des réseaux nationaux. Le règlement RTE-E est basé sur l'article 172 du traité sur le fonctionnement de l'Union européenne qui prévoit la base juridique pour adopter des orientations couvrant les objectifs, les priorités et les grandes lignes des mesures envisagées dans le domaine des réseaux transeuropéens tels que définis à l'article 171. Les orientations doivent identifier les projets d'intérêt commun qui sont nécessaires pour rendre les RTE-E aptes à remplir leur fonction. Les orientations fixent également les conditions dans lesquelles l'UE peut soutenir financièrement les PCI.

Portée de la compétence « réseau. » L'objectif de cette compétence, qui a un caractère partagé, vise à ce que l'Union, pour réaliser les objectifs liés au marché intérieur (art. 26 TFUE) et à la politique de cohésion (art. 174 TFUE), « contribue à l'élargissement et au développement de réseaux transeuropéens dans les secteurs des infrastructures du transport, des télécommunications et de l'énergie. » La finalité de cette politique est centrée sur l'articulation et l'interconnexion des réseaux : suivant la formulation de l'article 170 § 2 TFUE, il s'agit pour l'Union de contribuer « à l'établissement et au développement de

réseaux transeuropéens dans les domaines des infrastructures de transport, de télécommunications et d'énergie. »

L'analyse du règlement doit s'inscrire dans le périmètre de la compétence dite « réseau » de l'Union européenne. Les quelques (rares) arrêts relatifs au règlement n° 1315/2013 montrent que ce texte est interprété au regard d'une finalité générale, usuelle en droit du marché intérieur, tenant à la suppression des entraves entre les États membres de l'Union. Dans la première affaire portant sur ce texte, *Royaume-Uni c. Parlement et Conseil*, l'Avocat général Y. Bot soulignait que « l'établissement et le développement des réseaux transeuropéens, et notamment des RTE-T, doivent permettre de lier les réseaux nationaux entre eux afin d'éliminer tout obstacle à la libre circulation des marchandises et des personnes. Bien souvent, ces obstacles sont géographiques, comme c'est le cas dans les Alpes entre la France et l'Italie, ou techniques, comme l'existence de différents systèmes nationaux embarqués de signalisation et de contrôle des vitesses pour le transport ferroviaire qui permettent aux trains de réagir aux signaux transmis par le sol. De tels obstacles sont nécessairement un frein à l'établissement du marché intérieur. »⁵⁸

Deux conséquences découlent de cette finalité générale. Tout d'abord, la définition des projets d'intérêt commun, qui font l'objet d'un financement de l'Union et qui s'inscrivent dans la définition par les États des infrastructures éligibles, doit marquer une « valeur ajoutée européenne, » à savoir caractériser un projet qui, outre la valeur potentielle pour l'État membre considéré seul, « engendre une amélioration significative, soit des connexions de transport, soit des flux de transport entre les États membres que l'on peut démontrer sur la base d'améliorations en matière d'efficacité, de durabilité, de compétitivité ou de cohésion. » L'État est donc tenu de projeter ses projets d'aménagement de réseaux dans une perspective européenne et ne peut, isolément, qualifier un réseau comme étant d'intérêt commun.⁵⁹ Ensuite, lorsque des réseaux d'infrastructure relèvent du règlement n° 1315/2013 et se rattachent au réseau global, les États sont tenus de maintenir leur accessibilité à l'ensemble des modes de transport et ne peuvent réduire ni les capacités ni les liaisons d'ac-

⁵⁸ Conclusions présentées par l'AG Bot, 3 septembre 2015, C-121/14, *Royaume-Uni c. Conseil et Parlement*, EU:C:2015:526.

⁵⁹ CJUE, 12 novembre 2015, *Royaume-Uni c. Conseil et Parlement*, C-121/14, EU:C:2015:749, pt. 51: « conformément à l'objectif de contribuer à l'établissement et au développement de réseaux transeuropéens dans le secteur des infrastructures du transport, énoncé à l'article 170, paragraphe 1, TFUE, il ressort du considérant 8 de ce règlement que le réseau transeuropéen de transport doit être développé à travers la création de nouvelles infrastructures de transport, la réhabilitation et la modernisation des infrastructures existantes ainsi que par des mesures visant à promouvoir une utilisation économe en ressources de ces infrastructures. » Ajoutons que le fait que l'État ne puisse considérer de manière isolée un projet comme étant d'intérêt commun, il n'en demeure pas moins que, en vertu de l'article 172 TFUE, « [l]es orientations et projets d'intérêt commun qui concernent le territoire d'un État membre requièrent l'approbation de l'État membre concerné. »

cès : à titre d'exemple, un port intérieur relevant du réseau global et desservi par une liaison ferroviaire ne peut perdre la desserte par train, au risque de porter atteinte à l'objectif de valorisation des réseaux et à la nécessité de les rendre interopérables, entre les États et entre les différents modes de transport existants.⁶⁰ Toutefois, les États continuent de disposer d'un important pouvoir discrétionnaire pour décider si un projet d'infrastructure énergétique entre dans le champ de la réglementation : la jurisprudence considère que le pouvoir d'approbation reconnu aux États peut être entendu comme un pouvoir de veto – cette approche étant elle-même cohérente avec la reconnaissance, par l'article 194 TFUE, de la souveraineté de chaque État sur les mix énergétiques.⁶¹

Il résulte de ces éléments que la « compétence réseau » présente une autonomie et une consistance suffisantes pour justifier l'adoption du règlement 2022/269 et qu'un adossement supplémentaire à l'article 194 TFUE ne nous paraît pas justifié. En effet, la compétence « réseau » matérialise, par des financements et des projets, la création de réseaux interdépendants en matière énergétique (mais aussi de transport, télécoms, infrastructure). Elle renvoie nécessairement à une solidarité matérielle, « technique, » entre les États. Une référence complémentaire à la notion de solidarité au sens de la jurisprudence *OPAL* contribuerait à un manque de lisibilité de cette compétence spécifique et atténuerait le sens spécifique de la solidarité tel que présenté dans les questions précédentes. Elle ne serait également pas cohérente avec la reconnaissance d'un pouvoir d'approbation reconnu aux États.

Question 7

La conciliation entre la sécurité d'approvisionnement et la décarbonation : un équilibre entre la primauté accordée à la sécurité d'approvisionnement en cas de menace et une combinaison des objectifs à plus long terme.⁶²

Primat de la sécurité de l'approvisionnement. Les difficultés rencontrées dans l'exploitation du parc nucléaire français sur la période 2022–2023, dans un contexte énergétique déjà compliqué en raison des conséquences de l'invasion de l'Ukraine par la Russie sur les approvisionnements en gaz, ont conduit les autorités françaises à prendre des mesures traduisant la primauté des considérations liées à la sécurité d'approvisionnement sur tout autre objectif

⁶⁰ CJUE, 16 juin 2022, *Port de Bruxelles*, C-229/21, EU:C:2022:471, pt. 68 : « les États membres visent à assurer, dans la mesure du possible, l'interconnexion entre, notamment, les infrastructures ferroviaires, routières et, le cas échéant, de navigation intérieure, tant pour le transport de voyageurs que pour le transport de fret. »

⁶¹ Trib. UE, 8 février 2023, *Aquind Ltd*, aff. T-295/20, pt. 73.

⁶² Question traitée par Guillaume Dezobry, Université d'Amiens et avocat chez EY.

poursuivi au titre de la politique énergétique et, en particulier, sur l'objectif de décarbonation.

Alors que le cadre juridique avait été adapté pour pousser vers la sortie les dernières centrales au charbon – en plafonnant leur nombre d'heures de fonctionnement au moyen d'un critère exprimé en quantités de CO₂ émises –, la découverte du phénomène de corrosion sous contrainte et l'indisponibilité d'une partie significative du parc nucléaire français qui en a résulté ont conduit les autorités françaises à modifier temporairement ces textes pour permettre aux centrales à charbon d'être appelées et de contribuer à la sécurité d'approvisionnement.

Ainsi, l'article 12 de la loi relative à l'énergie et au climat du 26 septembre 2019 prévoyait initialement que l'autorité administrative fixe par décret « un plafond d'émissions applicable, à compter du 1^{er} janvier 2022, aux installations de production d'électricité à partir de combustibles fossiles situées sur le territoire métropolitain continental et émettant plus de 0,55 tonne d'équivalents dioxyde de carbone par mégawattheure. »

En application de cette disposition, le décret n° 2019-1467 du 26 décembre 2019 a créé l'article D. 311-7-2 du Code de l'énergie et fixait un seuil annuel de 0,7 kilotonne d'équivalents dioxyde de carbone par mégawatt de puissance électrique installée. Ce seuil correspondait à environ 700 heures de fonctionnement annuel pour une centrale thermique utilisant du charbon.

Pour les raisons évoquées précédemment, les autorités françaises ont souhaité pouvoir recourir de manière beaucoup plus intensive à la production des centrales à charbon.

Le législateur est alors intervenu à nouveau pour préciser qu'« un décret peut rehausser le plafond d'émissions de gaz à effet de serre applicable aux installations de production d'électricité à partir de combustibles fossiles en application du II de l'article L. 311-5-3 du code de l'énergie en cas de menace sur la sécurité d'approvisionnement en électricité de tout ou partie du territoire national. »⁶³

Plusieurs décrets ont ainsi été adoptés pour augmenter le seuil fixé initialement à 0,7 kilotonne et le porter à plus de 3 kilotonnes sur certaines périodes.⁶⁴

⁶³ Article 36 de la loi n° 2022-1158 du 16 août 2022 portant mesures d'urgence pour la protection du pouvoir d'achat.

⁶⁴ Décret n° 2022-1233 du 14 septembre 2022 modifiant le plafond d'émission de gaz à effet de serre pour les installations de production d'électricité à partir de combustibles fossiles pris en application de l'article 36 de la loi n° 2022-1158 du 16 août 2022 portant mesures d'urgence pour la protection du pouvoir d'achat.

Il est intéressant de noter que l'article 36 de la loi du 16 août 2022 prévoit également un dispositif de nature à limiter les conséquences sur l'environnement et sur les émissions de gaz à effet de serre.

Le législateur a précisé que :

Les exploitants des installations concernées sont soumis, sous peine de sanctions définies par le décret mentionné au premier alinéa du présent article, à une obligation de compensation des émissions de gaz à effet de serre résultant du rehaussement de ce plafond d'émissions. Cette compensation permet de financer des projets respectant les principes fixés à l'article L. 229-55 du code de l'environnement. Les projets de compensation mentionnés au présent article sont situés sur le territoire français et favorisent notamment le renouvellement forestier, le boisement, l'agroforesterie, l'agrosylvopastoralisme ou l'adoption de toute pratique agricole réduisant les émissions de gaz à effet de serre ou de toute pratique favorisant le stockage naturel de carbone.

Conséquences. Les mesures adoptées par l'État français pour faire face aux conséquences de la disponibilité dégradée de la flotte nucléaire nous conduisent à formuler deux remarques. Tout d'abord, la séquence que l'on vient de décrire montre que l'objectif principal était de renforcer la sécurité d'approvisionnement. Les mesures prises pour limiter les conséquences en matière d'émissions de gaz à effet de serre apparaissent alors comme des mesures de second ordre. En outre, lorsque la sécurité d'approvisionnement est appréhendée dans une perspective de plus long terme, la conciliation des objectifs peut être envisagée. À titre d'exemple, la possibilité de certifier des capacités de production dans le cadre du mécanisme de capacité français suppose de respecter des seuils en matière d'émission de gaz à effet de serre. Ainsi, l'article L335-3 du Code de l'énergie fixe les limites d'émissions de CO₂ devant être respectées par toute capacité pour être certifiée au titre du mécanisme de capacité. Ces dispositions permettent de combiner la recherche d'un niveau élevé de sécurité d'approvisionnement tout en favorisant le développement des installations décarbonées.

Question 8⁶⁵

Comment définir, dans l'état actuel du développement du droit communautaire, la relation entre l'article 192, paragraphe 2, point c), du TFUE et l'article 194 du TFUE ? Le droit de l'UE prévoit-il des limites à la liberté des États membres de définir leur bouquet énergétique ? Si ce n'est pas le cas, devrait-il y en avoir ? La solidarité énergétique constitue-t-elle une telle limite ? – articulation avec la marge de manœuvre interne.

⁶⁵ Question traitée par Pierre Jérémie, Ingénieur en chef des mines.

Articulation entre les articles 192 et 194 TFUE. Les politiques publiques en matière d'environnement, dont la lutte contre le changement climatique, et les politiques publiques de l'énergie sont des domaines dans lesquels le droit primaire de l'Union européenne se développe dans un équilibre délicat entre les ambitions communes, les compétences de l'UE au niveau des Traités et les compétences souveraines des États membres. L'énergie, qu'il s'agisse de combustibles physiques ou d'électricité, est un bien meuble corporel dont la libre circulation au sein de l'Union est l'un des objectifs les plus fondamentaux du projet européen. En outre, en tant que composante essentielle de la compétitivité économique et industrielle, l'intégration des politiques énergétiques est un champ d'intérêt naturel de la Commission en tant que garante d'*une Union toujours plus étroite*. Dans le même temps, dans plusieurs États membres, la maîtrise des dépendances énergétiques et la détermination du bouquet énergétique sont perçues comme faisant partie intégrante de la souveraineté nationale dans ce qu'elle comporte de plus politique.

Les articles 191–192 et 194 du traité reconnaissent la capacité de l'Union européenne à légiférer selon la règle de la majorité qualifiée, notamment pour promouvoir « sur le plan international, de mesures destinées à faire face aux problèmes régionaux ou planétaires de l'environnement, et en particulier la lutte contre le changement climatique » au titre des politiques publiques en matière d'environnement, et pour une liste de quatre domaines énumérés de la politique énergétique, dont « c) à promouvoir l'efficacité énergétique et les économies d'énergie ainsi que le développement des énergies nouvelles et renouvelables. » Cependant, l'article 192, paragraphe 2, point c), soumet à un régime d'unanimité au Conseil « les mesures affectant sensiblement le choix d'un État membre entre différentes sources d'énergie et la structure générale de son approvisionnement énergétique. » Dans la pratique, la difficulté politique de parvenir à l'unanimité au Conseil a conduit l'activité législative européenne à se limiter aux secteurs soumis aux règles de la majorité qualifiée.

Portée. Les limites exactes de la législation sur la majorité qualifiée sont encore en cours de définition par la pratique législative, mais plusieurs conclusions peuvent être tirées :

- La législation européenne peut imposer aux États membres des objectifs contraignants en matière d'énergies renouvelables, exprimés sous la forme d'une part d'énergie renouvelable dans la consommation totale d'énergie finale au niveau national, comme le fait la première directive sur les énergies renouvelables (2009/28/CE), sans tomber sous le coup de la règle de l'unanimité. Des procédures en manquement peuvent être conduites si ces objectifs ne sont pas atteints. Cela peut être interprété soit comme la conséquence du fait que ces objectifs en matière d'énergies renouvelables n'imposent pas *en soi* la fermeture d'installations de production d'électricité spécifiques

ou la restriction de technologies de production d'électricité spécifiques (n'affectant pas « significativement » la compétence nationale), soit comme la conséquence du fait que cette structure objective est l'approche qui tente de limiter le plus possible les compétences nationales tout en atteignant l'objectif politique commun (raisonnement fondé sur la subsidiarité).

- La législation de l'UE peut imposer des objectifs collectivement contraignants exprimés sous la forme d'une part d'énergie renouvelable dans la consommation totale d'énergie finale à l'échelle de l'UE, en s'appuyant sur un système d'engagements nationaux volontaires dans les plans nationaux intégrés énergie-climat, contestés par la Commission dans le cadre de règles de partage des charges relativement souples, et avec comme principale réaction des procédures d'infraction ou une contribution à une plateforme commune sur les énergies renouvelables au niveau de l'UE, avec la possibilité de « transfert statistique » en cas de dépassement ou de non-conformité. Il s'agit du cadre actuel découlant des deuxièmes et troisièmes directives sur les énergies renouvelables et du règlement sur la gouvernance (2018/2001/UE et 2018/1999/UE).
- La législation européenne peut fixer des objectifs contraignants en matière d'énergies renouvelables au niveau sectoriel – par exemple, la consommation d'énergies renouvelables dans la consommation finale d'énergie dans l'industrie, le secteur résidentiel, les transports, etc., et au niveau vectoriel – par exemple, favoriser certains types de matières premières renouvelables (les RFNBO) avec des mandats spécifiques ou plafonner la contribution d'autres types de matières premières (les biocarburants conventionnels).
- Le droit de l'UE peut interdire, par une décision prise à la majorité qualifiée, l'accès de certains types de production d'énergie à des mécanismes d'aide d'État sur la base de critères fondés sur les émissions de carbone. C'est ce que l'on peut déduire des dispositions en matière de gestion des risques de marché inscrites dans le règlement sur l'électricité 2019/943.
- Nous pensons que la législation de l'UE ne pourrait pas imposer, en vertu de la règle de la majorité qualifiée et en s'appuyant sur les articles 192 et/ou 194, l'élimination progressive d'actifs ou de technologies spécifiques, même sur la base de critères environnementaux conçus pour être transparents et non discriminatoires, car cela « affecterait de manière significative » le choix des États membres en matière d'approvisionnement. Le règlement 2019/631 sur les émissions des véhicules légers impose néanmoins une interdiction des nouveaux véhicules à moteur à combustion interne sur les routes européennes à partir de 2035, ce qui implique une élimination progressive des carburants liquides des bouquets énergétiques des États membres dans le secteur des transports, suggérant que la majorité qualifiée peut imposer des contraintes sectorielles en matière de bouquet énergétique.

L'accélération du rythme de la transition énergétique vers le zéro net d'ici 2050, suite à la mise en œuvre en 2021/1119 de l'engagement nationalement déterminé de l'Union, conformément à l'Accord de Paris (art. 4) dans le droit de l'UE (*European Climate Law*), matérialisée par l'effort législatif sans précédent de Fit for 55, met un accent central sur l'évolution du mix énergétique européen, et dorénavant, des mix énergétiques des États membres eux-mêmes, afin d'atteindre l'ambition climatique commune. Cet effort accru a entraîné des difficultés de mise en œuvre et un débat sur la pertinence du cadre existant de partage des charges, inchangé depuis le règlement sur la gouvernance (2018/1999).

Étant donné que l'UE rencontrera probablement des difficultés dans la capacité des États membres à déployer l'ambition 2030 et à fixer ses objectifs pour 2040, de nouvelles questions se poseront. En particulier, si l'objectif 2040 en matière d'énergies renouvelables est fixé à un niveau tel que l'objectif de consommation d'énergie finale renouvelable d'un État membre implique l'élimination progressive des actifs non renouvelables à faible teneur en carbone, il serait clair que le cadre de gouvernance actuel aurait un impact « significatif » sur la capacité des États membres à choisir entre différentes sources d'énergie. Cela signifie qu'en l'absence d'une restructuration de la gouvernance, prévoyant des degrés de liberté supplémentaires pour les États membres, et en l'absence d'une structure d'objectifs en matière d'énergies renouvelables capable d'intégrer de manière transparente d'autres productions d'énergie à faible teneur en carbone, il y aurait un risque d'impasse politique préjudiciable à la réussite de la transition.

Enfin, en ce qui concerne la sécurité d'approvisionnement, la législation de l'UE n'impose aucune forme d'autosuffisance énergétique au niveau des États membres, car cela aurait un impact significatif sur leur choix d'approvisionnement et restreindrait négativement les échanges au sein du marché unique. Depuis 2022, les États membres se voient imposer certaines mesures contraignantes relatives à la résilience, telles qu'en matière de remplissage des stockages de gaz, avec des jalons en termes de capacité remplie avant l'hiver, et sont de plus en plus incités à prendre dûment en compte les défis de la sécurité d'approvisionnement dans leurs plans nationaux intégrés relatifs au climat et à l'énergie. Aller plus loin impliquera de concevoir un cadre commun fondé sur le marché pour partager le coût de la sécurité d'approvisionnement, qui prendrait la forme d'un marché unique couplé de la capacité pour l'électricité et d'un instrument commun pour le stockage du gaz et de l'hydrogène. La conception de ces instruments est un élément clé d'un futur cadre de marché adaptée au net zero, priorité de la prochaine Commission en matière de conception du marché.

Question 9

Instruments mis en place par la France pour promouvoir la diversification des sources énergétiques.⁶⁶

Afin de faire face à ses obligations de décarbonation de son économie, la France a mis en place des outils permettant d'agir tant sur la production d'énergie que sur la consommation. Ces différents outils s'articulent au sein de la stratégie française pour l'énergie et le climat, feuille de route que se donne l'État pour atteindre les objectifs de réduction des émissions de gaz à effet de serre. Au sein de cette stratégie, deux outils concernent spécifiquement le domaine de l'énergie : la stratégie bas carbone (SNBC) et la programmation pluriannuelle de l'énergie (PPE). Ces deux outils ont été créés par la loi du 17 août 2015 relative à la transition énergétique pour la croissance verte.

Stratégie bas carbone. La SNBC est adoptée par décret et définit la trajectoire de la France pour réduire ses émissions de gaz à effet de serre à l'horizon 2050. Elle donne des orientations pour mettre en œuvre la transition bas-carbone dans les grands secteurs d'activité (transport, logement, industrie, agriculture, énergie, déchets) et fixe des « budgets carbone, » des plafonds d'émissions de gaz à effet de serre (GES) à ne pas dépasser par période de cinq ans. La dernière version de la SNBC et des budgets carbone pour les périodes 2019–2023, 2024–2028 et 2029–2033 ont été adoptés par décret le 21 avril 2020.

Programmation pluriannuelle énergie. La PPE de métropole continentale exprime les orientations et priorités d'action des pouvoirs publics pour la gestion de l'ensemble des formes d'énergie afin d'atteindre les objectifs de la politique énergétique définis par la loi. Elle doit être compatible avec les objectifs de réduction des émissions de gaz à effet de serre fixés par les budgets carbones, en particulier pour le secteur de l'énergie, ainsi qu'avec la Stratégie nationale bas-carbone (SNBC). La Programmation pluriannuelle de l'énergie est adoptée par décret et couvre deux périodes successives de cinq ans. Son adoption est précédée de phases de travail avec les parties prenantes, de concertations et de la consultation du public. Après son adoption, elle doit être présentée au parlement. La dernière version couvrant les périodes 2019–2023 et 2024–2028 a été fixée par décret du 21 avril 2020. Une nouvelle version aurait dû être adoptée avant le 31 décembre 2023. Elle prévoit entre autres des objectifs de réduction de la consommation finale d'énergie (Baisse de 7,6 % en 2023 et de 16,5 % en 2028 par rapport à 2012) ou de hausse de la capacité de production d'électricité renouvelables installées (+50 % en 2023 et un doublement en 2028 par rapport à 2017).

⁶⁶ Question traitée par Emmanuel Rodriguez, Directeur adjoint de la direction juridique de la Commission de Régulation de l'énergie.

Contenu de la PEE. La PPE contient des volets relatifs :

- à l'amélioration de l'efficacité énergétique et à la baisse de la consommation d'énergie primaire, en particulier fossile ;
- au développement de l'exploitation des énergies renouvelables et de récupération. La PPE définit en particulier les objectifs de développement des énergies renouvelables pour les différentes filières. Le Ministre chargé de l'énergie peut engager des appels d'offres pour les atteindre ;
- au développement équilibré des réseaux, du stockage, de la transformation des énergies et du pilotage de la demande d'énergie pour favoriser notamment la production locale d'énergie, le développement des réseaux intelligents et l'autoproduction ;
- à la stratégie de développement de la mobilité propre ;
- à la préservation du pouvoir d'achat des consommateurs et de la compétitivité des prix de l'énergie, en particulier pour les entreprises exposées à la concurrence internationale. Ce volet présente les politiques permettant de réduire le coût de l'énergie ;
- à l'évaluation des besoins de compétences professionnelles dans le domaine de l'énergie et à l'adaptation des formations à ces besoins.

« **Enlisement** » du processus d'adoption de la PEE. À noter qu'elle prévoit une réduction des capacités installées de production d'électricité nucléaire alors même qu'il a été annoncé une relance de ce mode de production d'électricité (discours du président de la République à Belfort le 10 février 2022) et qu'une loi du 22 juin 2023 permet l'accélération des procédures liées à la construction de nouvelles installations nucléaires à proximité de sites nucléaires existants et au fonctionnement des installations existantes. Le législateur a ajouté un étage supplémentaire au dispositif. En effet, la loi relative à l'énergie et au climat adoptée en novembre 2019 prévoit que le parlement fixe tous les 5 ans les grands objectifs de la PPE et de la SNBC par une loi de programmation sur l'énergie et le climat (LPEC). Cette loi devra préciser pour trois périodes successives de 5 ans les objectifs de réduction de gaz à effet de serre et pour deux périodes successives de 5 ans les objectifs de réduction de la consommation énergétique finale et de réduction de la consommation énergétique primaire fossile, par énergie fossile, ainsi que les objectifs de développement des énergies renouvelables pour l'électricité, la chaleur, le carburant et le gaz, de diversification du mix de production d'électricité et de rénovation énergétique dans le secteur du bâtiment. La loi aurait dû être adoptée avant le 1^{er} juillet 2023.

Question 10⁶⁷

Diversification des sources énergétiques et politique externe de l'Union.

La dimension externe de la politique européenne de l'énergie relève d'un cadre tout aussi complexe que conflictuel. Toutefois, l'on observe actuellement un glissement progressif des compétences externes des États membres au profit de l'Union européenne. Cette évolution des rôles des États membres et de l'UE s'explique par les interactions de plus en plus fortes entre la politique européenne de l'énergie et d'autres politiques européennes qui connaissent un essor remarquable sur la scène internationale, ainsi que par la diminution progressive de la marge de manœuvre des États membres dans le domaine de l'énergie, en raison du contexte géopolitique. Cette évolution est particulièrement visible en matière de sécurité d'approvisionnement, où les crises récentes ont poussé l'UE à s'affirmer davantage en tant qu'acteur stratégique, tandis que les États membres ont consenti à assouplir leurs prérogatives.

Pour comprendre cette évolution, faut-il rappeler au préalable que, très tôt, la Commission a cherché à promouvoir une coopération plus étroite entre la Communauté européenne et ses partenaires énergétiques.⁶⁸ À l'inverse, le Conseil insistait sur la nécessité de restreindre le développement des relations extérieures dans le secteur de l'énergie à une simple « approche coordonnée. »⁶⁹ Malgré l'utilisation de bases juridiques indirectes permettant à l'UE d'approfondir ses relations extérieures, les États membres se sont régulièrement montrés hostiles à toute atteinte à leur souveraineté énergétique. Le volet externe de la politique énergétique européenne a néanmoins commencé à évoluer dans les années 1990 avec la libéralisation des marchés de l'énergie et la nécessité de renforcer la sécurité d'approvisionnement. En 2006, la Commission soulignait dans son livre vert que la sécurité des approvisionnements externes était loin d'être assurée, notamment en raison des divergences entre États membres plus ou moins dépendants des pays tiers. La construction des gazoducs Nord Stream entre l'Allemagne et la Russie illustre parfaitement les défis de cohérence auxquels l'Union a pu se heurter.

Ces divergences – entre les États membres d'une part et au sein des institutions européennes d'autre part – expliquent pourquoi l'article 194 TFUE ne contient pas de dispositions spécifiques relatives aux relations extérieures.⁷⁰

⁶⁷ Question traitée par Benoît Blottin, Maître de conférence HDR à l'Université Paris Saclay.

⁶⁸ Voir COM(85) 245 final.

⁶⁹ Résolution du Conseil du 16 septembre 1986 concernant de nouveaux objectifs de politique énergétique communautaires pour 1995 et la convergence des politiques des États membres, JO n° C 241 du 25 septembre 1986, p. 1-3.

⁷⁰ Sur les compétences de l'UE en matière d'énergie depuis le traité de Lisbonne, voir C. Blummann, « Les compétences de l'Union européenne dans le domaine de l'énergie, » *RAE*, 2009, n° 4,

Bien que l'article 194 TFUE ait principalement une portée interne, la sécurité d'approvisionnement demeure nécessairement liée aux affaires extérieures de l'UE, fournissant ici un terreau fertile au développement d'une véritable politique énergétique extérieure de l'UE. De surcroît, en application de la théorie du parallélisme des compétences internes et externes,⁷¹ l'absence d'attribution de compétence externe explicite à l'UE n'a jamais réellement fait obstacle au développement de la dimension extérieure de la politique énergétique.⁷² Néanmoins, en vertu de la « réserve de souveraineté » présente au deuxième paragraphe de l'article 194 TFUE, les États membres gardent la main sur leur bouquet énergétique⁷³ et, partant, la sécurité énergétique reste encore aujourd'hui une prérogative de la souveraineté nationale, permettant aux États membres de négocier et de conclure leurs propres accords bilatéraux. Ils peuvent ainsi entretenir des relations indépendantes avec des partenaires étrangers. Bien que cette situation constitue un frein majeur à l'établissement d'une « véritable » politique extérieure de l'Union, la doctrine reste toutefois divisée sur la nécessité de confier à l'UE une compétence exclusive dans le domaine de l'énergie pour que son action extérieure soit plus efficace.⁷⁴

Par conséquent, si l'objectif d'assurer la sécurité des approvisionnements énergétiques conduit nécessairement à l'exercice d'une compétence externe, celle-ci ne semble pas être en mesure – pour l'instant – de devenir exclusive, au même titre que l'évolution juridique observée plus tôt en matière commerciale.

Au regard de l'actualité la plus récente, une telle affirmation doit cependant être nuancée. Tout d'abord, l'objectif de sécurité d'approvisionnement s'intègre dans plusieurs politiques de l'Union qui réduisent son autonomie :

p. 737–748 ; C. Kaddous, J. Bitar, « Les compétences de l'Union européenne en matière d'énergie après Lisbonne, » in D. Buschle, S. Hirsbrunner, C. Kaddous (dir.), *European energy law*, Bâle, Helbing Lichtenhahn, 2011, p. 3–21. Voir également S. Andoura, « La solidarité énergétique en Europe : de l'indépendance à l'interdépendance, » institutdelors.eu, 30 juillet 2013.

⁷¹ Conformément à la jurisprudence « *AETR*, » codifiée aux articles 3, § 2, et 216, § 1, TFUE. Ces deux dispositions prévoient que l'Union dispose d'une compétence (exclusive selon l'article 3, § 2, TFUE) pour la conclusion d'un accord international lorsque la conclusion d'un accord « est susceptible d'affecter des règles communes ou d'en altérer la portée. »

⁷² Voir E. Neframi, « La dimension extérieure de la politique de l'Union dans le domaine de l'énergie, » in C. Blumann (dir.), *Commentaire J. Mégret : L'énergie*, ULB, mars 2024, p. 503–553.

⁷³ Pour éluder d'éventuels malentendus, la déclaration commune n° 35 affirme que l'article 194 TFUE n'affecte pas le droit des États membres de prendre les dispositions nécessaires pour assurer leur approvisionnement énergétique. À noter qu'en matière d'environnement l'article 192, § 2, point c, dispose que le législateur européen, qui utilise en principe la procédure législative ordinaire, doit toutefois recourir à la procédure législative spéciale (unanimité au Conseil et simple avis du Parlement européen) pour « les mesures affectant sensiblement le choix d'un État membre entre différentes sources d'énergie et la structure générale de son approvisionnement énergétique. »

⁷⁴ Voir R. Kamphof, T. Bonenkamp, J. Selleslaghs and M. O. Hosli, « External competences in energy and climate change, » in R. Leal-Arcas (dir.), *Research Handbook on EU Energy Law and Policy*, Edward Elgar Publishing, September 2024, pp. 33–50.

- le développement croissant du marché intérieur de l'énergie impose une dimension extérieure guidée par l'objectif de sécurité énergétique ;
- l'on observe une montée en puissance de la politique européenne de l'environnement (et climatique) entraînée par l'ambition du *Green Deal*;⁷⁵
- de même, dans le contexte de la guerre en Ukraine, la politique étrangère et de sécurité commune intègre de plus en plus la question de la sécurité énergétique.⁷⁶

En somme, faut-il relever que : la diversification des partenaires et des sources d'énergie, le développement de la diplomatie énergétique, le déploiement des infrastructures, la transition énergétique et la lutte contre le changement climatique sont autant de domaines d'action qui renforcent le rôle de l'UE sur la scène internationale. Dès lors, la sécurité d'approvisionnement s'éloigne du giron des États membres (sans pour autant les exclure).

D'autre part, la marge de manœuvre des États membres dans la coopération énergétique internationale s'amenuise progressivement :

- Elle est tout d'abord **limitée** par l'obligation de coopération loyale prévue à l'article 4, § 3, TUE, qui interdit aux États membres de compromettre l'efficacité de l'action de l'UE sur la scène internationale : c'est en ce sens que la Cour de justice, notamment à travers la saga « COTIF, » a instauré un mouvement jurisprudentiel donnant une lecture extensive de l'action extérieure de l'UE.
- Cette marge de manœuvre est ensuite **influencée** par l'importance croissante des textes de *soft law*, qui définissent les grandes orientations de la coopération énergétique internationale. L'un des volets du plan *REPowerEU* concerne la stratégie énergétique extérieure et, dans sa communication du 18 mai 2022,⁷⁷ la Commission estime que l'UE doit actualiser sa stratégie extérieure en intensifiant la coopération internationale : il s'agit de « jeter les bases du nouveau système énergétique mondial. » Les textes législatifs européens issus du contexte de crise sont imprégnés de cette nouvelle approche, à commencer par le mécanisme d'achats commun de gaz.⁷⁸
- Elle est aussi **encadrée** par le rôle prépondérant de la Commission qui contrôle les accords externes d'approvisionnement que les États membres peuvent conclure avec des pays tiers. C'est en ce sens que la décision 2017/684 a introduit une obligation pour les États membres de notifier à la Commission

⁷⁵ Communication de la Commission européenne, *Le pacte vert pour l'Europe*, 19 décembre 2019, COM(2019) 640 final.

⁷⁶ Voir H. Flavier, « Pacte vert, énergie et guerre en Ukraine : vers une nouvelle géographie du droit ? », *RJE*, vol. 48, n° 4, décembre 2023, p. 777–787.

⁷⁷ Communication conjointe au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, *Stratégie énergétique extérieure de l'UE dans un monde en mutation*, JOIN(2022) 23 final, 18 mai 2022.

⁷⁸ Règlement (UE) 2022/2576 du Conseil du 19 décembre 2022 renforçant la solidarité grâce à une meilleure coordination des achats de gaz, à des prix de référence fiables et à des échanges transfrontières de gaz, JO n° L 335 du 29 décembre 2022, p. 1–35.

leurs projets d'accords intergouvernementaux avant de les conclure, et de tenir pleinement compte de l'avis rendu.⁷⁹

- Enfin, cette marge de manœuvre est **tributaire** du principe de solidarité énergétique dégagé dans l'arrêt de la Cour de justice *Allemagne c/ Pologne* rendu le 15 juillet 2021 (*OPAL*)⁸⁰ et présenté ci-dessus (q. 5 et 6).

En conclusion, l'évolution des rôles respectifs des États membres et de l'UE sur la scène internationale en matière d'énergie suggère que l'on s'éloigne désormais d'une simple compétence partagée, sans pour autant que les États membres ou la CJUE soient prêts à franchir le Rubicon en cédant à l'Union européenne une compétence externe exclusive. La marge de manœuvre des États existant *de jure* est devenue sensiblement restreinte *de facto*, provoquant par ailleurs le déclin des accords intergouvernementaux signés avec des pays tiers. Les textes les plus récents en matière de sécurité énergétique viennent confirmer la tendance selon laquelle les États membres obtiennent plus d'avantages à négocier ensemble que séparément, comme dans le cadre de la crise sanitaire où, malgré ses compétences limitées en matière de santé, l'UE a réussi à parler d'une seule voix sur la scène internationale. Ainsi, on peut affirmer que l'énergie, à travers une combinaison de la méthode communautaire et de la méthode intergouvernementale,⁸¹ relève désormais d'une compétence quasi-exclusive de l'UE, fondée sur une action principalement coordonnée par l'UE, impliquant une solidarité énergétique accrue entre les États membres.

Bien que cela reste anecdotique à ce stade, nous relèverons qu'en novembre 2023 le Parlement européen a approuvé sa proposition de réforme des traités consistant notamment à revoir la politique européenne de l'énergie : il souhaite non seulement supprimer la réserve de souveraineté prévue à l'article 194, § 2, alinéa 2, mais également conférer à l'Union une compétence exclusive en matière d'environnement, de biodiversité et de négociations sur le changement climatique, ce qui reviendrait à faire entrer l'Europe de l'énergie dans une nouvelle dimension.⁸²

⁷⁹ Décision (UE) n° 2017/684 du Parlement européen et du Conseil du 5 avril 2017 établissant un mécanisme d'échange d'informations en ce qui concerne les accords intergouvernementaux et les instruments non contraignants conclus entre des États membres et des pays tiers dans le domaine de l'énergie, et abrogeant la décision n° 994/2012/UE, JO L 99 du 12 avril 2017, p. 1–9.

⁸⁰ CJUE, gde ch., 15 juillet 2021, *Allemagne c/ Pologne*, aff. C-848/19 P, ECLI:EU:C:2021:598.

⁸¹ Ce qui correspond à une proposition de la Chancelière Angéla Merkel en 2010. Constatant l'évolution des compétences de l'UE et des États membres, elle appelait de ses vœux une « nouvelle méthode de l'Union » qui consisterait en « une action coordonnée dans un esprit de solidarité, chacun de nous dans le domaine qui relève de ses responsabilités, mais tous en nous fixant le même but. » Pour illustrer cette nouvelle approche, elle prend l'exemple de l'énergie. Discours d'Angéla Merkel au Collège d'Europe à Bruges le 2 novembre 2010, disponible à l'adresse suivante : <https://www.coleurope.eu/fr/events/mme-angela-merkel-prononce-un-discours-lors-de-la-ceremonie-douverture>

⁸² Résolution du Parlement européen du 22 novembre 2023 sur les projets du Parlement européen tendant à la révision des traités (2022/2051(INL)).

Section III : The EU's crisis management in the field of energy and its limits

Question 1

Articulation entre le périmètre de l'art. 194 TFUE et l'art. 122 TEU en situation de crise.⁸³

Ainsi que cela a été mentionné dans les réponses aux questions 2 et 5 (section I), le recours aux articles 194 et 122 TFUE répond à deux finalités différentes : le premier correspond aux mesures générales de régulation et d'encadrement des marchés de l'électricité et du gaz, couvrant également l'adoption des mesures de soutien à la transition écologique, tandis que le second correspond à des mesures d'urgence. L'existence d'affaires pendantes devant la Cour et le Tribunal (mentionnées ci-dessus) qui mettent en cause le recours à l'art. 122 TFUE pour l'adoption du règlement 2022/269 illustre une certaine fragilité de la base juridique, notamment pour interpréter la notion d'urgence ou de « graves difficultés, » ainsi que l'exigence selon laquelle le recours à l'article 122 doit se faire « sans préjudice d'autres dispositions prévues dans les traités. » Ces deux exigences – l'une matérielle, l'autre procédurale – doivent en principe contraindre le Conseil à motiver au plus près le recours à cette base juridique et ont pour conséquence de rendre contestable cette base juridique.

En outre, les rapporteurs constatent que l'article 122 TFUE ne permet pas l'intervention du Parlement européen et ne se rapporte ni à une procédure législative ordinaire ni véritablement à une procédure législative spéciale. Au regard de ces éléments, un recours élargi à l'article 122 § 1 TFUE ne paraît pas opportun.

Toutefois, l'usage de l'article 194 est également contraint au regard de l'exigence de la procédure législative ordinaire qui, en pratique, ne permet pas d'adopter des mesures d'urgence. Aussi, il apparaît qu'une évolution des textes pourrait intervenir :

- soit en associant l'art. 122 § 1 à une procédure législative spéciale, dans laquelle le Parlement serait associé par la voie d'un avis conforme et selon un délai contraint pour faire face à une procédure d'urgence ;
- soit en « rapatriant » les dispositions de l'article 122 § 1 sous le volet « énergie » (mais sous l'aspect plus général de politique économique) dans le cadre de l'ajout d'un § spécifique au sein de l'article 194 TFUE.

⁸³ Question traitée par Stéphane de La Rosa.

Question 2⁸⁴

Conséquence du programme REPowerEU.⁸⁵

Intégration du programme REPowerEU dans le PNNR. La France a soumis une version révisée de son Plan National de Relance et de Résilience (PNNR) en avril 2023,⁸⁶ intégrant un chapitre REPowerEU, et ayant été approuvé par le Conseil le 13 juillet 2023.⁸⁷ Depuis lors, près de la moitié du PNNR français est consacré au financement d'objectifs climatiques, et le chapitre REPowerEU est appelé à soutenir les objectifs nationaux de transition énergétique et de renforcement de l'indépendance énergétique. Ce chapitre identifie quatre investissements stratégiques pour la décarbonation de l'industrie et la rénovation énergétique, associés à des réformes législatives destinées à en renforcer la portée et l'efficacité,⁸⁸ répartis comme suit :

Deux d'entre eux sont destinés à soutenir l'objectif de neutralité carbone de la France. En premier lieu, le chapitre REPowerEU soutiendra la contribution de la France aux Projets Importants d'Intérêt Européen Commun (PIIEC) destinés à favoriser le développement de l'hydrogène. Pour l'heure, la France est associée à cinq projets de développement d'hydrogène constitutifs de PIIEC.⁸⁹ En second lieu, le chapitre REPowerEU contribuera au financement du programme « zéro industrie fossile, » lequel vise à soutenir l'investissement dans la production de chaleur biomasse, dans les projets d'efficacité énergétique et d'évolution des procédés, dans l'objectif de réduire la consommation de combustibles fossiles dans l'industrie, et les émissions de gaz à effet de serre.

⁸⁴ Question traitée par Étienne Durand.

⁸⁵ Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC (OJ L 63, 28.2.2023, pp. 1–27).

⁸⁶ Conformément aux articles 18.2 et 21 du Règlement 2021/241 et 21 bis du Règlement 2023/345.

⁸⁷ Revised Annex to the Council Implementing Decision amending Implementing Decision of 6 July 2021 on the approval of the assessment of the recovery and resilience plan for France, 2023/0217 NLE.

⁸⁸ Il convient de souligner que certains de ces investissements stratégiques étaient d'ores et déjà intégrés dans la version antérieure du PNNR, et sont depuis lors intégrés dans le chapitre REPowerEU du plan français.

⁸⁹ Cette orientation s'inscrit dans le prolongement de la stratégie nationale pour le développement de l'hydrogène bas carbone, lancée en 2020 et qui repose sur un plan d'aide à l'investissement de 7 milliards d'euros, et de l'ordonnance du 17 février 2021 ayant introduit un mécanisme de soutien à la production d'hydrogène renouvelable et bas carbone à partir d'électrolyse de l'eau (ordonnance n° 2021-167 du 17 février 2021 relative à l'hydrogène, JORF n° 42, du 18 février 2021, texte n° 2).

Deux d'entre eux sont destinés au soutien du programme national d'amélioration de l'efficacité énergétique des bâtiments. D'une part, le chapitre REPowerEU soutient les opérations de rénovation de l'habitat privé, en particulier au travers du programme « Ma Prime Rénov, » permettant de financer l'isolation, les travaux de chauffage et de ventilation, ainsi que les audits énergétiques des maisons individuelles et des appartements dans des logements collectifs. D'autre part, le chapitre REPowerEU participera aux programmes « Résilience I » et « Résilience II, » destinés à la sélection et au financement d'opérations de rénovations énergétiques des bâtiments publics, en vue d'en réduire les consommations.

Articulation du programme REPowerEU avec des évolutions législatives. La mise en œuvre du programme REPowerEU a été soutenue par des réformes législatives, animées par l'objectif d'accélérer le déploiement de projets d'énergie renouvelable en rationalisant les procédures d'autorisation, de réduire la consommation d'énergie et d'accroître la cohérence et la coordination des politiques publiques dans le domaine de la transition écologique.

- **Accélération du développement des énergies renouvelable.** En France, la loi d'accélération des énergies renouvelables du 11 mars 2023⁹⁰ a été adoptée en vue de simplifier et d'accélérer les procédures de délivrance d'autorisations requises pour la construction et l'exploitation d'installation de production d'électricité issue de sources renouvelables. En particulier, la loi a introduit un cadre permettant d'identifier des « zones d'accélération, » permettant d'identifier, en concertation avec les populations locales, des espaces propices à l'établissement d'installations de production, et cela aux fins de favoriser l'acceptabilité locales des projets. L'article L. 211-2-1 du Code de l'énergie établit, pour les projets énergétiques ayant vocation à être implantés dans une zone d'accélération, une présomption de « raison impérative d'intérêt public majeur, » permettant de faciliter l'obtention d'autorisations environnementales. Par ailleurs, la loi d'accélération fixe un délai maximal de trois mois pour la délivrance des autorisations requises pour les projets d'énergies renouvelables situés dans des zones d'accélération.⁹¹ En tout état de cause, l'efficacité de telles dispositions demeure incertaine, dans la mesure où les procédures accélérées de délivrance d'autorisation restent subordonnées à l'identification préalable de zones d'accélération par les autorités locales.
- **Le plan de sobriété énergétique.** Ce plan a été présenté par le Gouvernement en octobre 2022, au paroxysme de la crise de l'énergie. Il vise à accélérer les trajectoires de réduction de la consommation d'énergie, par la promotion

⁹⁰ Loi n° 2023-175 du 10 mars 2023 relative à l'accélération de la production d'énergies renouvelables, JORF n° 60 du 11 mars 2023, texte n° 1.

⁹¹ Il convient de noter que cette disposition a été abrogée par la loi relative à l'industrie verte du 23 octobre 2023, ce texte visant à accélérer les procédures d'octroi de l'ensemble des autorisations environnementales, dont *a fortiori* celles qui concernent les projets d'énergies renouvelables.

d'actions de sobriété énergétique, combinées au renforcement des mesures d'efficacité énergétique et de réduction des énergies fossiles, à l'attention de l'État, des collectivités territoriales et des entreprises, afin d'aligner leurs comportements avec l'objectif de neutralité carbone à l'horizon 2050.⁹²

- **La création du Secrétariat Général à la Planification Écologique.** En vue d'en accroître l'efficacité, la coordination des objectifs écologiques de la France est assurée par le Secrétariat général de la planification écologique, créé par le décret n° 2022-990 du 7 juillet 2022⁹³ et placé sous l'autorité du Premier ministre. Il est chargé de coordonner l'élaboration des stratégies nationales en matière de climat, d'énergie, de biodiversité et d'économie circulaire, tout en veillant au respect des engagements européens et internationaux de la France. Le secrétariat est également chargé de coordonner les actions des différents ministères et parties prenantes, et de mesurer la performance des actions menées.

Soutien accordé dans le cadre de NextGenerationEU. À ce jour, 30,9 milliards d'euros ont été accordés à la France sur la base de son plan de facilité de redressement et de résilience, ce qui représente 77 % de l'assistance financière globale au titre de NextGenerationEU, la France ayant atteint 73 % des étapes qu'elle a définies dans son plan national de facilité de redressement et de résilience.⁹⁴

Évaluation générale. Dans l'ensemble, ces réformes et programmes d'investissement répondent en cohérence et de façon complémentaires aux préoccupations de la France en matière de sécurité énergétique, en tant qu'ils articulent des mesures à court terme (comme l'illustre la loi du 11 mars 2023 d'accélération des énergies renouvelables) avec des plans à plus long terme.⁹⁵ En outre,

⁹² Le plan vise à sensibiliser le public aux moyens efficaces d'économiser l'énergie et contient des propositions de réduction de la consommation d'énergie dans différents domaines (logement, transport, industrie, etc.), classées par ordre de priorité en fonction du potentiel d'économie d'énergie. Il énonce une série de pratiques exemplaires, tant pour les entités publiques que pour les industries (par exemple : réduction des températures de chauffage dans les espaces de travail, décalage de la période de chauffage dans l'année, promotion du covoiturage, du travail à distance, mesures encourageant la limitation de la vitesse des travailleurs lors des déplacements professionnels, etc.), sans fixer d'obligations contraignantes.

⁹³ Décret n° 2022-990 du 7 juillet 2022 relatif au secrétariat général à la planification écologique, JORF n° 157 du 8 juillet 2022, texte n° 1.

⁹⁴ En août 2021 (avant l'entrée en vigueur de REPowerEU), 5,1 milliards d'euros ont été accordés à titre de préfinancement pour lancer la mise en œuvre d'investissements et de réformes clés décrits dans le plan RRF de la France, dont certains concernent des projets de transition écologique. Un premier versement de 8,5 milliards d'euros a été effectué en février 2022, en particulier pour soutenir les investissements dans des projets d'économie d'énergie, réduisant la consommation d'énergie et les émissions de gaz à effet de serre ; suivi d'un versement de 10,3 milliards d'euros en décembre 2023, pour soutenir les rénovations énergétiques des bâtiments publics et privés et des logements sociaux. Enfin, 7,5 milliards d'euros ont été accordés en mai 2024 pour soutenir les réformes dans le domaine de la transition verte (rénovation énergétique des bâtiments, soutien aux chemins de fer, accélération des travaux d'infrastructures de transport, et modernisation des hôpitaux et des prestations de santé).

⁹⁵ À l'instar de la stratégie française d'investissement dans l'hydrogène, dont les effets sont attendus sur des échéances plus longues.

les mesures françaises faisant écho à REPowerEU associent plusieurs formes de régulation, alliant mécanismes de droit contraignants (loi du 11 mars 2023) et outils de droit souple (plan de sobriété énergétique), permettant ainsi à divers acteurs de contribuer de différentes manières à l'amélioration de la sécurité énergétique nationale. En répondant aux préoccupations en matière de sécurité énergétique, la France associe étroitement les approches nationales et européennes, comme en témoigne sa participation à des PIIEC, en particulier dans le domaine de l'hydrogène.

Bien qu'il soit difficile de cerner précisément les effets concrets qu'appellent ces mesures, il convient de noter que la consommation d'énergie a diminué régulièrement au cours des 4 dernières années (en 2022, la consommation d'énergie primaire de la France était inférieure de 11,7 % à son niveau de 2019).⁹⁶ En conséquence, le taux d'indépendance énergétique progresse de 6 points sur un an, pour s'établir à 54,0 % au premier trimestre 2024, puis à 56,2 % au deuxième trimestre 2024.⁹⁷ Toutefois, plusieurs paramètres invitent à nuancer ces éléments. D'abord, le secteur énergétique français est confronté à une instabilité juridique persistante depuis 2020, qui a ralenti les investissements dans la transition énergétique et l'indépendance énergétique. Non seulement un flux continu de réformes juridiques⁹⁸ mais aussi une instabilité gouvernementale sans précédent ont conduit à des incertitudes susceptibles d'affecter les investissements stratégiques à l'échelle européenne. L'on signalera, par exemple, qu'à raison de telles instabilités, la France n'est pas en mesure de satisfaire certaines des obligations qui lui sont imposées au titre du nouveau règlement « TEN-E, »⁹⁹ lequel pourtant identifie une série de projets énergétiques français susceptibles de contribuer aux objectifs de l'UE en matière de sécurité d'approvisionnement et de climat.¹⁰⁰ Or, ces considérations peuvent aisément dissuader l'investissement au soutien de tels projets.

⁹⁶ La production d'énergie primaire, après avoir baissé en 2022 en raison d'un épisode inédit de limitation de la production nucléaire et de conditions météorologiques peu propices à la production d'énergies renouvelables, a augmenté au premier trimestre 2024 (+14,1 % par rapport à 2023) grâce à une hausse de la production nucléaire (+12,8 % sur un an) et à des conditions météorologiques plus favorables à la production hydroélectrique (+47,7 % sur un an) Ministère de la transition écologique et de la cohésion territoriale, Chiffres clés de l'énergie – édition 2023, statistiques.developpement-durable.gouv.fr

⁹⁷ Ministère de la transition écologique et de la cohésion territoriale, Conjoncture énergétique. Deuxième trimestre 2024, statistiques.developpement-durable.gouv.fr

⁹⁸ Les processus de permis énergétiques étant par exemple concernés par la loi du 11 mars 2023 précitée, la loi relative à l'industrie verte du 23 octobre 2023, la loi « ASAP » – loi relative à l'accélération et à la simplification de l'action publique – du 7 décembre 2020, la loi « ESSOC » – loi pour une société de confiance – du 10 août 2018, etc.

⁹⁹ Règlement (UE) 2022/869 du Parlement européen et du Conseil du 30 mai 2022 concernant des orientations pour les infrastructures énergétiques transeuropéennes, *JOUE*, L 152, 3.6.2022.

¹⁰⁰ En particulier, la France n'a pas mis à jour son manuel de procédures comme l'exige le règlement TEN-E; l'identité du ministre devant être considéré comme « responsable de l'énergie » au sens du règlement demeure incertaine, etc.

Instabilité normative. En dépit d'un processus de rationalisation des procédures d'autorisation pour les projets énergétiques,¹⁰¹ le système juridique français reste caractérisé par son extrême complexité et sa grande versatilité. Ceci est, du reste, particulièrement visible dans le domaine des énergies renouvelables, dont le cadre juridique a fait l'objet de réformes continues au cours de la dernière décennie, et dont l'ampleur peut varier d'une technologie renouvelable à l'autre. Une telle évolution asynchrone du droit français est susceptible d'en complexifier la connaissance et la compréhension par les porteurs de projets et le public. Des différences, plus ou moins marquées, peuvent ainsi apparaître entre des procédures *a priori* similaires, selon la technologie concernée.¹⁰² Par ailleurs, d'autres technologies, pourtant promues par les autorités politiques, ne bénéficient pas d'un cadre législatif très développé,¹⁰³ ce qui accentue le risque réglementaire et pourrait, à nouveau, décourager l'investissement.

Enfin, la faisabilité des projets énergétiques, qui peuvent contribuer à renforcer la sécurité énergétique et la transition climatique, dépend souvent de l'acceptation sociale, laquelle ne s'illustre pas par sa prévisibilité. Cette considération, qui a pu être sous-considérée dans le passé, semble jouer un rôle important dans l'évolution actuelle du droit français. En particulier, le secteur des énergies renouvelables est un domaine dans lequel le droit français a développé des approches innovantes, notamment en matière de participation du public. Certaines de ces approches visaient à limiter la participation du public afin d'accélérer la mise en service des projets d'énergie renouvelable. Celles-ci ont rencontré une forte opposition, car elles risquaient d'affaiblir l'acceptation du public et d'exacerber l'opposition des populations locales. D'autres approches visent à réformer la participation du public pour en faire un levier d'implication des populations locales dans la mise en œuvre du projet. Ces initiatives sont à saluer. D'une part, elles permettent d'engager un dialogue avec le public très en amont du développement des projets (voir par exemple la réforme introduite par la « loi ESSOC » et la loi d'accélération des énergies renouvelables, permettant aux populations locales de participer à l'identification des zones propices à l'implantation de projets énergétiques, avant même la désignation d'un porteur de projet), associant plutôt que soumettant les populations locales aux choix énergétiques des autorités publiques et des promoteurs de projets. D'autre part, ces approches en viennent à renouveler le concept même de participation du public, en incluant non seulement la participation aux

¹⁰¹ Introduction d'une « autorisation environnementale unique, » introduction d'un système de guichet unique pour les promoteurs de projets, renforcement de la coordination entre les autorités publiques, etc.

¹⁰² Les règles relatives à l'évaluation environnementale, à la participation du public ou aux autorisations environnementales peuvent faire l'objet de variations selon qu'elles concernent des projets de lignes électriques, d'installation de stockage de CO₂, des unités de production d'énergie à partir de sources renouvelables.

¹⁰³ C'est notamment le cas des technologies liées au transport et au stockage de l'hydrogène et du CO₂.

procédures préalables à la mise en œuvre des projets énergétiques, mais aussi la participation aux bénéfices qui en résultent. L'introduction d'un mécanisme de partage de la valeur dans le cadre de la loi sur l'accélération des énergies renouvelables¹⁰⁴ permet aux populations locales de bénéficier directement de la mise en œuvre d'un projet, ce qui facilite l'acceptation locale et encourage l'implication des citoyens dans la transition énergétique.

Question 3¹⁰⁵

Analyse de la diversité des instruments et des procédures prévus par les traités dans les situations de crise énergétique – lien avec l'art. 222 TFUE.

Le cadre juridique de l'Union européenne en matière de gestion de crise énergétique a récemment été mis à l'épreuve dans le cadre de la crise de la Covid-19 et la guerre en Ukraine. On dispose donc d'un retour d'expérience sur l'efficacité du cadre juridique pour résoudre une conjoncture économique grave ou une réduction significative de l'approvisionnement en raison de différends. L'UE dispose de plusieurs bases juridiques qui peuvent fonder des réponses aux crises énergétiques et qu'elle a en partie activées durant ces crises.

Crise énergétique et art. 194 TFUE. Le cadre juridique de la gestion de crise trouve d'abord un fondement efficace dans l'article 194 du TFUE. Sur ce fondement, le législateur de l'UE peut établir un cadre général de prévention des crises et des mesures d'urgence en tenant compte du principe de solidarité énergétique tel qu'interprété par la CJUE dans l'affaire du gazoduc *OPAL* de 2021.¹⁰⁶ La solidarité énergétique implique que soient pris en compte les intérêts de tous les acteurs susceptibles d'être concernés s'agissant notamment de la sécurité d'approvisionnement, de la viabilité économique et politique et de la diversification des sources d'approvisionnement. Il s'agit d'un principe général du droit de l'UE qui constitue donc un critère d'appréciation de la légalité des mesures adoptées par les institutions de l'Union et un fondement de la politique énergétique. Le principe de solidarité énergétique doit donc être pris en compte par les institutions de l'Union ainsi que par les États membres, dans

¹⁰⁴ La loi sur les énergies renouvelables a introduit un mécanisme de « contribution au partage de la valeur territoriale, » qui entend créer un lien tangible entre les citoyens et les municipalités situés à proximité des installations d'énergie renouvelable. Sous certaines conditions, qui seront précisées par décret, les porteurs de projets autorisés à exploiter une installation seront tenus de verser une contribution aux communes d'implantation, leur permettant de financer la rénovation énergétique, l'efficacité énergétique, la lutte contre la précarité énergétique et le développement de la mobilité urbaine.

¹⁰⁵ Question traitée par Louis de Fontenelle, Maître de conférences à l'Université de Pau Pays de l'Adour.

¹⁰⁶ CJUE, 15 juillet 2021, *République fédérale d'Allemagne contre République de Pologne*, aff. C-848/19P.

le cadre de l'établissement ou du fonctionnement du marché intérieur du gaz et de l'électricité, ce qui implique de prévoir des dispositions visant à faire face à des situations d'urgence, lorsqu'elles se produisent, mais également d'adopter des mesures visant à prévenir les situations de crise. Dans ce cadre, un cadre général des mesures d'urgence et de prévention des crises et des risques de rupture d'approvisionnement énergétique, pour le secteur de l'électricité,¹⁰⁷ et pour le secteur du gaz¹⁰⁸ a été établi. On a aussi pu observer la capacité de l'Union européenne de pouvoir adopter rapidement des règlements sur ce fondement dans la cadre de la crise de 2022.¹⁰⁹ Il y a cependant une limite qui tient au paragraphe 2 TFUE de l'article 194 qui dispose que les mesures prises sur ce fondement « n'affectent pas le droit d'un État membre de déterminer les conditions d'exploitation de ses ressources énergétiques, son choix entre différentes sources d'énergie et la structure générale de son approvisionnement énergétique. » Toutefois, ce paragraphe 2 constitue une exception, et le juge de l'UE y veille par une interprétation rigoureuse.¹¹⁰

Crise énergétique et art. 122 TFUE (voir aussi q. 1, section III). Un autre fondement de la gestion de crise énergétique est l'article 122 TFUE qui permet de prendre des mesures conjoncturelles, notamment en réaction à une crise énergétique. Cet article issu du titre VIII consacré à la « politique économique et monétaire » est composé de deux paragraphes. Le paragraphe 1 établit que le Conseil, sur proposition de la Commission, peut décider, dans un esprit de solidarité entre les États membres, des mesures appropriées à la situation économique, en particulier si de graves difficultés surviennent dans l'approvisionnement en certains produits, notamment dans le domaine de l'énergie. Le paragraphe 2 prévoit une assistance financière que l'UE accorde à un État membre qui connaît des « difficultés ou une menace sérieuse de graves difficultés » en raison de catastrophes naturelles ou d'événements exceptionnels échappant à son contrôle. Les mesures qui sont prises dans le cadre de l'article 122, paragraphe 2 doivent être temporaires.¹¹¹ Sur la base de l'article 122, paragraphe 1 du TFUE, le Conseil a adopté plusieurs actes juridiques pour faire face à la crise énergétique de 2022, notamment sur la

¹⁰⁷ 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, 14.6.2019, pp. 1–21.

¹⁰⁸ 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.

¹⁰⁹ 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, 30.6.2022, pp. 17–33.

¹¹⁰ Voir sur ce point, K. Huhta, “The scope of state sovereignty under article 194(2) TFEU and the evolution of EU competences in the energy sector,” *International and Comparative Law Quarterly*. 2021;70(4):991-1010. doi:10.1017/S0020589321000269.

¹¹¹ C'est ce que la CJUE a jugé dans l'affaire CJUE, 27 novembre 2012, *Thomas Pringle contre Gouvernement of Ireland e.a.*, aff. C-370/12, paragraphe 65.

réduction de la demande en gaz,¹¹² l'accélération du déploiement des énergies renouvelables par l'établissement de règles temporaires d'urgences visant à accélérer les procédures d'octroi de permis,¹¹³ la coordination des achats de gaz et les échanges transfrontières de gaz,¹¹⁴ des mécanismes d'achat commun ou de correction du marché afin de protéger les citoyens des prix excessivement élevés.¹¹⁵

Le recours à l'article 122 TFUE soulève cependant des craintes. On lui reproche de se substituer au cadre de la procédure législative ordinaire. En effet, les mesures, dans ce cadre, sont adoptées par le Conseil. Le rôle du Parlement européen est donc moindre et il existe un risque réel de déséquilibre institutionnel sur un sujet prioritaire. Une étude récente, réalisée par M. Chamon,¹¹⁶ révèle que le caractère temporaire des mesures prises en application de l'article 122 TFUE, paragraphe 1 TFUE est discutable et dépend de l'interprétation de cet article et notamment de ce que l'on entend par « des mesures appropriées à la situation économique, en particulier si de graves difficultés surviennent dans l'approvisionnement en certains produits, notamment dans le domaine de l'énergie. » Dans la pratique, le Conseil a adopté des décisions-cadres en application de l'article 122 TFUE. Il y a donc un risque d'usage de l'article 122 TFUE, paragraphe 1 pour des situations en dehors de celles d'urgence et qui instaurerait un cadre permanent. Seul l'article 122, paragraphe 2 serait une base d'urgence (« *a genuine emergency legal basis* »). Des affaires sont pendantes devant la CJUE et pourraient apporter des réponses quant au bien fondé de l'utilisation de l'article 122 TFUE pendant la crise énergétique. La première vise le règlement du Conseil 2022/2577 établissant un cadre en vue d'accélérer le déploiement des énergies renouvelables,¹¹⁷ la deuxième concerne le règlement du Conseil 2022/1854 du 6 octobre 2022, sur une intervention d'urgence pour faire face aux prix élevés de l'énergie.¹¹⁸

¹¹² Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ L 261I, 7.10.2022, pp. 1–21.

¹¹³ 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, pp. 36–44 ; 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, 10.1.2024.

¹¹⁴ 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, pp. 1–35.

¹¹⁵ 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, pp. 45–60.

¹¹⁶ M. Chamon, *The use of Article 122 TFEU. Institutional implications and impact on democratic accountability*, Study requested by AFCE committee, September 2023.

¹¹⁷ Recours introduit le 23 août 2023 par CEE Bankwatch Network et Ökobüro/Conseil, affaire T-535/23, C/2023/231.

¹¹⁸ F. Martucci, « Mesures structurelles – Le marché – Les aides publiques européennes et nationale, » RFDA. 2023, p. 73.

Crise énergétique et art. 222 TFUE. La dernière base juridique en matière de crise énergétique est l'article 222 TFUE dite « clause de solidarité. » Cette clause prévoit que L'Union et ses États membres agissent conjointement dans un esprit de solidarité si un État membre est l'objet d'une attaque terroriste ou la victime d'une catastrophe naturelle ou d'origine humaine. À cette fin, les États membres se coordonnent au sein du Conseil. Cependant, une attaque terroriste ou la victime d'une catastrophe naturelle ou d'origine humaine ne donne pas nécessairement lieu à une crise énergétique affectant les intérêts vitaux d'un État membre.¹¹⁹

Certains auteurs ont d'ailleurs regretté que l'article 222 TFUE ne fasse pas référence à la rupture majeure d'approvisionnement parmi les motifs justifiant une action conjointe de l'Union et de ses États membres.¹²⁰ Cependant, la décision du Conseil d'exécution de l'article 222 TFUE définit la notion de catastrophe comme « toute situation qui a ou peut avoir des effets graves sur les personnes, l'environnement ou les biens, y compris le patrimoine culturel. »¹²¹ Dans ce cadre, le changement climatique devrait être intégrée dans la notion « de catastrophes naturelles » visée à l'article 222 TFUE (à tout le moins si l'on pense par analogie à l'article 122 TFUE dont les prescriptions intègrent le changement climatique dans le cas des catastrophes naturelles¹²²). Si tel devait être le cas, le nombre d'événements qui pourrait être rattaché à la catastrophe serait significatif. La clause de solidarité a cependant des fragilités.¹²³ D'abord, les prescriptions de l'article 222 TFUE sont peu claires sur les modalités de sa mise en œuvre.¹²⁴ L'analyse de la décision d'exécution de 2014 met en évidence des conditions de mise en œuvre complexes. D'abord, le recours doit se réaliser à titre subsidiaire.¹²⁵ Ensuite, le champ d'application territorial est

¹¹⁹ Voir les propos de l'avocat général Campos Sanchez-Bordona sous l'affaire du Gazoduc OPAL.

¹²⁰ C. Vial, « L'Union européenne et la gestion des crises énergétiques, » in C. Blumann (dir.), *Vers une politique européenne de l'énergie*, éd. Bruylant, 2012, p. 220.

¹²¹ Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192, 1.7.2014, pp. 53–58.

¹²² Règlement (UE) 2016/369 du 15 mars 2016 relatif à la fourniture d'une aide d'urgence au sein de l'Union, JO L 070 du 16.3.2016, p. 1.

¹²³ Martino, Antonio-Maria (2016). The “Solidarity Clause” of the European Union – Dead Letter or Enabling Act?, *SIAC-Journal – Journal for Police Science and Practice (International Edition Vol. 6)*, pp. 40–51, Online: http://dx.doi.org/10.7396/IE_2016_D

¹²⁴ Les seules précisions apportées sont celles qui sont à destination de l'UE (paragraphe 3) et qui ont donné lieu à une décision d'exécution du Conseil – Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192, 1.7.2014, pp. 53–58.

¹²⁵ Article 4 de la décision du 24 juin 2014 : « En cas de catastrophe ou d'attaque terroriste, l'État membre affecté peut invoquer la clause de solidarité s'il estime, après avoir exploité les possibilités offertes par les moyens et les instruments existants, tant au niveau national qu'à celui de l'Union, que la situation dépasse manifestement les capacités de réaction dont il dispose. 2. Les autorités politiques de l'État membre affecté adressent leur invocation à la présidence du Conseil. Cette invocation est également adressée au président de la Commission européenne, par l'intermédiaire du ERCC. »

restreint et ne concerne qu'un seul État membre¹²⁶ (or, il est rare que la rupture d'approvisionnement ne concerne qu'un seul État). Troisièmement, la marge de manœuvre des États est importante. Ainsi, la déclaration n° 37 annexée à l'acte final de la Conférence intergouvernementale qui a adopté le traité de Lisbonne signé le 13 décembre 2007 dispose qu'« aucune des dispositions de l'article 222 ne vise à porter atteinte au droit d'un autre État membre de choisir les moyens les plus appropriés pour s'acquitter de son obligation de solidarité à l'égard dudit État membre. » C'est pourquoi le recours à l'article 222 TFUE n'est pas privilégié comme par exemple lors de la Covid-19¹²⁷. L'une des faiblesses de l'article 222 TFUE tient à une mise en œuvre qui demeure tributaire d'un cadre strictement intergouvernemental, à l'instar de la politique étrangère et de sécurité commune.¹²⁸

¹²⁶ Article 222 TFUE, « b) porter assistance à un État membre sur son territoire, à la demande de ses autorités politiques, en cas de catastrophe naturelle ou d'origine humaine. »

¹²⁷ E. Bernard, « La solidarité, condition et corollaire d'une défense européenne, » in M. Mezaguer, A-S. Millet-Devalle, N. Pigeon, *Union européenne et solidarité(s). Actes du congrès 2022 de l'Association française d'études européennes (AFEE)*, éd. Bruylant, 2024, p. 362.

¹²⁸ *Ibid.*

Jörg Gundel*

Abschnitt I: Die verschiedenen Dimensionen der Energiesolidarität und der Energieversorgungssicherheit im Unionsrecht und im nationalen Recht

1. Die Verankerung von Versorgungssicherheit und Energiesolidarität im europäischen und nationalen Recht (Fragen 1-5)

a) Die Zielsetzungen des Energierechts auf nationaler und europäischer Ebene

Die Versorgungssicherheit ist stets ein zentrales Anliegen des Energierechts gewesen; das gilt für die nationale ebenso wie für die unionsrechtliche Ebene, wobei sich die Gewichte der Regelungsebenen im Verlauf der Schaffung des Energiebinnenmarktes unweigerlich zugunsten des Unionsrechts verschoben haben. Im deutschen Recht finden sich auf der verfassungsrechtlichen Ebene zwar nur knappe Erwähnungen des Energiesektors in den Bestimmungen zu den Gesetzgebungs- und Verwaltungskompetenzen¹; die konkreten Regelungen zum Schutz der Versorgungssicherheit sind dann vor allem auf bundesgesetzlicher Ebene verankert.² Die Rechtsprechung des BVerfG hat der Sicherung der Energieversorgung aber auch unabhängig von einer besonderen verfassungsrechtlichen Verankerung stets zentrale Bedeutung als „Gemeinschaftsinteresse höchsten Ranges“ zuerkannt³.

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¹ S. Art. 73 Abs. 1 Nr. 14 GG (Gesetzgebungskompetenz für die Kernenergie), Art. 74 Abs. 1 Nr. 11 GG (Gesetzgebungskompetenz für die Energiewirtschaft), Art. 87c GG (Verwaltungskompetenz für die Kernenergie).

² Neben verschiedenen Bestimmungen im Energiewirtschaftsgesetz (Gesetz über die Elektrizitäts- und Gasversorgung – Energiewirtschaftsgesetz – EnWG v. 13.07.2005, BGBl. I S. 1970 mit zahlreichen späteren Änderungen) regelt den speziellen Fall einer Versorgungskrise insbesondere das erstmals im Jahr 1973 erlassene Energiesicherungsgesetz (EnSiG): Gesetz zur Sicherung der Energieversorgung bei Gefährdung oder Störung der Einfuhren von Mineralöl oder Erdgas (Energiesicherungsgesetz) v. 9.11.1973, BGBl. I S. 1585, im Anschluss abgelöst durch das Gesetz zur Sicherung der Energieversorgung bei Gefährdung oder Störung der Einfuhr von Erdöl, Erdölerzeugnissen oder Erdgas (Energiesicherungsgesetz 1975) v. 20.12.1974, BGBl. I S. 3681. Die gesetzliche Regelung ist lange Zeit unverändert geblieben und wurde erst im Zuge der durch den russischen Überfall auf die Ukraine ausgelösten Energiekrise mehrfach geändert und ergänzt; dazu S. Gerstner/J. Gundel, Einführung zum Energiesicherungsrecht, in: dies. (Hrsg.), Energiesicherungsrecht, 2024, Rn. 8 ff.; s. auch J. Wolff, Krisenresilienz der Energieversorgung – Gesetzliche Regelungen zur Versorgungssicherung in der Normallage und im Krisenfall, DV 57 (2024), 29 ff.

³ So BVerfG, 16.03.1971 – 1 BvR 52, 665, 667, 754/66, BVerfGE 30, 292 (323 f.) – Mineralölbevorratung; s. weiter BVerfG, 11.10.1994 – 2 BvR 633/86, BVerfGE 91, 186 (206) – Kohlepfefferning mit dem bekannten Zitat, wonach das Interesse an einer gesicherten Stromversorgung so allgemein sei „wie das Interesse am täglichen Brot“.

Auf der Ebene des Unionsrechts bildet nun der mit dem Vertrag von Lissabon eingefügte Art. 194 AEUV die zentrale Bestimmung für den Energiesektor. Hier werden in Art. 194 Abs. 1 AEUV die konkreten Ziele der EU-Energiepolitik in vier Komponenten definiert: Das Funktionieren des Energie(Binnen)marktes (lit. a), die Gewährleistung der Versorgungssicherheit (lit. b), des Umweltschutzes mit den Stichworten Energieeffizienz und erneuerbare Energien (lit. c) sowie die Förderung der Interkonnektion der Energienetze (lit. d). Dem Zielkatalog vorangestellt werden drei Leitprinzipien⁴ der EU-Energiepolitik – Solidarität zwischen den Mitgliedstaaten, Verwirklichung des Binnenmarktes und Wahrung des Umweltschutzes. Die Aufzählung der Leitprinzipien und Ziele⁵ ist damit der aus dem deutschen Energierecht vertrauten Zieltrias aus Preisgünstigkeit, Sicherheit und Umweltverträglichkeit der Energieversorgung (§ 1 EnWG 1998⁶) vergleichbar. Dabei entspricht das Binnenmarktziel gemäß lit. a durch den mit ihm verbundenen Wettbewerbsbezug der Preisgünstigkeit; die Versorgungssicherheit wird deckungsgleich in lit. b benannt; lit. c deckt zumindest Teilbereiche des Umweltbezugs ab, während der erste Halbsatz von Abs. 1 breiter die „Berücksichtigung der Notwendigkeit der Erhaltung und Verbesserung der Umwelt“ anspricht. Nur lit. d bildet kein eigenständiges Ziel, sondern erfüllt eine eher instrumentale Hilfsfunktion für die Erreichung der anderen Zielsetzungen.⁷

Im Fall von Zielkonflikten weist der Text des Art. 194 AEUV keinem der Ziele Vorrang zu;⁸ eine Rangfolge ergibt sich auch nicht aus anderen Bestimmungen des Vertrages wie etwa der Umwelt-Querschnittsklausel des Art. 11 AEUV.⁹

⁴ So die Begriffswahl für die in Art. 194 Abs. 1 AEUV den Zielen vorangestellten Aspekte bei U. Ehrlicke/D. Hackländer, Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrags von Lissabon, ZEuS 2008, 579 (585); D. Hackländer, Die allgemeine Energiekompetenz im Primärrecht der Europäischen Union, 2010, S. 108.

⁵ Zwischen beiden Gruppen bestehen deutliche inhaltliche Überschneidungen, s. auch D. Hackländer, Die allgemeine Energiekompetenz im Primärrecht der Europäischen Union, 2010, S. 108; ausführlicher zu den Leitprinzipien ebd., S. 125 ff.

⁶ Dort: „eine möglichst sichere, preisgünstige und umweltverträgliche (...) Versorgung“, zur Parallele auch G. Maichel, Das Energiekapitel in der Europäischen Verfassung – mehr Integration oder mehr Zentralismus für die leitungsgebundene Energiewirtschaft Europas, in: FS Götz, 2005, S. 55 (65); anders allerdings D. Hackländer, Die allgemeine Energiekompetenz im Primärrecht der Europäischen Union, 2010, S. 111. Der aktuell geltende § 1 Abs. 1 EnWG 2005 fächert die Ziele weiter auf, ohne dass damit allerdings ein Erkenntnisgewinn verbunden wäre; kritisch dazu J. Gundel, Nachhaltigkeit und Energieversorgung, in: Kahl (Hrsg.), Nachhaltigkeit als Verbundbegriff, 2008, S. 443 (444).

⁷ Zur Bedeutung hinreichender Verbindungskapazitäten zwischen den Mitgliedstaaten für Versorgungssicherheit und Energiesolidarität s. u. I. 4.

⁸ S. M. Nettesheim, Das Energiekapitel im Vertrag von Lissabon, JZ 2010, 19 (22); F. Germelmann, Der internationale und europäische Rahmen für den Klimaschutz in der Energieversorgung, DÖV 2024, 985 (990); ebenso C. Calliess, in: Calliess/Ruffert (Hrsg.), EUV/AEUV, 6. A. 2022, Art. 194 AEUV, Rn. 4, der allerdings schon die Existenz solcher Konflikte bezweifelt; s. dazu aber u. II. 3.

⁹ So zu Recht M. Ludwigs, Energierecht, in: Ruffert (Hrsg.), Europäisches Sektorales Wirtschaftsrecht, 2. A. 2020, 2. A. 2020, § 5, Rn. 54, 72 f.; s. auch Hirsbrunner, in: Schwarze/Hatje (Hrsg.), EU-Kommentar, 4. A. 2019, Art. 194 AEUV Rn. 7.

Ihre Gewichtung und der zu treffende Ausgleich liegen in der Verantwortung des europäischen Gesetzgebers bzw. – soweit auf dieser Ebene noch keine Weichenstellungen getroffen wurden – der Mitgliedstaaten.¹⁰ Insoweit ist Art. 194 AEUV tatsächlich vorrangig eine Kompetenznorm, während die Gewichtung der materiellen Entscheidungsmaßstäbe durch die Bestimmung nicht vorgezeichnet wird. Eine Neuerung liegt allerdings darin, dass die beiden Säulen des Energiewirtschafts- und des Energieumweltrechts heute ihre gemeinsame Grundlage in Art. 194 AEUV finden¹¹, so dass der Ausgleich dieser Belange heute auf einer einheitlichen Rechtsgrundlage erfolgt; vor dem Inkrafttreten des Vertrags von Lissabon wurden Rechtsakte des Energieumweltrechts auf der Grundlage der Umweltkompetenznorm des heutigen Art. 192 AEUV erlassen.

b) Insbesondere der Grundsatz der Energiesolidarität

Gegenüber der Fassung des Verfassungsvertrags, auf den Art. 194 AEUV zurückgeht, findet sich in der Bestimmung eine wesentliche Ergänzung durch die Einfügung des Solidaritätsziels; parallel dazu wurde auch die Notfallkompetenz des Art. 122 AEUV¹² durch einen entsprechenden Einschub ergänzt. Mit dieser Ergänzung wurde zu diesem Zeitpunkt vor allem einem Anliegen der osteuropäischen Mitgliedstaaten Rechnung getragen, die durch die wiederholten Lieferunterbrechungen aus Russland besonders betroffen wurden.¹³ Die Einfügung hat aber über diesen (weiterhin aktuellen) Anlass grundsätzliche Bedeutung: Die Energiesolidarität ist eine spezifisch unionsrechtliche Gewährleistung, die sich im deutschen Energierecht nicht findet und im nationalen Recht wohl auch keiner Erwähnung bedürfte, die im Zusammenhang des Unionsrechts aber daran erinnert, dass der Energiebinnenmarkt nach wie vor aus

¹⁰ S. EuGH, 27.07.2011 – Rs. C-2/10 (*Azienda zootechnica Franchini Sarl, Eolica di Altamura*), Slg. 2011, I-6561, Tz. 55 ff.: Auch bei der in Art. 194 Abs. 1 lit. c AEUV vorgegebenen Entwicklung neuer und erneuerbarer Energien sind entgegenstehende Umweltbelange zu berücksichtigen, so dass ein nationales Verbot der Errichtung von Windkraftanlagen in Naturschutzgebieten gerechtfertigt werden kann.

¹¹ Dazu m.w.N. *J. Gundel/J. Buckler*, Das europäische Energierecht nach dem Erlass des Clean energy package: Eine gelungene Synthese von EU-Klimaschutz- und EU-Binnenmarktrecht?, *GewArch* 2020, 41 (42); die deutsche Literatur hat demgegenüber lange an Art. 192 AEUV festgehalten; Art. 194 AEUV bezieht den Gesichtspunkt des Umweltschutzes aber eindeutig ein und ist damit die speziellere Norm. S. zur Diskussion m.w.N. *J. Gundel*, in: Häde/Nowak/Pechstein (Hrsg.), *Frankfurter Kommentar zu EUV/GRC/AEUV*, 2. A. 2023, Art. 194 AEUV Rn. 15; im Hintergrund dieser konservativen Argumentation dürfte stehen, dass das Umweltkapitel in Art. 193 AEUV den Mitgliedstaaten das Recht zum Erlass weitergehender Regelungen einräumt, was in Art. 194 AEUV nicht vorgesehen ist; auf der Grundlage von Art. 194 AEUV können solche Öffnungsklauseln allerdings im Sekundärrecht vorgesehen werden, s. mit Beispielen *Gundel*, a.a.O. Rn. 26.

¹² Zu dieser Rechtsgrundlage und ihrer Abgrenzung von Art. 194 AEUV s. noch u. III. 3. b).

¹³ Dazu *J. Gundel*, Die Energieaußenpolitik der EU: (Zwischen-)bilanz und Perspektiven nach dem Vertrag von Lissabon, in: FS Säckler, S. 697 (698 f.); J. Boudant, La solidarité européenne entre dépendance énergétique et stratégies commerciales, in: Barbato/Mouton (Hrsg.), *Vers la reconnaissance de droits fondamentaux aux Etats membres de l'Union européenne?*, 2010, S. 173 (183 ff.); A. Bavia, The impact of the Russia-Ukraine Gas Disputes on the European Union Gas Market: The Energy Solidarity Issue, in: Delvaux/HUnt/Talus (Hrsg.), *EU Energy Law and Policy Issues*, 2010, S. 17 ff.

Staaten besteht, die im Bereich der Energieversorgung sehr unterschiedliche wirtschaftliche, gesellschaftliche und geographische Gegebenheiten aufweisen, die diesen Solidaritätsappell nahelegen können.

Der Grundsatz der Energiesolidarität¹⁴ umfasst dabei zwei Elemente bzw. Facetten: Es geht zum einen um die Solidarität durch gegenseitige Unterstützung in Krisensituationen¹⁵ und die entsprechende Vorsorge hierfür¹⁶, zum anderen aber auch um die Berücksichtigung der Interessen anderer Mitgliedstaaten bei Entscheidungen über strukturelle Maßnahmen, die geeignet sind, die Versorgungssicherheit in einem Mitgliedstaat zu verbessern, dies aber zu Lasten der Sicherheit in anderen Mitgliedstaaten tun¹⁷. Die eigenständige Bedeutung des Solidaritätsziels ist durch die EuGH-Rechtsprechung, insbesondere durch die zentrale OPAL-Entscheidung des Gerichtshofs aus dem Jahr 2021¹⁸, herausgearbeitet worden; mit diesem Urteil wurde festgehalten, dass dieser Grundsatz auch ohne sekundärrechtliche Umsetzungsakte von der Union und den Mitgliedstaaten verlangt, die negativen Auswirkungen eigener Weichenstellungen im Energiesektor auf die Versorgungssicherheit anderer Mitgliedstaaten zu berücksichtigen.

¹⁴ S. zu ihm in jüngerer Zeit V. Baumgartl, Das unionsrechtliche Prinzip der Energiesolidarität, in: Bartl u. a. (Hrsg.), Nachhaltig in die Zukunft, 2024, S. 161 ff.; B. Blottin/F. Tesson, À la recherche de l'esprit de solidarité énergétique, in: Mezaguer/Millet-Devalle/Pigeon (éds.), Union européenne et solidarité(s), 2024, S. 189 ff.; M. Lamoureux, La politique de l'énergie: l'esprit de solidarité a-t-il été incarné?, in: Brosset/Mehdi/Rubino (éds.), Solidarité et droit de l'Union européenne – Un principe à l'épreuve, 2021, S. 111 ff.

¹⁵ Zu den hierfür geschaffenen unionsrechtlichen Instrumenten s. u. III. 1.

¹⁶ Zur Schaffung der entsprechenden Netzinfrastrukturen s. u. I. 4.

¹⁷ So nachdrücklich gegen die Position der Kommission, die nur auf den Krisenfall abgestellt hatte, EuG, 10.09.2019 – Rs. T-883/16 (Polen/Kommission), RdE 2020, 70 m. Anm. J. Gundel, Tz. 72 f.: „Der Solidaritätsgrundsatz umfasst im Gegenteil auch eine allgemeine Verpflichtung der Union und der Mitgliedstaaten, im Rahmen der Ausübung ihrer jeweiligen Befugnisse die Interessen der anderen Akteure zu berücksichtigen. Was insbesondere die Energiepolitik der Union betrifft, bedeutet dies, dass sich die Union und die Mitgliedstaaten bei der Ausübung ihrer Befugnisse im Rahmen dieser Politik bemühen müssen, Maßnahmen zu vermeiden, die geeignet sein könnten, die Interessen der Union und der anderen Mitgliedstaaten in Bezug auf die Sicherheit und die wirtschaftliche und politische Tragbarkeit der Versorgung sowie die Diversifizierung der Versorgungsquellen oder der Versorgung zu beeinträchtigen (...)“.

¹⁸ EuGH (GK), 15.07.2021 – Rs. C-848/19 P (Deutschland/Polen), EuZW 2021, 766; dazu N. Sölter, Abwägung ohne Maßstab – zum Grundsatz der Energiesolidarität, EuR 2022, 130 ff.; J. Gundel, Der Grundsatz der Energiesolidarität als justiziable Vorgabe des europäischen Energierechts, EuZW 2021, 758 ff.; K. Müller, Der Grundsatz der Energiesolidarität als unionsverfassungsrechtlicher Rechtmäßigkeitsmaßstab, ZEuS 2022, 819 ff.; K. Huhta/L. Reins, Solidarity in European Union Law and its Application in the Energy Sector, ICLQ 2023, 771 ff.; M. Münchmeier, The principle of energy solidarity: Germany v. Poland, 59 CMLRev. (2022), 915 ff.; M. Ryś, The principle of energy solidarity clarified: a certain way to uncertainty, Revista de derecho comunitario europeo 2022, 149 ff.; Bestätigung von EuG, 10.09.2019 – Rs. T-883/16 (Polen/Kommission), RdE 2020, 70 m. Anm. J. Gundel; dazu D. Buschle/K. Talus, One for all and all for one,? The General Court ruling in the OPAL case, 22 Utilities Law Review (2019), 235 ff.; A. Boute, The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline), 57 CMLRev. (2020), 889 ff.; M. Iakovenko, Case C-848/19 P: Germany v Poland and its outcomes for EU energy sector: An extended case note on the European Court of Justice judgment in the OPAL case, 14 Journal of World Energy Law and Business (2021), 38 ff.

Solche Konstellationen, in denen die Verbesserung der Versorgungssicherheit in einem Mitgliedstaat die Situation in einem anderen Mitgliedstaat verschlechtert, werden selten sein; die jüngste Vergangenheit hat aber gezeigt, dass sie nicht unvorstellbar sind – das gilt angesichts der Importabhängigkeit der EU-Mitgliedstaaten im Bereich der fossilen Energieträger¹⁹ vor allem dann, wenn Drittstaaten oder Drittstaaten-Unternehmen versuchen, die Mitgliedstaaten gegeneinander auszuspielen.²⁰ Tatsächlich wären die Diskussionen um die Reichweite der Energiesolidarität ohne den konkreten Hintergrund der langjährigen Energieabhängigkeit Europas von Russland²¹ und den damit verwickelten Ukraine-Konflikt²² wohl allenfalls auf theoretischer Ebene geführt worden.

Der EuGH hat auch geklärt, dass die Energiesolidarität zwar nur in Art. 122 AEUV und Art. 194 AEUV erwähnt wird, aber darüber hinaus als Grundsatz des Unionsrechts in andere Felder ausstrahlt. So wurde sie im OPAL-Fall auf den Vollzug der Erdgasbinnenmarktrichtlinie in der Fassung des Dritten Binnenmarktpakets angewandt, die kurz vor dem Inkrafttreten des Vertrags von Lissabon noch auf der Grundlage von Art. 114 AEUV erlassen worden war; in einem weiteren Fall hat der EuGH festgehalten, dass der Grundsatz auch im EU-Wettbewerbsrecht anwendbar ist.²³ Derzeit sind darüber hinaus Nichtigkeitsklagen anhängig, mit denen geltend gemacht wird, dass der Grundsatz auch im Bereich des EU-Umweltrechts und damit im Anwendungsbereich des Art. 192 AEUV Gültigkeit beansprucht.²⁴

¹⁹ Dazu z. B. J. Möller-Klapperich, Versorgungssicherheit und Importabhängigkeit im Gassektor, NJ 2022, 337 ff.; F. Fabbrini, The EU's Response to the War-Induced Energy Crisis: Legal and Budgetary Issues to 'Insure Domestic Tranquility', 51 LIEI (2024), 349 ff.; s. auch noch u. I. 5. zur Energie-Außenpolitik.

²⁰ Dieser Verdacht stand im Hintergrund des OPAL-Verfahrens (Fn. 18), das die Frage der Regulierungsfreistellung einer Onshore-Anbindungsleitung zur Nordstream-Pipeline betraf; die Verbindung verbesserte die Versorgungssicherheit Deutschlands, das nun auch bei Ausfall der über Belarus und die Ukraine führenden Verbindungsleitungen versorgt werden konnte, sie ermöglichte es dadurch aber gleichzeitig, andere Mitgliedstaaten ohne Verzicht auf das lukrative Deutschland-Geschäft von der Versorgung abzuschneiden. In der deutschen Diskussion sind diese Gefahren tatsächlich praktisch nicht berücksichtigt worden, s. z. B. S. Kohler, Nordstream II – Eine energie- und klimapolitisch notwendige Infrastruktur, et 11/2017, 33 f.; H. Kohte, Garant für eine langfristige Versorgungssicherheit: Die Nord Stream-Pipeline, et 11/2010, 18 ff.

²¹ Dazu z. B. U. Turksen, EU Energy Relations with Russia – Solidarity and the Rule of Law, 2018; T. Dyson/T. Konstadinides, Enhancing Energy Security in the EU: Pathways to Reduce Europe's Dependence on Russian Gas Imports, 41 ELRev. (2016), 535 ff.

²² S. z. B. S. Cuendet, Les aspects énergétiques de la crise en Ukraine, RGDIP 2014, 841 ff.

²³ EuGH, 26.09.2024 – Rs. C-255/22 P (Orlen/Kommission), EnZW 2025, 78 m. Anm. J. Gundel, Tz. 93 f. zum Kommissionsbeschluss AT.39816 v. 24.05.2018 – Upstream gas supplies in Central and Eastern Europe; dazu J. Lübking, Die Gazprom-Entscheidung der Kommission: Wettbewerbliche Preise und freie Lieferung von Gas in Mittel- und Osteuropa, WuW 2019, 434 ff.; s. auch J. Stern/K. Yafimava, The EU competition investigation of Gazprom's sales in central and eastern Europe: a detailed analysis of the commitments and the way forward, OIES paper NG 121, 2017.

²⁴ S. die Rs. C-445/23 (Polen/EP und Rat) gegen den Beschluss (EU) 2023/852 des EP und des Rates v. 19.04.2023 zur Änderung des Beschlusses (EU) 2015/1814 in Bezug auf die Menge der Zertifikate, die bis 2030 in die Marktstabilitätsreserve für das System für den Handel mit Treibhausgasemissionszertifikaten in der Union einzustellen sind, ABL EU 2023 L 110/21, und die Rs. C-451/23

Die Anerkennung der Energiesolidarität als bindender Grundsatz hat in der deutschen Literatur vor allem die Befürchtung von Rechtsunsicherheit ausgelöst²⁵, da der vage gehaltene Texteschub „im Geiste der Solidarität zwischen den Mitgliedstaaten“ keine subsumtionsfähigen Ableitungen im Sinne eines bestimmten Entscheidungsprogramms ermöglicht. Der EuGH hat aber auch festgehalten, dass dieser Grundsatz keine bestimmte Entscheidung vorgibt²⁶, sondern der Gesichtspunkt bei Entscheidungen von Unionsorganen und Mitgliedstaaten in die Abwägung einzubeziehen ist.

2. Die Kompetenzverteilung zwischen EU und Mitgliedstaaten im Energiesektor und ihre Konsequenzen für die Gewährleistung der Versorgungssicherheit (Fragen 6–9)

Die Schaffung des europäischen Energiebinnenmarktes war in den 1990er Jahren in einer Art von Aufholjagd begonnen worden, nachdem der Energiebereich – ebenso wie andere Sektoren mit Infrastrukturmonopolen von öffentlichen Unternehmen²⁷ – über lange Zeit von einer Öffnung der mitgliedstaatlichen Märkte verschont geblieben war. Der EU-Gesetzgeber hat hier mit mehreren Wellen von Rechtsakten, für die sich die Bezeichnung als Energiebinnenmarktpakete eingebürgert hat,²⁸ den Versuch unternommen, die zuvor verschlossen nebeneinander existierenden nationalen Märkte schrittweise in einen Energiebinnenmarkt umzuformen. Der Vertrag von Lissabon hat diese Entwicklung mit der Schaffung des Art. 194 AEUV primärrechtlich bestätigt, vollendet war

(Polen/EP und Rat) gegen die VO (EU) 2023/857 des EP und des Rates v. 19.04.2023 zur Änderung der VO (EU) 2018/842 zur Festlegung verbindlicher nationaler Jahresziele für die Reduzierung der Treibhausgasemissionen im Zeitraum 2021 bis 2030, ABL. EU 2023 L 111/1.

²⁵ S. N. Sölter, Abwägung ohne Maßstab – zum Grundsatz der Energiesolidarität, EuR 2022, 130 (135 ff.); K. Müller, Der Grundsatz der Energiesolidarität als unionsverfassungsrechtlicher Rechtmäßigkeitsmaßstab ZEuS 2022, 819 (835 ff.); T. Lübbig, Solidarität energisch vertreten, EuZW 2021, 737 f.

²⁶ EuGH, 26.09.2024 – Rs. C-255/22 P (Orlen/Kommission), EnZW 2025, 78 m. Anm. J. Gundel, Tz. 96 f.; ebenso schon die Vorinstanz EuG, 2.02.2022 – Rs. T-616/18 (Polskie Górnictwo Naftowe i Gazownictwo/Kommission), Tz. 422.

²⁷ Dieser Befund betraf neben der Energiewirtschaft u. a. auch die Bereiche Telekommunikation und Post, s. dazu im vergleichenden Überblick J. Kühling, Das Regulierungsrecht im Binnenmarkt, in: Müller-Graff (Hrsg.), Europäisches Wirtschaftsordnungsrecht, 2015, § 20 Rn. 17 ff.

²⁸ Zur Entwicklung s. im Überblick J. Gundel, in: Kühling/Theobald (Hrsg.), Energierecht (101. EL 2019), EuEnR Rn. 7 ff., 37 ff.; ders., Die Entwicklung des europäischen Energierechts, in: FS Danner, 2019, S. 61 ff.; M. Ludwigs, Energierecht, in: Ruffert (Hrsg.), Europäisches Sektorales Wirtschaftsrecht, 2. A. 2020, Rn. 6 ff. Zum Clean energy package oder Winterpaket als dem im Jahr 2019 erlassenen letzten größeren energierechtlichen Gesetzgebungspaket, das teils auch als viertes Binnenmarktpaket bezeichnet wird, s. J. Gundel/J. Buckler, Das europäische Energierecht nach dem Erlass des Clean energy package: Eine gelungene Synthese von EU-Klimaschutz- und EU-Binnenmarktrecht?, GewArch 2020, 41 ff.; M. Meyer/A. Sène, Das europäische Strommarktdesign nach Verabschiedung des „Winterpakets“, RdE 2019, 278 ff.; J. Pielow, Das EU-Winterpaket und die Energiepolitik der Mitgliedstaaten, RdE 2019, 421 ff.; zum dritten Paket aus dem Jahr 2009 s. J. Gundel/F. Germelmann, Kein Schlußstein für die Liberalisierung der Energiemärkte: Das Dritte Binnenmarktpaket, EuZW 2009, 763 ff.; zum zweiten Binnenmarktpaket aus dem Jahr 2003 s. H. Lecheler/J. Gundel, Ein weiterer Schritt zur Vervollendung des Energie-Binnenmarktes: Die Beschleunigungs-Rechtsakte für den Binnenmarkt für Strom und Gas, EuZW 2003, 621 ff.

der Energiebinnenmarkt dadurch freilich nicht. Im Jahr 2015 hat die Kommission dann in einem neuen Anlauf das Vorhaben der Energieunion²⁹ vorgestellt, das entgegen der durch den Begriff geweckten Erwartungen allerdings keine neue vertragliche Gemeinschaft vorsieht³⁰, sondern nur einen plakativen Titel für das Arbeitsprogramm der Kommission im Energiesektor darstellt.³¹ Dieses Programm behandelt die Weiterentwicklung des Sekundärrechts, mit der fünf „Dimensionen“ der Energiepolitik vorangetrieben werden sollten: Die Integration des Energiebinnenmarktes, die Verbesserung der Versorgungssicherheit, die Steigerung der Energieeffizienz, der Klimaschutz und schließlich die Förderung von Forschung und Innovation;³² damit wird letztlich das Zielprogramm des Art. 194 AEUV nachvollzogen und zugleich der Befund bestätigt, dass mit der Schaffung des Energiebinnenmarktes auch die Verantwortung für die Versorgungssicherheit auf die Unionsebene übergeht.

Entsprechend der ursprünglichen Verantwortungsverteilung hatte der EuGH die Versorgungssicherheit zunächst als Rechtfertigung für mitgliedstaatliche Ausnahmeregelungen nach dem heutigen Art. 36 AEUV³³ anerkannt;

²⁹ Kommissionsmitteilung „Rahmenstrategie für eine krisenfeste Energieunion mit einer zukunftsorientierten Klimaschutzstrategie“, COM (2015) 80 final v. 25.02.2015.

³⁰ Der Begriff der Energiegemeinschaft bzw. später -union geht auf eine politische Initiative aus dem Jahr 2010 zurück, die tatsächlich die Schaffung einer neuen vertraglichen Grundlage in den Blick genommen hatte, insoweit aber folgenlos geblieben ist; s. die u. a. von Jacques Delors initiierten Vorschläge zur Schaffung eines eigenen Energiegemeinschafts-Vertrags zwischen mitwirkungswilligen EU-Mitgliedstaaten, ausgeführt bei *Andoura/Hancher/van der Woude*, *Towards a European Energy Community: A Policy Proposal*, 2010.

³¹ S. näher *F. Germelmann*, *Die Energieunion – Eine neue Perspektive für die europäische Energiepolitik?*, EuR 2016, 3 ff.; *ders.*, *Energieunion und europäische Energienetze – auf dem Weg zu einem wirklichen Zusammenwachsen des Binnenmarktes?*, in: *Gundel/Lange* (Hrsg.), *Energieversorgung zwischen Energiewende und Energieunion*, 2017, S. 27 ff.; *M. Rodi/A. Behm*, *Die Energieunion – rechtliche und politische Gehalte einer neuen europäischen Spezialunion*, ZEuS 2016, 177 ff.; *J. Lang/P. Hohaus*, *Energieunion: Neue Perspektiven für eine europäische Energiepolitik*, ET 9/2015, 28 ff.; *T. Pellerin-Carlin*, *The European Energy Union*, in: *Leal-Arcas/Wouters* (eds.), *Research Handbook on EU Energy Law and Policy*, 2017, S. 67 ff.; monographisch *R. Leal-Arcas*, *The European Energy Union*, 2016.

³² Kommissionsmitteilung „Rahmenstrategie für eine krisenfeste Energieunion mit einer zukunftsorientierten Klimaschutzstrategie“, COM (2015) 80 final v. 25.02.2015, S. 4; dazu *F. Germelmann*, *Die Energieunion – Eine neue Perspektive für die europäische Energiepolitik?*, EuR 2016, 3 (6 f.); aufgenommen wird die Kategorisierung dann in der als Teil des Clean energy package erlassenen Energie-Governance-Verordnung, s. u. II. 2. bei Fn. 121.

³³ S. jeweils zu Abnahmepflichten bei inländischen Erdölraffinerien EuGH, 10.07.1984 – Rs. 72/83 (*Campus Oil*), Slg. 1984, 2727; EuGH, 25.10.2001 – Rs. C-398/98 (*Kommission/Griechenland*), Slg. 2001, I-7915, Tz. 29 ff., dort allerdings mit dem Ergebnis der Unverhältnismäßigkeit der Regelung. In jüngerer Zeit hat der EuGH die Energieversorgungssicherheit sogar als so gewichtig angesehen, dass sie unter bestimmten Voraussetzungen vorübergehende Ausnahmen vom Vorrang des Unionsrechts rechtfertigen kann, s. EuGH (GK), 29.07.2019 – Rs. C-411/17 (*Inter-Environnement Wallonie und Bond Beter Leefmilieu Vlaanderen*), NuR 2019, 538 = DVBl. 2020, 108 m. Anm. *W. Frenz*, Tz. 177 ff. zum Weiterbetrieb eines AKW ohne die unionsrechtlich vorgeschriebene UVP-Prüfung; dazu *J. Gundel*, *Die Zulassung zeitlich begrenzter Notfallausnahmen vom Vorrang des Unionsrechts durch den EuGH*, EuZW 2020, 890 ff.; *T. Iliopoulos/D. Bijmens*, *Fear of the Dark? The CJEU adds electricity shortage to the reasons justifying an ex post regularization of projects without an EIA*, 27 MJ (2020), 120 ff.; *B. Le Baut-Ferrarese/M. Molinier-Dubost*, *Le droit de l'Union européenne au cœur du dilemme de la sortie du nucléaire, énergie-environnement-infrastructures* 12/2019, 23 ff.

auch die erste Ölkrise der 1970er Jahre wurde vor allem auf der Ebene der Mitgliedstaaten bewältigt, obwohl die damalige EWG bereits zuvor Vorsorgemaßnahmen für den Fall von Versorgungskrisen erlassen hatte³⁴. Selbst die Koordination der Reaktion der westlichen Industrienationen auf diese Ölkrise erfolgte ohne unmittelbare Einschaltung der damaligen EWG im Rahmen der auf Initiative der OECD gegründeten Internationalen Energieagentur (IEA)³⁵, womit der Vorteil verbunden war, dass Nicht-EU-Staaten wie die USA und Kanada unmittelbar eingebunden werden konnten³⁶. Wie bereits erwähnt, hat sich dieses Bild mit der Schaffung des Energiebinnenmarktes ab den 1990er Jahren³⁷ geändert: Konkrete Einzelfallmaßnahmen werden zwar immer noch von den Mitgliedstaaten getroffen, so dass sich hier auch weiter die Frage der Vereinbarkeit solcher Eingriffe mit den Grundfreiheiten stellen kann³⁸; den normativen Rahmen für die Erhaltung der Versorgungssicherheit setzt heute jedoch überwiegend die EU³⁹.

Dass nationale Maßnahmen zum Schutz der Versorgungssicherheit in ein Spannungsverhältnis zum Binnenmarkt geraten können, haben in der jüngeren Vergangenheit die nationalen Maßnahmen zur Schaffung von Kapazitätsreserven oder Kapazitätsmärkten gezeigt, die jeweils auf nationale Strukturen setzen und damit die Gefahr begründen, dass der Energiebinnenmarkt sich im Krisenfall wieder in nationale Inseln auflöst⁴⁰. Konsequent enthält die im Jahr

³⁴ RL 68/414/EWG des Rates v. 20.12.1968 zur Verpflichtung der Mitgliedstaaten der EWG, Mindestvorräte an Erdöl und/oder Erdölzeugnissen zu halten, ABl. EG 1968 L 308/14; die heute geltende Nachfolgeregelung ist die RL 2009/119/EG des Rates v. 14.09.2009 zur Verpflichtung der Mitgliedstaaten, Mindestvorräte an Erdöl und/oder Erdölzeugnissen zu halten, ABl. EU 2009 L 265/9.

³⁵ Decision of the Council establishing an International Energy Agency, 14 ILM (1975), 789 ff., auch veröffentlicht in BGBl. 1975 II S. 738; s. auch www.iea.org; zu dieser Institution s. auch R. Lauwaars, Some Institutional Aspects of the International Energy Agency, 12 Netherlands Yearbook of International Law (1981), 113 ff.; M. Willrich/M. Conant, The International Energy Agency: an Interpretation and Assessment, 71 AJIL (1977), 199 ff.

³⁶ J. Woodliffe, A new dimension to international co-operation: the OECD international energy agreement, 24 ICLQ (1975), 525 (541); s. auch J. de Jong, The 2007 energy package: the start of a new era?, in: Roggenkamp/Hammer (Hrsg.), European Energy Law Report V, 2008, S. 95 (97).

³⁷ Zu den einzelnen Schritten s. m.w.N. o. I. 2. bei Fn. 28.

³⁸ S. z. B. zur Anordnung der Treuhandverwaltung für die von einer in Luxemburg ansässigen Rosneft-Tochtergesellschaft betriebenen Raffinerie in Schwedt nach dem russischen Überfall auf die Ukraine auf der Grundlage von § 17 EnSiG (die Regelung wurde eingefügt durch das Gesetz zur Änderung des Energiesicherungsgesetzes 1975 und anderer energiewirtschaftlicher Vorschriften v. 20.05.2022, BGBl. I S. 730); die Regelung wurde als verfassungs- und unionsrechtskonform eingestuft durch BVerwG, 14.03.2023 – 8 A 2.22, BVerwGE 178, 46 = NVwZ 2023, 1326 = DVBl. 2024, 564, wobei das BVerwG eine Berührung der Niederlassungsfreiheit sehr knapp unter Berufung darauf verneint hat, dass die Wirkungen des Eingriffs zu ungewiss und unbestimmt seien – das kann man für die gesetzliche Regelung annehmen, aber nicht für die konkrete Maßnahme der Treuhandverwaltung, die die Ausübung der Niederlassungsfreiheit unterbindet; zu diesem Urteil s. T. Holterhus, Verfassungs-, unions- und völkerrechtliche Aspekte der Treuhandverwaltung nach dem Energiesicherungsgesetz, NVwZ 2024, 554 ff.; s. auch T. Holterhus/S. Siebrecht, Entschädigungslose Enteignung russisch kontrollierter Energieinfrastruktur, JZ 2023, 321 ff.; D. Winkler/M. Zeccola/P. Michailidou, Die Renaissance des Energiesicherungsgesetzes, NVwZ 2023, 545 ff.

³⁹ S. dazu u. III.

⁴⁰ Zu dieser Diskussion s. zuletzt J. Lépée, Mécanisme de capacité, in: Le Baut-Ferrarese (ed.), Le droit de la sécurité d'approvisionnement énergétique dans l'Union européenne, 2024, S. 281 ff.;

2019 neugefasste Elektrizitätsbinnenmarktverordnung⁴¹ hier nun verbindliche Rahmenvorgaben,⁴² nach denen solche Regelungen nur als letztes Mittel zur Abwehr struktureller Versorgungsrisiken zulässig sind⁴³ und im Rahmen des Möglichen auch Angebote von Kapazitätsreserven aus anderen Mitgliedstaaten zugelassen werden müssen⁴⁴.

3. Der Vorbehalt der Bestimmung über den Energiemix (Frage 17)

Der Vertrag von Lissabon hat mit der neuen Kompetenznorm des Art. 194 AEUV aber auch eine Achillesferse der europäischen Energiepolitik geschaffen: Der letzte Halbsatz des Art. 194 Abs. 2 AEUV bestimmt, dass die Rechtssetzung nach dieser Bestimmung „unbeschadet des Art. 192 Abs. 2 Buchst. c nicht das Recht eines Mitgliedstaats [berührt], die Bedingungen für die Nutzung seiner Energiere Ressourcen, seine Wahl zwischen verschiedenen Energiequellen und die allgemeine Struktur seiner Energieversorgung zu bestimmen“. Die zentrale Entscheidung über den Energiemix⁴⁵ ist damit jedenfalls nicht der Mehrheitsentscheidung der Mitgliedstaaten unterworfen.

Die konkreten Konsequenzen dieser Anordnung sind freilich umstritten: Teils wird die Regelung als Anordnung eines nationalen Souveränitätsreservats verstanden, womit Regelungen auf EU-Ebene vollständig ausgeschlossen wären⁴⁶;

zuvor K. Huhta, *Capacity Mechanisms in EU Energy Law*, 2019; R. Pompl, *Kapazitätssicherung im europäisierten Stromwirtschaftsrecht*, 2019; L. Preuß, *Die Vereinbarkeit von Kapazitätsmechanismen mit der Warenverkehrsfreiheit, dem europäischen Beihilferecht und dem Energiebinnenmarkt*, 2017; J. Riewe, *Versorgungssicherheit durch Kapazitätsmechanismen*, 2016, sowie die Beiträge in Hancher/de Hauteclocque/Sadowska (Hrsg.), *Capacity Mechanisms in the EU Energy Market*, 2015; s. auch den Abschlussbericht der Kommission zur Sektoruntersuchung über Kapazitätsmechanismen, COM (2016) 752 final v. 30.11.2016 und dazu G. Anstey/S. Christian, *When Sisyphus gave up: Capacity Markets and State Aid in the EU*, *EstAL* 2017, 46 ff.; C. Klausbruckner/R. Volgger, *Energiepolitik: Die Sektoruntersuchung der Kommission zu Kapazitätsmechanismen*, in: Jaeger/Haslinger (Hrsg.), *Beihilferecht-Jahrbuch* 2016, S. 329 ff.; M. Wieckowski, *The state aid sector inquiry into electricity capacity mechanisms*, *EuZW* 2015, 859 ff.

⁴¹ Art. 21 – 26 VO (EU) 2019/943 des EP und des Rates v. 5.06.2019 über den Elektrizitätsbinnenmarkt, *ABl. EU* 2019 L 158/54.

⁴² Dazu R. Pompl, *Europäisierung der Versorgungssicherheit? Die Regelungen zur Sicherung der Erzeugungskapazitäten für Strom im vierten Binnenmarktpaket*, *RdE* 2020, 8 ff.; H. Stappert/C. Flock, *Der neue Ordnungsrahmen für Kapazitätsmechanismen der Mitgliedstaaten*, in: Gundel/Lange (Hrsg.), *Energierrecht nach dem Clean energy package*, 2021, S. 97 ff.

⁴³ Art. 21 VO (EU) 2019/943 Strombinnenmarktverordnung (Fn. 41).

⁴⁴ Art. 26 VO (EU) 2019/943 Strombinnenmarktverordnung (Fn. 41).

⁴⁵ S. zu den Reibungsflächen zwischen dem EU-Energiebinnenmarktrecht und den Weichenstellungen der deutschen Energiewende F. Germelmann, *Die deutsche Energiewende und der EU-Binnenmarkt*, in: Gundel/Germelmann (Hrsg.), *Die Europäisierung des Energierechts – 20 Jahre Energiebinnenmarkt*, 2016, S. 15 ff.; zum grundsätzlichen Festhalten Frankreichs an der Nutzung der Atomenergie s. J. Buckler, *Energiewende à la française – Die loi no 2015-992 sur la transition énergétique pour la croissance verte und die Monopolisierung der Kernstromerzeugung*, *DÖV* 2018, 755 ff.

⁴⁶ So das Verständnis von U. Ehrlicke/D. Hackländer, *Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrags von Lissabon*, *ZEuS* 2008, 578 (599): „striktes Eingriffsverbot“; K. Papenkort, *Der EURATOM-Vertrag im Lichte des Vertrages über eine Verfassung für Europa*, 2008, S. 129; wohl auch S. Hobe, *Energiepolitik*, in: Schwarze/Hatje (Hrsg.), *Der Reformvertrag von Lissabon*, *EuR-Beiheft* 1/2009, 219 (229 f.): „nationale Regelungsvorbehalte“;

daneben besteht die Lesart, die den Verweis auf Art. 192 Abs. 2 lit. c AEUV so versteht, dass – wie dort vorgesehen – einstimmige Entscheidungen möglich wären⁴⁷. In den praktischen Konsequenzen unterscheiden sich die Positionen gegenwärtig allerdings kaum, weil eine einstimmige Richtungsentscheidung zugunsten oder zulasten bestimmter Energieträger derzeit kaum zu erzielen wäre.

Der EuGH hat zu dieser Frage der Konsequenzen des Vorbehalts noch keine Klärung herbeigeführt⁴⁸. Er hat aber in Bezug auf den Anwendungsbereich des parallelen Vorbehalts in Art. 192 Abs. 2 AEUV schon einschränkend festgehalten, dass dieser nur Regelungen betrifft, die gezielt Auswirkungen auf den Energiemix haben sollen.⁴⁹ Diese enge Auslegung dürfte auf den parallelen Vorbehalt des Art. 194 Abs. 2 AEUV zu übertragen sein, was seinen Anwendungsbereich merklich reduziert.

4. Versorgungssicherheit, Energiesolidarität und Infrastruktur (Fragen 14-15)
Ein wesentliche Voraussetzung für die Erhaltung der Versorgungssicherheit und für die Ausübung von Energiesolidarität in Form von gegenseitiger Hilfe im Krisenfall ist allerdings, dass zwischen den Netzen der Mitgliedstaaten hinreichende Verbindungsleitungen bestehen: Einen entsprechenden allgemeinen Rahmen, innerhalb dessen die Planungen der europäischen Strom- und Gasnetzbetreiber koordiniert werden, hat der Energiebinnenmarktgesetzgeber mit dem dritten Energiebinnenmarktpaket geschaffen, das auch die Gründung entsprechender Verbünde der Netzbetreiber (European Network of Transmission System Operators for Electricity – ENTSO-E für Strom, European Network of Transmission System Operators for Gas – ENTSG für Gas) vorgegeben hat⁵⁰. Speziell in Bezug auf die grenzüberschreitenden Verbindungsleitungen ist es Ziel der Union, bei den Stromnetzen bis zum Jahr 2030 eine Verbin-

M. Nettesheim, Das Energiekapitel im Vertrag von Lissabon, JZ 2010, 19 (23 f.): „Vorbehalt zugunsten mitgliedstaatlichen Handelns“. Ebenso *C. Blumann*, Rapport introductif général, in: ders. (Hrsg.), *Vers une politique européenne de l'énergie*, 2012, S. 1 (14), der aber zugleich auf die Widersprüchlichkeit eines solchen Kompetenzvorbehalts hinweist.

⁴⁷ Dafür *J. Gundel*, in: Häde/Nowak/Pechstein (Hrsg.), *Frankfurter Kommentar zu EUV/GRC/AEUV*, 2. A. 2023, Art. 194 AEUV Rn. 31 f.

⁴⁸ Eine Gelegenheit dazu bietet möglicherweise die anhängige Rs. C-771/23 (Polen/EP und Rat), die sich gegen die auf Art. 194 AEUV gestützte RL 2023/1791 des EP und des Rates v. 13.09.2023 zur Energieeffizienz (...), ABL. EU 2023 L 231/1, richtet; hier wird geltend gemacht, dass wegen der Berührung der Wahl der Energiequellen ein Erlass nur auf der Grundlage von Art. 192 AEUV möglich gewesen wäre.

⁴⁹ EuGH, 21.06.2018 – Rs. C-5/16 (Polen/Parlament und Rat), EuZW 2018, 915 m. Anm. *J. Gundel*, Tz. 46; zu weiteren noch anhängigen Verfahren, in denen sich die Frage nach der Reichweite des Vorbehalts in Art. 192 Abs. 2 AEUV stellt, s. u. II. 1. mit Fn. 117.

⁵⁰ So Art. 4-5 VO (EG) Nr. 714/2009 des EP und des Rates über die Netzzugangsbedingungen für den grenzüberschreitenden Stromhandel und zur Aufhebung der VO (EG) Nr. 1228/2003, ABL. EU 2009 L 211/15, Art. 4-5 VO (EG) Nr. 715/2009 des EP und des Rates über die Bedingungen für den Zugang zu den Erdgasfernleitungsnetzen und zur Aufhebung der VO (EG) Nr. 1775/2005, ABL. EU 2009 L 211/36; dazu *J. Gundel*, Europäisches Energierecht, in: Kühling/Theobald (Hrsg.), *Energierecht* (101. EL 2019), EuEnR Rn. 59 ff.

dungskapazität von 15 % der Erzeugung zu erreichen;⁵¹ die unzureichende Verbindung der nationalen Stromnetze ist ein erheblicher Schwachpunkt des Energiebinnenmarktes. Als Erfolg kann die Unionspolitik in diesem Sektor dagegen verzeichnen, dass Gasfernleitungen bis Ende 2013 so aufgerüstet werden mussten, dass ihre Nutzung auch entgegen der ursprünglich allein vorgesehenen Fließrichtung von Ost nach West möglich ist („reverse flow“).⁵² Auf diese Weise ist im Krisenfall auch die Versorgung der osteuropäischen Mitgliedstaaten aus in Westeuropa vorhandenen Reserven möglich; für diesen Ausbau wurden auch EU-Mittel zur Verfügung gestellt⁵³.

Eine koordinierte Netzplanung erfolgt neben dem allgemeinen Rahmen der Binnenmarkt-Rechtsakte insbesondere durch die Identifikation von prioritären Netzausbauprojekten nach der TEN-E-Verordnung.⁵⁴ Die hierfür durch den Vertrag von Maastricht geschaffene Rechtsgrundlage im heutigen Art. 172 AEUV ist sogar älter als die Energiekompetenz des Art. 194 AEUV; mit der Einfügung der Energiekompetenz stellt sich nun aber die Frage der Abgrenzung vom Anwendungsbereich des Art. 172 AEUV. Diese Abgrenzung ist erforderlich, weil zwar beide Kompetenznormen das ordentliche Gesetzgebungsverfahren vorsehen, bei Art. 172 AEUV aber die Besonderheit besteht, dass bei konkreten räumlichen Planungen gemäß Art. 172 Abs. 2 AEUV auch die Zustimmung des jeweils betroffenen Mitgliedstaats erforderlich ist. Diese als durchaus legitim erscheinende Absicherung der Mitgliedstaaten gegen eine mehrheitlich entschiedene Überplanung des eigenen Staatsgebiets kann nicht dadurch überspielt werden, dass ein Rechtsakt auf Art. 194 AEUV gestützt wird;⁵⁵ entsprechende Regelungen müssen also weiter ihre Grundlage in Art. 172 AEUV als der insoweit sachnäheren Kompetenznorm finden.⁵⁶

⁵¹ Schlussfolgerungen des Europäischen Rates v. 23.–24.10.2015, Doc. EUCO 169/14, S. 6; Kommissionsmitteilung „Strategie für eine sichere europäische Energieversorgung“, COM (2014) 330 final v. 28.05.2014, S. 12.

⁵² S. Art. 6-7 der VO (EU) Nr. 994/2010 des EP und des Rates v. 20.10.2010 über Maßnahmen zur Gewährleistung der sicheren Erdgasversorgung und zur Aufhebung der RL 2004/67/EG des Rates, ABl. EU 2010 L 295/1.

⁵³ S. dazu z. B. den Bericht der Kommission zur Durchführung des Europäischen Energieprogramms zur Konjunkturbelebung, COM (2012) 445 endg. v. 8.08.2012, S. 4 ff.

⁵⁴ Zur Neufassung der TEN-E-Verordnung in Form der VO (EU) 869/2022 des EP und des Rates v. 30.05.2022 zu Leitlinien für die transeuropäische Energieinfrastruktur (...), ABl. EU 2022 L 152/45, s. T. Leidinger, Die neue TEN-E-Verordnung: Transeuropäischer Netzausbau und Auswirkungen auf die deutsche Genehmigungspraxis, DVBl. 2022, 1353 ff.; s. auch A. Lippert, Europäische Energiewende zwischen Infrastruktur und Markt, NVwZ 2021, 1561 ff.

⁵⁵ Dazu J. Gundel, Die energiepolitischen Kompetenzen der EU nach dem Vertrag von Lissabon: Bedeutung und Reichweite des neuen Art. 194 AEUV, EWS 2011, 25 (30); ders., in: Grabitz/Hilf/Nettesheim (Hrsg.), Das Recht der Europäischen Union, Art. 170 AEUV Rn. 29 (August 2018); ähnlich S. Schulenberg, Die Energiepolitik der Europäischen Union, 2009, S. 391 f.

⁵⁶ Anders C. Calliess, Sinn, Inhalt und Reichweite einer europäischen Kompetenz zur Energieumweltpolitik, in: Cremer/Pielow (Hrsg.), Probleme und Perspektiven im Energieumweltrecht, 2009, S. 20 (40), der für den Vorrang des Art. 194 AEUV plädiert und auf dieser Grundlage auch konkrete Projekte als zulässig ansieht, die die Interessen einzelner Mitgliedstaaten berühren, dabei den Widerspruch zur Wertung des Art. 172 Abs. 2 AEUV aber nicht problematisiert; ihm folgend M. Ludwigs, Die Energierechtsgesetzgebung der EU zwischen Binnenmarkt und Klimaschutz,

Dementsprechend wurde die im Jahr 2013 nach dem Inkrafttreten des Vertrags von Lissabon als Verordnung erlassene Neufassung der TEN-E-Leitlinien⁵⁷ zutreffend weiter auf Art. 172 AEUV und nicht auf den (damals) neuen Art. 194 AEUV gestützt;⁵⁸ auch die Ausgestaltung der Regelung trägt dem Zustimmungsvorbehalt der betroffenen Mitgliedstaaten Rechnung.⁵⁹ Dieselbe Rechtsgrundlage ist für Regelungen einschlägig, die die Finanzierung der betreffenden Vorhaben fördern.⁶⁰ Allgemeine Regelungen zur Verbesserung der „Planungsbedingungen“ – also z. B. die bereits erwähnten, im dritten Binnenmarktpaket normierten Planungspflichten der europäischen Netzbetreiber⁶¹ – oder zur Erleichterung der Finanzierung von Vorhaben wären dagegen auf Art. 194 AEUV zu stützen.⁶²

5. Der Beitrag der Energieaußenpolitik zur Versorgungssicherheit (Fragen 8, 19-20)

a) Die Rechtsgrundlage der Europäischen Energieaußenpolitik

Nachdem Europa weiterhin in erheblichem Umfang von Energieimporten abhängig ist⁶³, spielt für die Versorgungssicherheit auch die Energieaußenpolitik

ZG 2010, 222 (229); ähnlich *D. Hackländer*, Die allgemeine Energiekompetenz im Primärrecht der Europäischen Union, S. 195; konsequent bleibt nach dieser Ansicht für Art. 170 ff. AEUV im Energiesektor kaum noch ein Anwendungsbereich.

⁵⁷ VO (EU) Nr. 347/2013 des EP und des Rates v. 17.04.2013 zu Leitlinien für die transeuropäische Energieinfrastruktur und zur Aufhebung der Entscheidung Nr. 1364/2006/EG und zur Änderung der Verordnungen (EG) Nr. 713/2009, (EG) Nr. 714/2009 und (EG) Nr. 715/2009, ABl. EU 2013, L 115/39.

⁵⁸ Zustimmend *S. Heselhaus*, Europäisches Energie- und Umweltrecht als Rahmen der Energiewende in Deutschland, EurUP 2013, 137 (144 ff.); nach den in Fn. 56 nachgewiesenen Stimmen wäre dagegen Art. 194 AEUV die zutreffende Rechtsgrundlage.

⁵⁹ Anders als die Vorgängerregelung benennt die VO (EU) Nr. 347/2013 die vorrangigen Vorhaben nicht selbst, sondern überträgt diese Aufgabe der Kommission im Wege eines delegierten Rechtsakts gemäß Art. 290 AEUV; der Vorgabe des Art. 172 Abs. 2 AEUV wird dadurch Rechnung getragen, dass gemäß Art. 3 Abs. 4 der Verordnung die jeweils konkret betroffenen Mitgliedstaaten der Aufnahme zustimmen müssen. Ohne diese Zustimmung kann ein Vorhaben nicht aufgenommen werden, die Rechtmäßigkeit einer Verweigerung kann nur von den nationalen Gerichten überprüft werden, s. EuG, 8.02.2023 – Rs. T-295/20 (Aquind/Kommission), RdE 2023, 222 m. Anm. *J. Gundel*; dazu auch *B. Blottin*, Politique des réseaux transeuropéens et infrastructures énergétiques: le monde nébuleux des „projets d'intérêt commun“, RAE 2023, 281 ff.

⁶⁰ S. die auf Art. 172 AEUV gestützte VO (EU) Nr. 1316/2013 des EP und des Rates v. 13.12.2013 zur Schaffung der Fazilität „Connecting Europe“ (...), ABl. EU 2013 L 348/129, in der Folge ersetzt durch die parallel auf Art. 172 und 194 AEUV gestützte VO (EU) 2021/1153 des EP und des Rates v. 7.07.2021 zur Schaffung der Fazilität „Connecting Europe“ (...), ABl. EU 2021 L 249/38.

⁶¹ S. o. bei Fn. 50.

⁶² Wie hier *S. Schulenberg*, Die Energiepolitik der Europäischen Union, 2009, S. 391 f.; insoweit wohl auch *M. Ludwigs*, Energierecht, in: Ruffert (Hrsg.), Europäisches Sektorales Wirtschaftsrecht, 2. A. 2020, § 5, Rn. 84.

⁶³ Diese Abhängigkeit soll perspektivisch durch den weiteren Ausbau der erneuerbaren Energien verringert werden, wozu in der jüngsten Energiekrise eine auf Art. 122 AEUV gestützte Notverordnung – die VO (EU) 2022/2577 des Rates v. 22.12.2022 zur Festlegung eines Rahmens für einen beschleunigten Ausbau der Nutzung erneuerbarer Energien, ABl. EU 2022 L 335/36 – erlassen wurde; zu den inzwischen in Dauerrecht überführten Regelungen s. u. III. 3. a) mit Fn. 212. Eine rasche Verringerung der Importabhängigkeit ist hiervon freilich nicht zu erwarten.

der EU⁶⁴ eine erhebliche Rolle. Art. 194 AEUV begründet hierzu zwar keine ausdrückliche Außenkompetenz der Union für den Energiesektor, nach den Regeln der AETR-Doktrin ist die Nutzung dieser Kompetenz aber auch im Außenverhältnis und insbesondere zum Abschluss völkerrechtlicher Verträge möglich, soweit dies zur Erreichung der Ziele der EU-Energiepolitik erforderlich ist⁶⁵. Diese Zuständigkeit der Union auch im Außenverhältnis wird zur ausschließlichen Kompetenz, sobald und soweit sie ihre Zuständigkeit nach innen ausgeübt hat⁶⁶. Perspektivisch geht damit auch in diesem Feld die Zuständigkeit auf die Union über; auch hier gilt allerdings der Vorbehalt, dass die Entscheidung über die Wahl der Energiequellen bei den Mitgliedstaaten verbleibt und auf Unionsebene allenfalls durch einstimmige Entscheidung im Rat getroffen werden kann.⁶⁷

b) Die Sicherung der tatsächlichen Voraussetzungen für Energieimporte
Eine Erhöhung der Versorgungssicherheit durch Diversifizierung der Bezugsquellen von Energieimporten aus Drittstaaten hängt dabei zentral von der Schaffung der notwendigen Infrastrukturen ab; in der aktuellen Krise zeigt sich dies an der Schlüsselfunktion der LNG-Anlagen, die eine Gasversorgung unabhängig von vorhandenen Pipeline-Strukturen ermöglichen. Diese Anlagen können unionsrechtlich gefördert und auch von der Energiebinnenmarkt-Regulierung freigestellt werden⁶⁸; die Initiative für solche Projekte verblieb aber bei den Mitgliedstaaten bzw. privaten Unternehmen, so dass die unterschiedliche energiepolitische Ausrichtung der Mitgliedstaaten sich hier beson-

⁶⁴ Zu ihr auch *J. Gundel*, Möglichkeiten und Grenzen der Energie-Außenpolitik der EU in: Gundel/Germelmann (Hrsg.), *Die Europäisierung des Energierechts – 20 Jahre Energiebinnenmarkt*, 2016, S. 45 ff.; *A. Guckelberger*, Energieaußenpolitik der Union, in: *Liber Amicorum* Torsten Stein, 2015, S. 573 ff.; *Y. Petit*, *Sécurité d’approvisionnement énergétique et relations extérieures de l’Union européenne*, in: Flaesch-Mougin (Hrsg.), *Union européenne et sécurité: aspects internes et externes*, 2009, S. 363; *N. Pradel*, *La politique juridique extérieure de l’Union européenne dans le domaine de l’énergie*, in: Bugada (Hrsg.), *Energies, environnement et développement durable*, 2013, S. 263 ff.; *B. van Vooren*, *EU external energy policy: the legal and political impact of the new competence*, in: Trybus/Rubini (Hrsg.), *The Treaty of Lisbon and the Future of European Law and Policy*, 2012, S. 285; *T. Woltering*, *Die europäische Energieaußenpolitik und ihre Rechtsgrundlagen*, 2010.

⁶⁵ S. auch *M. Hahn*, *Auswärtige Annexkompetenzen interner Politiken*, in: v. Arnould/Bungenberg (Hrsg.), *Europäische Außenbeziehungen*, 2. A. 2022, § 15 Rn. 196 ff.; *J. Gundel*, in: Häde/Nowak/Pechstein (Hrsg.), *Frankfurter Kommentar zu EUV/GRC/AEUV*, 2. A. 2023, Art. 194 AEUV Rn. 12.

⁶⁶ S. dazu EuGH, 26.11.2014 – Rs. C-66/13 (Green Network SpA), *EnWZ* 2015, 78 m. Anm. *J. Gundel*; dazu auch *D. Fouquet/J. Nysten*, *Member States Cannot Unilaterally extend the EU Legislative Framework for Renewable Energy Support to Third States Beyond the Cooperation Mechanisms Foreseen*, *ENLR* 2015, 49 ff.

⁶⁷ S. o. I. 3. mit Fn. 45 ff.

⁶⁸ Für ein Beispiel der (erforderlichen) Billigung der EU-Kommission zu solchen Freistellungsentscheidungen der nationalen Regulierungsbehörde s. den Kommissionsbeschluss v. 25.05.2021 über die Ausnahme des German LNG Terminal in Brunsbüttel, Deutschland, von den Anforderungen in Bezug auf den Zugang Dritter und die Tarifregulierung, C(2021) 3814 final v. 25.05.2021; dazu z. B. *J. Nohl/V. Nguyen*, *Zur Regulierung des künftigen LNG-Terminals Brunsbüttel – Mehr Auflagen als Freistellung?*, *ZNER* 2021, 360 ff.

ders deutlich niedergeschlagen hat: In Deutschland wurden solche Anlagen bis zum Schock des russischen Angriffs auf die Ukraine nicht realisiert, weil ihre Wirtschaftlichkeit nicht gesichert erschien. Dass Frankreich im Herbst 2022 Gaslieferungen nach Deutschland ermöglichen konnte, lag auch daran, dass Frankreich über vier LNG-Terminals verfügt und so seine Speicher füllen konnte⁶⁹. Diese Erweiterung der Versorgungsoptionen wurde in Deutschland in Anwendung des im Mai 2022 verabschiedeten LNG-Beschleunigungsgesetzes⁷⁰ eilig nachgeholt.⁷¹

Ansonsten hat die EU mit der Schaffung alternativer Versorgungsrouten in der Vergangenheit keine großen Erfolge gehabt: So wurde das Nabucco-Pipelineprojekt⁷², mit dem mit Unterstützung der EU durch die Schaffung eines Transportwegs über die Türkei eine Alternative zum Transport von vorderasiatischem Erdgas über russisches Territorium geschaffen werden sollte, schließlich aufgegeben; funktionaler Nachfolger in diesem Bemühen um einen „südlichen Gaskorridor“ ist die von Aserbaidschan durch die Türkei bis nach Italien führende und im Jahr 2020 fertiggestellte TANAP/TAP-Leitung⁷³, die mit Mitteln der Europäischen Bank für den Wiederaufbau gefördert wurde und den Status eines Vorhabens von gemeinsamem Interesse nach der TEN-E-Verordnung⁷⁴ hatte⁷⁵. Ein anderes, inzwischen fast schon wieder vergessenes Projekt ist die Desertec-Initiative, mit der in Nordafrika in großem Stil Solarenergie erzeugt und nach Europa geleitet werden sollte;⁷⁶ dasselbe gilt für den

⁶⁹ S. FAZ Nr. 235 v. 10.10.2022, S. 15: „Gaslieferungen aus Frankreich können beginnen“.

⁷⁰ Gesetz zur Beschleunigung des Einsatzes verflüssigten Erdgases (LNG-Beschleunigungsgesetz – LNGG) v. 24.05.2022, BGBl. I S. 802; dazu z. B. B. Holzner/B. Freese, Staatliche Transformationsverantwortung bei der Errichtung von LNG-Infrastrukturen, in: FS Ramsauer, 2023, S. 383 ff.; R. Verheyen/M. Bohlmann, Beschleunigter Ausbau der Nutzung verflüssigten Erdgases, in: Kment/Rossi (Hrsg.), Zeitenwende bei der Energieversorgung, 2024, S. 117 ff.

⁷¹ Zur Inbetriebnahme des ersten Terminals an der Küste vor Wilhelmshaven im Dezember 2022 s. FAZ Nr. 295 v. 19.12.2022, S. 1: „Erstes deutsches LNG-Terminal eröffnet“.

⁷² Dazu z. B. L. Simonet, Les pipelines en droit international et dans les relations internationales, 2021, S. 309; s. auch M. Pickl/F. Wirl, Enhancing the EU's Energy Supply Security – An Evaluation of the Nabucco Project and an Introduction to its Open Season Capacity Allocation Process, ZfE 2010, 153 ff.; zu den zwischen den beteiligten Staaten ohne Beteiligung der EU geschlossenen völkerrechtlichen Verträgen s. J. Fuchs, Kooperative Erdgassicherheit – Energietransit im Völkerrecht unter besonderer Berücksichtigung des Nabucco-Abkommens vom 13.07.2009, ZaöRV 2011, 103 (118 ff.); C. Iliopoulos, Die europäische Energiepolitik und die internationalen Verträge Griechenlands im Energiebereich, in: FS Schwarze, 2014, S. 835 (848 ff.).

⁷³ Dazu z. B. N. Mustafeyev, The Southern Gas Corridor: legal and regulatory developments in major gas transit pipeline projects, Journal of World Energy Law and Business 2016, 370 ff.

⁷⁴ S. o. I. 4. mit Fn. 54.

⁷⁵ Dazu z. B. C. Iliopoulos, Die europäische Energiepolitik und die internationalen Verträge Griechenlands im Energiebereich, in: FS Schwarze, 2014, S. 835 (868); die TAP-Leitung wurde zudem durch die Kommissionentscheidung C(2013) 2949 v. 16.05.2013 von der Energiebinnenmarkt-Regulierung freigestellt.

⁷⁶ Dazu z. B. B. Holzner/P. Schumacher, Wüstenstrom aus der Sahara für die finnische Sauna, NuR 2009, 164 ff.; M. Deutsch/J. Hobohm, Strom aus der Wüste – Ja, aber aus welcher Quelle?, ET 7/2010, 54 ff.; M. Ruchser, Strom aus der Wüste: Realität oder Fata Morgana?, ET 12/2012, 92 ff.; F. Trieb/D. Hess, Solarstromexport als Baustein einer Energiepartnerschaft Europas und Nordafrikas, ET 10/2016, 93 ff.; zur Neuorientierung der fortbestehenden Initiative auf eine Deckung des

Mittelmeer-Solarplan, der dasselbe Ziel verfolgte⁷⁷. Die EU hatte hier indirekt Unterstützung dadurch signalisiert, dass eine Anrechnung dieser in Drittstaaten erfolgten Produktion auf die nationale Erneuerbaren-Produktion möglich war⁷⁸ (und auch nach der nun geltenden Nachfolge-Richtlinie möglich ist⁷⁹); zu den Voraussetzungen gehört freilich, dass die Elektrizität in der EU verbraucht wird, was eine Netzverbindung voraussetzt. Andere Ideen wie eine Kooperation der Mitgliedstaaten beim Gaseinkauf in Drittstaaten waren bereits im Rahmen der Vorschläge der Kommission zur Schaffung einer Energieunion⁸⁰ diskutiert worden;⁸¹ mehr als die Anregung einer freiwilligen Bündelung der Nachfrage war daraus aber nicht entstanden. Ein gemeinsamer Nenner ist hier auch schwer zu finden, nachdem dieser Einkauf von manchen Mitgliedstaaten selbst über staatlich kontrollierte Unternehmen vollzogen wird, während er in anderen Mitgliedstaaten – so auch in Deutschland – die Angelegenheit privater Unternehmen ist⁸². Dennoch wurden diese Überlegungen unter dem Eindruck der jüngsten Energiekrise wiederaufgenommen⁸³; eine im Dezember 2022 auf der Grundlage von Art. 122 AEUV erlassene Notverordnung⁸⁴ sieht

lokalen Energiebedarfs in Afrika s. *T. Isenburg*, Von Desertec zu lokalen Strommärkten für erneuerbare Energien in Nordafrika und im Mittleren Osten, ET 7/2017, 63 ff.

⁷⁷ Dazu z. B. *M. Bardolet*, A common strategy for closer EU-MENA cooperation in renewable energy, in: Cambini/Rubino (eds.), *Regional Energy Initiatives*, 2014, S. 84 (89 ff.).

⁷⁸ Art. 9 der RL 2009/28/EG des EP und des Rates v. 23.04.2009 zur Förderung der Nutzung von Energie aus erneuerbaren Quellen (...), ABl. EU 2009 L 140/16; die Bestimmung setzte ein neu errichtetes „gemeinsames Projekt“ voraus; s. auch das Commission Staff Working Document „Guidance of the use of renewable energy cooperation mechanism“, SWD(2013) 440 final v. 5.11.2013, S. 24 ff.; kritisch zu den einschränkenden Bedingungen *M. Bardolet*, A common strategy for closer EU-MENA cooperation in renewable energy, in: Cambini/Rubino (eds.), *Regional Energy Initiatives*, 2014, S. 84 (92); auf dieser Grundlage wurden soweit ersichtlich keine Projekte realisiert, s. *N. Grabmayr*, Strom aus der Wüste, 2022, S. 61.

⁷⁹ Art. 11 der RL (EU) 2018/2001 des EP und des Rates v. 18.12.2018 zur Förderung der Nutzung von Energie aus erneuerbaren Quellen, ABl. EU 2018 L 328/82; als zusätzliche Bedingung ist hier hinzugekommen, dass der Drittstaat die EMRK oder ein vergleichbares Abkommen zum Menschenrechtsschutz ratifiziert haben muss.

⁸⁰ S. o. I. 2. bei Fn. 31.

⁸¹ S. dazu *F. Germelmann*, Die Energieunion – Eine neue Perspektive für die europäische Energiepolitik?, EuR 2016, 3 (15 ff.); *P. Hohaus*, Erdgashandel und Beziehungen zu den Lieferländern, in: Pielow (Hrsg.), *Erdgas in Zeiten der Energiewende*, 2016, S. 27 (35 f.); *M. Bonn/G. Reichert*, Gemeinsamer Gaseinkauf: Option zur Senkung der Abhängigkeit von russischem Erdgas?, ET 8/2015, 27 ff.

⁸² Die Kommission hatte insoweit eine Verpflichtung zur Notifikation von Gaslieferverträgen erwogen, s. FAZ Nr. 28 v. 3.02.2016, S. 16: „Brüssel will Zugriff auf Gaslieferverträge“; der schließlich erlassene Beschluss (EU) 2017/684 des EP des Rates v. 5.05.2017 zur Einrichtung eines Mechanismus für den Informationsaustausch über zwischenstaatliche Abkommen und nicht verbindliche Instrumente zwischen Mitgliedstaaten und Drittländern im Energiebereich (...), ABl. EU 2017 L 99/1, gilt dagegen ausdrücklich nicht für Vereinbarungen zwischen Unternehmen, s. Art. 3 Abs. 6 des Beschlusses.

⁸³ S. dazu die Kommissionsmitteilung „Versorgungssicherheit und erschwingliche Energiepreise“, COM(2022) 138 final v. 23.03.2022, S. 6.

⁸⁴ VO (EU) 2022/2576 des Rates über mehr Solidarität durch eine bessere Koordinierung der Gasbeschaffung, zuverlässige Preis-Referenzwerte und den grenzüberschreitenden Austausch von Gas v. 19.12.2022, ABl. EU 2022 L 335/1; die Geltung der zunächst bis zum 30.12.2023 geltenden Regelung wurde durch die VO (EU) 2023/2919 des Rates v. 21.12.2023 zur Änderung der VO (EU) 2022/2576 hinsichtlich der Verlängerung ihrer Geltungsdauer, ABl. EU L 2023/2919 v. 29.12.2023, bis

entsprechende Mechanismen vor: Die Gasnachfrage wird danach über eine elektronische Plattform („AggregateEU“) gebündelt, der Vertragsschluss bleibt aber Angelegenheit der Unternehmen; der Betrieb dieser Plattform wurde im Rahmen der Neufassung der Gasbinnenmarktverordnung⁸⁵ in Dauerrecht überführt.

c) Die Schaffung völkervertraglicher Rahmenregimes: Energiecharta-Vertrag und Energiegemeinschaft

Tatsächlich hat die EU eher normative Bemühungen unternommen, um einen stabilen Rechtsrahmen für Energieimporte zu schaffen: Der erste Schritt in diesem Feld war die zu Beginn der 1990er Jahre erfolgte Initiative der EU zur Schaffung des Energiecharta-Vertrages (EnCV)⁸⁶, der Investitionssicherheit für Energieinvestitionen in den beteiligten Drittstaaten schaffen sollte. Der Vertrag wurde seinerzeit von der EU und ihren Mitgliedstaaten sowie einer Reihe von osteuropäischen und vorderasiatischen Vertragsstaaten abgeschlossen; dieses Instrument hat die erhoffte Wirkung allerdings nie erzielen können, weil insbesondere Russland als Unterzeichnerstaat und wichtiger Energieproduzent und –Transitstaat nicht zu einer Ratifikation bewegt werden konnte und 2009 endgültig mitgeteilt hat, nicht Vertragspartei werden zu wollen⁸⁷. Nur die im Abkommen enthaltene Unterwerfung der Vertragsstaaten unter die Investitionsschutz-Schiedsgerichtsbarkeit ist in der Folgezeit intensiver genutzt worden⁸⁸.

31.12.2024 verlängert; s. auch noch den auf Art. 4 Abs. 2 der Verordnung gestützten Kommissionsbeschluss v. 13.01.2023 über die Einsetzung des Ad-hoc-Lenkungsausschusses zur Erleichterung der Koordinierung der Nachfragebündelung und der gemeinsamen Beschaffung von Gas, ABl. EU 2023 C 48/6; zur Rechtsgrundlage des Art. 122 AEUV s. noch u. III. 3. b).

⁸⁵ Art. 42 ff. der VO (EU) 2024/1789 des EP und des Rates v. 13.06.2024 über die Binnenmärkte für erneuerbares Gas, Erdgas und Wasserstoff (...), ABl. EU L 2024/1789 v. 15.07.2024; dazu T. Burmeister/P. Kirstner/K. Sievert, Das Hydrogen and Decarbonised Gas Market Package, RdE 2024, 296 (306).

⁸⁶ Vertrag über die Energiecharta v. 17.12.1994, ABl. EG 1998 L 69/5; 34 ILM (1995), 381 m. Einführung T. Wälde S. 360 ff.; dazu m.w.N. F. Germelmann, Internationaler Investitionsschutz im Energierecht – Energiecharta-Prozess und Energiecharta-Vertrag, in: Kühling/Theobald (Hrsg.), Energierecht (88. EL 2016), EnCharta Rn. 12 ff.; J. Gundel, Die Bedeutung des Energiecharta-Vertrages, in: Säcker (Hrsg.), Berliner Kommentar zum Energierecht, Bd. I/1, 4. A. 2019, Einl. D Rn. 1 ff.

⁸⁷ Dazu F. Germelmann, Internationaler Investitionsschutz im Energierecht – Energiecharta-Prozess und Energiecharta-Vertrag, in: Kühling/Theobald (Hrsg.), Energierecht, 88. EL 2016, EnCharta Rn. 46.

⁸⁸ S. J. Gundel, Die Bedeutung des Energiecharta-Vertrages, in: Säcker (Hrsg.), Berliner Kommentar zum Energierecht, Bd. I/1, 4. A. 2019, Einl. D Rn. 38. Auch hieraus ergab sich ein Konflikt, weil die EU-Kommission und schließlich auch der EuGH sich auf den Standpunkt gestellt haben, dass die Zuständigkeit der Investitionsschutzgerichte nach dem EnCV nicht Fälle zwischen EU-Mitgliedstaaten (sog. Intra-EU-Sachverhalte) erfasst, s. EuGH (GK), 2.09.2021 – Rs. C-741/19 (Republik Moldau/Komstroy LLC), EuZW 2021, 945 m. Anm. N. Kuplewatzky; dazu m.w.N. F. Germelmann/J. Gundel, Die Entwicklung der EuGH-Rechtsprechung zum europäischen Verfassungs- und Verwaltungsrecht im Jahr 2021, BayVbl. 2022, 541 (549 f.); der EnCV enthält für eine solche Einschränkung keine Anhaltspunkte.

Dieses ursprünglich von der EU initiierte Abkommen ist inzwischen allerdings zu einem ungeliebten Kind geworden⁸⁹, was auf eine Gemengelage von Motiven zurückgeht: Zum einen hatten die EU-Mitgliedstaaten wohl nicht erwartet, dass sie selbst auf dieser Grundlage verklagt werden könnten, sondern hatten nur die Verbesserung des Schutzes der Investitionen ihrer Staatsangehörigen in Drittstaaten im Blick⁹⁰; zum anderen ist das Abkommen in das Visier der Klimaschutzbewegung geraten, weil es auch Investitionen im konventionell-fossilen Energiesektor schützt⁹¹. Die EU-Kommission hatte sich zunächst bemüht, eine Revision des Abkommens herbeizuführen, die zu einem künftigen Ausschluss des Schutzes von Investitionen in konventionelle Energieträger führen und die Kontrolldichte der Investitionsschutz-Schiedsgerichte reduzieren sollte⁹². Dieser Text wurde zwar abschließend ausverhandelt, nachdem aber zwischenzeitlich eine Reihe von Mitgliedstaaten – darunter die Niederlande, Frankreich, Spanien und auch Deutschland – das Abkommen gekündigt haben, weil die Neufassung ihre Erwartungen an eine weitergehende Reduzierung des Investitionsschutzes nicht erfüllte⁹³, hat sich auch die EU zum Austritt entschlossen.⁹⁴ Der EnCV wird zwar trotz dieser Kündi-

⁸⁹ Dazu z. B. N. Lavranos/A. Lath//R. Varma, The Meltdown of the Energy Charter Treaty (ECT): How the ECT was ruined by the EU and its Member States, *SchiedsVZ* 2023, 38 ff.

⁹⁰ S. zu dieser in den westlichen Industrienationen häufiger auftretenden verkürzten Wahrnehmung des internationalen Investitionsschutzes, dessen Abkommen stets auf Gegenseitigkeit gelten, s. z. B. J. Gundel, Völkerrechtliche Rahmenbedingungen der Energiewende: Der Energiecharta-Vertrag und das Vattenfall-Verfahren vor dem ICSID-Schiedsgericht, *EnWZ* 2016, 243 (248 f.).

⁹¹ S. z. B. P. Pearsall/D. Ingle/G. Smadja, The Energy Charter Treaty: A Friend or Foe of Decarbonisation?, in: A. Ipp/A. Magnussen (Hrsg.), *Investment Arbitration and Climate Change*, 2024, S. 245 ff.; A. Boute, The role of the Energy Charter Treaty for decarbonization, in: *Essays in Honour of Martha Roggenkamp*, 2022, S. 53 ff.

⁹² Zu diesem Revisionsprozess s. P. Thiessen, Reforming the Energy Charter Treaty for sustainability?, 40 *Journal of Energy and Natural Resources Law* (2022), 465 ff.; E. Cima, Retooling the Energy Charter Treaty for climate change mitigation: lessons from investment law and arbitration, 14 *Journal of World Energy Law and Business* (2021), 75 ff.; C. Verbarg, The EU's text proposal for a revised Energy Charter Treaty, in: Roggenkamp/Banet (Hrsg.), *European Energy Law Report XIV*, 2021, S. 31 ff.; s. auch B. Le Baut-Ferrarese, Le Traité sur la Charte de l'énergie au défi de la transition énergétique, *énergie-environnement-infrastructures* 2/2021, 11 ff.; K. Roiger-Simek, The Modernization of the Energy Charter Treaty: Dead in the Water?, 26 *ARIEL* (2021), 121 ff.; P. Kehl/S. Wuschka, The Energy Charter Treaty at a Tipping Point – Modernization Efforts, Withdrawal Plans and their Legal Consequences, *ZEuS* 2024, 59 ff.; zum Verhandlungsmandat der EU-Kommission s. Rat der EU, Negotiating Directives for the Modernisation of the Energy Charter Treaty, Doc. 10745/19 ADD 1 v. 2.07.2019.

⁹³ Dazu C. Zengerling/C. Buchmüller, Ausstieg aus dem Energiechartavertrag – ein Nachruf aus Perspektive der Energiewende, *EurUP* 2023, 219 ff.; für Frankreich s. kritisch zur Kündigung G. Filhol/W. Brillat-Capello, Effets juridiques du retrait de la France du Traité sur la Charte de l'Énergie, *JCP* 2022, 2236; V. Korom, Pourquoi la France devrait-elle rester dans le Traité sur la Charte de l'énergie?, *Rec. Dalloz* 2022, 2232 ff.; zur Kündigung durch Deutschland s. BGBl. 2023 II Nr. 15 v. 24.01.2023; kritisch dazu S. Mantilla Blanco, Legal Provisos of Germany's Withdrawal from the Energy Charter Treaty, *EnK-Aktuell* 2023, 01046.

⁹⁴ Beschluss (EU) 2024/1638 des Rates v. 30.05.2024 über den Rücktritt der Union vom Vertrag über die Energiecharta, *ABl. EU L* 2024/1638 v. 5.06.2024; s. zur Perspektive dieses Austritts auch L. Ankersmit, The EU's Strategy for More 'Rules-Based Trade' and the EU's Withdrawal from the Energy Charter Treaty, 50 *LIEI* (2023), 117 ff.; C. Rapoport, Moderniser ou quitter le Traité

gungen in Bezug auf bereits getätigte Investitionen noch für lange Zeit die Grundlage für Investitionsschutz-Schiedsverfahren bilden, da Art. 47 Abs. 3 EnCV eine – bei Investitionsschutzabkommen übliche – Nachwirkungsklausel („sunset clause“) enthält, die sich angesichts der langen Amortisationszeiten von Energie-Investitionen hier auf 20 Jahre erstreckt. In der Energiestrategie der EU wird das Abkommen aber künftig ersichtlich keine tragende Rolle mehr spielen.

Die zweite Generation der Bemühungen der EU um die Schaffung eines stabilen geographischen Umfelds für den Energiebinnenmarkt bildet der im Jahr 2006 in Kraft getretene Vertrag über die Energiegemeinschaft⁹⁵, der die Regeln des Energiebinnenmarktes auf die Partnerstaaten dieses Vertrags ausdehnt: Dazu gehörten zunächst die Staaten des Westbalkans, aber auch die später beigetretenen Mitglieder Moldawien, Ukraine und Georgien⁹⁶ – allerdings handelt es sich dabei durchgehend nicht um Staaten, die in größerem Umfang als Energielieferanten in Betracht kämen; Norwegen, das unter diesem Gesichtspunkt ein wichtiger Partner wäre, hat ebenso wie die Türkei, deren Beitritt ursprünglich beabsichtigt war, nur Beobachterstatus, ist aber auch schon über den EWR in die Unionsstrukturen eingebunden.

In die Maßnahmen zur Bekämpfung der jüngsten Energiekrise wurde die Energiegemeinschaft z.B. dadurch einbezogen, dass die EU-Mitgliedstaaten ihre durch die Änderung der Gassicherungsverordnung begründete Gaseinspeicherungspflicht⁹⁷ zwar grundsätzlich durch Nutzung von Speicheranlagen auf dem Territorium der Union erfüllen müssen; sie können zu ihrer Erfüllung aber auch Vereinbarungen mit Vertragsstaaten der Energiegemeinschaft zur Nutzung von deren Speicherkapazitäten treffen⁹⁸. Auch sollten die Änderungen der Gassicherungsverordnung möglichst rasch in den Regelbestand der Energiegemeinschaft übernommen werden⁹⁹.

sur la Charte de l'énergie: quels enjeux pour l'Union européenne et son ordre juridique, RAE 2023, 145 ff.

⁹⁵ ABl. EU 2006 L 198/15; zu den Strukturen des Abkommens s. die Beiträge in Buschle/Talus (eds.), *The Energy Community*, 2015; D. Buschle, *Die Energiegemeinschaft*, in: Müller-Graff/Hatje (Hrsg.), *Europäisches Organisations- und Verfassungsrecht*, 2. A. 2022, § 44; J. Gundel, *Regulierung und Internationalisierung – insbesondere im Energiesektor*, in: Schmidt-Preuß/Körber (Hrsg.), *Regulierung und Gemeinwohl*, 2016, S. 312 (327 ff.); J. Kuhlmann, *Enhanced sectoral multilateralism*, in: Cambini/Rubino (eds.), *Regional Energy Initiatives*, 2014, S. 141 ff.

⁹⁶ S. dazu die Nachw. bei J. Gundel, *Energierrecht*, in: Dausen/Ludwigs (Hrsg.), *Handbuch des EU-Wirtschaftsrechts* (49. EL 2020), Kap. M Rn. 219 ff.; s. auch R. Petrov, *European legal space and application of the European Union's „energy acquis“ in Ukraine and Moldova*, in: Cambini/Rubino (eds.), *Regional Energy Initiatives*, 2014, S. 175 ff.

⁹⁷ Dazu noch u. III. 1 a) bei Fn. 169.

⁹⁸ Art. 16 Abs. 3 der Gassicherungsverordnung – VO (EU) 2017/1938 in der durch die VO (EU) 2022/1032 des EP und des Rates v. 29.06.2022 zur Änderung der Verordnungen (EU) 2017/1938 und (EG) Nr. 715/2009 im Hinblick auf die Gasspeicherung, ABl. EU 2022 L 173/17, geänderten Fassung; zu dieser Änderungsverordnung s. noch unter III. 1. a) bei Fn. 169.

⁹⁹ Erwägungsgrund 35 der VO (EU) 2022/1032 des EP und des Rates v. 29.06.2022 zur Änderung der Verordnungen (EU) 2017/1938 und (EG) Nr. 715/2009 im Hinblick auf die Gasspeicherung, ABl. EU 2022 L 173/17; s. auch den Beschluss (EU) 2022/1842 des Rates v. 20.09.2022 über den

Zugleich handelt es sich bei der Energiegemeinschaft aber nur um eine unvollständige Kopie des Unionsrechts: Es wird zwar tatsächlich das EU-Binnenmarktsekundärrecht durch Beschlüsse des Ministerrats der Energiegemeinschaft inhaltlich übernommen¹⁰⁰. Es fehlt aber der institutionelle Rahmen des Unionsrechts und insbesondere eine gerichtliche Streitschlichtungsinstanz nach dem Vorbild des EuGH: Über den Vorwurf einer Vertragsverletzung entscheidet stattdessen der Ministerrat der Energiegemeinschaft¹⁰¹ und damit ein politisches Gremium.

Abschnitt II: Energiesolidarität, Energieversorgungssicherheit und der Übergang zu einer ökologischen Wirtschaft

1. Das europäische Ziel der Klimaneutralität und der daraus folgende Umbau der Energiewirtschaft (Fragen 10-15)

Der derzeitige Umbau der europäischen Energieversorgung wird freilich nicht durch das Bemühen um Versorgungssicherheit oder Wettbewerb getrieben, sondern durch die Belange des Klimaschutzes, wobei den völkerrechtlichen Rahmen das von der Union und den EU-Mitgliedstaaten gemeinsam abgeschlossene Klimaschutz-Abkommen von Paris¹⁰² bildet. Das daraus resultierende Umbauprogramm hat die EU-Kommission 2019 mit ihrer Mitteilung zum Europäischen Green Deal¹⁰³ vorgestellt; das zugleich angekündigte und im Jahr 2021 erlassene Europäisches Klimagesetz¹⁰⁴ hat dann die für 2030 zu erreichenden Klimaziele neu bestimmt¹⁰⁵ und das Ziel der Klimaneutralität der EU bis 2050 vorgegeben¹⁰⁶.

im Namen der Europäischen Union im Ministerrat der Energiegemeinschaft zu vertretenden Standpunkt in Bezug auf die Aufnahme der VO (EU) 2022/1032 des EP und des Rates über die Gasspeicherung in den Besitzstand der Energiegemeinschaft, ABl. EU 2022 L 254/43.

¹⁰⁰ Zur Übernahme der Regelungen des Clean energy package der EU durch die Energiegemeinschaft s. S. Minas, EU climate law sans frontières: The extension of the 2030 Framework to the Energy Community contracting parties, RECIEL 2020, 177 ff.

¹⁰¹ Art. 89 ff. des Abkommens (Fn. 95).

¹⁰² Beschluss (EU) 2016/1841 des Rates v. 5.10.2016 über den Abschluss des im Rahmen des Rahmenübereinkommens der Vereinten Nationen über Klimaänderungen geschlossenen Übereinkommens von Paris im Namen der Europäischen Union, ABl. EU 2016 L 282/1; BGBl. 2016 II S. 1082; dazu z. B. A. Proelß, Europäische Energieunion und internationaler Klimaschutz: Konkurrenz oder Konvergenz?, in: Gundel/Lange (Hrsg.), Europäisches Energierecht zwischen Klimaschutz und Binnenmarkt, 2019, S. 1 ff.; F. Germelmann, Entwicklungen im Recht des Klimaschutzes, in: FS Danner, 2019, S. 467 ff.

¹⁰³ Kommissionsmitteilung Der europäische Grüne Deal, COM(2019) 640 final v. 11.12.2019; dazu z. B. W. Köck/T. Markus, Der europäische „Green Deal“ – Auf dem Weg zu einem EU-„Klimagesetz“, ZUR 2020, 257 f.; C. Binet, L'Europe et son Green Deal – Quel avenir pour le climat?, JDE 2020, 207 ff.

¹⁰⁴ VO (EU) 2021/1119 des EP und des Rates v. 30.06.2021 zur Schaffung des Rahmens für die Verwirklichung der Klimaneutralität (...), ABl. EU 2021 L 243/1; dazu S. Schlacke/M. Köster/E. Thering, Das „Europäische Klimagesetz“ und seine Konsequenzen, EuZW 2021, 620 ff.; T. Schuelken/B. Sichla, Das Europäische Klimagesetz – Inhalt, Rechtsfragen und Ausblick, UPR 2021, 1 ff.

¹⁰⁵ Art. 4 Abs. 1 der VO (EU) 2021/1119: 55 % Emissionsreduktion bis 2030.

¹⁰⁶ Art. 1 Abs. 2 und Art. 2 der VO (EU) 2021/1119.

Ein wesentliches Werkzeug der Verzahnung der ehrgeizigen Klimaziele der EU mit der EU-Energiepolitik bilden die Rechtsakte, die der EU-Gesetzgeber in Reaktion auf das von der Kommission im November 2016 vorgelegte Vorschlagspaket „Clean Energy for all Europeans“¹⁰⁷ – das sog. Winterpaket 2016 – erlassen hat. Das Paket, mit dem insgesamt 8 Gesetzgebungsvorschläge vorgelegt wurden, macht die Verknüpfung der in der Vergangenheit zumeist getrennten Felder von Energiebinnenmarkt und Energieumweltrecht deutlich, weil die von der Kommission vorgeschlagenen Rechtsakte zugleich die Ziele der Vervollkommnung des Energiebinnenmarktes und der Umsetzung des Abkommens von Paris (und der im Vorfeld eingegangenen Selbstverpflichtungen¹⁰⁸) verfolgen. Dabei ist einer dieser Rechtsakte – die zentrale Energie-Governance-Verordnung¹⁰⁹ – letztlich beiden Feldern zuzuordnen, drei gehören dem Energieumweltrecht an, vier dem Energiebinnenmarktrecht, wobei diese Zuordnung heute aufgrund der sogleich erörterten einheitlichen Rechtsgrundlage des EU-Energierechts keine dogmatischen Konsequenzen mehr nach sich zieht. Tatsächlich gehört zu den Gemeinsamkeiten der Rechtsakte des Clean energy package, dass sie sämtlich auf der Grundlage der durch den Vertrag von Lissabon neu geschaffenen Energiekompetenz gemäß Art. 194 AEUV erlassen wurden¹¹⁰. Dass diese Wahl auch für die dem Energieumweltrecht zuzuordnenden Rechtsakte getroffen wurde, ist nicht selbstverständlich, weil solche Rechtsakte vor Inkrafttreten des Vertrags von Lissabon auf der Grundlage der Umweltkompetenz des heutigen Art. 192 AEUV erlassen wurden und zahlreiche Stimmen vor allem in der deutschen Literatur dafür plädiert haben, diese Lösung beizubehalten¹¹¹; nachdem die energieumweltrechtlichen Belange aber im Text des Art. 194 AEUV ausdrücklich aufgeführt werden, ist die Zuordnung auch des Energieumweltrechts zu dieser Bestimmung mehr als naheliegend¹¹². Im Anschluss an das Clean energy package hat die Kommission im Jahr 2021 dann noch das „Fit for 55“-Legislativpaket¹¹³ vorgestellt, das ebenfalls der Erreichung der EU-Klimaziele dient, dessen Rechtsakte aber nur zum Teil Fragen der Energieversorgung betreffen¹¹⁴; sie regeln überwiegend über

¹⁰⁷ S. die Erläuterung des Pakets in der Kommissionsmitteilung „Saubere Energie für alle Europäer“, COM (2016) 860 final v. 30.11.2016.

¹⁰⁸ Als Ziele bis zum Jahr 2030 waren zuvor 40 % Treibhausgasreduktion, 27 % Anteil erneuerbarer Energien und 27 % Verbesserung der Energieeffizienz beschlossen worden, s. die Schlussfolgerungen des Europäischen Rates v. 23.–24.10.2014, Doc. EUCO 169/14, S. 1, 5.

¹⁰⁹ Zu ihr s. sogleich unter II. 2. bei Fn 120.

¹¹⁰ Nur die Energie-Governance-Verordnung (s. sogleich Fn. 120) wurde zusätzlich auch auf die Umweltkompetenz des Art. 192 AEUV gestützt, was auch zutreffend erscheint, da sie auch Emissionen betrifft, die nicht auf die Energieerzeugung zurückzuführen sind.

¹¹¹ S. o. I. 1 a) mit Fn. 11.

¹¹² Auch die EuGH-Rechtsprechung hat rasch die vorrangige Bedeutung des Art. 194 AEUV betont, s. EuGH, 6.09.2012 – Rs. C-490/10 (Parlament/Rat), EnWZ 2012, 29 m. Anm. Gundel.

¹¹³ Kommissionsmitteilung „Fit für 55“: auf dem Weg zur Klimaneutralität – Umsetzung des EU-Klimaziels für 2030, COM(2021) 550 final v. 14.07.2021.

¹¹⁴ S. den Überblick bei U. Stäsche, Entwicklungen des Klimaschutzrechts und der Klimapolitik 2021-2022, EnWZ 2022, 201 (211 ff.).

den Energiesektor hinausgreifende Instrumente wie eine Ausweitung des Emissionsrechtehandels¹¹⁵ und flankierende Maßnahmen wie die Einführung einer Grenzausgleichsabgabe für Einfuhren aus Drittstaaten, die keine entsprechenden Belastungen vorsehen.¹¹⁶ Diese Rechtsakte wurden konsequent auf der Grundlage der EU-Umweltkompetenz erlassen; sie sind für den Energiesektor allerdings insoweit von Bedeutung, als gegen sie Nichtigkeitsklagen anhängig sind, die die Notwendigkeit einer einstimmigen Beschlussfassung im Rat gemäß Art. 192 Abs. 2 AEUV geltend machen, weil die Rechtsakte die Wahl der Mitgliedstaaten zwischen verschiedenen Energiequellen erheblich berührten¹¹⁷; die hierzu zu erwartenden Entscheidungen des EuGH hätten auch Auswirkungen auf die Auslegung des parallelen Vorbehalts in Art. 194 Abs. 2 AEUV. Gegenstand dieses Pakets ist allerdings auch die unmittelbar zum Energiesektor gehörende Novellierung der Rechtsakte zum Erdgasbinnenmarkt¹¹⁸, mit der die Umstellung der Gasnetze auf die Nutzung von Wasserstoff vorbereitet wird¹¹⁹.

¹¹⁵ RL (EU) 2023/599 des EP und des Rates v. 10.05.2023 zur Änderung der RL 2003/87/EG über ein System für den Handel mit Treibhausgasemissionszertifikaten in der Union (...), ABl. EU 2023 L 130/134.

¹¹⁶ VO (EU) 2023/956 des EP und des Rates v. 10.05.2023 zur Schaffung eines CO₂-Grenzausgleichssystems, ABl. EU 2023 L 130/52; dazu *M. Ruttloff/E. Wagner*, Neue Berichtspflichten durch den CO₂-Grenzausgleichsmechanismus, NJW 2023, 3327 ff.; *B. Hollaus/S. Mayr*, Der CO₂-Grenzausgleichsmechanismus der Europäischen Union: eine Klimaschutzmaßnahme und ihre WTO-rechtlichen Fallstricke, ÖZW 2022, 102 ff.; *A. Hervé*, Le level playing field comme fondement inavoué du mécanisme d'ajustement carbone aux frontières, RTDE 2023, 651 ff.

¹¹⁷ Zur RL (EU) 2023/599 (Fn. 115) s. die anhängige Rs. C-505/23 (Polen/Parlament und Rat); zur VO (EU) 2023/956 die (Fn. 116) die Rs. C-512/23 (Polen/Parlament und Rat); s. weiter die anhängige Rs. C-445/23 (Polen/EP und Rat) gegen den Beschluss (EU) 2023/852 des EP und des Rates v. 19.04.2023 zur Änderung des Beschlusses (EU) 2015/1814 in Bezug auf die Menge der Zertifikate, die bis 2030 in die Marktstabilitätsreserve für das System für den Handel mit Treibhausgasemissionszertifikaten in der Union einzustellen sind, ABl. EU 2023 L 110/21, und die Rs. C-451/23 (Polen/EP und Rat) gegen die VO (EU) 2023/857 des EP und des Rates v. 19.04.2023 zur Änderung der VO (EU) 2018/842 zur Festlegung verbindlicher nationaler Jahresziele für die Reduzierung der Treibhausgasemissionen im Zeitraum 2021 bis 2030, ABl. EU 2023 L 111/1.

¹¹⁸ RL (EU) 2024/1788 des EP und des Rates v. 13.06.2024 über gemeinsame Vorschriften für die Binnenmärkte für erneuerbares Gas, Erdgas und Wasserstoff (...), ABl. EU L 2024/1788 v. 15.07.2024; VO (EU) 2024/1789 des EP und des Rates v. 13.06.2024 über die Binnenmärkte für erneuerbares Gas, Erdgas und Wasserstoff (...), ABl. EU L 2024/1789 v. 15.07.2024; dazu *T. Burmeister/P. Kirstner/K. Sievert*, Das Hydrogen and Decarbonised Gas Market Package, RdE 2024, 296 ff.; *C. Le Bihan-Graf/L. Rosenblieh/S. Hahn Duraffourg*, Par une quatrième refonte des textes du paquet gaz, la Commission européenne encadre la création d'un marché européen commun de l'hydrogène, énergie-environnement-infrastructures 7/2022, 11 ff.

¹¹⁹ Dazu sogleich unter II. 3.

2. Governance-Verordnung und EU-Beihilfenrecht als Instrumente des Umbaus

Die neu geschaffene Energie-Governance-Verordnung¹²⁰ ist ein zentrales Element des Clean energy package, das vor allem – aber nicht ausschließlich – die Erreichung der zum Klimaschutz eingegangenen Selbstverpflichtungen sicherstellen soll. Sie enthält übergreifende Planungs- und Berichtspflichten der Mitgliedstaaten in Bezug auf die erwähnten fünf Dimensionen der Energieunion¹²¹, die durch die Erarbeitung integrierter nationaler Energie- und Klimapläne (INEK-Pläne) mit einem 10-Jahres-Horizont durch die Mitgliedstaaten verwirklicht werden sollen¹²². Darüber hinaus mussten die Mitgliedstaaten Langzeitstrategien mit einer Perspektive von mindestens 30 Jahren entwickeln und der Kommission erstmalig bis Ende 2020 vorlegen¹²³. Die Verordnung sieht grundsätzlich keine festen Zielvorgaben für die einzelnen Mitgliedstaaten vor, sondern verpflichtet die Staaten, sich durch die INEK-Pläne selbst Ziele zu setzen, die zur Erfüllung der von der Union insgesamt eingegangenen Verpflichtungen beitragen können¹²⁴; der Ansatz übernimmt damit in gewisser Weise die Selbstverpflichtungs-Lösung des Pariser Abkommens¹²⁵. Die ersten Entwürfe der INEK-Pläne waren von den Mitgliedstaaten im Dezember 2018 vorzulegen, im Juni 2019 folgte dann die erste Runde von Kommissionsempfehlungen zur Überarbeitung.¹²⁶ Im Anschluss an die Planerstellung haben die Mitgliedstaaten in regelmäßigen Fortschrittsberichten im Zwei-Jahres-Rhythmus über die Verfolgung und

¹²⁰ VO (EU) 2018/1999 des EP und des Rates v. 11.12.2018 über das Governance-System für die Energieunion und für den Klimaschutz (...), ABl. EU 2018 L 328/1; dazu S. Schlacke/S. Lammers, Das Governance-System der Europäischen Energieunion, EurUP 2018, 424 ff.; S. Schlacke/M. Knodt, Das Governance-System für die Europäische Energieunion und für den Klimaschutz, ZUR 2019, 404 ff.; H.-G. Dederer, Die Governance-Verordnung als Steuerungsinstrument zur Erfüllung der Klimaschutz-Verpflichtungen der Union durch die Mitgliedstaaten, in: Gundel/Lange (Hrsg.), Energierecht nach dem Clean energy package, 2021, S. 1 ff.; dazu monographisch S. Lammers, Die europäische Governance-Verordnung und das EU-Klimagesetz, 2023; L. Ruschinzik, Die Governance-Verordnung der EU für die Energieunion und den Klimaschutz, 2025.

¹²¹ S. o. I. 2. mit Fn. 32; s. insbes. Art. 4 der VO (EU) 2018/1999 (Fn. 120).

¹²² Art. 3 ff. der VO (EU) 2018/1999 (Fn. 120); zu den Einzelheiten der Abläufe s. S. Lammers/D. Römeling, Das neue Governance-System der Europäischen Energieunion: Anforderungen an Beteiligungs- und Überprüfungsrechte, ZUR 2019, 332 ff.

¹²³ Art. 15 der VO (EU) 2018/1999 (Fn. 120).

¹²⁴ S. Art. 5 der VO (EU) 2018/1999 (Fn. 120) für den Erneuerbare-Energien-Anteil, Art. 6 für die Energieeffizienz.

¹²⁵ Zur zentralen Rolle der nationally determined contributions (NDCs) im System des Pariser Abkommens s. z. B. H. Taghavi, Die europäischen NDCs als Herausforderung im Völkerrecht, ZUR 2023, 350 ff.; F. Germelmann, Der internationale und europäische Rahmen für den Klimaschutz in der Energieversorgung, DÖV 2024, 985 (987 ff.).

¹²⁶ S. für Deutschland die Empfehlung der Kommission v. 18.06.2019 zum Entwurf des integrierten Energie- und Klimaplans Deutschlands für den Zeitraum 2021-2030, ABl. EU 2019 C 297/17; s. auch die parallel dazu vorgelegte Bewertung des deutschen Entwurfs, SWD (2019) 229 v. 18.06.2019; s. später z. B. die Empfehlung (EU) 2024/612 der Kommission v. 18.12.2023 zum Entwurf des aktualisierten integrierten nationalen Energie- und Klimaplans Deutschlands für den Zeitraum 2021-2030 und zur Vereinbarkeit der Maßnahmen Deutschlands mit dem Unionsziel der Klimaneutralität und mit der Sicherstellung von Fortschritten bei der Anpassung, ABl. EU L 2024/612 v. 7.03.2024.

Erreichung der selbstgesetzten Ziele Rechenschaft abzulegen¹²⁷. Die Berichte sind wiederum durch die Kommission zu bewerten, die im Fall einer Verfehlung der nationalen Ziele allerdings nur durch den Erlass unverbindlicher Empfehlungen¹²⁸ tätig werden kann¹²⁹. Ob diese weiche Dialogsteuerung tatsächlich ausreicht, um die gesetzten Ziele zu erreichen, werden die künftigen Entwicklungen zeigen; die Verordnung sieht vor, dass die Kommission im Fall erkennbarer Zielverfehlung weitergehende Maßnahmen auf Unionsebene vorschlägt¹³⁰ – allerdings wird es schwierig werden, härtere Vorgaben zu entwickeln, die zugleich den Vorbehaltsbereich des Art. 194 AEUV unberührt lassen.

Ein weiteres Instrument, das auf die nationale Energiepolitik einwirken und auf die Erreichung des Ziels der Klimaneutralität hinwirken kann, ist das EU-Beihilfenrecht.¹³¹ Seine Maßstäbe sind regelmäßig berührt, wenn die Mitgliedstaaten finanzielle Anreize im Energiesektor setzen, die durch staatliche Mittel finanziert werden¹³²; ob hierzu auch Mittel gehören, die aus staatlich vorgesehenen Umlagesystemen stammen, ist immer wieder Gegenstand der EuGH-Rechtsprechung geworden¹³³. Wenn die Tatbestandsvoraussetzungen des Art. 107 AEUV erfüllt sind, steht die Genehmigung zwar im Ermessen der

¹²⁷ Art. 17 ff. VO (EU) 2018/1999 (Fn. 120).

¹²⁸ Zur Unverbindlichkeit dieser Rechtsaktform gemäß Art. 288 Abs. 5 AEUV, die auch die Unzulässigkeit von Nichtigkeitsklagen gemäß Art. 263 Abs. 1 AEUV erklärt, s. EuGH, 20.02.2018 – Rs. C-16/16 P (Belgien/Kommission), EuR 2018, 593 m. Anm. J. Gundel; die Gültigkeit kann allerdings im Vorabentscheidungsverfahren geprüft werden, s. EuGH (GK), 15.07.2021 – Rs. C-911/19 (Fédération bancaire française), EWS 2021, 323; dazu S. Geiger, Mittelbarer Rechtsschutz gegen nicht verbindliche Unionshandlungen, EuR 2022, 407 ff.; J. Gundel, Rechtsschutz gegen „Soft Law“-Regulierungsmaßnahmen der Union mit dem Instrument der Gültigkeitsvorlage, EWS 2021, 317 ff.; H. Marjosola/M. van Rijsbergen/M. Scholten How to exhort and to persuade with(out legal) force: Challenging soft law after FBF, 59 CMLRev. (2022), 1523 ff.; S. Scholz, Soft Law: Rechtsschutzpotential von Nichtigkeitsklage und Vorabentscheidungsverfahren, EuZW 2022, 453 ff.

¹²⁹ Art. 32 VO (EU) 2018/1999 (Fn. 120); dazu S. Schlacke/S. Lammers, Das Governance-System der Europäischen Energieunion, EurUP 2018, 424 (434 f.).

¹³⁰ Art. 31 Abs. 3, Art. 32 Abs. 2 VO (EU) 2018/1999 (Fn. 120).

¹³¹ Dazu W. Frenz, Energiebeihilfenrecht, in: Kühling/Theobald (Hrsg.), Energierecht (104. EL 2019) EuEn-BeihR Rn. 1 ff.; s. auch die Beiträge in Hancher/de Hauteclocque/Salerno (Hrsg.), State Aid and the Energy Sector, 2018.

¹³² Für ein jüngeres Beispiel s. die Genehmigung der deutschen Beihilfen für den Braunkohleausstieg durch den Beschluss (EU) 2024/2418 der Kommission v. 11.12.2023 über die staatliche Beihilfe SA.53625 (2021/C) Deutschlands für den Ausstieg aus der Braunkohle, ABl. EU L 2024/2418 v. 17.09.2024.

¹³³ S. in jüngerer Zeit EuGH (GK), 12.01.2023 – verb. Rs. C-702/20 u. C-17/21 (SIA DOBELES HES), wbl 2023, 626; dazu W. Weiß, Die Beihilfeneigenschaft umlagefinanzierter Förderungen im Lichte der EuGH-Rechtsprechung, EuZW 2023, 1089 ff.; F. Germelmann/J. Gundel, Die Entwicklung der EuGH-Rechtsprechung zum europäischen Verfassungs- und Verwaltungsrecht im Jahr 2023, BayVBl. 2024, 617 (623 f.); zuvor z. B. EuG, 20.09.2019 – Rs. T-217/17 (FVE Holýšov/Kommission), bestätigt durch EuGH, 16.09.2021 – Rs. C-850/19 P (FVE Holýšov/Kommission); EuGH, 28.03.2019 – Rs. C-405/16 P (Deutschland/Kommission), EuZW 2019, 418; EuGH, 15.05.2019 – Rs. C-706/17 (Achema), RIW 2020, 144; dazu F. Germelmann/J. Gundel, Die Entwicklung der EuGH-Rechtsprechung zum europäischen Verfassungs- und Verwaltungsrecht im Jahr 2019, BayVBl. 2020, 613 (622 f.); EuGH, 19.12.2013 – Rs. C-262/12 (Vent de colère), EWS 2014, 37 m. Anm. J. Buckler.

Kommission, dessen Ausübung sie durch den Erlass der Leitlinien für Energie- und Umweltbeihilfen¹³⁴ vorstrukturiert hat¹³⁵; bei der Ausübung dieses Ermessens ist aber wiederum die Wertung des Art. 194 Abs. 2 AEUV zu beachten.¹³⁶

3. Versorgungssicherheit vs. Klimaneutralität (Fragen 16-19)

Das Ziel der Klimaneutralität, das sich die EU zu Eigen gemacht hat, birgt die positive Perspektive einer Unabhängigkeit der EU von Energieimporten, auf die die Mitgliedstaaten in Bezug auf fossile Rohstoffe stets angewiesen waren. Die Achillesferse liegt allerdings darin, dass die als Ersatz vorgesehenen erneuerbaren Energien in einer Reihe von Mitgliedstaaten – darunter auch in Deutschland – vor allem in Form von Sonnen- und Windenergie verfügbar sind, deren Produktion volatil und damit ohne zusätzliche Vorkehrungen nicht in der Lage ist, eine den Anforderungen der Versorgungssicherheit entsprechende zuverlässige Bereitstellung von Energie zu gewährleisten. Eine erfolgreiche Dekarbonisierung ist damit von einer Lösung des Speicherproblems abhängig; auch ein immer umfangreicherer Ausbau der Erzeugungskapazitäten im Bereich der erneuerbaren Energien, den die EU in Reaktion auf die Energiekrise weiter forciert hat¹³⁷, kann dieses Problem allein nicht lösen. Perspektivisch wird hier nun sowohl auf der Ebene der EU¹³⁸ als auch durch den deutschen Gesetzgeber¹³⁹ eine Lösung durch den Einsatz von Wasser-

¹³⁴ S. aktuell geltend die Kommissionsmitteilung Leitlinien für staatliche Klima-, Umweltschutz- und Energiebeihilfen 2022, ABL. EU 2022 C 80/1.

¹³⁵ Die Leitlinien befreien die Kommission allerdings nicht von der Verpflichtung zur Prüfung von Einzelfällen, in denen die Voraussetzungen der Leitlinien nicht erfüllt sind, s. EuGH (GK), 19.07.2016 – Rs. C-526/14 (Kotnik u. a.), EuZW 2016, 793, Tz. 41 ff.; EuGH (GK), 8.03.2016 – Rs. C-431/14 P (Griechenland/Kommission), EuZW 2016, 393; dazu *F. Germelmann/J. Gundel*, Die Entwicklung der EuGH-Rechtsprechung zum europäischen Verfassungs- und Verwaltungsrecht im Jahr 2023, BayVBl. 2017, 689 (697); für eine striktere Selbstbindung zuvor wohl EuG, 23.11.2015 – Rs. T-670/14 (Milchindustrie-Verband/Kommission), RdE 2016, 231 m. Anm. *J. Gundel*, Tz. 24.

¹³⁶ So z. B. zur Klage Österreichs gegen die beihilfenrechtliche Genehmigung für Hinkley Point EuGH (GK), 22.09.2020 – Rs. C-594/18 P (Österreich/Kommission), EuZW 2021, 72 m. Anm. *B. Peters*, insbes. Tz. 48; dazu noch u. Fn. 150.

¹³⁷ VO (EU) 2022/2577 des Rates v. 22.12.2022 zur Festlegung eines Rahmens für einen beschleunigten Ausbau der Nutzung erneuerbarer Energien, ABL. EU 2022 L 335/36; dazu noch III. 3. a) mit Fn. 212.

¹³⁸ S. zunächst die Kommissionsmitteilung Eine Wasserstoffstrategie für ein klimaneutrales Europa, COM (2020) 301 final v. 8.07.2020; im Anschluss daran erfolgte bei der Neufassung der Gasbinnenmarktrechtsakte die Erweiterung ihres Geltungsbereichs auf Wasserstoff, s. o. II. 1. mit Fn. 118.

¹³⁹ S. für Deutschland zunächst Bundesregierung, Die nationale Wasserstoffstrategie – Schlüsselement der Energiewende v. 10.06.2020; im Anschluss erfolgte die Einfügung der §§ 28 j-p EnWG zur Regulierung von Wasserstoffnetzen durch Gesetz v. 16.07.2021, BGBl. I S. 3026; weiter wurde das Vorhaben der Errichtung eines Wasserstoffkernnetzes in das Gesetz aufgenommen, zunächst durch Einfügung von § 28q EnWG durch das Gesetz zur Anpassung des Energiewirtschaftsrechts an unionsrechtliche Vorgaben v. 29.12.2023, BGBl. I Nr. 405, weiter der Bestimmungen zu seiner Finanzierung in §§ 28r-s EnWG durch das Zweite Gesetz zur Änderung des EnWG v. 17.05.2024, BGBl. I Nr. 161; dazu *J. Beimesche*, Die neuen Regelungen zum Wasserstoffkernnetz und zum integrierten Netzentwicklungsplan Gas und Wasserstoff im Überblick, EnWZ 2024, 387 ff.; *C. Sieberg/C. Cesarano*, Bestandsaufnahme zum Entwurf gesetzlicher Regelungen für die Schaffung eines Wasserstoffkernnetzes, RdE 2023, 317 ff.

stoff angestrebt¹⁴⁰, dessen breite Nutzung aber einen umfassenden Um- bzw. Neubau der Versorgungsinfrastruktur erfordert¹⁴¹; die Konsequenzen dieses Umstiegs für die Energiekosten sind allerdings schwer abschätzbar. Bis diese in Deutschland gerade erst eingeleitete Umstellung abgeschlossen ist, wird die Versorgungssicherheit durch die Errichtung von neuen Reserve-Gaskraftwerken gewährleistet werden müssen¹⁴², die wiederum ohne staatliche Förderung nicht erfolgen wird; auch hier wird damit wieder das EU-Beihilfenrecht¹⁴³ zum maßgeblichen Rahmen.

4. Klimaneutralität und nationale Entscheidung über die Wahl der Energiequellen

Eine wesentliche Stellschraube für die Erreichung einer klimaneutralen Energieversorgung ist die Wahl der Energiequellen, über die wie erwähnt auf Unionsebene gemäß Art. 194 AEUV allenfalls einstimmig entschieden werden kann; nach anderer Ansicht ist dieses Feld dem Unionsgesetzgeber vollständig versperrt¹⁴⁴. Auf diese durch den Vertrag von Lissabon erfolgte Einschränkung gegenüber der zuvor für das Energiewirtschaftsrecht anwendbaren Binnenmarkt-Rechtsgrundlage des heutigen Art. 114 AEUV hat der Unionsgesetzgeber reagiert, indem er auf entsprechende Festlegungen für die Mitgliedstaaten verzichtet: So enthält die Erneuerbare-Energien-Richtlinie¹⁴⁵ anders als in der Vergangenheit keine nationalen Quotenvorgaben mehr¹⁴⁶, sondern nur noch eine Quote für die gesamte Union¹⁴⁷, und auch die EU-Governance-Verordnung¹⁴⁸

¹⁴⁰ S. J. Arnold/C. Kurz, Hochlauf der Wasserstoffwirtschaft, EurUP 2024, 313 ff.; C. Maaß/M. Weller/X. Zwanziger, Herausforderung Wasserstoffmarkthochlauf, NVwZ 2024, 782 ff.; T. Müller, Beschleunigungsansätze im Zulassungsrecht für Elektrolyseure, NVwZ 2024, 791 ff.

¹⁴¹ Dabei sollen die bestehenden Gasnetze zum Teil umgenutzt werden, s. z. B. Riege, Die Umstellung von Gasversorgungsleitungen für den Wasserstofftransport, EnWZ 2021, 387 ff.

¹⁴² Für ein entsprechendes Kraftwerkssicherheitsgesetz hatte die Bundesregierung am 11.09.2024 Eckpunkte vorgelegt und ein Konsultationsverfahren eröffnet, s. www.bmwk.de/Redaktion/DE/Meldung/2024/20240911-kraftwerkssicherheitsgesetz.html; die danach vorgesehenen Kraftwerke sollten ebenfalls auf die Nutzung von Wasserstoff umrüstbar sein. Aufgrund der für Februar 2025 angesetzten vorzeitigen Bundestagswahlen wurde das Vorhaben aber in dieser Legislaturperiode nicht mehr zu Ende geführt; kritisch zur als unzureichend angesehenen Dimension der Ausbaupläne H. Bontrup/M. Löffler, Weiterhin energiepolitisches Wunschenken in der Politik – Die neue Kraftwerksstrategie ist ein ungenügendes Flickwerk, ET 5/2024, 53 ff.

¹⁴³ Zu seiner Bedeutung für die Verfolgung der Klimaziele s. o. II. 2. bei Fn. 131.

¹⁴⁴ S. o. I. 3. mit Fn. 46 ff.

¹⁴⁵ RL (EU) 2018/2001 des EP und des Rates v. 21.12.2018 zur Förderung der Nutzung von Energie aus erneuerbaren Quellen, ABl. EU 2018 L 328/82; zu ihrer jüngsten Änderung s. noch u. III. 3 a) mit Fn. 215.

¹⁴⁶ Dazu J. Gundel/J. Buckler, Das europäische Energierecht nach dem Erlass des Clean energy package: Eine gelungene Synthese von EU-Klimaschutz- und EU-Binnenmarktrecht?, GewArch 2020, 41 (43); s. auch M. Ludwigs, Energierecht, in: Ruffert (Hrsg.), Europäisches Sektorales Wirtschaftsrecht, 2. A. 2020, § 5 Rn. 243; A. Proelß, Europäische Energieunion und internationaler Klimaschutz: Konkurrenz oder Konvergenz, EurUP 2019, 72 (79).

¹⁴⁷ S. zur Frage, ob eine solche Vorgabe gegen Art. 194 Abs. 2 AEUV verstößt, s. verneinend E. Albrecht/A. Mordhorst, Die Energiekompetenz des Art. 194 AEUV und die 32%-Zielvorgabe für den Anteil erneuerbarer Energien am Bruttoenergieverbrauch in 2030 in der EU, EnWZ 2019, 343 ff.

¹⁴⁸ S. o. Fn. 120.

gibt den Mitgliedstaaten keine verbindlichen Ausbauziele vor, sondern setzt auf die Abgabe von Selbstverpflichtungen durch die Mitgliedstaaten in den von ihnen vorzulegenden integrierten nationalen Energie- und Klimaplänen (INEKs), deren Nachbesserung im Fall unzureichenden Ehrgeizes von der EU-Kommission nur durch unverbindliche Empfehlungen angeregt werden kann¹⁴⁹.

Damit bleiben wesentliche Elemente des Ausgleichs zwischen Klimaneutralität und Versorgungssicherheit jedenfalls faktisch in der Hand der Mitgliedstaaten. Das betrifft insbesondere die Entscheidung für oder gegen die Nutzung der Kernenergie zum Zweck der Energieerzeugung¹⁵⁰, wobei allerdings schon aus der Existenz und Geltung des alle EU-Mitgliedstaaten bindenden Euratom-Vertrags¹⁵¹ folgt, dass die Entscheidung eines Mitgliedstaats für die Nutzung dieser Form der Energieerzeugung von den anderen Mitgliedstaaten zu akzeptieren ist.¹⁵² Auch die Entscheidung für oder gegen einen Kohleausstieg ist dementsprechend eine nationale Weichenstellung¹⁵³.

Diese nationalen Entscheidungen über den Energiemix können in ein Spannungsverhältnis zum Grundsatz der Energiesolidarität geraten: Mitgliedstaaten, die in eigener Entscheidung bei der Wahl der Energiequellen risikoreiche Lösungen bevorzugt haben, werden sich im Krisenfall nach dem Wortlaut der Verträge zwar ebenfalls auf die Energiesolidarität berufen können; sie müssen aber damit rechnen, dass diese Solidarität in

¹⁴⁹ S. o. II. 2. mit Fn. 128.

¹⁵⁰ So z. B. zur Klage Österreichs gegen die beihilfenrechtliche Genehmigung für Hinkley Point EuGH (GK), 22.09.2020 – Rs. C-594/18 P (Österreich/Kommission), EuZW 2021, 72 m. Anm. B. Peters, insbes. Tz. 48; dazu M. Olthoff/A. v. Bonin, Das „Hinkley Point“-Urteil des EuGH: Berücksichtigung von Nachhaltigkeitsaspekten in der beihilferechtlichen Prüfung sowie allgemein im EU-Kartell- und Fusionskontrollrecht, EuZW 2021, 181 ff.; A. Sikora, Applicability of the EU State Aid and Environmental Rules in the Nuclear Sector, EStAL 2020, 515 ff.

¹⁵¹ S. EuG, 12.07.2018 – Rs. T-356/15 (Österreich/Kommission), Tz. 101, 112, 237 und 371. Ein gesonderter Austritt von EU-Mitgliedstaaten aus diesem Vertrag ist strukturell ausgeschlossen, weil der Euratom-Vertrag auf die Organe der Union verweist und damit einen übereinstimmenden Mitgliederstand beider Verträge voraussetzt, s. dazu J. Grunwald, Der Euratom-Vertrag nach Lissabon, in: Liber Amicorum Torsten Stein, 2015, S. 543 (553); E. Tauschinsky/R. Böttner, „It's complicated“ – der unklare Beziehungsstatus zwischen der EU und Euratom, EuZW 2018, 674 (676 ff.).

¹⁵² Zu dieser Konsequenz des Euratom-Vertrags und der auf seiner Grundlage erlassenen Sicherheitsanforderungen s. bereits EuGH, 27.10.2009 – Rs. C-115/08 (Land Oberösterreich/ČEZ as), Slg. 2009, I-10265 = EuZW 2010, 26 m. Anm. W. Schärff, dort zu Unterlassungsklagen gegen den Betreiber des tschechischen Kernkraftwerks Temelin vor österreichischen Gerichten.

¹⁵³ S. für Deutschland das Gesetz zur Reduzierung und zur Beendigung der Kohleverstromung und zur Änderung weiterer Gesetze (Kohleausstiegsgesetz) v. 8.08.2020, BGBl. I S. 1818; dazu M. Kloepper, Das Kohleverstromungsbeendigungsgesetz, EurUP 2021, 185 ff.; S. Michaels/O. Däuper, Das Kohleausstiegsgesetz im Überblick, EnWZ 2020, 291 ff.; s. auch U. Büdenbender, Der gesetzliche Rahmen für den Ausstieg aus der Kohleverstromung, DVBl. 2021, 281 ff.; W. Kahl, Kohleausstieg und EU-Recht, EurUP 2020, 395 ff.; M. Kment/S. Fimpel, Gesetzlicher Ausstieg aus der Steinkohle – Verfassungsrechtliche Bewertung des Ausschreibungsverfahrens nach dem KVBG, DVBl. 2022, 947 ff.; H. Posser, Der deutsche Beitrag zur Erreichung der EU-Klimaziele – Insbesondere zur Gestaltung des Ausstiegs aus der Kohleverstromung, in: Gundel/Lange (Hrsg.), Energierecht nach dem Clean energy package, 2021, S. 41 ff.

einer solchen Konstellation eher widerwillig und zurückhaltend geleistet werden wird¹⁵⁴.

Ein weiteres Problem in der Handhabung des Energiemix-Vorbehalts liegt darin begründet, dass unabhängig vom Verzicht auf konkrete Zielvorgaben an einzelne Mitgliedstaaten die EU sich insgesamt zur Dekarbonisierung verpflichtet hat, was langfristig unweigerlich auch Konsequenzen für den Energiemix in den einzelnen Mitgliedstaaten haben wird: Eine nationale Entscheidung zugunsten fossiler Energieträger wäre auf Dauer nicht mit dieser Weichenstellung vereinbar. Man kann sich dazu auf den Standpunkt stellen, dass diese Konsequenzen nicht gezielt verfolgt werden und daher den Vorbehalt des Art. 194 Abs. 2 AEUV nicht verletzen¹⁵⁵; angesichts der Zwangsläufigkeit der Verengung der nationalen Entscheidungsmöglichkeiten erscheint dies aber wenig überzeugend. Es lässt sich aber auch gut argumentieren, dass alle Mitgliedstaaten das Paris-Abkommen ratifiziert und damit beschlossen haben, ihre Entscheidung über die Wahl der Energiequellen in einer klimafreundlichen Weise zu treffen¹⁵⁶. An dieser nationalen Entscheidung müssten sie sich dann auch unionsrechtlich festhalten lassen, zumal die EU und ihre Mitgliedstaaten das Paris-Abkommen gemeinsam als gemischtes Abkommen abgeschlossen haben.

Abschnitt III: Das Krisenmanagement der EU im Energiesektor und seine Grenzen

1. Die Umsetzung des Grundsatzes der Energiesolidarität im Krisenfall

a) Instrumente im Gassektor

Für den akuten Fall einer Gasversorgungskrise hat der Unionsgesetzgeber ab 2004 in mehreren Stufen vorgesorgt: Zunächst wurde die Gassicherungsrichtlinie (RL 2004/67/EG)¹⁵⁷ erlassen, die im Anschluss durch die VO (EU) Nr. 994/2010¹⁵⁸ abgelöst wurde. Den letzten Stand bildet geltende Gassicherungsverordnung aus dem Jahr 2017,¹⁵⁹ die teils auch als SoS („security

¹⁵⁴ S. J. Gundel, Der Beitrag des Energiebinnenmarktes zur Sicherung der Energieversorgung, RdE 2023, 209 (211 f.).

¹⁵⁵ Zu dieser Grenze des Vorbehalts s. bereits o. I. 3. bei Fn. 49.

¹⁵⁶ In diese Richtung C. Kreuter-Kirchhof, Der künftige Ausbau der erneuerbaren Energien in der EU, EuZW 2017, 829 (830); dies., Ist die Zukunft des Energierechts europäisch?, in: FS Bündenbender, 2018, S. 129 (147 ff.); S. Lammers, Die europäische Governance-Verordnung und das EU-Klimagesetz, 2023, S. 264.

¹⁵⁷ RL 2004/67/EG des Rates v. 26.04.2004 über Maßnahmen zur Gewährleistung der sicheren Erdgasversorgung, ABl. EU 2004 L 127/92.

¹⁵⁸ VO (EU) Nr. 994/2010 des EP und des Rates v. 20.10.2010 über Maßnahmen zur Gewährleistung der sicheren Erdgasversorgung und zur Aufhebung der RL 2004/67/EG des Rates, ABl. EU 2010 L 295/1; zu ihr S. Muter Goldberg, Regulation 994/2010: a measure to improve the security of gas supply in the EU?, in: Roggenkamp/Hammer (Hrsg.), European Energy Law Report VIII, 2011, S. 61 ff.

¹⁵⁹ VO (EU) 2017/1938 des EP und des Rates v. 25.10.2017 über Maßnahmen zur Gewährleistung der sicheren Gasversorgung und zur Aufhebung der VO (EU) Nr. 994/2010, ABl. EU 2017 L 280/1.

of supply“-Verordnung bezeichnet wird. Die drei aufeinanderfolgenden Rechtsakte weisen teils Kontinuität auf – so wurde die heute in Art. 4 der Gassicherungsverordnung vorgesehene Koordinierungsgruppe Erdgas, in der nun die Kommission, der Verbund der europäischen Ferngasnetzbetreiber (ENTSO¹⁶⁰), die EU-Energieregulierungsagentur ACER (Agency for the Cooperation of Energy Regulators)¹⁶¹ sowie Vertreter der nationalen Behörden und der Erdgasindustrie- und Verbraucherverbände vertreten sind¹⁶², schon mit der Gassicherungsrichtlinie 2004 eingerichtet.¹⁶³ Sie zeigen aber auch eine sukzessive Schärfung und Verfeinerung der Instrumente; so ist mit der im Jahr 2010 erlassenen Verordnung die Verpflichtung der Fernleitungsnetzbetreiber zur Schaffung der Kapazitäten für grenzüberschreitende Lastflüsse in beide Richtungen festgeschrieben worden¹⁶⁴, die sich nun in Art. 5 der geltenden Gassicherungsverordnung findet. Auch wurden die Mitgliedstaaten in dieser Verordnung erstmals in regionale Verbünde geordnet¹⁶⁵, was sich in der geltenden Verordnung verstärkt und unter der Bezeichnung „Risikogruppen“ wiederfindet¹⁶⁶. Einen gewissen Abschluss hat die Entwicklung mit der nun geltenden Gassicherungsverordnung gefunden, die zwei wesentliche neue Elemente einführt: Der Verbund der europäischen Ferngasnetzbetreiber wird zur Durchführung einer unionsweiten Simulation von Gefahrenszenarien verpflichtet, die gemäß Art. 7 Abs. 1 der Verordnung bis zum ersten 1. November 2017 durchzuführen war, und die Mitgliedstaaten werden zu Solidaritätsleistungen in Form von Gaslieferungen verpflichtet, wenn in einem Mitgliedstaat eine Gasmangellage entsteht. Damit wurden erstmals Mitgliedstaaten, die selbst nicht unmittelbar von einer Versorgungskrise betroffen sind, verbindlich zu Solidarität verpflichtet, wenn in einem anderen Teil der EU ein kritischer Zustand eintritt: Diese nicht betroffenen Staaten müssen im Ernstfall ihren eigenen Verbrauch – notfalls auch durch hoheitliche Maßnahmen – einschränken, um hierdurch Reserven zu schaffen, die dem unmittelbar betroffenen Mitgliedstaat zur Verfügung gestellt werden

¹⁶⁰ S. o. I. 4. bei Fn. 50.

¹⁶¹ S. zunächst die VO (EG) Nr. 713/2009 des Europäischen Parlaments und des Rates v. 13.07.2009 zur Gründung einer Agentur für die Zusammenarbeit der Energieregulierungsbehörden, ABl. EU 2009 L 211/1; monographisch zu ACER M. Steger, Zur Verselbstständigung von Unionsagenturen, 2015; C. Untrierer, Die Agentur für die Zusammenarbeit der Energieregulierungsbehörden im europäischen Verwaltungsverbund, 2016; w. Nachw. bei J. Gundel, Europäisches Energierecht in: Kühling/Theobald (Hrsg.), Energierecht (101. EL 2019), Europäisches Energierecht Rn. 47, 55. Die zum dritten Energiebinnenmarktpaket gehörende ursprüngliche ACER-Verordnung wurde abgelöst durch die VO (EU) 2019/942 des EP und des Rates v. 5.06.2019, ABl. EU 2019 L 158/22.

¹⁶² S. den Kommissionsbeschluss v. 11.08.2011 über die Zusammensetzung der Koordinierungsgruppe „Erdgas“, zur Regelung ihrer Arbeitsweise und zur Aufhebung des Beschlusses 2006/79/EG, ABl. EU 2011 C 236/10.

¹⁶³ Art. 7 RL 2004/67/EG; s. im Anschluss daran den Kommissionsbeschluss v. 7.11.2006 über die Zusammensetzung der Koordinierungsgruppe „Erdgas“, ABl. EU 2006 L 319/49.

¹⁶⁴ Art. 6 Abs. 5 der VO (EU) Nr. 994/2010 mit dem Zieldatum des 3.12.2013; s. dazu bereits o. I. 4. mit Fn. 52.

¹⁶⁵ Anhang IV der VO (EU) Nr. 994/2010.

¹⁶⁶ Anhang I der VO (EU) 2017/1938 (Fn. 159).

können. Das Potential dieser unionsweiten Pufferung wird eindrucksvoll durch eine Simulation demonstriert, die ENTSOG im Jahr 2017¹⁶⁷ für den Fall einer regional begrenzten Versorgungskrise durchgeführt hat: Danach wären bei einer Unterbrechung der Gaslieferungen aus Russland in den unmittelbar betroffenen osteuropäischen Staaten ohne Korrekturen Lieferkürzungen von 30 bis 80% nötig; dieser Einschnitt lässt sich aber bei Einbeziehung weiterer Staaten in die Ressourcenbewirtschaftung auf eine Kürzung von durchgängig 7% glätten¹⁶⁸; allerdings müsste diese Verbrauchsreduktion eben auch in nicht unmittelbar betroffenen Mitgliedstaaten durchgeführt werden. Dieser Ausgleich zwischen den Mitgliedstaaten ist freilich vor allem dann hilfreich, wenn eine Mangellage nur in einem Teil der Mitgliedstaaten auftritt. Wenn es sich dagegen um eine flächendeckende Krise in allen Mitgliedstaaten handelt, bleibt der Effekt beschränkt: In diesem Fall müssten entsprechende Reserven vorhanden sein, um das Versorgungssystem aufrechterhalten zu können, was in der Gassicherungsverordnung jedoch nicht verbindlich vorgegeben war. Diese Lücke hat der EU-Gesetzgeber in der jüngsten Energiekrise im Gefolge des Ukraine-Kriegs, mit dem die weitere Versorgung Europas mit russischem Gas und Öl in Frage gestellt war, eilig durch eine Änderung der Gassicherungsverordnung und der Gasbinnenmarkt-Verordnung geschlossen¹⁶⁹: Danach wurde zum 1. November 2022 bzw. 2023 eine Mindestbefüllung von 80% (2022) bzw. 90% (2023) der Kapazität in den Speicheranlagen auf dem Territorium der Mitgliedstaaten vorgegeben; Mitgliedstaaten, die über keine solchen Anlagen verfügen, müssen sicherstellen, dass mindestens 15% ihres durchschnittlichen Jahresverbrauchs der letzten fünf Jahre in Anlagen in anderen Mitgliedstaaten eing gespeichert sind¹⁷⁰.

b) Instrumente im Stromsektor

Das Gegenstück zur Gassicherungsverordnung im Stromsektor bildet die VO (EU) 2019/941 über die Risikovorsorge im Elektrizitätssektor¹⁷¹, deren Entwurf die Kommission im November 2016 als Teil des „Clean energy package“ vorgelegt hat. Mit dieser Verordnung sollen Stromversorgungskrisen verhütet bzw. bewältigt werden, die über das hinausgehen, was durch technische Regelungen wie die Leitlinie für den Übertragungsnetzbetrieb¹⁷² und den Netzkodex über

¹⁶⁷ ENTSOG Union-wide Security of Supply Simulation Report 2017, verfügbar unter www.entsog.eu; dazu J. Gundel, Solidarität der Mitgliedstaaten bei Versorgungskrisen im Energiebinnenmarkt – Europäische Lösungsansätze für die Frage der Versorgungssicherheit, RdE 2019, 1 (4).

¹⁶⁸ ENTSOG Union-wide Security of Supply Simulation Report 2017, S. 28.

¹⁶⁹ VO (EU) 2022/1032 des EP und des Rates v. 29.06.2022 zur Änderung der Verordnungen (EU) 2017/1938 und (EG) Nr. 715/2009 im Hinblick auf die Gasspeicherung, ABl. EU 2022 L 173/17; s. dazu z. B. R. Fleming/M. Guérin, Europe's security of gas supply legislation – a short legal history and latest developments, 42 JENRL (2024), 51 ff.

¹⁷⁰ Art. 6 a – 6 VO (EU) 2017/1938 (Fn. 159).

¹⁷¹ VO (EU) 2019/941 des EP und des Rates v. 5.06.2019 über die Risikovorsorge im Elektrizitätssektor (...), ABl. EU 2019 L 158/1.

¹⁷² VO (EU) 2017/1485 der Kommission v. 2.08.2017 zur Festlegung einer Leitlinie für den Übertragungsnetzbetrieb, ABl. EU 2017 L 220/1.

den Notzustand und den Wiederaufbauzustand des Übertragungsnetzes¹⁷³ beherrscht werden kann.

Mit der VO (EU) 2019/941 werden für den Stromsektor Strukturen übernommen, die zuvor nur im Gasbereich existierten: Zwar war parallel zur Gassicherungsrichtlinie 2004¹⁷⁴ auch die RL 2005/89/EG über Maßnahmen zur Gewährleistung der Elektrizitätsversorgung und von Infrastrukturinvestitionen¹⁷⁵, erlassen worden, die sich aber vor allem mit der Netzinfrasturktur befasste. Auch die Koordinierungsgruppe Strom, der in der Verordnung verschiedene Aufgaben zugewiesen werden, war erst 2012 – um damit deutlich später als das entsprechende Gremium im Gassektor¹⁷⁶ – durch Kommissionsbeschluss eingerichtet worden¹⁷⁷.

Die Verordnung enthält ebenfalls zunächst die Verpflichtung des Stromnetzbetreiberverbands ENTSO-E¹⁷⁸ zur Entwicklung von Krisenszenarien auf regionaler Ebene nach dem Vorbild der Regelungen für Erdgas¹⁷⁹, weiter auf dieser Grundlage die Verpflichtung der nationalen Behörden zur Erstellung von Risikovorsorgeplänen¹⁸⁰, die marktbasierende und nicht-marktbasierende Maßnahmen zur Krisenbewältigung bis hin zu einem „detaillierten Lastabwurfplan“ enthalten müssen. Auch die verschiedenen Krisenstufen sind in Anlehnung an die Gassicherungsverordnung definiert; im Vergleich zur Gassicherungsverordnung fällt dabei insbesondere das Fehlen quantifizierbarer Anforderungen an eine Mindestversorgung auf; besonders geschützte Kundengruppen werden nicht definiert. Weiter sieht die Verordnung sieht erstmals auch in diesem Bereich gegenseitige Hilfsmaßnahmen der Mitgliedstaaten vor, die bei Versorgungskrisen greifen sollen, die von den Netzbetreibern mit den ihnen zur Verfügung stehenden Instrumenten nicht bewältigt werden können.

2. Die Kostenpflichtigkeit der Energiesolidarität

Die Solidarität im Energiesektor unterscheidet sich von anderen Feldern des Unionsrechts dadurch, dass sie stets kostenpflichtig vorgesehen ist: Über Entschädigungen für die Lieferungen sollten die Mitgliedstaaten auf der Grundlage der Gassicherungsverordnung nach zuvor gemeinsam festgelegten Maßstäben verhandeln und bis zum 1.10.2018 bzw. spätestens bis zum 1.12.2018 sog. So-

¹⁷³ VO (EU) 2017/2196 der Kommission v. 24.11.2017 zur Festlegung eines Netzkodex über den Notzustand und den Netzwiederaufbau des Übertragungsnetzes, ABl. EU 2017 L 312/54.

¹⁷⁴ S. o. III. 1. a) mit Fn. 157.

¹⁷⁵ RL 2005/89/EG des EP und des Rates v. 18.01.2006 über Maßnahmen zur Gewährleistung der Elektrizitätsversorgung und von Infrastrukturinvestitionen ABl. EU 2006 L 33/22, zu ihr z. B. S. Muter *Goldberg*, The directives regulating security of supply: a snapshot, in: Roggenkamp/Hammer (Hrsg.), *European Energy Law Report V*, 2008, S. 109 (119 ff.).

¹⁷⁶ S. o. III. 1. a) mit Fn. 163.

¹⁷⁷ Kommissionsbeschluss v. 15.11.2012 zur Einsetzung der Koordinierungsgruppe „Strom“, ABl. EU 2012 C 353/2.

¹⁷⁸ S. o. Fn. I. 4. mit Fn. 50.

¹⁷⁹ Art. 5-6 VO (EU) 2017/1938 (Fn. 159).

¹⁸⁰ Art. 10-11 VO (EU) 2017/1938 (Fn. 159).

lidaritätsabkommen abschließen¹⁸¹. Danach können zu diesem Entgelt auch Entschädigungszahlungen gehören, die der hilfeleistende Mitgliedstaat seinen Einwohnern oder Unternehmen gewährt, deren Versorgung er zum Zweck der Hilfeleistung eingeschränkt hat¹⁸². Die VO (EU) 2019/941 sieht entsprechende Regelungen für den Stromsektor vor¹⁸³. Der Abschluss solcher Abkommen ist in der Folge freilich weitgehend unterblieben, das europaweit erste Abkommen wurde erst am 14.12.2020 zwischen Deutschland und Dänemark abgeschlossen¹⁸⁴, ein Abkommen zwischen Deutschland und Österreich folgte im Dezember 2021.¹⁸⁵ Die Umsetzung dieser Entschädigungsregeln in Deutschland erscheint dabei angreifbar: Nach § 12 Abs. 1 EnSiG¹⁸⁶ sind grundsätzlich keine Entschädigungszahlungen für Versorgungseinschränkungen vorgesehen, wenn diese Einschränkung zur Sicherung der Versorgung in Deutschland erfolgt¹⁸⁷; anderes gilt dagegen nach § 12 Abs. 2 EnSiG, wenn die Versorgung zum Zweck der Unterstützung anderer EU-Mitgliedstaaten eingeschränkt wird – wobei offensichtlich die Erwartung besteht, dass der unterstützte EU-Mitgliedstaat die zur Begleichung dieser Ansprüche nötigen Aufwendungen erstatten wird¹⁸⁸. Der deutsche Gesetzgeber rechtfertigt diese unterschiedliche Behandlung mit dem Verweis auf die nationale Solidargemeinschaft, die in der ersten Konstellation den Verzicht auf Entschädigungen rechtfertige und die im zweiten Fall nicht betroffen sei¹⁸⁹. Dabei wird aber erkennbar missachtet, dass das Unionsrecht nun auch eine europäische Solidarität im Energiesektor vorsieht. Die Regelung, die angesichts der kaum abschätzbaren Kosten für solche Entschädigungsleistungen andere Mitgliedstaaten von der Inanspruchnahme von Solidaritätslieferungen aus Deutschland abschrecken dürfte, kann mit guten Gründen als Verstoß gegen den Grundsatz der Unionstreue (Art. 4 Abs. 3 EUV) eingeordnet werden¹⁹⁰.

¹⁸¹ Art. 13 Abs. 13 der Verordnung; s. zu ihren Inhalten die Empfehlung (EU) 2018/177 der Kommission v. 2.02.2018 zu den in die technischen, rechtlichen und finanziellen Regelungen zwischen den Mitgliedstaaten für die Anwendung des Solidaritätsmechanismus gemäß Art. 13 der VO (EU) 2017/1938 [...] aufzunehmenden Elementen, ABl. EU 2018 L 32/52.

¹⁸² S. m.w.N. J. Gundel, Solidarität der Mitgliedstaaten bei Versorgungskrisen im Energiebinnenmarkt – Europäische Lösungsansätze für die Frage der Versorgungssicherheit, RdE 2019, 1 (5 ff.).

¹⁸³ Art. 15 VO (EU) 2019/941 (Fn. 171).

¹⁸⁴ Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung des Königreichs Dänemark über Solidaritätsmaßnahmen zur Gewährleistung der sicheren Gasversorgung, verfügbar unter www.bmwk.de.

¹⁸⁵ Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der österreichischen Bundesregierung, vertreten durch die Bundesministerin für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie, über Solidaritätsmaßnahmen zur Gewährleistung der sicheren Gasversorgung v. 2.12.2021, BGBl. II S. 1222.

¹⁸⁶ § 12 EnSiG wurde neu gefasst durch das Zweite Gesetz zur Änderung des Energiesicherungsgesetzes und anderer energiewirtschaftlicher Vorschriften v. 25.11.2022, BGBl. I S. 2102.

¹⁸⁷ S. H. Eibenstein, Energieversorgungssicherheit und das System öffentlich-rechtlicher Ersatzleistungen: Entschädigungsansprüche im Fall einer zur Versorgungssicherheit erfolgenden Gasregulierung, NWVBZ. 2023, 133 ff.

¹⁸⁸ Dazu K. Reiter, in: Gerstner/Gundel (Hrsg.), Energiesicherungsrecht, 2024, § 12 EnSiG Rn. 16.

¹⁸⁹ BT-Drs. 20/4328 v. 8.11.2022, S. 6.

¹⁹⁰ Dazu J. Gundel, in: Gerstner/Gundel (Hrsg.), Energiesicherungsrecht, 2024, § 2a EnSiG Rn. 16.

3. Die Rechtsgrundlagen des unionsrechtlichen Krisenmanagements: Insbesondere das Verhältnis von Art. 194 und Art. 122 AEUV (Fragen 21-23)

a) Der Einsatz von Art. 122 AEUV in der Energiekrise

In der durch den Überfall Russlands auf die Ukraine ausgelösten jüngsten Energiekrise¹⁹¹ mussten die vom EU-Gesetzgeber vorbereiteten Solidaritätsinstrumente im Gas- und Stromsektor allerdings nicht zum Einsatz kommen. Stattdessen hat die EU-Kommission nach der im Mai 2022 erfolgten Veröffentlichung ihrer Strategie RepowerEU¹⁹² vor allem Vorschläge für Rechtsakte auf der Grundlage der Notfallkompetenz des Art. 122 AEUV vorgelegt,¹⁹³ womit diese Kompetenznorm erstmals intensiver genutzt wurde. So wurde im August 2022 eine auf Art. 122 AEUV gestützte Verordnung zur Senkung der Gasnachfrage in den Mitgliedstaaten erlassen;¹⁹⁴ sie sah eine freiwillige Senkung des Gasverbrauchs durch die Mitgliedstaaten um 15% vor, die sich hierzu „nach besten Kräften“ bemühen sollten¹⁹⁵. Die zunächst auf den 31.03.2023 befristete Geltung der Regelung wurde durch eine weitere Ratsverordnung¹⁹⁶ auf den 31.03.2024 verlängert, im Anschluss wurde sie durch eine auf der Grundlage von Art. 194 AEUV erlassene Empfehlung des Rates an die Mitgliedstaaten¹⁹⁷ ersetzt. Gegen diese Verordnung hat Polen eine noch anhängige Nichtigkeitsklage¹⁹⁸ erhoben, wobei die Klagebegründung die praktischen Vorteile des Einsatzes von Art. 122 AEUV deutlich macht: Sie stützt sich vor allem darauf, dass in die nationale Entscheidung über den Energiemix eingegriffen werde,

¹⁹¹ Dazu aus deutscher Perspektive z. B. P. Sikora, Grundstrukturen der Energieversorgungssicherheit, NJW 2023, 2989 ff.; M. Ludwigs, Gewährleistung der Energieversorgungssicherheit in Krisenzeiten, NVwZ 2022, 1086 ff.; C. Kreuter-Kirchhof, Europäische Energiesolidarität – Wege zur Vorbeugung und Bewältigung schwerer Energieversorgungskrisen in der EU, NVwZ 2022, 993 ff.; R. Sinder/T. Wiertz, Energieversorgungssicherheit, NVwZ 2023, 552 ff.

¹⁹² Kommissionsmitteilung „REPowerEU-Plan“, COM (2022) 230 final v. 18.05.2022; s. zuvor die Kommissionsmitteilung „REPowerEU: gemeinsames europäisches Vorgehen für erschwinglichere, sichere und nachhaltige Energie“, COM (2022) 108 final v. 8.03.2022.

¹⁹³ Dazu J. Gundel, Der Beitrag des Energiebinnenmarktes zur Sicherung der Energieversorgung, RdE 2023, 209 ff.; M. Ludwigs, Unionsrechtliche Rahmensetzungen zur Bewältigung der Energiekrise – Die EU-Notfallkompetenz auf dem Prüfstand, EuZW 2023, 506 ff.; ausführlich E. Neumann/D. Römling, Die Notstandskompetenz des Art. 122 Abs. 1 AEUV und ihre Bedeutung für die Energieversorgungskrise, EuR 2024, 93 ff.

¹⁹⁴ VO (EU) 2022/1369 des Rates v. 5.08.2022 über koordinierte Maßnahmen zur Senkung der Gasnachfrage, ABl. EU 2022 L 206/1.

¹⁹⁵ Art. 3 i.V.m. Art. 6 bis 8 der Verordnung. Verpflichtend wurde die Senkung in diesem Umfang erst dann, wenn die Kommission entweder aus eigener Initiative oder auf Antrag von fünf Mitgliedstaaten, die die Alarmstufe nach Art. 11 Abs. 1 lit. b der Gassicherungsverordnung ausgerufen haben, dem Rat die Ausrufung des „Unionsalarms“ vorschlägt und der Rat diese Ausrufung in der Folge beschließt, s. Art. 4-5 der VO (EU) 2022/1369; dazu B. Scholtka, Das neue Gassparen in der EU, EuZW 2022, 785 f.

¹⁹⁶ VO (EU) 2023/706 des Rates v. 30.03.2023 zur Änderung der VO (EU) 2022/1369 zwecks Verlängerung des Nachfragesenkungszeitraums für Maßnahmen zur Senkung der Gasnachfrage und zur verstärkten Berichterstattung und Überwachung in Bezug auf die Umsetzung dieser Maßnahmen, ABl. EU 2023 L 93/1.

¹⁹⁷ Empfehlung 2024/2476 des Rates v. 25.03.2024 betreffend die Fortsetzung koordinierter Maßnahmen zur Senkung der Gasnachfrage, ABl. EU C 2024/2476 v. 27.03.2024.

¹⁹⁸ Anhängige Rs. C-675/22 (Polen/Rat).

jedoch findet sich dieser Vorbehalt nur in Art. 194 Abs. 2 AEUV, nicht aber in Art. 122 AEUV.¹⁹⁹

Weiter wurde im Oktober 2022 auf der Grundlage von Art. 122 AEUV die VO (EU) 2022/1854²⁰⁰ erlassen, die zwei Mechanismen der Gewinnabschöpfung vorsah: Nach dem ersten, als „Obergrenze für Markterlöse“ bezeichneten Mechanismus²⁰¹ wurden die Einnahmen von Stromerzeugern mit niedrigen Produktionskosten auf 180 Euro/MWH begrenzt; die Differenz ging an die Mitgliedstaaten und muss von ihnen „gezielt zur Finanzierung von Maßnahmen verwendet werden, mit denen Stromkunden unterstützt werden, um die Auswirkungen der hohen Strompreise auf diese Kunden abzumildern.“²⁰² Auf einer zweiten Ebene sieht die VO (EU) 2022/1854 in ihren Art. 14-18 einen Solidaritätsbeitrag durch alle im Energiesektor tätigen Unternehmen vor, deren Gewinn mehr als 20% über dem Durchschnitt der vier Vorjahre liegt.²⁰³ Auf diesen Übergewinn haben die Mitgliedstaaten einen Solidaritätsbeitrag von mindestens 33% zu erheben²⁰⁴; sie müssen diese Einnahmen für Maßnahmen zur Bekämpfung der Energiekrise einsetzen, sind hierbei aber nicht auf eine Unterstützung der Energieverbraucher beschränkt²⁰⁵. Getroffen wurden durch diese Regelung vor allem Stromerzeuger, die nicht unter Einsatz von Gas produzierten, denen aufgrund des europäischen Systems der Strompreisbildung aber die hohen Gaspreise dennoch zugutekamen. Auch gegen diese Verordnung, deren Regelungen überwiegend befristet bis zum 31.12.2023 galten, sind Nichtigkeitsklagen anhängig.²⁰⁶

Im Dezember 2022 folgte ein weiteres auf Art. 122 AEUV gestütztes Verordnungspaket, das u. a. eine Verordnung zur Bündelung des Gaseinkaufs enthielt²⁰⁷; die Geltung dieser Verordnung wurde zunächst um ein Jahr verlängert²⁰⁸, im Anschluss wurde die Regelung in die auf der Grundlage

¹⁹⁹ Selbst wenn die Schranke einer Berührung des nationalen Energiemix auch im Rahmen des Art. 122 AEUV anwendbar wäre – wofür freilich angesichts des Textbefunds nichts spricht –, wäre eine solche Berührung wohl zu verneinen, weil die Verordnung an die im Mitgliedstaat vorhandenen Speicher bzw. den dortigen bisherigen Gasverbrauch anknüpft und damit die nationalen Weichenstellungen zum Energiemix zugrunde legt.

²⁰⁰ VO (EU) 2022/1854 des Rates v. 6.10.2022 über Notfallmaßnahmen als Reaktion auf die hohen Energiepreise, ABl. EU 2022 L 261 I/1.

²⁰¹ Art. 6-11 der VO (EU) 2022/1854.

²⁰² Art. 10 Abs. 1 der VO (EU) 2022/1854.

²⁰³ Art. 15 der VO (EU) 2022/1854.

²⁰⁴ Art. 16 Abs. 1 der VO (EU) 2022/1854.

²⁰⁵ S. die Auflistung der möglichen Verwendungen in Art. 17 der VO (EU) 2022/1854.

²⁰⁶ Rs. T-802/22 (ExxonMobil Producing Netherlands und Mobil Erdgas-Erdöl/Rat); Rs. T-759/22 (Electrawinds Shabla South EAD/Rat); Rs. T-775/22 (Vermilion Energy Netherlands u. a./Rat); Rs. T-795/22 (Vermilion Exploration and Production Ireland u. a./Rat); Rs. T-803/22 (Petrogas E&P Netherlands/Rat); s. noch unter III. 3. c).

²⁰⁷ VO (EU) 2022/2576 des Rates über mehr Solidarität durch eine bessere Koordinierung der Gasbeschaffung, zuverlässige Preis-Referenzwerte und den grenzüberschreitenden Austausch von Gas v. 19.12.2022, ABl. EU 2022 L 335/I, s. bereits o. I. 5. b) mit Fn. 84.

²⁰⁸ VO (EU) 2023/2919 des Rates v. 21.12.2023 zur Änderung der VO (EU) 2022/2576 hinsichtlich der Verlängerung ihrer Geltungsdauer, ABl. EU L 2023/2919 v. 29.12.2023 bis 31.12.2024 verlängert.

von Art. 194 AEUV erlassene Neufassung der Gasbinnenmarktverordnung integriert.²⁰⁹ Daneben wurde eine weitere Verordnung zur Etablierung eines Gaspreisdeckels beim Gaseinkauf²¹⁰ erlassen, deren Geltung ebenfalls verlängert wurde²¹¹. Die größte Aufmerksamkeit hat allerdings die in diesem Paket enthaltene Verordnung mit Regelungen zur Beschleunigung des Ausbaus der erneuerbaren Energien in den Mitgliedstaaten²¹² gefunden, weil die mit den Regelungen verbundene Aufwertung dieser Vorhaben zugleich zu Lasten des bisher auch im Unionsrecht betonten Natur- und Artenschutzes ging²¹³. Diese letzte Verordnung wurde in ihrer Geltung teils auf der Grundlage von Art. 122 AEUV verlängert²¹⁴, teils wurden die Regelungen auf der Grundlage von Art. 194 AEUV durch eine Änderung der Erneuerbare-Energien-Richtlinie²¹⁵ in Dauerrecht überführt.

Den in der jüngsten Energiekrise auf der Grundlage von Art. 122 AEUV erlassenen Verordnungen ist gemeinsam, dass sie inhaltlich eher Richtlinien- als Verordnungscharakter tragen, den Mitgliedstaaten also nur einen äußeren Rahmen setzen. Solche „hinkenden Verordnungen“, deren Wirkung entgegen dem Ausgangskonzept der EU-Verordnung von einer mitgliedstaatlichen Umsetzung abhängt, finden sich in jüngerer Zeit allerdings häufiger im Unionsrecht²¹⁶.

²⁰⁹ Art. 42 ff. der VO (EU) 2024/1789 des EP und des Rates v. 13.06.2024 über die Binnenmärkte für erneuerbares Gas, Erdgas und Wasserstoff (...), ABl. EU L 2024/1789 v. 15.07.2024; s. auch o. I. 5. b) mit Fn. 85.

²¹⁰ VO (EU) 2022/2578 des Rates v. 22.12.2022 zur Einführung eines Marktkorrekturmechanismus zum Schutz der Bürgerinnen und Bürger der Union und der Wirtschaft vor überhöhten Preisen, ABl. EU 2022 L 335/45.

²¹¹ VO (EU) 2023/2920 des Rates v. 21.12.2023 zur Änderung der VO (EU) 2022/2578 hinsichtlich der Verlängerung ihrer Geltungsdauer, ABl. L 2023/2920 v. 29.12.2023.

²¹² VO (EU) 2022/2577 des Rates v. 22.12.2022 zur Festlegung eines Rahmens für einen beschleunigten Ausbau der Nutzung erneuerbarer Energien, ABl. EU 2022 L 335/36; dazu *M. Kment/C. Maier*, EU-Notfallrecht für ein beschleunigtes Genehmigungsverfahren zugunsten erneuerbarer Energien, ZUR 2023, 323 ff.; *R. Ruge*, Die EU-Notfallverordnung – Revolution im EU-Umweltrecht?, NVwZ 2023, 870 ff.; *K. Schobener*, Umsetzung der EU-Notfallverordnung für erneuerbare Energien – Erleichterungen für Genehmigungen in Go-to-Gebieten, et 4/2023, 57 f.

²¹³ Dazu z. B. *C. Sobotta*, REPowerEU – Quo vadis Naturschutz, NVwZ 2023, 1609 ff.

²¹⁴ VO (EU) 2024/223 des Rates v. 22.12.2023 zur Änderung der VO (EU) 2022/2577 zur Festlegung eines Rahmens für einen beschleunigten Ausbau der Nutzung erneuerbarer Energien, ABl. EU L 2024/223; die betroffenen Bestimmungen gelten danach nun bis zum 30.06.2025.

²¹⁵ S. die RL (EU) 2023/2413 des EP und des Rates v. 10.10.2023 zur Änderung der RL (EU) 2018/2001 (...) im Hinblick auf die Förderung von Energie aus erneuerbaren Quellen (...), ABl. EU L 2023/2413 v. 31.10.2023; s. ergänzend die Empfehlung 2024/1343 der Kommission v. 13.05.2024 zur Beschleunigung der Genehmigungsverfahren für Projekte in Bereich der erneuerbaren Energien und der damit zusammenhängenden Infrastruktur, ABl. EU L 2024/1343 v. 21.05.2024; dazu *F. Sailer/M. Deutinger*, Die Beschleunigung des Erneuerbaren-Ausbaus durch die EU-Notfall-Verordnung und die novellierte Erneuerbare-Energien-Richtlinie, EurUP 2024, 70 ff.; *D. Römling*, Die Novelle der Erneuerbare Energien-Richtlinie (EU) 2018/2001 (RED III), EurUP 2024, 237 ff.

²¹⁶ Zu diesem Phänomen s. *J. Gundel*, in: Häde/Nowak/Pechstein (Hrsg.), Frankfurter Kommentar zu EUV/GRC/AEUV, 2. A. 2023, Art. 288 AEUV Rn. 15 ff.; *M. Ruffert*, in: Calliess/Ruffert (Hrsg.), EUV/AEUV, 6. A. 2022, Art. 288 AEUV Rn. 22; s. auch EuGH, 12.04.2018 – Rs. C-541/16 (Kommission/Dänemark), EuZW 2018, 735 m. Anm. *J. Gundel*.

b) Die Abgrenzung der Anwendungsbereiche von Art. 122 und Art. 194 AEUV

Die Abgrenzung der Notfall-Rechtsgrundlage des Art. 122 AEUV von der allgemeinen Energie-Rechtsgrundlage des Art. 194 AEUV hat in diesem Feld zentrale Bedeutung, weil auf der Grundlage des Art. 122 AEUV der Rat mit qualifizierter Mehrheit²¹⁷ ohne Beteiligung des Europäischen Parlaments entscheidet, während im Bereich des Art. 194 AEUV das ordentliche Gesetzgebungsverfahren anwendbar ist und bei steuerlichen Maßnahmen im Energiesektor gemäß Art. 194 Abs. 3 AEUV sogar Einstimmigkeit erforderlich ist; auch der Energiemix-Vorbehalt des Art. 194 AEUV findet sich bei Art. 122 AEUV nicht.

Gerade diese geringen Anforderungen des Art. 122 AEUV sind zwar in Krisensituationen hilfreich, weil sie rasche Entscheidungen ermöglichen; sie sprechen aber zugleich dafür, Art. 122 AEUV künftig nur als Grundlage für tatsächliche Eilmaßnahmen zu nutzen, weil die geringeren Verfahrensanforderungen nur durch einen solchen Notfallbezug zu rechtfertigen sind.²¹⁸ Die Etablierung von normativen Notfallregimes ist dagegen seit der Einführung des Art. 194 AEUV auf diese Bestimmung zu stützen²¹⁹. Dementsprechend galten die in der Energiekrise auf der Grundlage des Art. 122 AEUV erlassenen Rechtsakte sämtlich nur befristet²²⁰; unbefristet geltende Weichenstellungen wie die Änderung der Gassicherungsverordnung²²¹ oder der Erneuerbare-Energien-Richtlinie²²² wurden auf der Grundlage von Art. 194 AEUV erlassen.

c) Insbesondere: Die Abschöpfung von „Übergewinnen“ auf der Grundlage von Art. 122 AEUV

Die Grenze der Tragfähigkeit der Rechtsgrundlage des Art. 122 AEUV ist wohl bei Gewinnabschöpfungsmaßnahmen erreicht, wie sie in der Ratsverordnung

²¹⁷ S. Art. 16 Abs. 3 EUV.

²¹⁸ S. J. Gundel, in: Häde/Nowak/Pechstein (Hrsg.), Frankfurter Kommentar zu EUV/GRC/AEUV, 2. A. 2023, Art. 194 AEUV Rn. 12 f.; ders. Solidarität der Mitgliedstaaten bei Versorgungskrisen im Energiebinnenmarkt – Europäische Lösungsansätze für die Frage der Versorgungssicherheit, RdE 2019, 1 (2 f.); im Ergebnis ebenso Calliess, in: Cremer/Pielow (Hrsg.), Probleme und Perspektiven im Energieumweltrecht, 2009, S. 20 (41); K. Talus/P. Aalto, Competences in EU Energy Policy, in: Leal-Arcas/Wouters (eds.), Research Handbook on EU Energy Law and Policy, 2017, S. 15 (23); s. auch D. Hackländer, Die allgemeine Energiekompetenz im Primärrecht der Europäischen Union, 2010, S. 167 ff.; S. Schulenberg, Die Energiepolitik der Europäischen Union, 2009, S. 182 ff.; D. Thimig, Die rechtlichen Möglichkeiten zur Errichtung eines europäischen Erdgasnotstandprogramms, 2008, S. 99 f.; B. Kempen, in: Streinz (Hrsg.), EUV/AEUV, 3. A. 2018, Art. 122 AEUV Rn. 3.

²¹⁹ Für die Möglichkeit der Abstützung auch normativer Regeln auf Art. 122 AEUV dagegen D. Hattenberger, in: Schwarze/Hatje (Hrsg.), EU-Kommentar, 4. A. 2019, Art. 122 AEUV Rn. 3; U. Häde, in: Calliess/Ruffert (Hrsg.), EUV/AEUV, 6 A. 2022, Art. 122 AEUV Rn. 2.

²²⁰ S. auch M. Ludwigs, Unionsrechtliche Rahmensetzungen zu Bewältigung der Energiekrise, EuZW 2023, 506 (509 f.).

²²¹ S. o. III. 1. a) mit Fn. 169.

²²² S. o. Fn. 215.

(EU) 2022/1854²²³ vorgesehen waren.²²⁴ Das gilt nicht bereits deshalb, weil es sich um steuerliche Maßnahmen handelt – Art. 122 AEUV enthält anders als Art. 192 und Art. 194 AEUV keinen entsprechenden Vorbehalt²²⁵ –, sondern beruht darauf, dass es sich nicht um zur Krisenbekämpfung notwendige Maßnahmen handelt.²²⁶ Durch diese Abschöpfung wird weder Energieknappheit gemindert noch ist sie ein notwendiges Mittel zur Senkung der Energiepreise, nachdem die Mitgliedstaaten hierfür auch Haushaltsmittel einsetzen können. Die Abschöpfung dient zur Generierung von Haushaltsmitteln für die Mitgliedstaaten und entspricht dem Gerechtigkeitsempfinden in Bezug auf „Krisengewinne“; beides gehört aber nicht zu den mit der Notfallkompetenz des Art. 122 AEUV unter den dort geltenden erleichterten Voraussetzungen verfolgbaren Zwecken.

Wenn die angegriffenen Regelungen der auf Art. 122 AEUV gestützten EU-Notfallverordnung durch den EuGH als primärrechtswidrig eingestuft werden sollten – die Zulässigkeit der anhängigen Individualklagen²²⁷ ist allerdings sehr zweifelhaft²²⁸, so dass eine solche Klärung wohl im Vorabentscheidungsverfahren erfolgen müsste –, hat dies allerdings nicht notwendig Konsequenzen für die entsprechenden nationalen (Umsetzungs-)Regelungen: Diese wurden von

²²³ S. o. III. 3. a) mit Fn. 200.

²²⁴ Dazu *M. Valta*, Unions- und verfassungsrechtliche Rahmenbedingungen für eine Übergewinnsteuer am Beispiel des Energiekrisenbeitragsgesetzes, *StuW* 2023, 71 ff.; *T. Hackemann/D. Weiler*, Vereinbarkeit der EU-NotfallVO mit Art. 122 Abs. 1 AEUV und mögliche Auswirkungen auf das EU-EnergieKGB, *ISR* 2023, 70 ff.; *D. Keuper/M. Zeck*, Rechtsunsicherheit durch die neue Übergewinnsteuer im Energiebereich?, *DStR* 2023, 1297 ff.; *J. Möller-Klapperich/C. Rasquin*, Ökonomische und rechtliche Grundlagen einer Übergewinnsteuer, *NJ* 2022, 433 ff.

²²⁵ Zutreffend *M. Ludwigs*, Unionsrechtliche Rahmensetzungen zur Bewältigung der Energiekrise, *EuZW* 2023, 506 (509); *M. Valta*, Unions- und verfassungsrechtliche Rahmenbedingungen für eine Übergewinnsteuer am Beispiel des Energiekrisenbeitragsgesetzes, *StuW* 2023, 71 (74); anders *T. Hackemann/D. Weiler*, Vereinbarkeit der EU-NotfallVO mit Art. 122 Abs. 1 AEUV und mögliche Auswirkungen auf das EU-EnergieKGB, *ISR* 2023, 70 (75 f.), die steuerliche Maßnahmen ohne Begründung von Art. 122 AEUV ausnehmen.

²²⁶ Dazu *T. Meickmann*, Unionsrechtliche Grundlagen und Grenzen von Sondersteuern am Beispiel des EU-Solidaritätsbeitrags, *EWS* 2024, 241 (243 f.); *ders.*, Das Steuererfindungsrecht der Europäischen Union, *JZ* 2023, 748 (752); *M. Valta*, Unions- und verfassungsrechtliche Rahmenbedingungen für eine Übergewinnsteuer am Beispiel des Energiekrisenbeitragsgesetzes, *StuW* 2023, 71 (74 f.); *R. Weber*, Die Neuordnung der EU-Wirtschaftsverfassung durch Art. 122 AEUV?, *AöR* 149 (2024), 82 (109); *J. Gundel*, Der Beitrag des Energiebinnenmarktes zur Sicherung der Energieversorgung, *RdE* 2023, 209 (213); anders wohl *M. Ludwigs*, Unionsrechtliche Rahmensetzungen zur Bewältigung der Energiekrise, *EuZW* 2023, 506 (510 f.).

²²⁷ S. o. bei Fn. 206.

²²⁸ Den Maßstab bilden die Zulässigkeitsvoraussetzungen einer Individualnichtigkeitsklage nach Art. 263 Abs. 4, 3. Alt. AEUV, weil die auf der Grundlage von Art. 122 AEUV ohne Parlamentsbeteiligung erlassenen Rechtsakte als Rechtsakte mit Verordnungsscharakter im Sinn dieser Alternative einzuordnen sind. Das Erfordernis der individuellen Betroffenheit nach Art. 263 Abs. 4, 2. Alt. AEUV entfällt damit; die 3. Alternative setzt aber stattdessen voraus, dass keine Durchführungsmaßnahmen erforderlich sind, was hier jedoch der Fall ist, s. *M. Ludwigs*, Unionsrechtliche Rahmensetzungen zur Bewältigung der Energiekrise, *EuZW* 2023, 506 (508). Die Zulässigkeit kann nach der Praxis der Unionsgerichte allerdings auch offengelassen werden, wenn das Gericht die Klage als jedenfalls unbegründet ansieht, s. z. B. *EuG*, 21.12.2022 – Rs. T-187/21 (*Firearms United Network u. a./Kommission*), Tz. 17 f.

den nationalen Gesetzgebern eigenständig erlassen²²⁹ und wären bei Wegfall der unionsrechtlichen Vorgabe nun ohne unionsrechtliche Abschirmung im vollen Umfang am Maßstab des nationalen Verfassungsrechts zu messen²³⁰; sie können dieser Kontrolle aber ggf. standhalten. Zugunsten der Verfassungsmäßigkeit hat inzwischen für die deutsche Umsetzung das BVerfG²³¹ entschieden, ohne auf die unionsrechtlichen Fragen einzugehen; es hat für die Rechtfertigung der Gewinnabschöpfung auf die besondere Situation abgestellt, in der die europäischen Regeln der Energiepreisbildung den betroffenen Energieversorgern exzessive und auch nicht vorhersehbare Gewinne beschert haben. Abgeschlossen ist der Streit damit zwar nicht, weil gegen die deutsche Umsetzungsgesetzgebung auch ein Investitionsschutzverfahren auf der Grundlage des EnCV²³² anhängig ist²³³, das ein in Großbritannien ansässiger²³⁴ Investor anhängig gemacht hat; die vom BVerfG akzeptierten Gründe sprechen aber auch dafür, dass die Gewinnabschöpfung dem investitionsschutzrechtlichen Standard der fairen und angemessenen Behandlung²³⁵ entsprach.

IV. Ausblick

Ein zentrales Problem für das Spannungsfeld von Energieversorgungssicherheit und Energiesolidarität und zugleich auch für den ökologischen Umbau der Energiewirtschaft bleibt die aus Art. 194 Abs. 2 AEUV folgende zumindest faktische Verortung der Entscheidung über den Energiemix auf der Ebene der Mitgliedstaaten. Die Union und die Mitgliedstaaten setzen hier letztlich darauf, dass diese unterschiedlichen nationalen Entscheidungen sich auch ohne eine rechtliche Verpflichtung zur Koordination zu einem sinnvollen Ganzen zusammenfügen, das die Versorgungssicherheit im Binnenmarkt gewährleistet und zugleich die Erreichung der Klimaziele der Union sichert. Die

²²⁹ Nur vereinzelt wird angenommen, dass die nationale Regelung dann ihrerseits verfassungswidrig wäre, weil der nationale Gesetzgeber – im Rückblick unzutreffend – von seiner Verpflichtung zum Erlass ausgegangen sei; hierfür *T. Hackemann/D. Weiler*, Vereinbarkeit der EU-NotfallVO mit Art. 122 Abs. 1 AEUV und mögliche Auswirkungen auf das EU-EnergieKGB, ISR 2023, 70 (79 f.).

²³⁰ Zutreffend *T. Meickmann*, Unionsrechtliche Grundlagen und Grenzen von Sondersteuern am Beispiel des EU-Solidaritätsbeitrags, EWS 2024, 241 (245); s. auch *S. Gerstner/J. Gundel*, Einführung zum Energiesicherungsrecht, in: dies. (Hrsg.), Energiesicherungsrecht, 2024, Rn. 54.

²³¹ BVerfG, 28.11.2024 – 1 BvR 460/23, 1 BvR 611/23, GewArch 2025, 21 = EnWZ 2025, 33 m. Anm. *H. Kahl*.

²³² Zu diesem Investitionsschutzabkommen für den Energiesektor s. o. I. 5. c) mit Fn. 86 ff.

²³³ S. das anhängige Verfahren *Klesch Group Holdings Ltd. und Raffinerie Heide GmbH*, ICSID Case No ARB/23/49; dazu *F. Dörfelt/M. Perkams*, Einstweilige Anordnung gegen die Bundesrepublik Deutschland wegen der Übererlösabschöpfung durch ICSID-Schiedsgericht, ENK-Aktuell 2024, 010401.

²³⁴ Es handelt sich damit nicht um einen nach Unionsrecht unzulässigen Intra-EU-Streit im Sinne der Achmea-Doktrin, s. EuGH (GK), 6.03.2018 – Rs. C-284/16 (Achmea/Slowakei), EuZW 2018, 239 m. Anm. *B. Scholtka* = NVwZ 2018, 723 m. Anm. *J. Gundel*; dazu m.w.N. *F. Germelmann/J. Gundel*, Die Entwicklung der EuGH-Rechtsprechung zum europäischen Verfassungs- und Verwaltungsrecht im Jahr 2018, BayVBl. 2019, 583 (595 f.); erweiternd auf die Anwendung des von der EU und ihren Mitgliedstaaten abgeschlossenen Energiecharta-Vertrages EuGH (GK), 2.09.2021 – Rs. C-741/19 (Republik Moldau/Komstroy LLC), EuZW 2021, 945 m. Anm. *Kuplewatzky*.

²³⁵ Art. 10 Abs. 1 EnCV.

EU-Governance-Verordnung ermöglicht dabei zumindest eine systematische Beobachtung und Kontrolle der Entwicklungen in den Mitgliedstaaten; auch sie verzichtet aber mit Rücksicht auf den Vorbehalt des Art. 194 Abs. 2 AEUV auf zwingende Instrumente.

Welchen Spannungen ein Energiebinnenmarkt mit unterschiedlich ausgerichteten nationalen Entscheidungen zur Wahl der Energieträger im Krisenfall ausgesetzt sein kann, hat die Energiekrise im Gefolge des russischen Überfalls auf die Ukraine gezeigt. Die Geschehnisse haben aber auch deutlich gemacht, dass die Union unter anderem mit Art. 122 AEUV über effektive Instrumente zur Reaktion auf unerwartet auftretende Krisen verfügt, und dass die im Energiebinnenmarkt verfügbaren Reserven mobilisiert werden können, um Krisen im Bereich der Energieversorgung zu beherrschen, die einen einzelnen Mitgliedstaat überfordern könnten.

GREECE

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

The Greek Constitution of 1975, as amended and in force following the four revisions of 1986, 2001, 2008, and 2019, does not contain reference to the principles of energy solidarity and security of energy supply as interpreted and applied by the Court.² However, under the provisions of Article 28 paras. 2 and 3 of the Constitution, EU law forms an integral part of the national legal order and enjoys enhanced formal validity.³ Consequently, the principles of energy solidarity and security of energy supply are also understood as an integral part of the national legal order. In addition, relevant reference has been in the jurisprudence of national courts. However, this reference has not yet been the subject matter of a legal dispute.⁴

Moreover, it is important to make the following observations regarding the Greek Constitution:

A. Principle of energy solidarity

In terms of constitutional provisions:

- (1) Article 25 of the Constitution, as revised in 2001, contains the general rules and principles governing the interpretation and application of funda-

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¹ The replies to questions from sections I and III were prepared by P. Iliopoulos in collaboration with Ek. Iliadou; the replies from section II were prepared by D. Lelovitis and Ek. Iliadou.

² Under Article 19(1) TEU: “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.”

³ E. Venizelos, *Constitutional Law Lessons* (Μαθήματα Συνταγματικού Δικαίου), 2nd edn., Sakkoulas Publications, Athens–Thessaloniki 2021, p. 184. See also Council of State (Plenary Session) 3470/2011.

⁴ Indicatively see: Council of Europe 5th Division, 144/2024, section 10.

mental rights. According to Article 25 para. 4: “The State has the right to require from all citizens to fulfill the duty of social and national solidarity.” Literature suggests that this provision does not constitute a legal basis for additional restrictions on fundamental rights or for the inference of additional constitutional obligations.⁵ However, Article 25 para. 4 should be interpreted in conjunction with the principle of the rule of law, stipulated in Article 25 para. 1,⁶ thereby enriching the interpretation of the individual social guarantees and social rights enshrined in the Constitution.⁷ In this context, Article 25 para. 4 of the Constitution has been invoked by the jurisprudence when assessing the constitutionality of measures adopted during the period of the economic and financial crisis of the 2010s, as follows from the decision of the Council of State (Plenary Session) 668/2012, aiming to establish the constitutionality of restrictions on social benefits. It was also used during the period of the COVID-19 pandemic to establish the constitutionality of measures restricting freedom of movement and assembly, freedom of religion or compulsory vaccination measures.⁸ Moreover, the concept of solidarity can be found on the background of the Council of State decisions No. 185-188/2024, which ruled that the provisions of Article 37 of Law 4936/2022 on the imposition of an extraordinary levy on the excess profits of electricity companies do not contravene the Constitution, since reasons of public interest justify the imposition of similar restrictions on freedom to conduct business.

- (2) Individual manifestations of the principle of solidarity are the *stricto sensu* social rights, such as those guaranteed in Article 21 of the Constitution,⁹ which include the protection of the family, marriage, maternity, childhood, the care for ensuring decent living conditions for all citizens through a system of minimum guaranteed income, special care for families with many children, disabled war and peacetime veterans, war victims, widows and orphans, as well as persons suffering from incurable bodily or

⁵ X. Contiades, A. Fotiadou, Article 25 (Άρθρο 25), in: S. Vlachopoulos, X. Contiades, G. Tasopoulos, *Syntagma*, p. 61, online publication available at: <https://www.syntaxwatch.gr/my-constitution/arthro-25/>

⁶ Article 25 para. 1 of the Greek Constitution stipulates: “1. The rights of the human being as an individual and as a member of society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relationships between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter’s favor, and should respect the principle of proportionality.”

⁷ H. Anthopoulos, Article 25 (Άρθρο 25), in: F. Spyropoulos, X. Contiades, H. Anthopoulos and G. Gerapetritis G. (eds.), *Constitution*, Sakkoulas Publications, Athens–Thessaloniki 2017, p. 693.

⁸ Council of State OL 1762/2023, section 18.

⁹ J. Iliopoulos-Strangas, G. Leventis, ‘Der Schutz der sozialen Grundrechte in der Rechtsordnung Griechenlands’, in: J. Iliopoulos-Strangas (ed.), *Soziale Grundrechte in Europa nach Lissabon*, Nomos–Ant. N. Sakkoulas–Bruylant–facultas.wuv, Baden–Baden–Athen–Brüssel–Wien 2010, pp. 249 ff.

mental ailments, the social right to health, the social right to housing, the protection of people with disabilities, etc. Such guarantees of social rights have a positive sign (*status positivus*) and impose the intervention of the state to provide appropriate protection, the cost of which is socialized and shared among all those who contribute to public burdens.¹⁰ It is noted in this regard that according to theory and jurisprudence, social rights are being treated as fully binding provisions of the Constitution. Although they may not give rise to actionable claims in every case in a manner similar to those that apply to individual – defensive rights (*status negativus*), they limit the legislator, whose choices are subject to constitutional review.¹¹

- (3) Special reference should be made to Article 106 para. 1, which stipulates that: “In order to consolidate social peace and protect the general interest, the State shall plan and coordinate economy activity in the Country, aiming at safeguarding the economic development of all sectors of the national economy. The State shall take all measures necessary to develop sources of national wealth in the atmosphere, in underground and underwater deposits, and to promote regional development and to further especially the economy of mountainous, insular and frontier areas.” Article 106 para. 3 stipulates that: “[...] the law may regulate the acquisition by purchase of enterprises or the compulsory participation therein of the State or other public agencies, in the event these enterprises are of the nature of a monopoly or are of vital importance to the development of sources of national wealth or are primarily intended to offer services to the community as a whole.” As generally acknowledged, these provisions establish the possibility of state intervention in the economy, for the sake of pursuing public interest objectives,¹² among which one could include the respect of the requirements stemming from the principle of energy solidarity. Moreover, the same provisions make special reference to the utilization of national energy resources as a parameter of the state’s growth dynamic.
- (4) Article 5 para. 1 of the Greek Constitution stipulates that: “All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution [...]” This provision, together with the aforementioned provisions of Article 106 and the right to property under Article 17 of the Constitution, are part of the core of the

¹⁰ Ibid., pp. 281–284.

¹¹ E. Iliadou, ‘Justitiabilität der sozialen Grundrechte und Gewährleistungen sozialen Inhalts? Zum Stand der aktuellen Rechtsprechung in Griechenland’, in: J. Iliopoulos-Strangas (ed.), *Die Zukunft des Sozialen Rechtsstaates in Europa*, SIPE, Bd. 10, NomosStämpfli Verlag–Ant. N. Sakkoulas, Baden-Baden 2015, pp. 47–66.

¹² G. Dellis, Article 106 (Άρθρο 106), in: S. Vlachopoulos, X. Contiades, G. Tassopoulos, *Syntagma*, p. 11, online publication available at: <https://www.syntagmawatch.gr/my-constitution/arthro-106/>

so-called economic constitution. The above, combined with the principle of the social state and with the individual social rights result in the choice of the system of the “social market economy,” as stated by the case law (Council of State B’ 1410/2022). The regulatory scope of Article 5 para. 1 and the correlation of general freedom with the rights of others,¹³ as explicitly mentioned in the provision, is considered as being able to establish the prospect of its utilization as a means for the co-assessment of energy solidarity parameters.

The above constitutional provisions could be used in interpretative correlation with the principle of protection of the value of the human being (Article 2 para. 1 of the Constitution) for establishing obligations related to the principle of energy solidarity. Such an approach is followed, for example, in the decision of the Pireaus’ Multi-member Court of First Instance No. 953/2024, where on the occasion of disputes regarding the electricity tariff adjustment clause, it was held that any provision imposing strict compliance with the principle of cost-reflectiveness of electricity tariffs is contrary to Articles 2 para. 1, 5 para. 1, 106 para. 3 and 25 para. 3 of the Constitution.

At the level of ordinary legislation, manifestations of the principle of energy solidarity can be found in the individual cases of Public Service Obligations (PSOs), which have been established for the electricity and natural gas sectors under the provisions of Law 4001/2011. The concept of PSOs corresponds to the similar concept of “public service obligations” found in secondary EU law¹⁴ as well as to the concept of Services of General Economic Interest (SGEI) under Article 106(2) TFEU. The PSOs provided for under Greek law may be grouped into two main groups, PSOs imposed for social reasons and PSOs imposed to strengthen social cohesion and ensuring that all consumers receive product and services of equal quality. Thus, Articles 57 and 58 of Law 4001/2011 establish the procedure for selecting a Supplier of Last Resort and a Supplier of Universal Service, while para. 1 of Article 55 of Law 4001/2011 provides that by presidential decree issued upon a proposal from the Minister of Environment and Energy and notified to the European Commission, other PSOs may be designated for the purpose of protecting vulnerable customers, of ensuring security, including security of supply, regular supply, quality and supply prices, as well as for ensuring environmental protection, including energy efficiency, energy from renewable sources and climate protection.

Based on the above provisions, until today, the following services have been classified as PSOs: the special tariffs applied to families with three or more

¹³ E. Iliadou, Article 5 para. 1 (Άρθρο 5 παρ. 1), in: S. Vlachopoulos et al., *Syntagma*, p. 37, online publication available at: <https://www.syntagmawatch.gr/my-constitution/arthro-5-paragraphos-1/>

¹⁴ See, for example, Article 9 of Directive (EU) 2019/944.

children,¹⁵ the Social Housing Tariff (“KOT”) for the protection of vulnerable consumer groups and more specifically for low-income individuals, the unemployed, the disabled and individuals in need of mechanical support,¹⁶ the Solidarity Services Tariff applied to legal entities of public law of a welfare nature, ecclesiastical-charitable institutions and specially certified, non-profit private law entities that provide social care services,¹⁷ as well as the uniform tariff for consumers of non-interconnected islands and isolated microgrids,¹⁸ who are required to enjoy energy prices identical to those applied to the interconnected system covering mainland Greece and the interconnected islands (similarly to the “postage stamp method”). In the same context, with Article 105 of Law 4821/2021, a new Article 58B was added to Law 4001/2011, entitled “Ensuring uniform pricing of electricity consumers.” According to this article, ensuring uniform pricing of electricity consumers in the country constitutes a Public Service Obligation (PSO), for which compensation is payable.¹⁹ Furthermore, with para. 3 of Article 61 of Law 4986/2022, a new Article 58C, has been added to Law 4001/2011. According to which, “Offsetting risk stemming from energy crises constitutes a Public Service Obligation (PSO).” The market participants responsible for the provision of such PSO, as well as any other relevant matter are defined by decision of the Minister of Environment and Energy. However, to date, no ministerial decision has been issued under this specific provision and it remains unknown at this time whether it will be utilized.

Moreover, it must be noted that the provisions of Articles 46–54 of Law 4001/2011 on the protection of consumers in the electricity and natural gas sectors are also based on the idea of energy solidarity. The protective function of these provisions goes beyond the general rules on consumer protection (Law 2251/1994, GG A’ 191). Special reference must be made in this regard to the rules of Article 52 for the protection of vulnerable consumers, which include those affected by energy poverty, the elderly, consumers with serious health problems, as well as those located in remote areas and non-interconnected islands. Similarly, the provisions introducing the institution of Citizen Energy

¹⁵ For the special tariff for large families, see Council of State (Plenary Session) 430/2022, where it is accepted that in view of the special constitutional protection of large families under Article 22 S, in the context of the pursuit of addressing the country’s demographic problem, the abolition of the special tariff for large families and its replacement by the CTO is unacceptable.

¹⁶ See Ministerial Decision D5-IL/B/F29/16027/6-8-10 (Government Gazette B’ 1403) of the Ministry of Interior, as amended and in force.

¹⁷ See Ministry of Interior Decision D5/IL/B/F.1.21/oik.23824/23-12-2013 (Government Gazette B’ 3274), Ministry of Interior Decision APEIL/C/F1.21/441/oik.23609/19-12-2014 (Government Gazette B’ 3545) as well as Ministry of Interior Decision YPEN/DIE/23189/264/9-3-2021 (Government Gazette B’ 987).

¹⁸ See the Ministry of Justice Decision PD5/IL/F1B/12924/13-6-2007 (Government Gazette B’ 1040).

¹⁹ Law 5037/2023 expanded RAE’s competence to include Water and Waste, renaming it to RAAEY (Regulatory Authority for Waste, Energy and Water).

Communities, as included in Articles 47A to 47IB²⁰ of Law 4001/2011, should also be classified as being based on the idea of energy solidarity.

B. Security of energy supply

As mentioned above, there is no explicit reference to the principle of security of energy supply in the Greek Constitution. However, Article 23 para. 2 of the Constitution stipulates that: “The right to strike shall be subject to the specific limitations of the law regulating this right in the case of public servants and [...] all types of enterprises of a public nature or of public benefit, the operation of which is of vital importance in serving the basic needs of the society as a whole. These limitations may not be carried to the point of abolishing the right to strike or hindering the lawful exercise thereof.” This provision can be seen as a manifestation of the principle of continuity, which principally applies in the case of public services (in accordance with the functional criterion), a concept which focuses on the provision of goods and services that are important for the whole of society. It should be highlighted that in the past and before the implementation of market liberalization policies for a long period of time from the post-war period and onwards, the energy sector in Greece had been organized according to the system of public monopoly, which corresponded to the concept of public services according to the functional criterion. A key element of this concept is the application of the so-called principles of public services, namely the principles of continuity, neutrality, economy and adaptability.²¹ But even after exiting the concept of public services, it is beyond doubt that such undertakings operating in the energy sector maintained their public benefit character, due to the fact that this characterization relates to the nature of the goods and services provided at each time.²²

Following the liberalization of the electricity and natural gas markets, security of supply issues are extensively regulated at the level of statutory/ordinary legislation. In particular, the following should be mentioned:

- (1) Article 3 of Law 4001/2011 on the Operation of Electricity and Gas Energy Markets, for Exploration, Production and Transmission Networks of Hydrocarbons and other provisions, published in the Government Gazette of Greece, Issue A 179, on August 22, 2011, stipulates the following: “1. The exercise of Energy Activities is under the supervision of the State, which is exercised by the Minister of Environment, Energy and Climate Change and

²⁰ These were added by Law 5037/2023 (GG A' 78)

²¹ E. Spiliotopoulos, V. Kondylis, Handbook of Administrative Law (Εγχειρίδιο Διοικητικού Δικαίου), 16th edn., Nomiki Vivliothiki, Athens 2023, p. 19, footnote 17.

²² Council of State Decision No. 1515/2007.

the Energy Regulatory Authority (RAE)²³ within the framework of their responsibilities and the country's long-term energy planning. The long-term energy planning takes into account the existing and potential energy reserves at national, regional and international level, the inter-community development program for electricity and natural gas networks, the trends of the international energy market and aims to: (a) European internal energy market integration through increased cross-border trade, in order to achieve competitive prices, higher standards of services, improve the efficiency of the sector and at the same time strengthen security of supply and sustainability; (b) secure the country's energy supply and implement a sustainable policy to address climate change and strengthen competitiveness within the single European internal market; (c) the protection of the environment, within the framework of the country's international obligations, [...]; (d) the balanced regional development of the country, with the main objective of integrating isolated networks into the Interconnected System and creating a single national and European internal market; (e) the improvement of the productivity and competitiveness of the national economy and the achievement of healthy competition with the aim of reducing energy costs for all Users and Customers; (f) combating Energy Poverty by formulating the National Action Plan. The long-term energy planning is formulated on a ten-year rolling basis and takes the form of a decision of the Minister of Environment, Energy and Climate Change, which is notified to the competent Standing Committee of the Hellenic Parliament [...]. 2. The State shall ensure the modernization and development of all activities in the energy sector, to ensure, under conditions of healthy competition, the provision of technically reliable and affordable energy to consumers, to combat Energy Poverty and to implement the rules of the liberalization of the electricity market and the Natural Gas market." Furthermore, para. 4 of the same article stipulates that "The Minister of Environment and Energy and RAE shall exercise the powers assigned to them by this law and the acts issued under its authorization in such a way that: [...] (b) all of the country's energy needs are met and the security of supply and the uninterrupted supply of energy are preserved, in accordance with the economically optimal of the available technologies."

- (2) According to Article 12 of Law 4001/2011, issues related to security of supply are extensively regulated. Central responsibilities in this regard are assigned to RAAEY. Besides, the national regulatory authority has decisive powers in relation to the preparation and implementation of the network expansion plans ("development programs") of the natural monopolies, that is, the transmission grid and the distribution network, in accordance with what is defined in Article 14 of the same law.

²³ Already renamed as Regulatory Energy for Waste, Energy and Water (RAAEY).

- (3) Article 73 regulates security of supply issues relating to the National Natural Gas System, providing for the mandatory preparation of an emergency plan to address crisis situations in the relevant market, in accordance with the provisions of secondary EU law, with the aim of ensuring, as far as possible, the supply of Protected Consumers, that is, household consumers connected to the natural gas network.
- (4) Specific responsibilities of the National Electricity Transmission System Operator related to ensuring supply in the electricity market are included in Articles 94 *et seq.* of Law 4001/2011. In this context, the possibility of implementing a capacity adequacy mechanism is established (Article 95), detailed regulations are provided for the control and implementation of investments in the Transmission System, issues of interconnection of non-interconnected islands are regulated, etc.
- (5) Security of supply issues for non-interconnected islands are regulated under Article 133A of Law 4001/2011 as added by Article 46 of Law 5092/2024 (GG A' 33). The model introduced by these provisions is based on the provision of financial compensation through the PSOs Account for the installation and operation of additional generation capacity, when required.
- (6) Specific provisions of Law 4001/2011 further regulate issues of demand management contracts in the context of pursuing security of supply objectives. Among these, the interruptible load service contracts, which are financed through the mechanism of imposing the transitional security of supply fee (Article 143B of Law 4001/2011).²⁴ At this point it should be noted, however, that balancing services are being currently provided within the context of the target model and the relevant balancing market operated by the TSO, as foreseen in Art. 7 of Law 4425/2016.
- (7) The special protective framework for RES, as accepted in the case law of the Council of State, further aims at security of supply, in parallel with the pursuit of climate goals.²⁵

In conclusion, although there is no explicit reference to the principles of energy solidarity and security of energy supply at the constitutional level, it can be accepted that these principles are derived from several provisions of the Greek Constitution. Additionally, in the specific legislation for the electricity and natural gas sectors, following the implementation of the policy of markets liberalization, many specifications of these principles may be identified.

²⁴ See Decision Council of State No. 1146/2024.

²⁵ See Decision Council of State No. 666/2024, para. 8.

Question 2

A. Impact on the general principle of solidarity

The fact that the principle of energy solidarity is recognized by the Court in *OPAL* case as a specific expression of the general principle of solidarity could be interpreted as signifying the intention of the Court to establish a concrete relationship between the two notions in order to come to an essential conclusion regarding the importance of solidarity in EU law.

It should be noted that the general principle of solidarity takes various forms in several policy sectors described in the Treaties. Energy solidarity is not a “unique” beast. The principle of solidarity can be found in many provisions of both the TEU²⁶ and the TFEU,²⁷ to which the General Court had referred and to which the Court also expressly refers in the *OPAL* case. However, the connection made by the Court is considered important in terms of the conclusion it leads to, namely that “the principle of solidarity underpins the entire legal system of the European Union [...] and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.”²⁸

In conclusion, the Court utilized this opportunity to confirm that the principle of solidarity should be viewed as a building block of the Union’s constitutional framework.

B. Energy solidarity as a limit to national sovereignty

Examining the assumption whether energy solidarity should be viewed as a “corrective tool,” which sets limits to national sovereignty, the following

²⁶ As regards the TEU, the Court in para. 39 of the judgement in the case *Germany v Poland*, C848/19 P, EU:C:2021:598 refers to the preamble (“the Member States declare that, by establishing the European Union, they intend to deepen the solidarity between their peoples”) Article 2 TEU, as one of the characteristics of a society founded on the values common to the Member States, and in the third subparagraph of Article 3(3) TEU, according to which the European Union is to promote, *inter alia*, solidarity among Member States. Additionally, it refers Article 21(1) TEU, in accordance to which solidarity is also one of the principles governing the European Union’s external action and, Article 24(2) and (3) TEU, where it is stipulated that it is among the provisions relating to the common foreign and security policy as “mutual political solidarity” among Member States.

²⁷ In the case of the TFEU, beyond Article 194(1), the Court mentions in para. 40 of the judgement Article 67(2) which expressly refers to solidarity between Member States in matters of asylum, immigration and external border controls, and Article 80 TFEU. Furthermore the Court highlight that in Title VIII of Part Three of the TFEU, specifically in Chapter 1 which covers economic policy, Article 122(1) TFEU also refers explicitly to the spirit of solidarity between Member States, which additionally features in Article 222 TFEU, according to which the European Union and its Member States are to act jointly in a spirit of solidarity where a Member State is the object of a terrorist attack or the victim of a disaster.

²⁸ *Ibid.*, para. 41.

must be observed. According to the Court, the principle of energy solidarity governs the whole EU energy policy,²⁹ that is, it is applied during the formulation of energy policy by the Union. To this extent one may argue that the principle of energy solidarity, as a standalone principle, has on the face of it no additional effect on national sovereignty of the Member States beyond the effects of the secondary EU energy legislation, which *inter alia* implements the principle of energy solidarity. More specifically, since the transposition of the EU Directives into the national legal order must comply with not only the letter but also the spirit of such Directives, inevitably, it must also comply with the requirements of energy solidarity as enshrined in such Directives and/or Regulations. To this extent, the impact to national sovereignty is minimal. However, despite the fact that the Member States, in the context of Article 194(2) TFEU still maintain the right to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of their respective energy supply, their national sovereignty is arguably affected to the extent that the national energy policy of each Member State has to take into account the principle of energy solidarity.

After all, energy policy is a sector in which the Member States and the European Union have shared competences.³⁰ According to Article 194 (2) TFEU, this competence can be characterized as a *sui generis* shared competence, considering that the Union legislates following the ordinary procedure aiming to pursue the objectives stipulated in Article 194(1), while the Member States retain exclusive competence over the sectors mentioned and included in the para. 2 Article 194(2). In fact, the exclusive competence of the Member States over the above matters is also preserved when EU environmental policy is being exercised (under Article 191 TFEU). Under Article 192(2)(c), unanimity is required for the adoption of any measure relating to EU environmental policy, which significantly affects a Member State's choice between different energy sources and the general structure of its energy supply. This means that all Member States can only unanimously agree on such measures to be adopted by the Union, thus being allowed to concede part of their national sovereignty on a voluntary basis. An example of an environmental measure adopted with unanimity is the establishment of targets for the decarbonization of the Union by 2050.

In any case, shared competence is exercised under the Treaties under the conditions of Article 4(3) TEU (principle of sincere cooperation), the provisions of Article 5 TEU (principles of conferral, subsidiarity and proportionality), as well as the provision of Article 2(2) TFEU, according to which: "When the Treaties

²⁹ Ibid., para. 47.

³⁰ That is, with regard to the competences of the Union and the Member States in the field of energy, in addition to Article 194 TFEU one must also consider Article 4(2)(i) TFEU.

confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

In conclusion, the principle of energy solidarity somewhat limits the national sovereignty of the Member States beyond the extent it is already limited by the other general principles arising from the Treaties as well as the provisions concerning the exercise of energy policy. Nevertheless, it must be highlighted that both the principle of energy solidarity and the other cited rules occupy the same hierarchical level within the legal order and must be concurrently examined and applied.

C. Energy solidarity as a building block of EU’s constitutional identity

Examining the case C-157/21, one must give particular weight to para. 145, according to which the Union must be able to defend, within the limits of its powers, the values enshrined in Article 2 TEU (including that of the rule of law).³¹

As mentioned by the Court, the principle of solidarity constitutes one of the fundamental principles of EU law, entailing rights and obligations both for the European Union and for the Member States.³² It underpins the entire legal system of the European Union and is closely linked to the principle of sincere cooperation.³³ Given that the principle of energy solidarity is strongly related to the general principle of solidarity (mentioned in Article 2 TEU), it may be seen as a specific expression of the general principle, being a part of the constitutional identity of the EU.

As to its application, the Court established that “the principle of solidarity requires the institutions of the Union, including the Commission, to weigh up the interests involved in the light of that principle, taking into account the interests of both the Member States and the Union as a whole,”³⁴ namely, the interests of the affected Member States shall be taken into account and shall be weighed against the interest of the Union.

³¹ According to Article 2 TEU “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” See V. Skouris, *Demokratie und Rechtsstaat, Europäische Union in der Krise*, Z. H. Beck, 2018

³² *Ibid.*, para. 49

³³ *Ibid.*, para. 41

³⁴ *Ibid.*, para. 53

On the internal and the external nature of the principle of energy solidarity, we are of the opinion that it primarily applies internally but can potentially have some external implications. Taking the example of security of supply, where energy solidarity is applicable according to Article 194 TFEU: On the one hand the internal dimension of security of supply, that is, ensuring the uninterrupted supply of natural gas consumers, and on the other hand the external dimension, that is, in a scenario involving the supply of natural gas from third countries, such as in the *OPAL* case, whereby an international agreement could potentially be affected by the principle of energy solidarity.

Question 3

Regarding the potential “tension” (internal contradiction) between the four objectives of Article 194(1) TFEU, it may be argued that there does not seem to be such a risk in general, but this cannot be ruled out in a specific case. In such a case, the policy drawn up at Union level will have to balance any conflicting objectives, as will the Court in any case brought before it. The Court shall apply in its interpretation the provision of “general application” of Article 7 TFEU, that is, application to all its fields of action, according to which “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.”

Regarding the potential legal consequences of the principle of solidarity in relation to the Green Transition³⁵ and the relevance of human rights and social criteria, we are of the opinion that the principle of solidarity may potentially trigger such legal effects. Namely, an element of the Green Transition is also the promotion of Renewable Energy Sources (RES), which is one of the objectives of Article 194(1), TFEU. In the current status of things, Green Transition is a high priority objective for the Union and the Member States, albeit other objectives are pursued concurrently and fundamental social and individual rights continue enjoying protection. Nevertheless, because climate change is a major threat to the continuation of human existence, Green Transition gains increased weight and leads to a further balancing of any conflicting goals. To the extent that issues of protection of fundamental individual and social rights are raised, the Green Transition should also be “just,” *inter alia* by ensuring that the residents of a Member State or region are not unduly or overly impacted by the measures adopted.

³⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions “The European Green Deal” of 11 December 2019, COM/2019/640 final.

In this context, the provisions on the protection of social rights and the protection of human rights contained in the Treaties are expected to be utilized to ensure that the Green Transition is at the same time a Just Transition. In particular, the TEU provides that the Union shall establish, inter alia, a highly competitive social market economy³⁶ and combat social exclusion and discrimination.³⁷ The TFEU provides that the Union has shared competence in “social policy, for the aspects defined in this Treaty,”³⁸ the Union shall adopt measures to ensure the coordination of the employment policies of the Member States (Article 5(2) and may take initiatives to ensure coordination of Member States’ social policies.³⁹ Finally, the Union has competence to undertake actions to support, coordinate or supplement the action of the Member States in seven named areas, among which is the area of protection and improvement of human health.⁴⁰

With regard to human rights, the TEU provides, on the one hand, that the values on which the Union is founded include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities,⁴¹ and, on the other hand, that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights⁴² and that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”⁴³

Question 4

Greece has not (so far) experienced any such tensions with the two neighboring EU Member States, Italy and Bulgaria. On the contrary, there is close cooperation with both countries, both in terms of electricity and natural gas. The following are indicative.

Regarding electricity, Greece is interconnected with Italy and Bulgaria. Furthermore, on 15.12.2020, the coupling of the Day-Ahead Market of Greece with the European Day-Ahead Market took place at the border of Italy (Single Day-Ahead coupling).⁴⁴ This was followed by the coupling of the Greek and Bulgarian Day-Ahead markets 11.05.2021 and the Intra-day Markets of Greece,

³⁶ Article 3(3) TEU.

³⁷ Article 3(3) TEU.

³⁸ Article 4(2)(b) TFEU.

³⁹ Article 5(3) TFEU.

⁴⁰ Article 6 TFEU.

⁴¹ Article 2 TEU.

⁴² Article 6(1) TEU.

⁴³ Article 6(3) TEU.

⁴⁴ RAAEY Decision Nr. 1574/2020 (Government Gazette B’ 5505/14.12.2020).

Italy and Slovenia with the Successful implementation of Complementary Regional Intraday Auctions (CRIDAs) between Greece-Italy-Slovenia on 21.09.2021. Finally, on 29.11.2022, the integration of Greek borders (GR-IT and GR-BG) to the XBID and continuous intraday trading was implemented.

As regards the cross-border transfer of natural gas, the Greek-Italian relationship on this matter is unproblematic and has mostly to do with TAP (Trans Adriatic Pipeline). As for Bulgaria, in 2009 the construction of a natural gas pipeline was agreed between the two States, IGB (Interconnector Greece Bulgaria), which allows bidirectional flow of natural gas. Apart from Greece, the IGB pipeline aims to enhance the security of supply of Bulgaria (initially) and Romania (subsequently) with natural gas from the Caspian Sea and the Middle East transported via the TAP pipeline.⁴⁵ Finally, it should be noted that on 18.01.2024 a Memorandum of Understanding (MoU) on energy policy matters⁴⁶ was signed between Greece and Bulgaria.

Question 5

As regards the procedure of adopting secondary EU legislation (“measures”) in sectors, to which shared competence is exercised, such as the energy sector and the environmental sector,⁴⁷ the following must be observed. Decisions concerning the four objectives of Article 194(1) TFEU are adopted under the “ordinary legislative procedure,”⁴⁸ that is, by majority (for the European Parliament by a majority of the votes cast⁴⁹ (“simple majority”), and for the Council by a qualified majority,⁵⁰ that is, a reinforced majority). On the contrary, for the three areas of Article 194(2), subpara. 2 TFEU, in which the Member States have exclusive competence, unanimity is required in the case the Member States decide that a matter falling within those three areas should be dealt at the level of the Union.

⁴⁵ On this matter see C. Iliopoulos, *Aspects of European Energy Law* (Ζητήματα Ευρωπαϊκού Δικαίου Ενέργειας), Ant. N. Sakkoulas, Athens, 2014, pp. 221–224.

⁴⁶ Based on the Memorandum of Understanding between the two countries, it is sought to:

- Increasing the transmission capacity of national electricity and natural gas systems, as well as the construction and expansion of hydrogen transmission networks.
- The optimization of renewable energy and hydrogen production in the wider Southeastern Europe region, aiming for a sustainable and predictable market. This will be done in cooperation with transmission system operators and regulators.
- The advancement of the digitization process of the electricity networks for the management and balancing of the electricity systems of the two countries.
- The promotion of joint projects of EU and regional interest, with the aim of transitioning to a climate-neutral economy.

⁴⁷ Article 4(2)(e) and Article 4(2)(i) TFEU.

⁴⁸ As stipulated in Article 194(2) subpara. 1, TFEU.

⁴⁹ Article 231 TFEU.

⁵⁰ Article 238 TFEU.

If a Member State considers that it has been wronged by a specific decision of an EU institution concerning one or more areas of Article 194(1) TFEU, for example, because the constitutional, economic, geographical or social particularities of that specific Member State would justify an exemption (derogation) or the granting of a transitional period until the full application of the measures, it has the right to bring actions or proceedings before the General Court⁵¹ or before the Court of Justice,⁵² requesting, one or more of the following: invalidity due to violation of the principle of solidarity⁵³ and the principle of sincere cooperation⁵⁴ or the principle of proportionality⁵⁵ or the principle of equality, not accepting a decision of a common denominator (there should be equal treatment of the similar and unequal treatment of the dissimilar).⁵⁶ The same applies if a Member State considers that it has been wronged by another Member State in the above context.

Based on the above, the principle of proportionality together with the principle of energy solidarity should always be considered when adopting secondary EU legislation concerning energy. Nevertheless, in order to achieve the Just and Green Transition, an appropriate balance ought to be struck between the individual national interests and the Union's goals. Arguably, the principle of equality is also applicable in the same context and will therefore be an important factor which will contribute to taking into account the particularities of each Member State. It should be very difficult to adopt a measure of uniform application in the EU, while objective criteria justifying the granting of an exemption (partial or full) to a Member State (that is, different treatment) can be invoked.

In fact, it can be argued that the long-established practice of Member States to agree to a full or a time-limited exemption of a Member State from specific EU legislation,⁵⁷ also constitutes a strong indication that the particularities of individual Member States shall also be taken into account in the future.

⁵¹ Article 256 TFEU.

⁵² Article 259 TFEU.

⁵³ Article 194 TFEU.

⁵⁴ Article 4(3) TEU.

⁵⁵ Article 5(1) TEU.

⁵⁶ See Article 4(2)(a), TEU, "The Union shall respect the equality of the Member States before the Treaties and their national identities inherent in their fundamental political and constitutional structure, which include regional and local self-government."

⁵⁷ For example 'Under EU effort-sharing legislation, Poland was permitted to increase its emissions by 14% compared with 2005 levels by 2020 and now needs to achieve a 7% reduction by 2030' – [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698766/EPRS_BRI\(2021\)698766_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698766/EPRS_BRI(2021)698766_EN.pdf)

Question 6

A. Shared competence and jurisprudence

Article 2(2) TFEU, as discussed, is applicable in the four objectives laid out in Article 194(1) TFEU, which are pursued under shared competence. It follows from this provision, among other things, that the Member States exercise their competence to the extent that the Union has not exercised its own, and therefore the EU is entitled to exercise its competence first in the four areas of Article 194(1) TFEU. Indeed, the EU has been exercising its competence, in the energy sector, by adopting secondary legislation from 1996 and 1998⁵⁸ until today. In the same context, the Commission has also adopted decisions. All the decisions and secondary legislation are subject to review by the General Court and/or Court of Justice.

As to the question of whether energy policy is now primarily exercised by the EU and not by the Member States, the answer seems to be affirmative. However, the legality of this development should always be judged by the case law of the Court to date. The decision of the Court in the *OPAL* case, is indicative. It required that the EU institutions (including the Commission), when taking “measures” within their competence, to conduct an analysis of the interests involved in the light of energy solidarity, taking into account the interests both of the Member States and the EU. As already noted, the EU pursues energy policy within the framework of Article 194(1) TFEU and 194(2) subpar. 1, while the Member States retain the exclusive right to pursue energy policy pursuant to Article 194(2) subpara. 2.

Two additional judgments of the Court, as well as the Order of the Vice-President of the Court, highlight a tendency of affirming some clear limits. The limits established are the same limits provided by the Treaty, that is, there should be no interference of the Member States rights regarding their “reserved” areas of energy policy competence.

(1) C-594/18P of 22.09.2020 (*Hinkley Point*)

Within the dispute addressed by the *Hinkley Point* decision, the Commission did not call into question the right of the Member States under Article 194(2) TFEU to determine its choice between different energy sources (including nuclear energy). On the contrary, by expressly invoking this provision, this right was confirmed. Most notably, it was not the Commission that attempted to question the aforementioned right, but it was a Member State (Austria).

⁵⁸ The First Energy Package, adopted between 1996 and 1998, introduced a first liberalization of national energy markets.

(2) C-121/21R – Application for interim measures under Article 279 TFEU

It should be noted that the Court did not ultimately issue a judgment on the case because the Czech Republic, by a relevant request, informed the Court that, in accordance with Article 147(1) of the Rules of Procedure, it waived any claim for the resolution of the dispute in question, following an amicable agreement with the Republic of Poland. Nevertheless, this does not deduct from the importance of some interesting points of the Order, which should be kept in mind.

The Order initially stipulates that the Court hearing an application for interim relief may order an interim measure only if the following three conditions are cumulatively met: (a) when it is established that the granting such a measure is justified, *prima facie*, in fact and in law (*fumus boni iuris*), (b) this measure is urgent, in the sense that it is necessary in order to avoid serious and irreparable damage to the interests of the applicant, and (c) where appropriate, the interests involved have been also weighed up by the Court.⁵⁹

In this particular case, the *fumus boni iuris*⁶⁰ and urgency⁶¹ were easily established. Regarding the weighing up of interests,⁶² the following must be noted. The Republic of Poland put forward three main legitimate interests which, in its view, justified its contested decisions. Those interests were of environmental, economic and social nature.⁶³ On the facets of Poland's legitimate interest, the Order provided the necessary analysis and concluded that "the weighing up of the interests involved must favour the granting of the interim measures sought by the Czech Republic."⁶⁴

Bringing the above into the context of whether energy policy can predominantly be exercised under shared competence or whether there can be a purely national energy policy, it must be noted that the interim measures in this case concerned a dispute between Member States. Such disputes must be resolved in the appropriate, established fora and according to the relevant procedure. The resolution of a dispute between Member States cannot be considered as an over-extension of the competence or intervention of the Union, in areas where Member States are entitled to exercise their national policy. In the present case, the Vice-President of the Court proceeded to weigh up the interests of the two Member States involved and pleaded in favor of the granting of the interim measures sought, by drawing, *inter alia*, some important conclusions.⁶⁵

⁵⁹ Para. 34.

⁶⁰ Paras. 40–52.

⁶¹ Paras. 53–79.

⁶² Paras. 80 ff.

⁶³ Paras. 83–88.

⁶⁴ Para. 95.

⁶⁵ Para. 92

In conclusion, the above case demonstrates the principle that balancing shall always remain essential when conflicting interests exist within the EU, whether this relates to conflicting goals of the Union or of the Member States.

(3) C-157/21 – *Poland v Parliament and Council*

The Court confirmed the competence of the European Union to adopt the contested Regulation on the basis of Article 322(1)(a) TFEU (para. 63–189) and rejected all the grounds of appeal (paras. 190–363), stating, *inter alia*, that “The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.”⁶⁶

It follows from the decision that the Court confirmed its position regarding the values of Article 2 TEU (including the principle of the rule of law), which it formulated in the *OPAL* case. More specifically, the Court indicated that values such as the rule of law form “the foundation of the European Union and its legal order.”⁶⁷ Similarly in the *OPAL* case, the Court had stated 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 one of the fundamental principles of EU law.”⁶⁸

B. Delineating the limits of competences

The areas of Article 194(2), subpara. 2 TFEU fall within the exclusive competence of the Member States. This was confirmed indirectly, yet clearly by the *OPAL* judgment, where the Court, interpreting the principle of solidarity in the field of energy, expressly stated that it does so in the context of Article 194(1) TFEU.⁶⁹ On any occasion, it is essential to highlight that the legal question of whether the principle of solidarity could also apply as a limiting factor to the Member States’ competence stipulated in Article 194(2) subpara. 2 was not raised before the Court for its consideration in the *OPAL* case. Nevertheless, in our opinion, the principle of solidarity cannot be used as a tool to limit the exclusive competence of the Member States, stipulated in Article 194(2) subpara. 2 TFEU. A distinction shall be drawn between (a) a factual case falling under Article 194(1) TFEU, as for instance in the *OPAL* case where there was a limitation of the capacity useable on a specific pipeline by dominant undertakings and (b) a Member State’s right to determine the conditions for exploiting its

⁶⁶ Para. 145.

⁶⁷ Para. 146

⁶⁸ Para. 38

⁶⁹ Paras. 37, 38, 39, 47.

energy resources, its choice between different energy sources and the general structure of its energy supply, under Article 194(2) TFEU. Germany's "exclusive competence" under Article 194(2), subpara. 2 was not limited by the *OPAL* judgment, as it could and still can determine the conditions for exploiting of its own energy resources, choose between different energy sources and choose the general structure of its energy supply.

This interpretation is also supported by the fact that the European Council Conclusions have often included the political position of the Heads of State and Government regarding the exclusive competence of the Member States in the aforementioned three areas of Article 194(2), subpara. 2 TFEU.⁷⁰

The concluding remark, following the cases presented, is the following: the Union is indeed particularly active in the exercise of energy policy within the framework of Article 194(1) TFEU. However, it cannot be suggested that the recent case-law of the Court of Justice contributes to or indicates an "indirect" extension of the competence of the European Union to include the three areas of Article 194(2), subpara. 2 TFEU, areas in which the Member States retain their exclusive competence.

Finally, as already mentioned, there is always the possibility that all Member States voluntarily decide to "concede" part of their national sovereignty, in case they unanimously decide on a matter of "reserved" competence. An example of this is the decision to increase the participation of RES in the mix for the year 2030, where a unanimous decision⁷¹ affected the "choice between different energy sources" for the production of electricity (e.g. coal/lignite, oil, natural gas, nuclear energy, RES), as well as the "general structure of energy supply" of the Member States.

C. Council Regulation (EU) 2022/2576 as an example of exercising energy policy

One of the issues raised is whether the adoption by the Council Regulation (EU) 2022/2576 indicates that the principle of energy solidarity ultimately leads to the exercise of shared competence by the Union *par excellence*. As mentioned, it is a fact that the Union is particularly active in the exercise of energy policy. Nevertheless, the EU exercises the shared competence conferred on it by the Treaties in a lawful manner. The Member States are by no means prevented from taking initiatives in matters where the Union has not exercised the shared

⁷⁰ Indicatively see para. 47 of European Council Conclusions '23/24 MARCH 2006 PRESIDENCY CONCLUSIONS', 18.05.2006, 7775/1/06 REV 1 and para. 3 of European Council Conclusions '23/24 OCTOBER 2014 PRESIDENCY CONCLUSIONS', 24.10.2014, EUCO 169/14.

⁷¹ Directive (EU) 2018/2001.

competence. As for the areas in which the Member States have exclusive competence, for example “the right to choose between different energy sources,” they have the right to either act unilaterally or cooperate by unanimously deciding to take adopt measures jointly, if their common interest dictates them to do so. In this specific case, of Council Regulation (EU) 2022/2576, the Member States decided, regarding the supply of natural gas, to adopt this solution temporarily, to deal with the crisis resulting from Russia’s invasion of Ukraine. This is not the only instance where the Member States decided to cooperate because of their common interest. In other areas, such as combatting the COVID-19 pandemic, the Member States decided again to act jointly (joint negotiation for joint purchase at the same price, but payment by each respective Member State of the price for the quantity it received). Drawing an analogy between these two examples and the promotion of interconnections of energy networks, one can argue that the fact the promotion of interconnections is within the shared competences does not imply that there is no room for Member States to take similar initiatives, which are also related to security of supply.

D. Conclusions

Summarizing the above, Article 194 TFEU is divided into two paragraphs. The principle of energy solidarity applies to the four areas (objectives) of Article 194 (1) TFEU, as accepted by the Court in the *OPAL* case, to which shared competence applies. These areas also include ensuring security of energy supply in the Union. According to the decision in the *OPAL* case, the principle of energy solidarity requires that the EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole.

As regards the three sectors of “reserved” competence under Article 194(2), subpara. 2 TFEU, in which the Member States have exclusive competence, the Court’s decision in the *OPAL* indicates that the principle of energy solidarity cannot limit the exclusive competence of the Member States. It is a different scenario when the Member States voluntarily agree to take joint action.

Question 7

As technology evolves and critical energy infrastructure is more and more advanced and digitalized, the requirements for achieving security of energy supply tend to expand. To achieve resilience: awareness, continuous adaptations and a dynamic approach are essential. The readiness to implement corrective and protective measures is a dynamic exercise.

When examining whether the notion of security of supply takes into account constitutional, economic, geographical and political specificities of the respective Member States, and one has to address the emerging and recurring question of competence, namely whether, when defining the concept of security of supply and the measures necessary to achieve this, the EU institutions should take into account the individual specificities of the Member States. When establishing the framework which shall produce a minimum threshold for energy security, it seems less likely that the economic or constitutional specificities of a Member State would be considered. However, the geographical and political specificities would arguably be taken into account, if brought up by the respective Member States. It is within the competence of the EU to establish a framework that will ensure the promotion of minimum rules and policies that establish security of supply within European territory. The Member States are free to suggest more resource-intensive measures to be implemented on pan-European level and at the same time are free to implement additional national measures as long as they do not raise issues of compatibility and interoperability.

Therefore, regarding shared competence, the following must be observed. Security of supply, which falls within the scope of Article 194(1) TFEU is a matter of shared competence. It is in this context that the EU adopted Regulation (EU) 2019/941 and Directive (EU) 2022/2555 (NIS 2 Directive). As set out in the *OPAL* decision, when the Union pursues energy policy measures, for instance, taking measures for security of supply, the individual specificities of the Member States are taken into account and weighed. This is required, as set out above, by the principle of equality and the principle of proportionality. There is no indication that Directive (EU) 2022/2555 has failed to sufficiently take into account the individual specificities of the Member States.

Examining the concepts of security of supply, resilience and risk preparedness in Greece, the following must be observed. Firstly, in the Greek legal order, regarding the “classical” concept of security of supply, according to Article 12, Law 4001/2011, the supervision of the measures necessary to ensure security of supply is the responsibility of the Regulatory Authority for Waste, Energy and Water (RAAEY). With regard to the implementation of measures concerning risk-preparedness in the electricity sector, Article 12, para. 4 of Law 4001/2011 provides that RAAEY is designated as the Competent Authority for the execution of the tasks provided for in Regulation (EU) 2019/941, including the preparation of a risk-preparedness plan.⁷² Furthermore, regarding security of supply, Article 17, Law 4425/2016 is crucial. Based on its provisions a duty is imposed on the Electricity TSO (IPTO) to operate, exploit, maintain and

⁷² Most recent amendments to be seen in RAAEY Decision No. E-120/2024 (GG B 3327/12.06.2024).

develop the National Electricity Transmission System in order to ensure the country's supply of electricity in an adequate, safe, efficient and reliable manner.⁷³ Accordingly, with regard to the security of natural gas supply, in order to address emergency incidents of supply disruption at each natural gas entry point in the country, the measures provided for in the Preventive Action Plan and the Emergency Measures Plan drawn up by RAAEY are applied, after the preparation of the National Risk Assessment Study, in combination with the Regional Risk Assessment Studies.

Specifically, in accordance with Article 73 of Law 4001/2011, by decision of RAAEY, following a recommendation from the operator of the National Natural Gas System (NNGS), DESFA, an emergency plan is established. DESFA takes the necessary measures to address crisis situations, in accordance with the provisions of the Network Code of NNGS and the Emergency Measures Plan.⁷⁴ RAAEY is preparing a Preventive Action Plan for the security of natural gas supply in Greece in accordance with the provisions of Articles 8 and 9 of Regulation (EU) 2017/1938 in cooperation with DESFA, IPTO and the Ministry of Environment and Energy. The Preventive Action Plan aims to lay down appropriate measures to reduce or eliminate risks that may affect the security of natural gas supply in the Country. Regarding the "broadened" concept of security of supply, that is, the securing of energy resources against cyberthreats (EU) 2022/2555 has already been incorporated by Law 5160/2024.

From the above, we conclude that both the Union and Greece are sufficiently resilient and risk-prepared, however taking into account the dangers arising from cyberthreats, they should not become complacent either at the legislative level or at the level of technical implementation of the relevant legislative measures. The levels of resilience and risk preparedness are dynamic as they relate to newly emerging dangers.

Addressing the question whether, especially after the sabotage of Nord Stream (2022), Balticconnector (2023), the concept of energy security should be seen in a wider sense than from the angle of "security of supply," we believe that the "classical" concept of security of supply has now evolved towards a more "expanded" notion, that is, including cybersecurity due to the digitalization of

⁷³ The main vehicle for planning and scheduling the necessary investments by IPTO in this context is the Ten-Year Development Program (TYDP). In accordance with the provisions of Law 4001/2011 and the System Operation Code, the Ten-Year Development Program includes the System development projects for its respective reference period, including the necessary infrastructure for the penetration of RES as well as the schedules and estimated cash flows for their implementation. Furthermore, IPTO prepares, within the framework of security of supply, the capacity adequacy study, which is a special study regarding the adequacy of electrical capacity and adequate power reserve margins, taking into account each time the approved Ten-Year Development Program of IPTO as well as the long-term energy planning of the country.

⁷⁴ See RAAEY Decision No. E-182/2023 (GG B 6453/13.11.2023).

energy infrastructures and the consequent need for prevention and defense against the risks they face. In conclusion, in 2025, the physical protection of an energy source and/or the infrastructures that transport and/or distribute is no longer sufficient, but constant vigilance against “remote” risks and possible malicious attacks against infrastructures is required, along with planning regarding disruptions in the supply of energy sources.

Question 8

Since the establishment of the European Communities, the natural resources of the Member States of the Union (coal, oil, natural gas, nuclear energy) were not sufficient to cover their energy needs. Therefore, Member States were and continue to be obliged to import such resources from third countries thereby developing relations with the countries of origin of these energy resources and the countries of transit. The issue of International Agreements and Foreign Policy of the Member States and the EU became prominent. More specifically, two agreements were signed with these states. The first, entitled Energy Charter Treaty (hereafter ‘ECT’), was signed in 1994 between the EU and its Member States, on the one hand, and Russia and several former Soviet Union (USSR) States, on the other. Further Signatories and Contracting Parties to the Treaty were added subsequently. The ECT is a multilateral agreement that entered into force in 1998 and contains, among other things, provisions on investment protection, dispute resolution, transit and trade in the energy sector.⁷⁵ Of course, after Russia’s invasion of Ukraine, relations with Russia have been disrupted, even to the point of imposing sanctions and significantly reducing natural gas supplies from Russia. Recently, with the two decisions adopted on 30 May 2024, the Council of the European Union decided on the withdrawal of the European Union and Euratom from the ECT.⁷⁶

The second, entitled the Treaty Establishing the Energy Community, was signed in October 2005 in Athens and entered into force in July 2006. The Treaty was signed between, on the one hand, the EU and its then Member States and, on the other hand, non-EU Members that were or are candidates to become members of the EU, namely the Western Balkan countries Albania, Bosnia and Herzegovina, Croatia, Montenegro, the Former Yugoslav Republic of Macedonia (FYROM),⁷⁷ Kosovo, Bulgaria, and Romania. Today, the EU (represented by the European Commission) and 9 other neighboring countries make up the Energy Community. Albania, Bosnia and Herzegovina, Kosovo,

⁷⁵ For details, see C. Iliopoulos, ‘International Energy Law’, *European Politeia Journal* 3/2009, pp. 583–610.

⁷⁶ Council Decision (EU) 2024/1638 and Council Decision (EU) 2024/1677.

⁷⁷ Since 2018 referred to as North Macedonia.

North Macedonia, Montenegro, and Serbia have been part of the Energy Community since it was established, with Georgia (2017), Moldova (2010) and Ukraine (2011) joining later.⁷⁸ Bulgaria, Croatia, and Romania were already part of the Energy Community before joining the EU. The purpose of this Treaty is to create a single electricity and natural gas market on the European continent regardless of whether the candidate countries join the EU or not.

It is worth noting that the aforementioned Treaties should be characterized as “mixed,” because they were signed by both the Member States and the EU, which means that both the States and the Union consider themselves competent, but without determining, in accordance with their established practice in other areas, for which issues the Union is competent and for which the Member States are competent. The European Council, the EU’s highest political body, has played and continues to play an important role in making the political decisions that have led to the signing of the above Treaties and their development from the beginning until today. This body has repeatedly and explicitly expressed the position that the European Energy Policy must be supported by the EU’s foreign policy, while also emphasizing the need to diversify sources, suppliers and routes.⁷⁹

The foreign policy, therefore, which aims at external security of supply, ultimately also serves internal security of supply, namely solidarity between Member States, as defined in Article 194(1) TFEU and in the general provisions on shared competence, as well as in the case law of the ECJ. Consequently, in our view, in the context of the EU exercising its foreign policy, the concepts of energy solidarity and security of supply are inextricably linked to each other. As regards the Projects of Common Interest (hereafter ‘PCIs’), they are regulated by Regulation (EU) 347/2013 of the European Parliament and of the Council. The PCIs are included in a list drawn up and updated every two years by the Commission on the basis of specific and objective criteria. Regulation (EU) 2022/869, as amended, has established a framework for the development and interoperability of European Union (EU)-wide energy infrastructure priority corridors and areas, bringing them in line with the European Green Deal. The PCIs, as identified by Delegated Regulation (EU) 2024/1041, can be classified into three categories: PCIs within a Member State, PCIs between two or more Member States, and PCIs between a Member State and a Third State.⁸⁰ With regard to the principle of energy solidarity and its relationship with

⁷⁸ Armenia, Norway, and Turkey take part as Observers.

⁷⁹ On this matter see C. Iliopoulos, *Aspects of European Energy Law*, Ant. N. Sakkoulas, Athens 2014, pp. 21–58.

⁸⁰ It must be clarified that there is always the possibility for Member States to proceed in the building of energy infrastructure in cooperation with third countries without applying for the project to be listed as PCI and to be co-funded by the European Union. Such an example is TAP, which transports Azerbaijani gas to Europe via Turkey, Greece, Albania, and Italy.

European foreign policy, in particular with regard to PCIs, it should be noted that the European Commission takes into account, when assessing applications for inclusion in the relevant list, the impact that specific projects are expected to have on one or more Member States. Given that PCIs primarily serve the objectives of Article 194(1) TFEU and must, *inter alia*, have a cross-border impact on at least two EU Member States or between an EU Member State and a Member State of the European Economic Area,⁸¹ it follows that the principle of energy solidarity must also be applied when selecting them by the European Commission. In fact, when a PCI serves the inflow or outflow of energy between an EU Member State and a third country, then it functions as tool of the external energy policy of the EU and/or one or more Member States. Furthermore, especially after Russia's invasion of Ukraine, European foreign policy relating to energy is gaining even greater importance. A manifestation of this has been, for instance, the signing of Memorandum of Understanding "on a Strategic Partnership in the Field of Energy" between EU and Azerbaijan on 18 July 2022. The Commission has long supported the expansion of the Southern Gas Corridor as a major contribution to secure, reliable and predictable natural gas supplies in South Eastern Europe and, potentially, also in the Western Balkans, via the Trans Adriatic Pipeline (TAP), enhancing the diversification of energy sources and reducing the dependency from Russian gas.⁸²

Question 9

The Energy Union strategy⁸³ upon its announcement was a milestone for the EU's Energy Policy as it approached energy policy in a new spirit, combining it with Climate Policy and established five different dimensions which harmonically pursue not only the Union's energy goals, but also help towards achieving environmental considerations. In this context, Regulation (EU) 2018/1999 was adopted with an aim to ensure that the EU's Energy Union Strategy on the dimensions of energy security, internal energy market, energy efficiency, decarbonization and research, innovation and competitiveness is implemented and coordinated coherently in order to ensure that the Energy Union achieves its objectives, in particular the targets and objectives of the 2030 policy framework for climate and energy in line with the Paris Agreement on climate change.

⁸¹ Article 4(1)(c)(iii) of Regulation (EU) No. 347/2013.

⁸² See Press release, accessible at: https://neighbourhood-enlargement.ec.europa.eu/news/eu-and-azerbaijan-enhance-bilateral-relations-including-energy-cooperation-2022-07-18_en

⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, 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 */

The above framework did not change the fact that security of supply, under Article 194(1) TFEU remains a matter of shared competence. Nevertheless, in the case of natural gas, the responsibilities arising in the context of the shared competence for security of supply have been further delineated by the provisions of Regulation (EU) 2017/1938. In particular, with Article 1 of the Regulation it is stipulated that its provisions “aim to safeguard the security of gas supply in the Union by ensuring the proper and continuous functioning of the internal market in natural gas (‘gas’), by allowing for exceptional measures to be implemented when the market can no longer deliver the gas supplies required, including solidarity measure of a last resort, and by providing for the clear definition and attribution of responsibilities among natural gas undertakings, the Member States and the Union regarding both preventive action and the reaction to concrete disruptions of gas supply.”

Article 3 of the Regulation establishes a governance model regarding the attribution of responsibilities for natural gas security of supply, while Article 4 presents a form of coordination by establish a “Gas coordination group” (hereafter ‘GCG’). Under the governance scheme suggested, there are three levels of competence (“three-level approach”), that is, the security of gas supply shall be the shared responsibility of natural gas undertakings, Member States, through their competent authorities, and the Commission, within their respective areas of activity and competence. Article 3(4) provides that “when implementing the measures provided for in this Regulation, the competent authority shall establish the roles and responsibilities of the different actors concerned in such a way as to ensure a three-level approach which involves, first, the relevant natural gas undertakings, electricity undertakings where appropriate, and industry, second, Member States at national or regional level, and third, the Union.” At the same time, the GCG composed of representatives of the Member States, in particular representatives of their competent authorities, as well as the Agency for the Cooperation of Energy Regulators (hereafter ‘the Agency’), ENTSOG and representative bodies of the industry concerned and those of relevant customers, is expected to (a) be consulted and (b) to assist the Commission on the issues stipulated in Article 4(2) which relate to security of supply of natural gas.

When attempting to evaluate the design and effectiveness of the governance model established under Regulation (EU) 2017/1938, one is inclined to argue that on the face of it, it seems like a sufficiently clear and “logical” model, given that it foresees preventive actions, that is, an organized model for ensuring that natural gas security of supply disruption shall not occur and reactive actions, should there still be a security of supply situation. The provision of a specific role for natural gas undertakings is arguably a logical consequence of the new reality, that is, the liberalization attempt of the formerly monopolistic markets.

Nevertheless, one has to examine why this governance model was “bypassed” after the outbreak of the war between Russia and Ukraine and a different model was followed by adopting Council Regulation (EU) 2022/2576. From a legal point of view, the different legal bases of these two Regulations should be mentioned. Regulation (EU) 2017/1938 was issued on the basis of Article 194(2), while Regulation (EU) 2022/2576 was issued on the basis of Article 122(1) TFEU, a provision which stipulates the Union’s prerogatives in case of economic emergencies. In our view, the two different legal bases when seen in conjunction with the provisions included in the respective Regulations, point towards the reasons behind the adoption of a different “governance model” in the latter scenario, where excessive prices and intra-day volatility threatened the consumers’ ability to procure natural gas. In essence, an unforeseen need arose for the Union to act “differently,” yet quickly and in a spirit of solidarity to ensure that the EU’s economy was not severely affected. The particular “emergency situation” was seen as requiring temporary rules and measures on (a) the expedited setting up of a service allowing for demand aggregation and joint gas purchasing by undertakings established in the Union; (b) secondary capacity booking and transparency platforms for LNG facilities and for gas storage facilities; and (c) congestion management in gas transmission networks.⁸⁴

Understanding the different situations that the two aforementioned regulations were intended to address is essential when evaluating the current state of security of supply from the governance perspective. In our view, the existing governance model of Regulation (EU) 2017/1938 is both sufficient and coherent. Nevertheless, the possibility cannot be precluded that, when necessary, the Union may be required to take the “leading role” in extreme conditions, as was the case with Regulation (EU) 2022/2576. This is an option which, as mentioned, is already foreseen by the Treaties. Retaining however at the national level a significant degree of competence regarding security of supply – under the coordination provided by the existing governance regime – can be important for additional reasons. In particular, the energy policy is a significant aspect of the Member States’ foreign policy. A particular Member State might have various fields of cooperation with third countries outside the EU and energy cooperation, even gas supply, can be now or in the future a significant aspect of the relationship between the two countries. Any benefits conferred to one (or more) Member State(s) by the cooperation with a third country, under this Member State’s foreign policy, are benefits that can be further conferred to other Member State in the spirit of solidarity, for example, in the form of natural gas supply.

In conclusion, we find the existing governance model for the security of supply of natural gas, both as a sufficiently coherent and effective basis. Nevertheless,

⁸⁴ Article 1 of the Council Regulation (EU) 2022/2576.

should any potentially novel scenarios arise which might require the EU to take more initiative, these can always be addressed by adopting temporary measures, as was demonstrated with Regulation (EU) 2022/2576. Energy policy and security of supply have an internal and an external dimension for all Member States, and it is mainly for this reason that the “three-level approach” stipulated in Regulation (EU) 2017/1938 should continue to apply until the Member States decide to improve or amend it, if and when the underlying conditions have significantly changed in a permanent and not a temporary manner.

Section II: Energy solidarity, energy security and green transition

Question 1

1. Introduction

The climate targets set out in the EU’s energy and climate legislation, which have been most clearly defined since the adoption of the Clean Energy Package⁸⁵ (2018–2019), aim to address the problem of climate change, or the climate crisis, which is the most complex systemic problem the entire planet is currently facing. Setting the EU climate targets for 2030, 2040, and 2050 prioritizes fairness and solidarity, addressing climate change as a critical policy objective. Climate change differs from traditional environmental issues due to the global distribution of greenhouse gas emissions, affecting the entire planet and complicating responsibility assignment. The cumulative effect of emissions over decades adds urgency as impacts become evident. Once greenhouse gas concentrations exceed certain thresholds, climate damage becomes irreversible, raising intergenerational justice issues and hindering future generations’ ability to mitigate climate change effects. The unprecedented risks and significant economic implications justify the EU’s climate targets. The European Commission’s subsequent strategy identifies areas needing special protection due to disproportionate exposure to negative impacts, leading to targeted legislation based on fairness and solidarity.

2. Fairness and Solidarity in the Green Transition

The EU’s commitment to Green Transition is rooted not only in its pursuit of a sustainable and climate-neutral future but also in its adherence to the principles of *solidarity* and *fairness*.⁸⁶ Solidarity and fairness are considered to be core

⁸⁵ Commission, *Clean Energy for All Europeans Package*.

⁸⁶ A. Bartenstein, *The Concept of Solidarity: Energy Policy in the European Union*, Baden-Baden, Nomos, 2021.

principles of the EU Green Deal⁸⁷ and are further emphasized in the “Fit for 55”⁸⁸ initiative which pledges to be balanced ensuring that no one is left behind.⁸⁹ Enshrined in the CJEU case law, they are integral to the Energy Transition policy, promoting equity and inclusiveness to support all citizens, especially the vulnerable.

Fairness and solidarity defined

Fairness ensures the just distribution of burdens and benefits associated with the Green Transition, protecting and supporting vulnerable groups. Policies are designed to consider differential impacts across social groups, activities, and regions. *Solidarity* emphasizes mutual support and cooperation among EU Member States to achieve common climate objectives, creating a resilient and sustainable energy system benefiting all citizens. This principle underpins the EU’s approach to an equitable Green Transition.

3. Tools to Achieve Fairness and Solidarity

3.1. Governance tools and legislation

Regulation on the Governance of the Energy Union and Climate Action

Regulation (EU) 2018/1999⁹⁰ (Governance Regulation) Regulation (EU) 2018/1999 sets rules for EU countries to ensure the Energy Union Strategy on energy security, internal energy market, energy efficiency, decarbonization, and research is implemented coherently. It aims to achieve the 2030 climate and energy targets and the Paris Agreement. Member States must develop integrated national energy and climate plans (NECPs) aligned with EU targets. The regulation fosters fairness and solidarity through high coordination among Member States and establishes a robust governance framework with a monitoring system to track progress.

European Climate Law

Regulation (EU) 2021/1119 (European Climate Law)⁹¹ entered into force in July 2021 and made binding the climate neutrality commitment. Regulation (EU) 2021/1119 enshrines the EU’s commitment to achieving climate neutrality by 2050 into legally binding legislation. It sets a binding target of reducing net

⁸⁷ COM(2019) 640 final.

⁸⁸ Commission, *Fit for 55: Delivering the EU’s 2030 Climate Target on the Way to Climate Neutrality*.

⁸⁹ The notion of “Leaving No One Behind” is a core principle of the United Nations’ 2030 Agenda for Sustainable Development, widely recognized and adopted in various EU policy frameworks, which aim to ensure a just and inclusive transition to a sustainable future.

⁹⁰ OJ L 328, 21.12.2018, pp. 1–77.

⁹¹ OJ L 243, 9.07.2021, pp. 1–17. See also Commission, *Climate Law*.

greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. This law mandates that all EU policies contribute to these goals in a socially fair and cost-efficient manner. The European Climate Law ensures that all policies contribute to the climate neutrality goal in a socially fair manner (solidarity).⁹²

Energy Efficiency and Renewable Directives

The EU's regulatory frameworks, such as the Energy Efficiency Directive⁹³ and the Renewable Energy Directive,⁹⁴ incorporate provisions that prioritize fairness and solidarity. These directives mandate Member States to reduce energy poverty and promote equitable access to renewable energy.

Carbon Border Adjustment Mechanism (CBAM)

The CBAM is designed to prevent carbon leakage by imposing a carbon price on imports of certain goods from non-EU countries. This mechanism ensures that imported products pay a similar carbon price as EU products, promoting global emissions reductions and protecting EU industries from unfair competition. It aligns with the principles of fairness and solidarity by ensuring that the costs of climate action are shared globally.

3.2. Financial mechanisms

Just Transition Mechanism

The Just Transition Mechanism (JTM) provides targeted financial and technical assistance to regions and workers most affected by the transition away from fossil fuels.⁹⁵ Implementing the just transition concept, the JTM aims to address socio-economic challenges and facilitate a fair and inclusive transition. Overall, the JTM, ensures that the transition is supported through various financial instruments and advisory services, promoting *solidarity* and *fairness* across the EU. The Just Transition Fund (JTF)⁹⁶ is one of the three pillars of the JTM,⁹⁷ providing financial support to regions and sectors most affected by the transition away from fossil fuels.⁹⁸

⁹² Commission, *Carbon Border Adjustment Mechanism*, (CBAM).

⁹³ Directive (EU) 2023/1791 on Energy Efficiency and Amending Regulation (EU) 2023/955 (recast). OJ L 231, 20 Sept. 2023, pp 1–111. See also Commission, *Energy Efficiency Targets, Directive and Rules*.

⁹⁴ OJ L 2413, 18 Oct. 2023, pp. 1–123.

⁹⁵ Commission, *Just Transition Mechanism*.

⁹⁶ Regulation (EU) 2021/1056 of 24 June 2021 establishing the Just Transition Fund, OJ L 231, 30.06.2021, pp. 1–20. See also Commission, *Just Transition Fund*.

⁹⁷ The other two pillars of the JTM are a budget guarantee under the InvestEU programme and a public sector loan facility.

⁹⁸ See point 3.3. Funding mechanisms.

Social Climate Fund

Established through Regulation (EU) 2023/955,⁹⁹ this fund¹⁰⁰ supports vulnerable households and micro-enterprises in accessing energy-efficient housing and clean heating solutions. It aims to mitigate the social impact of carbon pricing policies and ensure that no one is left behind. The Social Climate Fund aims to enhance equity by tackling economic inequalities and fostering solidarity through a collaborative and inclusive energy transition. This initiative, intricately connected to the Emissions Trading System (ETS), contributes to creating a fairer and more cohesive society, in line with the EU's overarching objectives of justice and sustainability.

3.3. Funding mechanisms

The EU supports the energy transition through several other financial mechanisms aimed at fostering fairness, solidarity, and sustainability. The EU's Cohesion Fund and the European Regional Development Fund (ERDF) reduce economic and social disparities by financing energy projects that benefit the environment and regional development. The Connecting Europe Facility (CEF) enhances resilience among Member States by funding critical infrastructure. The European Investment Bank (EIB) provides loans and financial instruments to support low-carbon energy projects,¹⁰¹ while the InvestEU Programme mobilizes private investment in strategic energy projects. Additionally, Horizon Europe funds research and innovation to accelerate the transition to clean energy, and the LIFE: Clean Energy Transition program backs innovative solutions and best practices in energy efficiency. These combined efforts ensure a coordinated, inclusive, and sustainable approach to Europe's energy future.

4. Protection of Vulnerable Consumers

- **Energy Poverty and Vulnerable Consumers Coordination Group:** Established by Decision (EU) 2022/589,¹⁰² this group serves as a platform for the Commission and Member States to share information, coordinate legislation, and design programs to address energy poverty and support vulnerable consumers.
- **Recommendations on Energy Poverty:** In 2020, the Commission published its first Recommendation on energy poverty, issued as part of the Renovation Wave Strategy, a major initiative encouraging the renovation of private

⁹⁹ OJ L 130, 16.05.2023, pp. 1–51.

¹⁰⁰ Commission, *Social Climate Fund*.

¹⁰¹ Investment Bank, *Energy*.

¹⁰² OJ L 112, 11.4.2022, pp. 67–72.

and public buildings to improve energy efficiency and reduce energy poverty. On 23 October 2023, the Commission published a new Recommendation on energy poverty (C/2023/4080),¹⁰³ together with a guidance document.¹⁰⁴

- **Clean Energy for All Europeans Package**¹⁰⁵: This legislative framework of 2019 includes measures to protect consumers, such as ensuring clear contract information, the right to switch suppliers easily and access to energy comparison tools. In June 2024, the EU introduced significant reforms to the electricity market through the Electricity Market reform (Directive (EU) 2024/1711¹⁰⁶ and Regulation (EU) 2024/1747¹⁰⁷), published in June 2024, and the revised gas market legislation strengthen consumer rights and protection..
- **The Energy Poverty Advisory Hub**: The Energy Poverty Advisory Hub (EPAH)¹⁰⁸ is the leading EU initiative aiming to eradicate energy poverty. It stands as the premier EU initiative dedicated to eliminating energy poverty.
- **Energy Performance of Buildings and Energy Efficiency**: The revised Energy Performance of Buildings Directive¹⁰⁹ (EU/2024/1275), effective as of May 2024, mandates that EU Member States include plans to reduce energy poverty in their National Building Renovation Plans.¹¹⁰
- **Energy Efficiency**: The updated Energy Efficiency Directive¹¹¹ (EU/2023/1791), significantly enhances efforts to address energy poverty and empower consumers with a broad array of impactful measures. Revenue from the extension of the EU Emissions Trading System (ETS) to buildings and transport will support these efforts through the Social Climate Fund.¹¹² Furthermore, each EU country must achieve a portion of its energy savings targets specifically among vulnerable customers and those affected by energy poverty.

5. Solidarity in Times of Scarcity

The EU has established mechanisms to ensure that vulnerable groups, such as households and hospitals, receive necessary energy supplies during crises.

¹⁰³ Commission Recommendation (EU) OJ L, 2023/2407.

¹⁰⁴ SWD(2023) 647.

¹⁰⁵ Commission, *Clean Energy for All Europeans Package*.

¹⁰⁶ OJ L 2024/1711.

¹⁰⁷ Regulation (EU) 2024/1747 OJ L2024/1747.

¹⁰⁸ *Energy Poverty Advisory Hub*..

¹⁰⁹ OJ L, 2024/1275, 8.05.2024.

¹¹⁰ Commission, *National Building Renovation Plans and Zero-Emission Buildings*..

¹¹¹ OJ L 231, 20.09.2023, pp. 1–111.

¹¹² See point 3.2. Financial mechanisms.

- **Regulation (EU) 2017/1938**¹¹³ (Regulation on Security of Gas Supply): Introduces a solidarity mechanism activated during extreme gas crises to ensure access to gas for protected customers. It requires EU countries to make necessary cross-border arrangements and involves the Gas Coordination Group¹¹⁴ for monitoring and information exchange.
- **Financial instruments and projects:** the Connecting Europe Facility (CEF)¹¹⁵ and the InvestEU Programme,¹¹⁶ fund critical infrastructure and energy projects to enhance resilience and solidarity among EU Member States.
- **Community Energy for Energy Solidarity (CEES)**¹¹⁷: Analyzes successful community energy initiatives to tackle energy poverty and create replicable toolkits for the EU. It aims to adopt energy efficiency measures, support schemes, and empower community leaders.¹¹⁸

These mechanisms, complemented by financial instruments and collaborative projects outlined in previous sections, ensure that the EU's principles of fairness and solidarity are upheld during energy crises, protecting vulnerable consumers and fostering a united approach to energy security. While these initiatives reflect the EU's commitment to solidarity and fairness during energy crises, it will take time to determine if their governance and implementation are truly effective.

6. Emergency Measures during the Energy Crisis

In response to the energy crisis, the EU implemented emergency measures under Article 122 TFEU to secure energy supplies while maintaining climate objectives. This legal basis allows for exceptional measures during severe economic difficulty or natural disasters, underpinning solidarity and fairness among Member States.

Key measures include:

- **Regulation (EU) 2022/2578:** Introduced a market correction mechanism and price cap to prevent excessive gas pricing.
- **Regulation (EU) 2022/1032:** Ensured gas storage requirements for winter demand.
- **Regulation (EU) 2022/1369:** Aimed at reducing energy consumption in buildings to lower costs and carbon emissions.

¹¹³ See Regulation (EU) 2024/1789, OJ L, 2024/1789, 15.07.2024.

¹¹⁴ See 2006/791/EC OJ L 319, 18.11.2006, pp. 49–50.

¹¹⁵ Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility, OJ L 249, 14.07.2021, pp. 38–81.

¹¹⁶ Commission, *InvestEU Programme*..

¹¹⁷ Commission, *Community Energy for Energy Solidarity (CEES) Project*.

¹¹⁸ See point 5. Protection of Vulnerable Consumers.

These regulations were part of the REPowerEU¹¹⁹ plan,¹²⁰ which sought to enhance the resilience of the natural gas market and reduce the EU's dependence on external energy sources. The REPowerEU plan,¹²¹ launched in May 2022, aimed to phase out Russian fossil fuel imports, save energy, diversify energy supplies, and produce clean energy.¹²² By leveraging Article 122 TFEU, the EU could implement measures that support the most vulnerable populations, uphold justice and solidarity, and ensure that no Member State is disproportionately affected by energy shortages or price surges.

7. Jurisprudential Support

Energy Solidarity Principle: The evolution of an autonomous legal concept

The concept of “energy solidarity” within the EU energy policy framework, as articulated in Article 194 TFEU, has historically sparked debate regarding its precise nature and extent.¹²³ Initially, it was viewed as a general political principle in the form of a correction mechanism in cases of emergency¹²⁴ rather than a legal criterion for evaluating EU actions. However, the Court has elevated energy solidarity to a definitive expression of the broader principle of solidarity, which is a cornerstone of EU law.¹²⁵ In its 2021 *OPAL* ruling,¹²⁶ the Court established that energy solidarity constitutes a legally binding principle of EU energy law that should inform EU institutions and the Member States in their energy decisions. Moreover, the Advocate General's assertion that the principle of solidarity applies broadly to all goals of the EU's energy policy – not just the security of gas supply – has been supported by the Court.¹²⁷ The Court is notably connecting the principle of energy solidarity with the principle of sincere cooperation outlined in Article 4(3) TEU, underscoring the importance of solidarity and mutual support in achieving common energy objectives within the EU framework.¹²⁸

¹¹⁹ Commission, *REPowerEU: Affordable, Secure and Sustainable Energy for Europe*.

¹²⁰ COM(2022) 230 final.

¹²¹ Council of the EU, *REPowerEU Infographics*.

¹²² L. Hancher, A. Hauteclouque, ‘Strategic Autonomy, REPowerEU And The Internal Energy Market: Untying The Gordian Knot’, *CMLR*, vol. 61, no. 1, 2024, pp. 55–92.

¹²³ E. Küçük, ‘Solidarity in EU law: An elusive political statement or a legal principle with substance’, in: A. Biondi, E. Dagilytė, and E. Küçük (eds.), *The Solidarity in EU Law. Legal Principle in the Making*, Edward Elgar, 2018.

¹²⁴ M. Iakovenko, ‘Case C-848/19 P: *Germany v Poland* and its outcomes for EU energy sector: an extended case note on the Court of Justice judgment in the *OPAL* case’, *The Journal of World Energy Law & Business*, vol. 14, Issue 6, December 2021, pp. 436–446.

¹²⁵ A. Boute, ‘The Principle of Solidarity and the Geopolitics of Energy: Poland v. Commission (OPAL pipeline)’, *Common Market Law Review*, 2020, vol. 57, pp. 898–914.

¹²⁶ Case C-848/19 P: *Germany v Poland*, (OPAL), ECLI:EU:C:2021:598. See also R. Fleming, ‘A legal perspective on gas solidarity’, *Energy Policy*, vol. 124, 2019, p. 102.

¹²⁷ Opinion of Advocate General, ECLI:EU:C:2021:218, points 76 and 77.

¹²⁸ *OPAL*, para. 41.

This expanded interpretation brings to light many new factors to consider regarding the impact of the *OPAL* case on the EU energy sector, including the necessity for coordinated actions across Member States, the balancing of diverse energy needs and interests, and the imperative to ensure equitable energy access and resilience in times of crisis. In particular, the Court elucidated that those initiating energy decisions are required to meticulously assess the potential impacts on other Member States and institutions. They bear full responsibility for this proactive analysis and cannot defend their inaction by pointing to the absence of objections from those potentially affected. Additionally, the Court mandated that explicit reference to the principle of energy solidarity is imperative, decisively countering Germany's argument that the Commission had sufficiently considered the implications for Poland's energy security.¹²⁹

Similarly, in the *Hinkley Point C* case,¹³⁰ the Court upheld the Commission's decision to approve state aid for the Hinkley Point C nuclear power station. The Court highlighted that such aid was compatible with the internal market due to its promotion of nuclear energy as a low-carbon source. This decision underscores the CJEU's commitment to balancing economic interests with environmental goals and aligns with the EU's broader climate and energy objectives. By ensuring fair competition and equitable energy policies, the CJEU's rulings in both cases demonstrate the importance of integrating sustainability into the legal framework governing the EU's energy transition.¹³¹

The case law of the Court underscores the principles of solidarity and fairness as fundamental to the EU's legal framework. Key rulings of the Court¹³² highlight the legal obligation of Member States to support each other in achieving common objectives. These decisions emphasize that solidarity is not merely a political ideal but a binding legal principle that ensures coordinated actions and mutual support, particularly in areas like energy policy and international protection. This reinforces the EU's commitment to a cohesive and equitable approach in addressing shared challenges.

Question 2

1. **Revised Legislation:** The "Fit for 55" package includes revisions to existing EU climate and energy laws as well as new legislative proposals. This has led

¹²⁹ *OPAL* (C-848/19 P), paras. 97–98.

¹³⁰ Case C-594/18 P: *Republic of Austria v European Commission* [2020] ECLI:EU:C:2020:598, 22 Sept. 2020.

¹³¹ See also answer to Question 5, Section I.

¹³² University of Pisa, *Enforcing Solidarity – Case-Law Database and Studies – Solidarity in EU Law*.

to the adoption of new regulations and directives that align with the EU's climate goals.¹³³

2. **Energy Taxation Directive:** The package proposes to revise the Energy Taxation Directive to align the taxation of energy products with the EU's climate policies. This includes abolishing tax exemptions for energy products used in intra-EU shipping and air transport.
3. **Energy Security:** The "Fit for 55" package aims to enhance energy security by promoting the diversification of energy sources and reducing dependence on fossil fuels. This includes measures to increase the share of renewable energy, improve energy efficiency, and develop new infrastructure for energy interconnections.

Energy Solidarity and Security in Greece

Greece has historically relied heavily on lignite for electricity generation. The phase-out of lignite by 2028, as mandated by the National Climate Law,¹³⁴ poses significant challenges in ensuring a stable energy supply. The country is working to diversify its energy sources, including increasing the use of renewable energy and natural gas. Greece has faced specific legal issues and challenges in the context of energy solidarity and security.

4. **Energy Communities**¹³⁵: Greece has implemented legal frameworks to support the establishment of energy communities, which aim to promote energy autonomy and solidarity at the local level. However, challenges remain in ensuring grid availability for these projects and in financing installation costs.¹³⁶
5. **Energy Security:** Greece's reliance on imported fossil gas raises concerns about energy security and the need for alternative solutions, such as the rapid development of energy storage, grids, and the penetration of renewables.
6. **Island Connectivity:** Greece aims to connect 29 autonomous islands with the mainland grid system by 2030. This project is essential for enhancing energy security and integrating renewable energy sources.¹³⁷
7. **Interconnections:** Greece has built alliances and partnerships for the development of energy infrastructure, including interconnections with Bulgaria, North Macedonia, Albania, and Egypt. These interconnections

¹³³ The EU Emissions Trading System (ETS) has been reformed to include road transport and buildings, and new CO₂ emissions standards for cars and vans have been introduced.

¹³⁴ Law 4936/2022 (OG A' 105).

¹³⁵ Clean Energy for EU Islands, *Energy Communities, Energy Cooperatives, Energy Clusters*.

¹³⁶ See Law 4513/2018 (OG A' 9/2018), which has established a new type of civil cooperative, the 'energy community'.

¹³⁷ See also Commission, *State Aid Case No. SA.58482: Greece Remuneration Scheme of Hybrid Power Stations in Non-Interconnected Island*, on a state aid investigation by the Commission regarding Greece's remuneration scheme for Hybrid Power Stations (HPS) in Non-Interconnected Islands (NIIs) electricity systems.

are crucial for enhancing energy security and diversifying energy sources in the region.¹³⁸ Greece and Cyprus have signed an agreement to advance a major electricity interconnection project, aimed at ending Cyprus's energy isolation and bolstering Greece's position as a clean energy corridor in the EU. The project will link Cyprus's national electricity transmission system with European networks via Greece. This interconnection is crucial for enhancing energy security and integrating renewable energy sources in the region.¹³⁹

8. The main issue that arises concerning this project beyond the geopolitical concerns is how the costs of the interconnector will be distributed among consumers in the interconnected Member States. This cost allocation is a matter for the competent national regulatory authorities in each Member State to address. As the project is included in the list of projects of common interest (PCI), these national competencies should operate without prejudice to the powers of the ACER. The resolution of cost-sharing among consumers will be crucial for the project's success, requiring careful coordination and cooperation between national regulatory authorities to ensure that the financial burden is equitably shared and that the project contributes to the overarching goals of energy security and sustainability.

Legal Framework¹⁴⁰

- The **National Climate Law N4936/2022**¹⁴¹ creates a framework for Greece's transition to climate neutrality by 2050. It includes measures for reducing emissions across various sectors and emphasizes sustainable urban mobility and the circular economy.
- The **Fair Development Transition Law N4872/2021**¹⁴² addresses past injustices and promotes transparency and accountability, which are crucial for building trust in state institutions and ensuring fair transitions in energy policy.
- **Law N4986/2022**¹⁴³ outlines measures for urban planning and development, including the integration of specific areas into broader plans to improve infrastructure, public safety, and social cohesion.

¹³⁸ Commission, *National Energy and Climate Plans Factsheet*.

¹³⁹ See respective decisions of the Greek and Cypriot NRAs, RAEK, Decision No. 300/2024, Project of Common Interest 2.6.2 for Electrical Interconnection Between Kofinou (CY) and Korakia, Crete and RAAEY, Decision No. E-192/2024 Revision of the elements of Decision No. 847/2017 of RAE, "Cross-Border Cost Allocation of the Project of Common Interest 'EUROASIA Interconnector' between Greece and Cyprus."

¹⁴⁰ See also answer to Question 9, Section I.

¹⁴¹ Official Gazette 105/A' 27.5.2022.

¹⁴² Official Gazette A 247/10.12.2021.

¹⁴³ Official Gazette A 204/28.10.2022 (as amended and in force).

National Plan

The revised National Energy and Climate Plan 2021–2030 (NECP) includes ambitious targets for reducing gas consumption and increasing the share of renewables. However, the implementation of these targets requires coordination and adoption of appropriate policy and technical measures.¹⁴⁴

Conclusion and Criticism

The “Fit for 55” package has driven the development of EU and national energy laws, promoting energy solidarity and security. However, Greece faces challenges in integrating renewable energy sources (RES) and addressing its complex regulatory framework. Urgent investments in grid modernization and energy storage are needed. The current convoluted legislation hampers policy effectiveness, necessitating simplification and transparency. Addressing these issues is crucial for Greece to fully benefit from the “Fit for 55” package and achieve a fair, competitive transition to climate neutrality.

Question 3

The Role of “Do No Significant Harm” (DNSH)¹⁴⁵ in Energy Law

The “do no significant harm” (hereafter ‘DNSH’) principle, stemming from the Green Deal, is a key sustainability principle within the EU’s sustainable finance framework. It aims to prevent economic activities from causing significant environmental harm, supporting the EU’s fairness and solidarity goals. Integrated into all policy areas, DNSH aligns with Articles 11 and 194 TFEU, which mandate environmental protection, renewable energy promotion, and energy efficiency. The DNSH principle is essential for ensuring that energy law aligns with the EU’s sustainability commitments.

Application of DNSH in Energy Law:

1. **EU Taxonomy Regulation:** The DNSH principle was set out as a qualifying element of the eligibility of an investment for the purpose of accessing financial instruments more favorable in terms of conditionality and cost, in Article 17 of Regulation 2020/852 (EU Taxonomy Regulation).¹⁴⁶
2. **Recovery and Resilience Facility:** The Recovery and Resilience Facility (RRF) was developed with Regulation 2021/241,¹⁴⁷ which specifies in that

¹⁴⁴ Commission, *Commission’s Assessment and Recommendations on Greece’s Draft Updated NECP*.

¹⁴⁵ Commission, *Technical Guidance on the Assessment of Significant Harm*.

¹⁴⁶ OJ L 198, 22.06.2020, pp. 13–43.

¹⁴⁷ OJ L 57, 18.02.2021, pp. 17–75. See also Commission, *Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation 2021/C 58/01*, OJ C 58, 18.02.2021, pp. 1–30.

“the Facility shall only support measures respecting the principle ‘do no significant harm’.”

3. **European Green Deal:** The DNSH principle is embedded in the European Green Deal, guiding the transition to a sustainable and climate-neutral economy. This includes ensuring that all funded projects and initiatives comply with DNSH criteria.

Impact and Challenges

The integration of the DNSH principle into energy law ensures that environmental protection is a key consideration in energy projects, promoting sustainability and minimizing adverse impacts.

However, challenges include:

- Ensuring consistent application across all Member States.
- Balancing economic development and environmental protection.
- Addressing potential conflicts between national and EU-level interpretations of DNSH.

By embedding DNSH in energy law, the EU aims to ensure a holistic approach to sustainability, aligning economic activities with environmental goals. This principle helps to guide the transition towards a more sustainable and resilient energy system in the EU.

DNSH and Greece

In Greece, while direct reference to EU’s DNSH principle is rather rare,¹⁴⁸ several energy laws embody similar concepts. The Environmental Impact Assessment (hereafter ‘EIA’)¹⁴⁹ process, governed by Law 4014/2011,¹⁵⁰ aligns with the Directive 2011/92/EU¹⁵¹ as amended by Directive 2014/52/EU,¹⁵² which requires that any energy project likely to have significant environmental effects is thoroughly assessed before approval. This ensures that potential harm to the environment is minimized, resonating with the DNSH principle. The constitutional revision of 2001 added the concept of sustainability to Article 24 of the Greek Constitution, sparking a significant theoretical debate about its meaning. The relevant clause states for the preservation of the environment, the State is obliged to take special precautionary or coercive measures, within the framework laid down by the principle of sustainability. Originally a concept focusing on managing resources to maintain natural capital, sustainability has evolved to emphasize the preservation of resources for future generations.

¹⁴⁸ See e.g. Article 23 para. 3 of Law 4936/2022.

¹⁴⁹ Commission, *Environmental Impact Assessment*.

¹⁵⁰ Official Gazette, Issue No. 209, 21 September 2011, Law No. 4014, *Environmental Licensing of Works and Activities, Regulation of Illegal Constructions in Connection with Environmental Stability*.

¹⁵¹ Directive 2011/92/EU, OJ L 26, 28.01.2012, pp. 1–21.

¹⁵² Directive 2014/52/EU OJ L 124, 25.04.2014, pp. 1–18.

Thus, the constitutional principle of sustainability primarily concerns environmental protection, leading to the adoption of measures that prioritize environmental interests over conflicting ones. This aligns with Article 194 TFEU, which emphasizes the need to preserve and improve the environment in the context of energy policy.

In the same context, special reference should be made to the concept of the environmental *acquis*, which is reflected in the relevant case law and means that the provisions of the Constitution prevent the amendment of the regulatory framework that results in a reduction of the environmental protection already provided (indicatively see Council of the State Plenary Session decision 10/1988¹⁵³). Furthermore, it should be noted that the Council of State Decision 1885/2023 determined that the modification of the environmental licensing procedure for investments in renewable energy sources (RES) to reduce the requirements for environmental impact assessments can be deemed acceptable, provided that the modifications are based on a scientific study.

Key Aspects of EIA in Greece:

- **Legislative Framework:** Law 4014/2011 outlines the requirements for conducting EIAs in Greece, including mandatory public consultation and the consideration of alternative solutions to minimize environmental impact.
- **Quality of EIA Reports:** Studies indicate variability in the quality of Environmental Impact Statements (EISs) in Greece, with many meeting minimum legislative requirements but performing poorly against best practice criteria.
- **European Commission's Involvement:** The European Commission has closely monitored Greece's implementation of the EIA Directive, particularly ensuring alignment with EU standards in energy projects.

While EIAs are crucial for Greece's energy policy, further improvement is needed in EIS quality and national enforcement mechanisms. Strengthening these areas is essential for a sustainable and environmentally conscious energy development approach.

Question 4

The EU addresses energy poverty and promotes social equity through initiatives like the Clean Energy for All Europeans package. These measures ensure vulnerable populations have access to affordable energy, fostering a just transition to a low-carbon economy. Member States align their energy policies with EU goals, implementing National Energy and Climate Plans (NECPs) and adhering to the “do no significant harm” principle. In Greece, the social dimension is

¹⁵³ See indicatively Council of State Plenary Session Decision 10/1988.

critical due to economic challenges and reliance on fossil fuels. Targeted reforms and supportive measures are essential to ensure an equitable and sustainable energy transition.¹⁵⁴ Such reforms and measures include, *inter alia*:

1. **National Action Plan – Energy Poverty Action Plan:** The Ministry of Environment and Energy has approved a National Action Plan to combat energy poverty¹⁵⁵ in September 2021. This plan includes measures to identify and support households affected by energy poverty. Currently, the primary strategy involves a social tariff that offers discounted electricity rates to vulnerable households.
2. **Just Transition Fund:** Greece has received¹⁵⁶ significant funding from the Just Transition Fund (JTF)¹⁵⁷ to support regions most affected by the transition away from fossil fuels. For example, the regions of Western Macedonia and Megalopolis have been allocated funds to support economic diversification and reskilling workers. The Just Transition Fund¹⁵⁸ has contributed significantly to the fair green transition in Greece. By providing targeted support to the most affected regions, the fund helps ensure that the transition to a climate-neutral economy is equitable and inclusive. This includes investments in renewable energy, energy efficiency, and economic diversification.

Question 5

In the realm of State aid control, the Commission evaluates national aid measures for compliance with EU rules to prevent distortions of competition and trade within the internal market. However, reconciling State aid with the concept of energy solidarity poses inherent challenges. The Commission's guidelines on State aid¹⁵⁹ for climate, environmental protection, and energy outline the need for aid measures to align with EU energy goals while avoiding undue distortions of competition. The *Hinckley Point* case (Case C-594/18 P)¹⁶⁰ confirmed that environmental scrutiny is a valid consideration under Article 106 TFEU, which allows for exceptions to competition rules for undertakings entrusted with services of general economic interest. This suggests that there is potential for energy solidarity scrutiny in the State aid context as well.¹⁶¹ While it affirms the right of Member States to define their energy mix, it also reinforces the EU's authority to scrutinize and regulate State aid

¹⁵⁴ International Energy Agency, *Greece 2023: Executive Summary* (IEA, 2023).

¹⁵⁵ Energy Poverty Observatory, *Action Plan on Energy Poverty*.

¹⁵⁶ Commission, *EU Cohesion Policy: EUR 1.63 Billion for a Just Climate and Energy Transition in Greece*.

¹⁵⁷ Commission, *Just Transition Mechanism*.

¹⁵⁸ *Ibid.*

¹⁵⁹ See: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_6982/IP_21_6982_EN.pdf

¹⁶⁰ ECLI:EU:C:2020:742.

¹⁶¹ J. Nowag, 'The Article 106 TFEU Exception', *Environmental Integration in Competition and Free-Movement Laws*, Oxford, 2016.

to ensure it aligns with broader Union principles, including competition and environmental goals. This dynamic interplay highlights the ongoing tension and future uncertainties in navigating these dual imperatives.¹⁶²

In practice, State aid measures can be reconciled with energy solidarity by ensuring that they contribute to the EU's energy goals, such as promoting renewable energy, energy efficiency, and security of supply. The 2022 guidelines on State aid for climate,¹⁶³ environmental protection, and energy provide a framework for assessing whether aid measures are compatible with EU rules, taking into account their positive impact on society and the environment. Overall, while balancing energy solidarity and State aid is complex, it requires considering both economic and solidarity aspects to support EU energy goals without distorting competition.

Question 6

Articles 170–172 TFEU and Article 194 TFEU establish the legal framework for developing trans-European networks and the EU's energy policy, respectively. The revised TEN-E Regulation (Regulation (EU) 2022/869) operationalizes these articles through Projects of Common Interest (PCIs), which are key infrastructure projects that integrate energy markets, enhance security of supply, and promote sustainability. Energy solidarity, mandated by Article 194 TFEU, ensures energy availability and affordability across Member States, especially during crises. This synergy exemplifies the EU's commitment to a secure, sustainable, and equitable energy future, fostering solidarity and cohesion among Member States.¹⁶⁴

Question 7

Defining the Relationship

The relationship between decarbonization and security of energy supply is synergistic and mutually reinforcing, and can be understood through several key aspects:

1. **Diversification of Energy Sources:** Decarbonization promotes the use of a diverse mix of renewable energy sources such as wind, solar, hydro, and biomass. This diversification reduces dependency on a single type of energy source, thereby enhancing energy security by mitigating the risks associated with supply disruptions from geopolitical tensions or market volatility.¹⁶⁵

¹⁶² S. Thomas, 'The *Hinkley Point* decision: An analysis of the policy process', *Energy Policy*, vol. 96, 2016, pp. 421–431.

¹⁶³ OJ C 80, 18.02.2022, pp. 1–89.

¹⁶⁴ S. Andoura, 'Energy Solidarity in Europe: From Independence to Interdependence', *Jaques Delors Institute*, 2020.

¹⁶⁵ R. Leal-Arcas, A. Gasimov, V.S. and Reddy, 'Energy Security, Decarbonization, and the Environmental Justice Movement', *Sustainability in Environment*, vol. 8, no. 2, pp. 53–66, 2023.

2. **Reduction of Import Dependency:** By increasing the share of domestically produced renewable energy, countries can reduce their reliance on imported fossil fuels.
3. **Stability and Predictability:** Renewable energy sources, once established, provide a more stable and predictable supply of energy compared to fossil fuels, which are subject to price fluctuations and supply chain disruptions.

The Role of REPowerEU

The EU's REPowerEU¹⁶⁶ initiative, launched in response to the energy crisis triggered by Russia's invasion of Ukraine, exemplifies the relationship between decarbonization and energy security. Key components of this initiative include:

1. **Accelerating Renewable Energy Deployment:** REPowerEU focuses on rapidly increasing the capacity of renewable energy installations across the EU. This includes investments in wind, solar, and other renewable technologies to ensure a steady and sustainable energy supply.
2. **Enhancing Energy Efficiency:** Improving energy efficiency is a critical component of decarbonization. By reducing overall energy consumption, the EU can lower its dependence on fossil fuels and reduce greenhouse gas emissions.
3. **Infrastructure Development:** REPowerEU supports the development of energy infrastructure, including grid modernization and the construction of new transmission lines.

Pursuing Decarbonization for Energy Security

Efforts to decrease fossil fuels should be vigorously pursued at the Union level for several reasons:

1. **Mitigating Climate Change:** Reducing fossil fuel use is essential for mitigating climate change and meeting the EU's climate targets. This not only benefits the environment but also reduces the long-term risks associated with climate-related disruptions to energy supply.
2. **Reducing Supply Disruptions:** Fossil fuel markets are often volatile and subject to geopolitical tensions. By transitioning to renewable energy, the EU can reduce the risk of supply disruptions and ensure a more reliable energy supply.
3. **Economic Benefits:** Investing in renewable energy and energy efficiency creates jobs, stimulates economic growth, and reduces energy costs in the long run. These economic benefits contribute to the overall stability and resilience of the EU's energy system.

¹⁶⁶ Commission, *REPowerEU: Affordable, Secure and Sustainable Energy for Europe*.

4. **Energy Independence:** Achieving greater energy independence through renewable energy reduces the EU's vulnerability to external energy shocks and enhances its strategic autonomy.

In conclusion, decarbonization efforts contribute to a resilient and sustainable energy system, ensuring climate goals and a secure supply.

Question 8

The relationship between Article 192(2)(c) TFEU and Article 194 TFEU reflects the balance between environmental protection and energy policy autonomy. Article 192(2)(c) permits measures impacting a Member State's energy choices if unanimously adopted for environmental reasons. Article 194 outlines the EU's energy policy, emphasizing market functionality, security of supply, efficiency, and renewable energy, while respecting Member States' rights to determine their energy mix. EU law imposes constraints on Member States' energy mix autonomy through measures under Article 192(2)(c) and the principle of energy solidarity. Proponents argue for limits to ensure cohesive policy and address climate change, while opponents advocate for national discretion. Member States retain discretion but must align policies with EU objectives and principles, such as energy solidarity and sustainability. Regulation 2018/1999 requires Member States to develop National Energy and Climate Plans (NECPs) aligned with EU targets, fostering solidarity and limiting autonomy.

Question 9

National Energy and Climate Plan (NECP)¹⁶⁷: Greece's National Energy and Climate Plan (NECP) serves as a comprehensive strategic roadmap designed to meet ambitious climate and energy targets by the year 2030. The plan sets forth a goal to reduce greenhouse gas emissions by 42% compared to 1990 levels, aiming to significantly curb the country's carbon footprint¹. Additionally, the NECP targets a 35% share of renewable energy in the gross final energy consumption, promoting the transition towards cleaner and more sustainable energy sources.

National Climate Law (Law 4936/2022)¹⁶⁸: National Climate Law (Law 4936/2022): This law sets a legal framework for climate action, aiming for climate neutrality by 2050. It includes measures to phase out lignite by 2028,

¹⁶⁷ See Greece – Draft Updated NECP 2021–2030.

¹⁶⁸ Official Gazette, Issue No. 105, 27 May 2022, *National Climate Law 4936/2022 on the Transition to Climate Neutrality and Adaptation to Climate Change*.

promote zero-carbon and electric vehicles, and reduce CO₂ emissions from buildings and companies. Additionally, the law establishes a carbon budgeting mechanism for the main sectors of the economy and governance and participation systems for climate action. It also contains emergency provisions to address the energy crisis and protect the environment. The law outlines several key measures, including:

Law 3468/2006¹⁶⁹ as amended and in force: This law defines renewable energy and promotes the use of Renewable Energy Sources (RES) such as wind, solar, geothermal, and biomass. Specifically, it aims to transpose the EU Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources into national law. The law encourages the generation of electrical power from RES and high-efficiency cogeneration of electricity and heat by providing a framework of rules and principles.

Key aspects of the law include:

- *Definition of Renewable Energy Sources (RES):* RES includes wind energy, solar energy, wave energy, tidal energy, biomass, gases from sanitary landfills and biological treatment plants, biogases, geothermal energy, and hydraulic energy used in hydroelectric stations.
- *Promotion of RES:* The law grants priority to the generation of electrical power from RES and high-efficiency cogeneration plants in the internal electricity market.
- *Support for Producers:* It defines licensing procedures for producers using RES or high-efficiency cogeneration, including autonomous electricity producers and auto-producers who generate electricity primarily for their own use.
- *Incentives and Guarantees:* The law includes provisions for issuing Guarantees of Origin for electricity produced from RES, ensuring transparency and credibility in the market.

Impact and Future Prospects

The implementation of Law 3468/2006 has played a pivotal role in advancing Greece's renewable energy sector. It has facilitated the growth of wind and solar farms, enhanced energy security, and contributed to the country's efforts to combat climate change.

Law 4014/2011¹⁷⁰: Law 4014/2011 establishes a comprehensive framework for environmental licensing and regulating illegal constructions in Greece. The implementation of Law 4014/2011 has been instrumental in promoting environmental sustainability and regulating construction activities in Greece. By addressing illegal constructions and ensuring compliance with environmental

¹⁶⁹ Official Gazette, Issue No. 129, 27 June 2006, Law No. 3468.

¹⁷⁰ Official Gazette, Issue No. 209, 21 September 2011, Law No. 4014.

standards, the law contributes to a cleaner and more sustainable environment. Moving forward, continued enforcement and public awareness will be crucial for achieving the law's objectives and maintaining environmental stability.

Law 4414/2016: This Act amended the legal framework for the support of renewable energy sources (RES) and high efficiency cogeneration (HEC) power plants to ensure compatibility with the "Guidelines for State Aid in the Environment and Energy Sectors (2014–2020)." In particular, the mechanism of competitive tendering for the granting of FIP-type operating aid has been introduced, preparing the framework for the integration of RES into the competitive electricity market.

Conclusion and Criticism

Greece has made significant strides in addressing climate-related issues in its energy mix. However, challenges remain:

- **Inadequate Networks for Renewables:** The current infrastructure is insufficient for integrating renewable energy, requiring urgent investments in modernization, smart grids, and energy storage.
- **Complex Legislative Framework:** The convoluted legal framework hampers investments and project implementation. Simplification and transparency are needed to support long-term goals.
- **Lack of Effective Spatial Planning:** Inconsistent spatial planning delays renewable energy projects. Effective planning is crucial for reducing conflicts and integrating projects smoothly.

Addressing these issues will help Greece fully realize its climate and energy policies, ensuring energy security, economic stability, and environmental sustainability.

Question 10

Evolution of EU's External Competence

The EU's exclusive external competence in a particular policy area can also stem implicitly from other Treaty provisions, especially when measures have been implemented within their framework or for attaining specific objectives where the EU has internal competence. This doctrine of implied powers, codified in the Treaty of Lisbon, aims to ensure the unity, consistency, and full effectiveness of EU law, as seen in cases like *Commission v Council (ERTA)*, C-22/70¹⁷¹ and *Opinion 1/77*¹⁷² on the European Laying-up Fund for Inland Waterway Vessels. If the EU lacked such competence, its capacity to advance its goals on the international stage would be weakened. This would

¹⁷¹ ECLI:EU:C:1971:32.

¹⁷² ECLI:EU:C:1977:63.

jeopardize internal achievements, as Member States might form inconsistent international agreements, which they would still be obligated to honor under the international law principle of *pacta sunt servanda*.

The COTIF Judgment

The decision in *Germany v. Council (COTIF)* Case C-600/14,¹⁷³ pertains to the EU's shared external competence in areas lacking established common rules. Germany challenged a Council decision on the EU's position within an international transport agreement. While the dispute involved the Union's competence in a mixed agreement, the judgment addressed the exercise of this competence in relation to concluding international agreements. The CJEU referenced Opinion 2/15¹⁷⁴ on the EU-Singapore Free Trade Agreement (EUSFTA),¹⁷⁵ clarifying that agreements under shared competence cannot be solely approved by the Union. However, the COTIF judgment confirmed that such a finding does not negate the EU's external competence to conclude the EUSFTA, contributing significantly to the discourse on whether mixity in international agreements should be optional or mandatory. It also clarifies how Article 3(2) TFEU, which deals with the exclusive competence of the EU to enter into international agreements, should be applied. This involves understanding when the EU alone can act and when Member States need to be involved).¹⁷⁶

Shared Competence and Energy Security

The COTIF judgment reinforces that the EU can act independently in areas of shared competence, particularly in energy policy. This independence is crucial for addressing cross-border energy security challenges, allowing for coordinated and timely actions. The judgment aligns with the principle that "shared is not always mixed," enabling the EU to conclude and implement international agreements when shared competence exists, thus resolving issues related to problematic "mixity."

Mixed International Agreements and the Solidarity Principle

Notably, Opinion 2/00 on the Cartagena Protocol demonstrated the complexities in determining the EU's external competence. In this case, the Court assessed whether the Cartagena Protocol on Biosafety¹⁷⁷ should be concluded under the Common Commercial Policy (hereafter 'CCP'), which would grant the EU exclusive competence. However, the Court ultimately decided that the CCP was not the appropriate legal basis, as the protocol primarily fell within the scope of environmental policy, requiring shared competence between the

¹⁷³ ECLI:EU:C: 2017:935.

¹⁷⁴ CJEU, Opinion 2/15.

¹⁷⁵ Commission, *EU-Singapore Agreements*.

¹⁷⁶ M. Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017', *European Constitutional Law Review*, 14, 2018, pp. 231–259.

¹⁷⁷ United Nations Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*.

EU and its Member States. In contrast, the Rotterdam Convention case¹⁷⁸ involved a dual legal basis, recognizing it as a mixed agreement that necessitates the involvement of both the EU and its Member States.

These cases highlight the complexities in determining the EU's external competence. The CCP gives the EU exclusive competence, while Articles 3(2) and 216 TFEU provide competence that arises from internal EU measures that might be affected by external actions. If these internal measures are limited, the competence may remain shared between the EU and Member States, necessitating cooperation to ensure the unity and effectiveness of EU law.¹⁷⁹

National Sovereignty and EU Objectives

Article 194(2) TFEU allows Member States to determine their energy mix and resource exploitation conditions, but this autonomy must align with EU-wide principles. The principle of energy solidarity limits national sovereignty, mandating cooperation during energy crises.¹⁸⁰

Enhancing Global Trade Relationships

To tackle resource scarcity, the EU focuses on diversifying energy sources and bolstering global trade ties. According to Article 216(1) TFEU, the EU autonomously negotiates international agreements to secure a variety of energy supplies and beneficial terms, thus boosting energy security and resilience. These agreements often incorporate sustainable practices and foster technological cooperation, aiding the global shift towards greener energy. By decreasing reliance on a few suppliers, addressing geopolitical risks, and supporting its climate goals through renewable energy and efficiency initiatives, the EU ensures long-term energy stability. This strategy ultimately positions the EU as a prominent leader in the global energy market.¹⁸¹

Conclusions: Shared competences and energy security

The sophisticated governance approach adopted by the EU and its Member States, characterized by shared competence and decisive action, is essential for securing a stable and sustainable energy future. This evolution not only addresses immediate energy security concerns but also lays the foundation for long-term resilience and prosperity, benefiting all Member States and contributing to global energy stability.

¹⁷⁸ ECLI:EU:C: 2006:2.

¹⁷⁹ I. Govaere, 'External Competence: What's in a Name? The Difficult Conciliation between Dynamism of the ECJ and Dynamics of European Integration', in: P. Demaret, I. Govaere, and D. Hanf (eds.), *European Legal Dynamics / Dynamiques Juridiques Européennes*, Brussels, PIE-Peter Lang, 2007.

¹⁸⁰ K. Talus, *EU Energy Law and Policy: A Critical Account*, Oxford University Press, 2014.

¹⁸¹ S. Andoura, *Energy Solidarity in Europe: From Independence to Interdependence*, Notre Europe-Jacques Delors Institute, 2013.

Question 11

Impact of REPowerEU on Energy Security in Greece

The REPowerEU initiative has had a significant impact on Greece's energy security while Greece, being strategically located, plays a crucial role in its implementation. The **Vertical Corridor gas pipeline** project, for instance, is expected to enhance Greece's position as an energy gateway to Central and Eastern Europe, reducing regional dependency on Russian energy supplies. Additionally, the initiative has led to improvements in Greece's energy infrastructure, making it more resilient and capable of integrating renewable energy sources.

Application for Support and Financing Reforms

Greece has applied for support under REPowerEU to finance reforms in its energy sector. The country's Recovery and Resilience Plan¹⁸² includes investments in green technologies, energy efficiency, and renewable projects, crucial for modernizing infrastructure.

Cohesion Policy Perspective

Regional Development: REPowerEU supports regional development by improving infrastructure, promoting sustainable mobility, and enhancing social cohesion.

Addressing Inequalities: Efforts are needed to ensure even investment distribution across regions to prevent exacerbating inequalities and ensure accessibility for all communities.

Challenges and Sustainability

Long-term Sustainability and Effectiveness: It is important to recognize that while the initiative has brought about significant changes, there are concerns about the long-term sustainability and effectiveness of some measures. For instance, the reliance on large-scale infrastructure projects may perpetuate dependency on fossil fuels rather than fully transitioning to renewable energy sources.

Equitable Distribution of Investments: While the recovery and resilience plan includes investments in green technologies, there is a risk that these investments may not be evenly distributed across regions, potentially exacerbating

¹⁸² Commission, *Greece's Recovery and Resilience Plan*.

existing inequalities. Ensuring that all regions benefit from these initiatives and focusing on a comprehensive transition to renewable energy sources is crucial for maximizing the benefits of REPowerEU.

Section III: The EU's crisis management in the field of energy and its limits

Questions 21, 22, and 23

A. Introduction

Section III of the Questionnaire is dedicated to crisis management in the energy sector by the EU as well as to the potential limits of management. More specifically, three possible legal bases for the EU to pursue energy policy in times of crisis are suggested, namely those of Articles 194 TFEU, 222 TFEU, and 122 TFEU, all three of which refer to the spirit of solidarity. On these matters we would like to reply as follows:

B. Delimitation of the scope of application of Articles 194, 222 TFEU, and 122 TFEU

The Court in the *OPAL* case dealt with the issue of the delimitation of the scope of application, in a period of crisis, of Articles 194 TFEU and 222 TFEU in the energy sector. This question was raised by the Federal Republic of Germany, which argued (in the context of its second ground of appeal) that the principle of solidarity, laid down in Article 194 TFEU, is an emergency mechanism which must be used only in exceptional cases, namely those covered by Article 222 TFEU.¹⁸³

The Court rejected that argument, holding that the wording of Article 194 TFEU does not contain any indication that, in the field of the Union's energy policy, the principle of energy solidarity should be limited to the situations referred to in Article 222 TFEU. Article 194(1) TFEU and Article 222 TFEU concern different situations and pursue different objectives. The EU institutions and the Member States must take into account the principle of energy solidarity, in the context of the establishment and functioning of the internal market and, in particular, the internal market in natural gas, by ensuring security of energy supply in the European Union, which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations.¹⁸⁴

¹⁸³ Ibid., para. 55–59, 67

¹⁸⁴ Ibid., para. 67–69.

From the above points supported by the Court, it follows, in our opinion, that the principle of solidarity is applicable both in the context of Article 194(1) TFEU with regard to the four objectives (purposes) of this provision, namely not only for dealing with emergency situations, when they arise, but also for taking measures to prevent crisis situations, as well as in the context of Article 222 TFEU for dealing with emergency situations such as terrorist attacks or natural or man-made disasters.

From our point of view, the position of the Court regarding the relationship between Articles 194(1) and 222 TFEU is both clear and valid. On the contrary, there seems to be a need to define the respective scope of the relationship between Article 194(1) TFEU and Article 122 TFEU. It is obvious that the relationship between these two provisions is a general-to-specific relationship; Article 122(1) TFEU must apply when the EU must take ex post appropriate measures to deal with the economic situation, in particular if serious difficulties arise in the supply of certain products, especially in the energy sector. This is irrespective of the fact that this provision has the advantage of speed (celerity) compared to the provisions of Article 194(1) and 194(2) subpara. (a) TFEU. The decisions under Article 122(1) TFEU are adopted, on a proposal from the Commission, exclusively by the Council (by a qualified majority¹⁸⁵), while those under Art. 194 are adopted in accordance with the ordinary legislative procedure, that is, by a simple majority in the European Parliament and a qualified majority in the Council after consulting the Economic and Social Committee (ESC) and the Committee of the Regions.

C. Time limits of Article 122(1) TFEU

The Questionnaire rightly refers to Council Regulation (EU) 2022/1854 and to Council Regulation (EU) 2022/2576, as examples of recent secondary legislation of EU law with Article 122(1) TFEU as their legal basis. To these examples, one could possibly add the Council Regulation (EU) 2022/1369.

Exploring the limits of Article 122 TFEU, that is, whether or not the period during which such (exceptional) legislative acts are in force can be prolonged (“temporal validity”), the answer is affirmative. Neither the provision of Article 122(1) TFEU itself nor any other provision of primary law contains any limitation as to the temporal validity. It is therefore at the discretion of the EU legislator, that is, the Council, either to adopt a legislative act which from the outset includes an explicit option for its force to be prolonged, or to address this issue later with a new legislative act.

¹⁸⁵ Article 16(3),(4) and (5) TEU.

The first solution was adopted, as more appropriate in terms of legal certainty, in the adoption of Council Regulation (EU) 2022/1369 and which includes a “Review clause” (Article 9), under which upon conducting a review and presenting a report, the Commission may propose to prolong the period of application of this Regulation. Similarly, Article 20 of Council Regulation (EU) 2022/1854 provided for a possibility of the Commission to propose, “in the event that this is justified by the economic circumstances or the functioning of the electricity market in the Union and individual Member States,” to extend the period of application of this Regulation. Finally, Article 30 of Council Regulation (EU) 2022/2576 contained a similar provision for temporal prolongation. Indeed, by virtue of Article 1(3) of Council Regulation (EU) 2023/2919 the validity of Council Regulation 2022/2576 was extended until 31.12.2024.

Once the objectives of the mentioned regulations were achieved, the legislator decided that no further extension of their validity was necessary. In order to address the problems, which arose mainly as a result of Russia’s invasion of Ukraine in February 2022, Article 122(1) TFEU was applied at the level of EU primary law. The fact that these regulations had such a short temporal application is indicative of their “exceptional” nature.

D. Efficiency of crisis management instruments vs. Efficiency of the classic measures of EU energy legislation,

On the one hand, it must be established that the three aforementioned regulations achieved their objectives both in terms of the celerity of the procedure, as they were based on the “simplified” procedure of Article 122(1) TFEU, and in terms of substance since the decision on whether or not the objectives were achieved was preceded by a review and report by the Commission. It is beyond doubt that when dealing with an exceptionally urgent and extraordinary situation, it is not only preferable but also necessary to choose a (simplified) procedure that will produce immediate results.

On the other hand, however, the comparison with the more complex ordinary legislative procedure, in the context of Article 194(1) and 194(2) subpara. (a) TFEU, should not be disregarded. Two types of dissimilar measures are being compared, namely emergency measures (under Article 122(1) TFEU), which had to be taken *ex post* to remedy severe difficulties that have arisen, with preventive measures (under Article 194 TFEU), which aim to enact EU energy policy while preventing *ex ante* the occurrence of problems.

Nevertheless, one must admit that, as regards the preferable procedure for dealing with emergency situations (Article 222 TFEU or Article 194(2) subpara. A TFEU), the Court’s interpretation in the *OPAL* case creates, at first

sight, some legal uncertainty. As already stated previously, the Court has taken the view that the principle of solidarity is applicable both in the context of Article 194(1) TFEU with regard to the four objectives (purposes) of this provision, namely not only for dealing with emergency situations, when they arise, but also for taking measures to prevent crisis situations, as well as in the context of Article 222 TFEU for dealing with emergency situations such as terrorist attacks or natural or man-made disasters. A logical consequence of this position is that, as regards the legal basis of the procedure, the provision of Article 194 (2) subpara. a, TFEU applies, a thought which the Court did not expressly state. However, the urgency of the “severe difficulties arising in the supply of certain products, notably in the area of energy” suggests that in practice the procedure under Article 122(1) TFEU will be chosen for the adoption of the appropriate legislation. The European Parliament, for its part, did not react to this practice when the three aforementioned Regulations were adopted. It cannot be ruled out that it will do so in the future by bringing an action for annulment before the Court. In such a case, the Court will have the opportunity to clarify its case-law, after certainly taking into account all the specific facts of such case as to their urgency.

E. National legislation and observations

The recent energy crisis has highlighted the exposure of consumers and industries to the rapid rise in energy prices. Greece did take emergency measures to limit the impact on consumers of the rapid rise in prices. These measures were temporary in nature. Indicatively, three emergency measures are mentioned below:

- Article 138 of Law 4951/2022 provided for the temporary suspension (initially until 1.09.23)¹⁸⁶ of the application of an adjustment clause in variable electricity supply tariffs and established an obligation for electricity suppliers to announce on a monthly basis the prices they will offer for the following month, thus increasing the predictability of prices for consumers, who were given the possibility to switch supplier every month without penalty. On the other hand, article 12A¹⁸⁷ of Law 4425/2016, as amended in 2022, provided for the establishment and operation, for a limited period, of a mechanism for recovering the “excess revenues” of electricity producers. It was foreseen that through the partial recovery of revenues, subsidies¹⁸⁸ on consumers’ electricity

¹⁸⁶ See also Ministerial Decision YPEN/GGEOPY/54277/4 of the Minister for Environment and Energy (Government Gazette B’ 3312/2023).

¹⁸⁷ This article was added to Law 4425/2016 by Article 122 of Law 4951/2022 and was subject to a series of amendments, the most recent of which was made by Article 92 of Law 5027/2023.

¹⁸⁸ Regarding subsidies, see Article 61 of Law 4839/2021, which established a special account called “Energy Transition Fund” and provided for the possibility of providing from the special account a subsidy for the invoiced consumption of electricity. This subsidy was awarded to the eligible consumers in the form of a rebate on the amount due to the respective electricity suppliers.

tariffs would be financed. It is worth noting that this national measure preceded the adoption of similar measures by Regulation (EU) 2022/1854. This mechanism,¹⁸⁹ although not directly applicable to the supply of electricity, indirectly allowed suppliers to maintain the pricing policy that ensured their sustainability, because the high prices presented to the consumers at retail level were subsidized by the state through the funds that it had recovered from electricity producers.

- Article 37 of Law 4936/2022 established a one-off extraordinary levy based on the increase in the gross margin from the participation of each electricity production unit in the electricity markets of Law No. 4425/2016 (A' 185) (hereinafter referred to as "electricity markets"), for the period from 1 October 2021 to 30 June 2022.¹⁹⁰
- Article 40 of Law 4994/2022 established a temporary mechanism for the partial refund of the revenues of electricity suppliers, pursuant to which an extraordinary levy was imposed on suppliers. The levy was based on their "excess revenues" which originated from their participation in the domestic retail electricity market.¹⁹¹

The above measures contributed to addressing the consequences of the energy crisis and to the safe transition of consumers, markets, and businesses, to a smoother period, while preventing an increase in energy poverty.¹⁹²

F. EU Treaties provisions, such as Article 222 TFEU, which can be utilized for addressing climate change related threats, for example, a natural disaster which endangers the security of energy supply

One should examine whether the Treaties legitimize the EU to take measures to guarantee the security of energy supply when it is threatened not by military events, such as the Russian Federation's invasion of Ukraine in February 2022, but by a natural disaster.

First of all, we agree with the view that the provision of Article 222 TFEU is appropriate as a legal basis for addressing the issue at hand, since in

¹⁸⁹ Pursuant to the Mechanism, provision was made for the Clearing House (EnEX Clear) to withhold, from the Participants in the Next Day Market and the Intraday Market, a portion of the proceeds to which they are entitled from their participation in the Next Day Market and the Intraday Market. By joint decision of the Ministers of Environment and Energy and Finance, the methodology and the mathematical formula for the calculation of the administratively determined unit price were adopted.

¹⁹⁰ See Ministerial Decision YPEN/DHE/87027/2890/30.08.2022 (GG B' 658/05.09.2022) as subsequently amended. On the constitutionality of such measure see Council of State B' 188-190/2024, stating that such levy is not a tax but an economic measure aiming to ensure the proper operation of the Greek electricity market.

¹⁹¹ See Ministerial Decision YPEN/DIE/112266/2012 (GG B' 6312/06.11.2023).

¹⁹² See T. Fortsakis, Ek. Iliadou, *Energy Law* (Δίκαιο της Ενέργειας), 3rd edn., Nomiki Vivliothiki, Athens 2023, pp. 309–310.

Article 222(1) it is expressly provided that the Union has competence to assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster. This provision is formulated in a general manner, which means it should be interpreted as applicable in any type of natural disaster, and therefore also one that endangers the security of energy supply. The concept of “assistance” is also formulated in a general manner, which means that the Council has a very wide discretion as to the exact type of assistance. The provisions of Art. 222(2), (3) and (4) define the decision-making procedure at EU level. This procedure does not involve the European Parliament, as is the case with the procedure under Article 122 TFEU, apparently because of the urgency of the measures.

A further provision, which could also serve as a legal basis for addressing a major climate related threat which jeopardises security of energy supply of the Union, is Article 122(2) TFEU, which relates to severe difficulties caused by natural disasters or exceptional occurrences beyond the Member States’ control. The decision-making procedure followed under Art. 122(2) TFEU bears significant similarities to that of Article 222 TFEU. The Council is competent to decide, without any substantial involvement of the European Parliament, which is merely informed *ex post*. The assistance foreseen in this case, that is, the granting of financial assistance, is more specifically worded, yet it is obligatory for the Council to provide such assistance.

A common feature of the two provisions, that is, Articles 222 and 122(2) TFEU is the presence of severe situations caused by a natural disaster, that is, a consequence of climate change. The EU, which after the Maastricht Treaty (1990/1992) became explicitly competent in the field of the environment at Treaty level, acquired after the Lisbon Treaty (2007/2009) as an additional competence that of “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.” (Article 191(1) TFEU). According to Article 192(1) TFEU, decisions are taken by the European Parliament and the Council acting in accordance with the ordinary legislative procedure. In our opinion, the provisions of Articles 191(1) and 192(2) TFEU, under which the EU could potentially take measures in favour of Member States which have suffered from natural disasters attributable to climate change, must, as general provisions, should concede in favour of the special provisions of Articles 222 and 122(2) TFEU.

HUNGARY

Ákos Szalai*

Preliminary remarks

Hungarian energy law, Hungary's approach to the EU energy policy and energy law issues is fundamentally determined by the main objectives of Hungarian energy policy. These objectives are: (i) to strengthen energy sovereignty and (ii) energy security, (iii) to maintain the results of the reduction of the utility charges, and (iv) decarbonisation. In the Hungarian government's assessment, among these, security of energy supply and enhancing energy sovereignty have become explicit national security issues.¹

In the preliminary remarks it is worth to make two important points in order to facilitate an adequate reading of the answers given to the questionnaire.

1. The text is divided into two separate parts. The first three sections focus on the situation of the Hungarian energy market, Hungarian regulation and the position of the Hungarian government. However, the questionnaire also raises several issues where there is no official Hungarian position. On these, the rapporteur's view is also presented in the text. However, for structural reasons, this appears separately in section IV. When interpreting these, it should be borne in mind that the rapporteur's research field is essentially the economic analysis of law, and his answers are therefore also determined by the models from this field of research.
2. The most important document of Hungarian energy policy is the National Energy and Climate Plan prepared for the European Union. A considerable part of the text is based on the last Hungarian version of this document, as revised in 2023.² (The official English version of the revised Plan is not available. Where there is no deviation from the previous version available in English, the official English version is referenced in the text and cited as NECP. Where the revised version differs from the official English translation, it is referenced as NECP-HU.)

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¹ National Energy and Climate Plan, Ministry of Information and Technology, available at: https://energy.ec.europa.eu/system/files/2022-08/hu_final_necp_main_en.pdf, accessed 15 August 2024 (hereinafter: NECP), p. 23.

² Nemzeti Energia és Klímaterv, 2023 felülvizsgált változat, Ministry of Information and Technology, available at: https://commission.europa.eu/system/files/2023-09/HUNGARY%20-%20DRAFT%20UPDATED%20NECP%202021-2030%20_HU.pdf, accessed 15 August 2024 (hereinafter: NECP-HU).

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

First of all, it should be noted that there is no official Hungarian position on the *OPAL* case, which is central to the questionnaire, and on the changing concept of energy solidarity that can be derived from it. This will be discussed in the section IV.

1. Solidarity and energy security in Hungarian jurisprudence and energy policy

Solidarity is present in Hungarian energy policy, though not in the form derived from the *OPAL* case, yet it is included therein in the sense of Article 222 TFEU. For example, Article 98 of Act XL of 2008 on Natural Gas Supply contains the steps to be taken in the event of a solidarity measure under Article 13(1) of Regulation (EU) 2017/1938 of the European Parliament and of the Council. In parallel, Article 76 defines who can be considered as a protected consumer.

Although the Hungarian government has not made any statement on the *OPAL* case, it seems to have used the idea of solidarity in the same sense in its debate with Bulgaria. In early November 2023, Bulgaria imposed an export duty of €10 per megawatt-hour on natural gas, which also applied to gas of Russian (and not only Russian) origin transiting through its territory. This was calculated to have increased the price of gas by around 30% in Hungary. As the vast majority of Russian gas entering Hungary comes via Bulgaria, the Hungarian government did its utmost to abolish the transit fee. In this dispute the Hungarian side invoked the principle of solidarity: the Bulgarian move in fact violated the very principle of solidarity, because it imposed significant additional costs on Hungary.

While solidarity only appears in Hungarian law in this specific sense, energy security permeates Hungarian energy policy and energy law. The NECP sets energy security as its main objective.³

2. Tension between objectives

The conflict between different objectives also arises in Hungarian policy debates. Perhaps the best example is the debate over the transformation of the Mátra Power Plant, where the goals of security of supply and decarbonisation

³ NECP, p. 23.

clashed. Mátra Power Plant is a lignite-fired general power plant which is strategically important in the national electricity system, but is also responsible for about 14% of total national GHG emissions. (The government is planning to build a new gas turbine power plant, a new photovoltaic power plant and an industrial energy storage facility on the site of the Mátra Power Plant, as well as to recycle waste water – namely, use Refuse Derived Fuel (RDF) for energy.) But energy supply – at least in the shorter term – would suffer greatly from the plant's loss. Moreover, as NECP underlines: most of the Hungarian households with lignite-based heating are located in the region of the Mátra Power Plant. "In the course of revitalisation and the transition we aim to replace household heating energy with clean energy and to reduce energy consumption."⁴

At the same time, Hungarian energy policy emphasises synergies between objectives. It seeks to apply instruments that it believes will serve all objectives simultaneously. Or at least not in conflict with any of them. But the goal is achieved by taking a widely disputed position on nuclear energy: nuclear energy is considered by the Hungarian government as green energy. This is why the key project in the decarbonisation of the Hungarian energy system is the so-called Paks2 project, under which two new nuclear power plant units will be built by 2030, each with a capacity of 1,200 MW:

As a result the share of carbon-free power generation in Hungary could further increase. In terms of both climate protection and local air quality, it is important to substitute predominantly fossil fuel based retail heating with clean energy to the extent possible.⁵

Hungarian energy policy explicitly points out that certain energy choices would create conflicts between the objectives. For example, the NECP is explicitly critical of over-emphasising the role of weather-dependent energy sources, which can cause significant fluctuations in energy supply. (This is why the document criticises the German decision to shut down nuclear power plants.)⁶

Also, the short-term trade-off occurs when the energy strategy calls for the need for further innovation (which can be interpreted as conditions for increasing renewable energy, for example). The list includes, among other areas, innovation and development goals such as⁷:

- ensuring systemic balance;
- seasonal electricity and heat storage solutions;
- developing energy supply methods that ensure that electricity (from renewable sources) is used locally;

⁴ NECP, p. 26.

⁵ NECP, p. 27.

⁶ NECP, p. 35.

⁷ NECP-HU, p. 34.

- “greening” of transport (the uptake of electric vehicles and car sharing, and biofuels);
- promoting the uptake of hydrogen and hydrogen technologies – including large-scale industrial demand for low-carbon, decentralised green hydrogen production methods for smaller demands.

3. Green transition and economic performance

The Hungarian energy strategy and economic policy is also very much concerned with the link between the green transition and economic performance. Here too, synergies are emphasised, but conflicts also arise.

It should be noted that in Hungary – like in other former socialist countries – the state of the environment was quite poor in 1990. With the transformation of the economy, more modern, less polluting and more energy-efficient technology has been introduced. Thus, especially if we take 1990 as a starting point, Hungary is able much more easily (with fewer economic problems) to reduce the pollution and to keep it low than other countries. For example, according to the National Clean Development Strategy,⁸ Hungary could achieve full climate neutrality by 2050 without compromising economic growth or welfare.⁹ But NECP states that “in order to achieve this, neither industry nor transport energy use can be limited in the case of economic growth.”¹⁰ And, as NECP adds, Hungary cannot meet this target without substantial financial contribution from the European Union. “Hungary would need approximately HUF 50,000 billion to implement carbon neutral power generation, fully phase out the use of natural gas and to fully electrify transport.”¹¹

Of course, the economic burden of decarbonisation on Hungary depends heavily on the distribution of costs between countries. The Hungarian government therefore firmly insists that the Polluter Pay Principles also mean that “the cost of decarbonisation should mainly be borne by countries [and companies] mostly held responsible for the current situation.”¹²

In addition to economic growth and competitiveness, the impact on the labour market will also be a major focus. This is also evident in the plans for the Mátra Power Plant:

⁸ Adopted in Government Resolution 620/2021 (IX.3.). National Clean Development Strategy 2020–2050, Ministry of Information and Technology, available at https://unfccc.int/sites/default/files/resource/LTS_1_Hungary_2021_EN.pdf

⁹ NECP-HU, p. 37.

¹⁰ NECP-HU, p. 51.

¹¹ NECP, p. 24.

¹² NECP, p. 24.

The Mátra Power Plant had a substantial socio-economic impact within the immediate region, including the creation and retention of jobs, the indirect creation of jobs by related undertakings, and local tax revenues.¹³

The NECP also states that one of the prerequisites for the transformation of the energy market is the availability of a well-prepared and skilled green energy workforce,¹⁴ in order to overcome the expected shortage of skills and competences in the energy sector.¹⁵ Moreover, the transformation of energy use may also bring significant changes outside the energy sector, with new employment needs and opportunities¹⁶ that need to be prepared for.

4. Cross-border tensions

Cross-border environmental problems are significant for Hungary. Especially in the case of pollution of rivers entering the country. There have been several recent cases where these have become a central issue in Hungarian politics. (Perhaps the most memorable being the cyanide pollution of the Tisza in January 2000. This was caused by a dam bursting at a cyanide reservoir of a gold mine in Romania, resulting in the total destruction of the fish stocks of the second largest river in Hungary.) Resistance to the socialist regime itself was catalysed by a cross-border energy project (alongside the problems of the Hungarian minority across the border, mainly in Romania).

The energy project that played this major role was the Gabčíkovo-Nagymaros dam system and hydroelectric power plant. Signed in 1976, it was designed to generate power, to improve navigation on Danube, and to protect against flooding. Much of the power generation would have taken place in Gabčíkovo, Slovakia – this required the diversion of a significant part of the Danube water. Water released from a reservoir connected to the power plant at fixed intervals would have periodically raised the level of the Danube downstream in order to reduce the risk of flooding, another dam would have been built at Nagymaros, which would have been capable of generating a minimum amount of electricity. After protests by Hungarian environmentalists and the election of a new democratic government, Hungary terminated the interstate treaty in 1992. Subsequently, the water of the border river was diverted and the Gabčíkovo Power Plant was commissioned.

There has been no similar major recent environmental conflict (which has caused serious political upheaval).

¹³ NECP, p. 26.

¹⁴ NECP-HU, p. 35.

¹⁵ NECP-HU, p. 59.

¹⁶ NECP-HU, p. 106

But the NECP also stressed the cross-border impacts in the interconnected energy system. The cross-border effects are illustrated by is German nuclear policy. This is implicitly criticised in the document because it is the reason for the fluctuations in German energy production. And because of the Energy Union (the interconnection of systems), this now also affects other countries:

fluctuating production in German power plants based on renewable energy sources has a direct, pronounced effect on the electricity systems of other States in the region.¹⁷

On the other hand, in the case of debate on Bulgarian transit fee, we have also seen that gas and oil coming through pipelines also raises important cross-border implications for Hungary. A decision to block the transit of (mainly Russian) oil or gas through or along pipelines running on the territory of a country can seriously affect Hungary's (short-term) energy security. Similar effects can be seen in the case of the Adria pipeline, where the dispute between Hungary and Croatia is whether the Croatian side has sufficient capacity to allow Hungary to displace oil coming through the pipelines from Russia (Croatia says the capacity is sufficient).

5. Components of energy security

According to NECP, the security of supply is part of national sovereignty.¹⁸ In order to strengthen energy security the focus is on energy independence and reducing import dependency. The strategy focuses on (i) improving energy efficiency, (ii) maximising the sustainable exploitation of (conventional and unconventional) national hydrocarbon reserves and renewable resources, and (iii) maintaining the level of nuclear capacities. As NECP puts it: "Hungary's security of supply can be further improved by strengthening market integration and developing a diversified supply portfolio."¹⁹

The strategy specifically addresses the issue of cybersecurity:

The activities of attackers with different backgrounds and motivations (script-kiddies, cybercriminals, state-sponsored attack groups, so-called APT groups) are increasingly affecting the energy sector. Therefore cybersecurity must become a key element of national security.²⁰

¹⁷ NECP, p. 35.

¹⁸ NECP, p. 51.

¹⁹ NECP, p. 51.

²⁰ NECP, p. 56.

6. Energy Union

The Energy Union is of central importance for Hungary. If only because in 2022, 74% of primary energy supply came from external sources (including nuclear fuel). Import dependency is significant, especially in the field of hydrocarbons, where the figure is over 80%.²¹ This is why the Hungarian energy strategy considers the expansion of cross-border capacities a success. The transmission capacity of cross-border high-voltage lines reaches about 50% of the gross installed capacity in Hungary, significantly exceeding the 15% EU target.²² And in natural gas market. Hungary is a major regional transit country.

7. Import diversification

The Energy Union also creates more opportunities to diversify the national energy mix. The NECP sees this as a means of achieving a sustainable reduction in energy costs for consumers.²³

At the same time, the Hungarian government's repeatedly stated position on the diversification of resources is that it would not be strengthened, but weakened, if Europe completely abandons Russian oil and gas. This would mean losing a source.

Hungary's energy mix is often criticised for not doing enough to diversify it, many say, and for not sufficiently reducing dependence on Russia. The Hungarian government cites the lack of pipeline infrastructure, especially for natural gas and oil, as one of the obstacles to diversification in the short term. NECP also identifies the need to develop infrastructure to ensure access to new independent sources of gas imports (e.g. Azeri, LNG, Romanian, gas traded on Western European markets) as a target.²⁴ Also as a short-term barrier to diversification, the Hungarian energy policy refers to the fact that certain technologies used in Hungary (e.g. Hungarian oil processing capacity) are calibrated to Russian oil. At this point, the debate on the pace of diversification is about when it is worthwhile to undertake the technology change and the costs involved.

²¹ NECP-HU, p. 30.

²² NECP, p. 198.

²³ NECP, p. 96.

²⁴ NECP-HU, p. 31.

Section II: Energy solidarity, energy security and green transition

The starting point for the green transition is that the Hungarian government's goal is to have the largest share of Hungary's electricity generation come from two sources: nuclear and renewable energy, mainly solar. This defines the Hungarian position on the various EU programmes designed to facilitate the green transition.

But before we get to analyse the Hungarian position, it is worth reviewing the main pieces of Hungarian legislation and government strategies that respond to green transition. First of all: Hungary has adopted a climate law (Act XLIV of 2020 on Climate Protection), making the achievement of climate targets mandatory. However, it is interesting that NECP itself does not refer to the Act as the most important document in this field, but to the National Climate Change Strategy, which was adopted by a resolution of the Parliament in 2018.²⁵ This covers the period 2018–2030, but also provides a projection up to 2050 – for example, it envisages a gross GHG emission reduction of 52–85% by 2050 compared to 1990.

1. “Fit for 55”

As mentioned, democratic Hungary inherited a rather poor economic structure in 1990. In the course of the economic transformation, highly polluting, highly energy-intensive and also less efficient industrial plants were replaced by more modern producers. Thanks in part to this, since 1990 CO₂ emissions declined by a 32% decline and the energy consumption dropped by 15%. Therefore, the emission reductions that have been pledged seem easily achievable.

2. “Do no significant harm”

The principle is reflected in NECP in only one place: to increase CO₂ absorption capacity, the proportion of land covered by forests and other wooded land should be significantly increased where this does not cause negative impacts in other directions, for instance, on water balance, soil strength and biodiversity.²⁶

Many environmental organisations criticise Hungarian energy policy, especially because this principle is overlooked. Among many examples, here are

²⁵ 23/2018 (X.31.) Parliamentary Resolution on the second National Climate Change Strategy 2018–2030 looking ahead to 2050.

²⁶ NECP-HU, pp. 27–28.

just two discussions. One is the restarting of the Mátra Power Plant, the other is the increase of domestic gas (and especially shale gas) production. (Both of these instruments have been highlighted in the responses to the energy crisis – see Section III for more on this.) With the restart of lignite-based power generation at the Mátra Power Plant, it is doubtful whether coal-based electricity generation can be phased out as planned (it should have been by 2025). And gas extraction often takes place in natural parks or in arid areas where mining can further reduce water resources.

3. Energy poverty

The Hungarian energy policy may be characterised as consumer-oriented. This means that it aims to serve essential values for consumers, such as affordable energy costs, and a large degree of freedom of choice.²⁷

The most important element of this policy is Act LIV of year 2013 on the implementation of reducing the household public utility charges.²⁸ For natural gas, electricity and district heating (and several non-energy sectors), it stipulates that the price paid by users under universal service obligation and by residential consumers must not exceed the maximum price set by law. (And the Act requires that all bills must indicate how much higher the price would be if this price ceiling did not exist.)

The solution has received a lot of criticism. First of all, because it is not well targeted and creates harmful incentives. The level of price-subsidies in this form is proportional to energy consumption, that is, large energy consumers (presumably the higher income households) receive a greater extent. It is particularly important to point out here that the price-ceiling has not helped the households in energy-poverty using lignite, coal or wood for heating.

On the other hand, the low price has also created disincentives for energy transition and emission reductions: it has reduced the returns on investments in energy savings and the benefits of switching to alternative technologies (such as solar).

However, it is also worth pointing out that, while maintaining the reduction in utility charges is one of the main objectives, the NECP itself highlights that “it may be necessary to carry out the conceptual reform of administrative price control of electricity, natural gas and district heat”²⁹ which may contain

²⁷ NECP, p. 51.

²⁸ The official title is: Act LIV of year 2013 on the implementation of reducing the household overhead costs, but this paper uses *utility charges* to refer Hungarian term *rezsiköltség*.

²⁹ NECP, p. 69.

different service packages. This could include, although not addressed in NECP, a particular focus on vulnerable customers/households. The latter concept is also reflected in the document. NECP defines vulnerable consumers as consumers who have difficulties in providing for the basic energy needs of their dwelling or building.³⁰ In English version:

In this regard we will mainly focus on two clearly distinct social groups: large families living in single-family houses in small municipalities and single pensioners living in apartment blocks (or to a lesser extent in single-family houses).³¹

4. Just Transition Fund (JTF)

More than €250 million from the JTF will support the regions most affected by the phasing-out of coal production as well as the conversion of the lignite-fired Mátra Power Plant. The funds will be used to boost energy efficiency research and innovation in SMEs. Another goal is to promote labour market adaptability, namely, to help workers learn new skills, change jobs or start new businesses.

5. State Aid

As of September 2024, the list of existing state aids notified to the Commission includes more than 80 energy-related aids.

The state support for the Mátra Power Plant – much debated in the policy – should be highlighted. According to its annual report, in 2021, the company operating the power plant received HUF 39.3 billion (about €106 million at year-end exchange rates) as state aid in 2021, while last year it received HUF 55.3 billion (about €138 million at year-end exchange rates).

Among public support, it is also worth talking about support for the consumers. The energy saving target cannot be achieved without reducing energy consumption of households. As the NECP points out, some 2.6 million residential properties need some form of energy modernisation,³² which should be promoted, among other things, by financial incentives. (In Hungary, about 42% of primary energy use is in buildings, with residential buildings accounting for the largest share, at almost 60%. The residential sector accounts for about 35% of final energy use, the majority of which comes from buildings.)³³

³⁰ NECP-HU, p. 32.

³¹ NECP, p. 51.

³² NECP-HU, p. 30.

³³ NECP-HU, p. 52.

6. Decarbonisation and security of energy supply

We have already seen the conflicts between decarbonisation and energy security above. (This is particularly acute if we also want to reduce the role of nuclear energy – as many countries are doing, and as Hungary is opposing.)

We have seen that Hungarian government is very critical of further large-scale integration of weather-dependent renewables. Therefore, according to the NECP, in order to ensure the system security and to keep costs low, it should be preceded by the promotion of using innovative and smart solutions ensuring greater flexibility.³⁴ The electricity grid, especially the distribution grid, should also be prepared for the increasing spread of decentralised capacity.³⁵ It is also important to build up electricity storage capacity and to improve the accuracy of weather forecasting.³⁶ According to NECP, gas-fired power plants are the main source of short-term fluctuations in weather-dependent generation. This is why it is necessary to prevent the necessary reduction in controllable generating capacity³⁷ and to increase its capacity: this is why it has been decided to install 1,500 MW of CCGT capacity.³⁸

NECP believes that decarbonisation is helped by the interconnection of European markets. In this case, weather-dependent generation will be integrated into a larger energy grid. While this may be a problem for other countries (as seen above with the German example), an interconnected market will increase and optimise electricity trade between countries,³⁹ which will help reduce this fluctuation.

7. Limits to the Member States' freedom to set their energy mix

The Hungarian government is clearly in favour of maintaining the freedom of Member States to choose their own energy mix. This is also evident in the different views on the role of Russian energy. As we have seen, Hungary is heavily dependent on imports. And its short-term options are also limited due to its geography. NECP underlines that changing the mix will also depend to a large extent on the cooperation of neighbouring countries.⁴⁰ (This was seen above in the Croatian-Hungarian debate on the Adria pipeline.)

³⁴ NECP, p. 28.

³⁵ NECP, p. 53.

³⁶ NECP, p. 93.

³⁷ NECP, p. 57.

³⁸ NECP-HU, p. 32.

³⁹ NECP-HU, p. 39.

⁴⁰ NECP, p. 32.

8. The impact of the climate change

1. As mentioned, Hungary has adopted a climate act. Its § 3 states that: Hungary will reduce greenhouse gas emissions by at least 40% by 2030 compared to 1990.
2. After 2030, if final energy consumption increases above 2005 levels, the increase will be provided exclusively by carbon neutral energy sources.
3. The country will achieve a share of renewable energy sources in gross final energy consumption of at least 21% by 2030.
4. Hungary will reach full climate neutrality by 2050, that is, the remaining domestic emissions and removals of greenhouse gases will be in balance by 2050.

At the same time, the Act is criticised by the green movement for only including these objectives without any consequences in case the objectives are not met. The National Climate Change Strategy envisages a gross GHG emission reduction of 52–85% by 2050 compared to 1990. The objectives in the National Air Pollution Control Programme (reduction of particulate matter) cannot be achieved without reducing pollution from energy use.

The development of the battery industry will be at the heart of political debate in Hungary by 2024. It is clear that the government intends to share the economic benefits from the green transition by creating battery manufacturing in Hungary. The National Battery Industry Strategy (NBIS),⁴¹ for example, sets the goal for Hungary to become a major player in the battery value chain “supporting the widespread use of carbon-free electricity and being environmentally and socially sustainable.” It also “aims to promote the development of a competitive national industry that will contribute to increasing our economic added value and creating new jobs.”⁴²

9. REPowerEU

Hungary’s revised REPowerEU chapter approved at the end of 2023 is worth €4.6 billion. The goal of the programme is to strengthen the electricity sector and promote the uptake of renewable energy sources and energy efficiency in order to reduce dependence on fossil fuels. The reforms include the introduction of dynamic pricing in the retail electricity market, the restructuring of regulatory reserve markets, strengthening the role of energy communities and aggregators, encouraging the uptake of electricity storage, increasing the

⁴¹ National Battery Industry Strategy 2030, Ministry of Information and Technology, https://www.hu-ba.hu/wp-content/uploads/2024/01/Hungarian-National-Battery-Industry-Strategy-2030_ENG.pdf, accessed 15 August 2024.

⁴² NECP-HU, p. 37.

number of smart meters. A number of measures aim at increasing the production of renewable energy in particular solar energy, renewable hydrogen, geothermal energy and sustainable biomethane, and promoting their more efficient use. Significant investments are planned to promote sustainable transport and energy efficiency in households, businesses and the public sector. The decarbonisation of industry, up-skilling and retraining of the workforce are also included.

The goals also include supporting digital upgrades for energy system operators, increasing the number of smart meters, and developing digital learning materials for green skills. And strengthening social resilience is also an important objective. For example, the programme will support energy retrofitting for vulnerable households.

But the EU has set 27 “super milestones” to protect the EU’s financial interests and strengthen the independence of the Hungarian judiciary. Hungary will not be eligible for any payments under the Recovery and Resilience Facility (RRF) until it has satisfactorily implemented these “super milestones.”

Section III: The EU’s crisis management in the field of energy and its limits

1. The perception of European energy policy

As we have seen, Hungary’s import dependency is high. The role of Russian gas and oil coming through pipelines is particularly important. Its share has not even decreased significantly during the current energy crisis. In fact, the Hungarian government continued to negotiate further long-term gas purchases with Russia even during the war in Ukraine. This situation fundamentally determines the Hungarian government’s approach to the European plans of handling the energy crisis. The debate is mainly about the role of Russian energy sources. As we have seen, the Hungarian government is in favour of diversification, but it believes that it would be counterproductive for Europe to give up a source of imports.

At the same time, and especially as the defence of the country’s sovereignty *vis-à-vis* the European Union is a key issue in the government’s rhetoric, serious conflicts have also emerged over the retention of as much national competence as possible in energy policy decisions. Part of this is because (as we have seen) the Hungarian government is unable or unwilling to spend money on replacing Russian energy sources in the short term.

2. Recent energy crisis measures in national legal order

In the summer of 2022, rising energy prices led many to expect the end of the ceiling on the utility charge, and this led to a significant movement in the Hungarian residential energy market. Many households that had previously been heating exclusively with gas also looked for alternative technologies. Demand for stoves, firewood, lignite and coal has increased. There has also been a significant increase in energy saving investments and many people have bought and installed solar panels.

The main reaction of the Hungarian government was to declare a state of energy emergency (in Hungarian *veszélyhelyzet*) in 2022. On 15 July, it adopted Government Resolution 1335/2022 on the adoption of certain necessary measures in connection with the energy emergency. The declaration of the state of emergency (danger) and the steps to be taken were not communicated to the Commission in advance. Because of this questions have been raised, for example, as to whether the declaration of the state of emergency (danger) is in line with the situation covered by Article 222 TFEU. But it is important to know that the state of emergency (danger) has a different meaning – and plays a very important role – in the political communication of the Hungarian government and in constitutional law. In recent years, the government declared state of emergency (danger) several times for different reasons (first in connection with COVID and then with the war in Ukraine – and the related energy crisis). In times of emergency, the government is given additional powers – it can make regulations on issues that would otherwise require legislative acts.

The government resolution foresaw seven steps to be taken:

1. The reform of the utility charge regulation (restructuring and reducing the electricity and gas price-ceiling). Although the government resolution itself did not contain any specific policy, the next decrees made it clear that the former price ceiling (the “protected prices”) would only be applied up to a certain amount of gas and electricity. For households, this amount is 1,729 cubic metres per year for natural gas and 2,523 kilowatt-hours per year for electricity. Above that level, so-called residential market prices would apply, which are also regulated by the state, but significantly higher. For electricity it is about twice as high, for gas about seven times as high as the “protected price.”
2. Increasing domestic production of lignite and coal. This policy is clearly in contradiction with the national objectives of the Green Transition, as outlined above. Critics have also raised the issue that, even if a temporary increase can be supported, it should be made clear for how long and to what extent the government expects an increase. It was also not clear whether this increase was intended to cover only the needs of the Mátra Power Plant

or whether an increase in consumption by households and other sectors was also expected.

3. Recommissioning of all (lignite) units of the Mátra Power Plant and ensuring continuous production. In 2022, the oldest of the five units of the Mátra Power Plant did not work. The next government resolution⁴³ explicitly included dates: “in order to meet security of supply targets, it is necessary to increase lignite-based production [...] by 31 December 2029.” A year later, the deadline has softened: the new resolution⁴⁴ stated that it is “necessary to ensure the operational capability of large lignite units” until the “combined cycle gas turbine power plant is commissioned.” In doing so, the government has overruled the previous plan to phase out lignite by 2025. Environmental groups have therefore strongly criticised the decision. In addition, as we have seen, lignite-fired power plant requires substantial state support. However, the government points out that the postponement of the shutdown and conversion is only a reaction to the fact that the war in Ukraine has fundamentally changed the energy flow between the two countries. In the previous decades, significant amounts of electricity were imported from Ukraine to Hungary, but because of the regular and severe damage to the electricity system in the region, Ukraine itself is now dependent on imports.
4. Increasing domestic fossil gas production (including shale gas) from 1.5 billion cubic metres to 2 billion cubic metres per year. As we have seen above, critics of the plan clearly cite its damaging impact on nature. In addition, many argue that the move will require significant state aid (or tax breaks) – especially as previous market-based production (whether conventional or fracking) has not proved profitable, and stakeholders have withdrawn.
5. Extending the operating life of the Paks nuclear power plant. The move has raised questions about how it will help to handle the energy crisis. The licences for the plant’s operating units expire between 2032 and 2037. In other words, the extension of the licences will not increase current energy production. (Many argue that the aim was rather to make this alternative available to the government in case the so-called Paks2 project did not materialise – or was delayed.)
6. Ensuring that enough gas is stored to ensure winter gas supply until 1 November. Hungary has a large gas storage capacity (6.5 billion cubic metres compared to an annual domestic gas consumption of 9.5 to 10 billion cubic metres), which was still about 45% full at the time of the government resolution. This point calls on the relevant ministers to purchase additional gas.

⁴³ Government Resolution No. 1452/2022 (IX.19.) on the measures necessary to increase the lignite-based production of MVM Mátra Energia Zártkörűen Működő Részvénytársaság.

⁴⁴ Government Resolution No. 1500/2023 (XI. 16.) on certain tasks related to the implementation of Government Resolution No. 1335/2022 (VII.15.) on the taking of certain necessary measures in connection with the energy emergency and Government Resolution No. 1452/2022 (IX.19.) on measures necessary to increase lignite-based production of MVM Mátra Energia Zártkörűen Működő Részvénytársaság.

It should be noted that it has already been made public that the government is negotiating with the Russian government to purchase 700 million cubic metres of additional gas (Hungary and Russia signed a 15-year contract in 2021 for the import of about 4.5 billion cubic metres of gas from Russia.)

7. The introduction of export restrictions on energy commodities. This point, although not stated in the text itself, applied only to the export of firewood. (It should be added that an export ban on other energy carriers is not viable, if only because of Hungary's significant transit role. In addition, 500 million cubic metres of gas from Hungarian gas reserves had been sold to Serbia only a short time before, but already during the energy crisis.) However, according to the subsequent government decree,⁴⁵ no export ban was imposed, only a notification obligation. Once the notification is made, the Ministry of Agriculture can decide whether the state will exercise its right of pre-emption. If it does not, the wood can be exported. Hungarian timber exports have not stopped. The State has exercised its right rarely (from August to mid-November all exports were allowed).

Important steps have been taken beyond these measures. The two most publicised are the firewood programme and the restriction on heating in public buildings.

- Firewood programme. The Officially Priced Firewood Programme was launched in mid-September 2022.⁴⁶ The idea was to offer the population access to firewood at a capped price. Firewood produced on state-owned forest companies was available at this price up to a maximum of 10 forest cubic metres per household. The scheme has, of course, come in for considerable criticism for its logging-increasing effect.
- Heating regulation in public buildings. On 19 September 2022, the Government issued a decree⁴⁷ restricting heating in (i) budgetary bodies under the direction or supervision of the Government or a member of the Government, (ii) budgetary bodies under that are part of the central sub-system of the budgetary system, and (iii) companies over which the State has a majority or indirect influence. Specifically, the Regulation stipulated that they must not be heated to temperatures above 18 degrees Celsius. (The only exceptions are some types of institutions, mainly residential and childcare institutions.) At the same time, another government decree⁴⁸ stipulated that budgetary bodies belonging to the central sub-system of the budgetary system, central, regional and local budgetary bodies and institutions under their control or

⁴⁵ 294/2022 (VIII.9.) Government Decree on the registration procedure and other measures for the export of wood-based raw materials and products of strategic importance for the security of energy supply.

⁴⁶ Government Decree No 287/2022 (VIII.4.) on the application of different rules for the provision of firewood during an emergency.

⁴⁷ Government Decree No 353/2022 (IX.19.) on the emergency operation of certain institutions.

⁴⁸ 354/2022 (IX.19.) on the regulation of the use of natural gas by certain institutions.

supervision, as well as economic entities over which the state has a majority or indirect influence, must achieve a 25% reduction in natural gas consumption in the 2022–2023 heating season.

Section IV: Rapporteur's view on solidarity

As I indicated in the introduction, in this section I will try to answer those questions where no official Hungarian position can be identified or where the questionnaire specifically asked for expert opinions.

The central issue is the new concept of solidarity in the *OPAL* case. First and foremost, it is necessary to understand to what extent the meaning and role of solidarity in this case differs (if at all) from the same concept in earlier European law and, more specifically, in European energy law (e.g., in Article 194 TFEU). The main difference, in my view, is that solidarity was previously an extra-legal or political concept.

In the *OPAL* case, the Court of Justice of the European Union (hereafter 'the Court') invoked the principle of solidarity to prohibit a Member State from taking a step for which there was no specific prohibition – and which the Commission had explicitly authorised it to take. At this stage, it is not known whether the interpretation of the principle of solidarity as standard will become a permanent case law or how the practice will respond to these partial questions. However, if it becomes a standard,⁴⁹ it could fundamentally reshape the institutional environment of EU energy policy, but also of other policies. For example, in the case of shared competences, one of the reasons for EU action could be, and should be today, if decisions taken by a Member State were to have a negative impact on others. (This is called spillover effects in the literature of multi-level governance or fiscal federalism. A special form of these policies is harmful competition, or the not-in-my-backyard regulation.) But if this interpretation of solidarity becomes permanent, the decision-making processes of individual Member States should incorporate and reinforce the assessment of the impact on others. Consequently, there will be less need for such action by the Union to prevent decisions of Member States with harmful effects on others. It can be assumed that the countries will be less likely to take such decisions – if only because of the possibility of ex-post review by the Court and possible sanctions.

⁴⁹ The following analysis draws on the literature that distinguishes between standards and rules and examines their different effects. For example, Luis Kaplow, 'Rules Versus Standards: An Economic Analysis,' *Duke Law Journal* 42(3) (1992), pp. 557–569, Barbara Luppi and Francesco Parisi, 'Rules versus Standards', in: F. Parisi (ed.): *Production of Legal Rules* (Edward Elgar, 2011), pp. 43–53, Hans-Bernd Schaefer, 'Legal Rules and Standards', in: Ch. K. Rowley and F. Schneider (eds): *The Encyclopedia of Public Choice* (Springer, Boston, MA, 2004), pp. 671–674.

This solidarity as standard would give the Court a much bigger role than before (even if the activism of the EU bodies is not reduced in the way we have just seen, if they do not consciously leave more problems to the courts). The Court would be expected to play a significantly greater role in assessing the impact of individual decisions of Member States.

But the requirements for national decision-making may also change. So far, the points in the TFEU where the principle of solidarity has appeared (e.g. Article 194 TFEU) have typically also defined the requirements for each Member State. In contrast, solidarity in this form calls for balancing – even when they would otherwise be free to choose.

This assessment may also be reviewed *ex post* by the Court. The main question is how well defined the test will be in case of this review. The precision and predictability of this test is of central importance, if only because the Court will expect the Member States to apply it. Today, the content of this test, and thus the precise meaning of solidarity as standard, is obviously rather uncertain.

As with any new test that is still to be developed, the standards, of course, increase legal uncertainty. At the moment, we do not know much about the *OPAL* case – in fact, all we know is that every time a decision is taken in a Member State, the decision-maker has to weigh up the benefits for his or her own country against the impact on others. But this balancing can take many different forms. Without being exhaustive, the questions may include:

- whether all impacts should be considered equally, or whether the impacts on the decision-making Member State are more important;
- whether the impacts on Member States that are less well-off (e.g., poorer or more vulnerable to certain negative impacts) should be given more weight;
- how Member States should learn about the impact on others, what information they should collect;
- whether the more accurately predictable and the more uncertain impacts should be given equal weight.

The loss of predictability is a negative consequence – at least in the short term. However, this understanding of solidarity – like all such standard and non-rule-based jurisprudence – can also make the system more flexible and responsive. The standards make it easier for Member States to react to changing conditions (and thus to changing effects) than the rules, when the Union wants to set out in advance precisely what solidarity requires. (It is easy for these reactions, which seem appropriate today, to become too strong or too weak as circumstances change – but they remain rule until the regulation changes.)

ITALY

Paolo Gonnelli
Marco Selvaggi
(rapporteurs)*

Section I: Multidimensionality of energy solidarity and energy security in EU and national law (by Marco Selvaggi**)

Question 1

Before addressing the specific topic, it is worth noting that the principle of solidarity in our national legal system is expressly mentioned and placed in Article 2 of the Italian Constitution, which expresses it on both the political and economic-social levels: “The Republic acknowledges and guarantees the inviolable rights of man, both as an individual and within the social groups in which one’s personality is expressed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled.”¹

More generally, the principle of equality itself is an expression of the solidaristic theme and is part of constitutional duties.

The implementation of the principle of solidarity within the norms of the Italian Constitution, has been further recognised over time, particularly on a social and political levels (social policy, social security, labour protection and safety, education, health protection); an example of this is the constitutional reform of 2001, which assigned to the exclusive legislative power of the State the task of determining “the essential levels of services concerning civil and social rights that must be guaranteed throughout the national territory” (Article 117, lett. m, Constitution, a statement generally considered to be a direct expression of the principle of solidarity.

Legal literature has investigated? Extensively the constitutional principle of solidarity not only with reference to the express indication of Article 2 of the Constitution, but also to the projections of this principle in the various constitutional norms; from the principle of the unity and indivisibility of

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¹ The Italian text is as follows: “La Repubblica riconosce e garantisce i diritti inviolabili dell’uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l’adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.”

the Republic (Article 5 of the Constitution), to the principle of subsidiarity (Article 118), to the principle of fiscal subsidiarity (Article 119, paragraph 5 of the Constitution), to the principle of freedom of association (Article 18).

The Constitutional Court has intervened in numerous rulings on the principle of solidarity; precisely on the subject of volunteering, and thus in the recognised indissoluble link between the principle of solidarity and the principle of substantive equality, the Court in its ruling of 31 December 1993, no. 500, clarified that “this modern vision of the dimension of solidarity, going beyond the traditional schemes of charity and assistance, and going beyond the anchorage to duties and obligations imposed by law, constitutes, on the one hand, a way to contribute to the realisation of that substantial equality which allows the development of the personality, to which paragraph 2 of Article 3 of the Constitution refers, while, on the other hand, it aims to obtain – not only from the State, the entities and the increasingly varied reality of social formations, but from all citizens – cooperation to achieve essential common goods such as scientific research, artistic and cultural promotion, as well as health.”

The Court of Justice has also pronounced itself on the subject of volunteering after being referred by the Council of State for a preliminary ruling on the interpretation of Articles 49 (freedom of establishment) and 56 (freedom to provide services) TFEU (Court of Justice of the EU, Section 7, judgment of 7 July 2022, joined cases C-213/21 and C-214/21, *Italy Emergenza Cooperativa Sociale* and others).

The administrative judges have questioned the Court of Justice on the following points: 1) principally, on the legitimacy of a national regulation that establishes that healthcare transport be entrusted to voluntary associations and the Italian Red Cross; 2) subordinately (if the answer to the first question is in the affirmative), whether direct entrustment should in any case be subject to the non-payment of the service (Cons. Stato, section 3, ordinance no. 1797 of 3 March 2021 and Cons. Stato, section 3, ordinance no. 536 of 18 January 2021).

In its reasoning, the Court of Justice premised on the consideration that “in application of the principle of solidarity enshrined in Article 2 of the Constitution of the Italian Republic and the principle of subsidiarity guaranteed by Article 118 of it, the Italian legal system, both national and regional, attributes to voluntary associations characterised by the absence of profit-making purposes, the prevalence of services rendered in the form of voluntary work and the marginality of commercial and productive activity an active role in the provision of healthcare services,” concluding that “Articles 49 TFEU and 56 TFEU must be interpreted as not precluding national legislation, such as that

at issue in the main proceedings, which allows local authorities to entrust the provision of healthcare transport services by direct awarding, in the absence of any form of advertising, to voluntary associations, provided that the legal and contractual framework in which the activity of those associations takes place actually contributes to a social purpose and *to the pursuit of the objectives of solidarity and budgetary efficiency.*”

Nevertheless, the practice of Italian constitutional jurisprudence has assigned to the principle of solidarity the orientation of controlling the legislator’s discretion in adopting austerity measures in times of crisis.

An example of this is Sentence No. 70/2015 of the Italian Constitutional Court, which declared the constitutional illegitimacy of the measures blocking the automatic revaluation of old-age and retirement pensions, one of the pivotal measures of the austerity policies implemented in Italy from 2011 onwards, recognising that the right to an adequate pension represents “a certain, albeit not explicit, expression of the principle of solidarity and the principle of substantive equality.”

The subject is obviously very broad and it is not possible to deal with it exhaustively in this script in short, it is not wrong to maintain, in agreement with authoritative doctrine, that Article 2 of the Constitution and the principle of solidarity are the *keystone* of the entire constitutional order.² This assertion appears to be in line with what the Court of Justice held in the *OPAL* judgment where the judges of the Court qualified the principle of solidarity as a fundamental principle of the supranational order (*OPAL* judgment, para. 41).

Since, then, the principle of solidarity is mentioned in various provisions of the Treaties, it belongs to that *species* of principles underlying the primary law of the European Union that marks the bases and limits of the Union’s action.

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Turning to the place and nature of the concepts of solidarity and energy security in our national legal system, the framework has rapidly found its way into the regulatory arena in conjunction, in particular, with recent periods of economic, pandemic and geopolitical crisis that have impacted the European and national economies, with noticeable inflationary effects, and have raised fears of energy supply problems, bringing energy security to the forefront of European and national policies.

² V. Crisafulli, ‘Lo spirito della Costituzione’, in: *Studies for the tenth anniversary of the Constitution. Collection of writings on the Constitution*, I, Giuffrè, Milan, 1958, p. 104.

The Repower EU communication of May 2022 emphasised the goal of reducing dependence on Russia by increasing renewables, energy efficiency and reducing consumption.

The same communication called on Member States to introduce policies to diversify gas supply sources, making use of natural gas including through liquefied natural gas (LNG), with infrastructure consistent with the deep decarbonisation scenario to 2050, and above all indicating to states the goal of eliminating dependence on Russian gas imports.

Remaining in general terms, Italy's response to the crisis moved in line with the initiatives taken within the EU and consisted of measures aimed at:

- ensure a high stocking rate;
- diversify the origin of imported gas;
- increase regasification capacity;
- enhancing national energy production;
- reduce gas and electricity consumption.

In this context, since 2022 Italy has intensified its efforts to diversify its natural gas supply sources by entering into new supply agreements via pipeline and via LNG terminals, increasing the use of existing infrastructure, including storage facilities and regasification plants, thus redirecting gas supplies mainly from the Mediterranean Sea and succeeding in halving supplies from Russia by the end of 2022.

The country has also taken steps to strengthen the infrastructures for the security of supply: increasing the capacity of regasification terminals (through the new floating storage and regasification units – FSRUs in Piombino and Ravenna to be operational in 2023–2025 and increasing the regasification capacity of existing terminals), also aiming to expand the – South–North transport capacity along the Adriatic backbone interconnector, to increase national production, including through the optimisation of existing concessions. These measures could also lead Italy to act as a reference for European countries, in a perspective of solidarity and centrality of European cooperation.

Gas consumption and supply sources are monitored in order to ensure compliance with Safety Regulation No. 1938/2017, also with regard to the Risk Analysis document and the consequent updating of preventive and emergency action plans. The new structure of gas supplies, characterised by the reduction of Russian gas imports, requires a new risk assessment, considering that the new balances must be evaluated in light of the challenges that the national energy system will have to face in the short and medium term.

With regard to the security of the electricity system, it must be considered that Italy is historically a net importer of electricity. In this context, the energy transition and the decarbonisation targets defined at EU level represent an important opportunity not only to limit the impacts of climate change, but also to reduce energy dependence through increased production from domestic renewable sources. In any case, further expansion of electricity interconnections with foreign countries is planned on both the northern and southern borders, which will not only increase the security of interconnected systems, but also promote efficiency and competition with a greater alignment of wholesale prices.

With a view to a possible resumption of domestic production, nuclear energy can also contribute to improving energy security, as it can provide a stable and continuous source of energy and reduce vulnerability to external supply disruptions and dependence on imported fossil fuels; however, the issue, in Italy, is controversial and uncertain in future developments.

As illustrated above, the practice of constitutional jurisprudence in our system has qualified the principle of solidarity as a criterion for scrutinising the constitutional legitimacy of laws.

On the other hand, in the field of energy market legislation, the intervention of the national courts and the Constitutional Court does not record any significant interventions and indeed does not appear to be explicitly declined in relation to an important dispute currently before the Constitutional Court.

On the appeal of a company in the sector, the Regional Administrative Court of Lazio raised the incidental question of the constitutionality of the solidarity contribution introduced by Article 1, paragraphs 115 *et seq.* of Law No. 197/2022,³ allegedly in conflict – pursuant to Article 117 of the Constitution – with the constraints deriving from EU law and, specifically, from EU Regulation 1854/2022, which instituted, among other provisions, a temporary solidarity contribution based on the taxable profits made in the 2022 tax year by companies and permanent establishments active only in the oil, gas, coal and refining sectors.

Regulation 1854/2022 identified the measures that Member States may take, where they have not already adopted equivalent measures, to address the emergency situation in a harmonised manner across the entire territory of the Union, setting them out in full in the Regulation's recitals.

³ Lazio Regional Administrative Court Order No. 773/2024 of 16.01.2024.

These measures consist of: (i) the reduction of electricity consumption (Recital 10 and then in detail 16 *et seq.*); (ii) a cap on market revenues obtained by renewable energy producers (recital 11 and then in detail 23 *et seq.*); (iii) a temporary exceptional solidarity contribution “for Union companies and permanent establishments engaged in activities in the crude oil, natural gas, coal and refining sectors” (Recitals 12, 13 and 14 and then in detail 50 *et seq.*).

The Italian legislature, with the rules indicated, intended to place the temporary solidarity contribution also at the expense of entities other than those identified at European level due to their specific business dynamics, while excluding precisely those companies engaged in oil extraction activities, which are specifically contemplated at supranational level, and including electricity producing companies, which are, moreover, already recipients of the compensation mechanisms on the price of electricity fed into the grid.

It will be necessary to wait for the Constitutional Court’s ruling to see whether the principle of energy solidarity and the innovative legal analyses contained in the *OPAL* judgment are one of the areas of scrutiny of the issue of constitutionality, aspects not considered by the Referring Court.

Question 2

This question have already been answered in part, at least from the standpoint of national law, considering the constitutional case law on the principle of solidarity as an expression of a general principle of our legal system capable of constituting a constraint on conduct and a limit on the legitimacy of legislative acts and measures of the Public Administration.

In terms of EU law, the innovative scope of the *OPAL* judgment is well outlined in the aforementioned decision.

The Luxembourg judges recognise that the spirit of solidarity between Member States, mentioned in Article 194(1) TFEU, constitutes a specific expression, in the energy sector, of the principle of solidarity, which in turn constitutes one of the fundamental principles of EU law, identifying, in paragraphs 39 and 40, the declination of the principle of solidarity in the other rules of the TFEU.

The systematic reconstruction of the *OPAL* judgment is well known and it is not worth going over it again here in its essential themes; the conclusion reached by the judges is that the principle of solidarity underlies the entire legal system of the Union and is closely related to the principle of sincere cooperation, enshrined in Article 4(3) TEU.

In this regard, the Court has notably ruled that this principle not only obliges the Member States to take all appropriate measures to ensure the scope and effectiveness of Union law, but also imposes on the Union's institutions mutual duties of loyal cooperation with the Member States in the context of "the totality of energy policy objectives, grouping them together and giving them coherence" (paragraph 43 *OPAL* Judgment).

It can be concluded on this point that the Court's statements in the *OPAL* judgment go beyond the limit traditionally recognised to the principle of solidarity as a principle particularly applicable to interventions in response to emergency situations, as explicitly provided for in Article 122(1) TFEU, so that there can be no doubt that the vision expressed in the aforementioned decision is not only a principle that can be interpreted as a "corrective instrument" outlining the limits of national sovereignty in the field of energy, but, in the opinion of the writer, a structural element of EU energy policy and of integration between States, acting both as an indefectible parameter in the adoption of measures in the field of energy and as a parameter for evaluating the legitimacy of the measures adopted.

The question arises, however, whether the contents of the *OPAL* judgment constitute a point of arrival or a starting point in the elaboration of the principle of solidarity in EU law.

Certainly, the jurisprudence of the Court on the principle of solidarity has distant roots, beginning with the Judgment of 10.12.1969 joined cases 6 and 11/69 *Commission v. France*, which recognised that the principle of solidarity is at the basis of the Community system, a recognition that has been reinforced by numerous Court decisions.⁴

In the writer's opinion, the innovative prescriptions of the *OPAL* judgment constitute a starting point in the concrete affirmation of the principle of energy solidarity as a constitutive element of the EU constitutional framework (which goes beyond the particular national interests), but, it appears to be a difficult subject in the current situation and it is not unlikely that further interpretative interventions will have to be awaited.

Moreover, it does not escape the fact that the undoubtedly structural need for the creation of an energy union must be reinforced by the principle of

⁴ Judgment of 29.06.1978, C-77/77, *Benzine en Petroleum Handelsmaatschappij BV and others v. Commission*; 18 March 1980 in joined cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Ferriera di Valsabbia and others v. Commission*; Judgment of 2 February 1989, 186/87 *Cowan v. Trésor public*; Judgment of 20 September 2001. C-453/99 *Courage and Crehan*; Court of Justice (Grand Chamber), 12 September 2017, C-589/15 *Anagnostakis v. Commission*; Judgment of the CJEU of 2 April 2020 *Commission v. Republic of Poland, Hungary and Czech Republic*.

energy solidarity on a par with the principle of loyal cooperation. As pointed out in the Advocate General's conclusions in the *OPAL* judgment, one must also reckon with the difficulty of applying a concept, the principle of energy solidarity, which, like most legal principles, is characterised by an abstract nature that will not make it easy, *first and foremost* for the Commission, to come up with unambiguous solutions.

Question 3

The energy market and national energy policies themselves represent a strategic area where tensions are evident and are closely linked to the realisation of objectives in and between Member States and the diversity of their interests.

The point of synthesis stems from Article 194 TFEU, which was introduced as a legal basis for the development of the Union's competences in the field of energy, although it must be duly taken into account that the measures necessary to achieve EU energy policy objectives do not affect the right of a Member State to determine the conditions of use of its energy sources, the choice between different energy sources and the general structure of its energy supply.

With regard to EU energy policy, it should be noted that in the first instance judgment in the *OPAL* case (Judgment of the General Court – First Chamber Extended – of 10 September 2019 *Republic of Poland v. European Commission* T-883/16, pp. 71–73), later upheld by the Court of Justice of the European Union, the General Court ruled that the principle of energy solidarity entails a general obligation, for the Union and the Member States in the exercise of their respective competences under the Union's energy policy, to take into account the interests of all potentially affected parties, and to avoid adopting measures which might adversely affect their interests, with regard to security of supply, economic and political sustainability and diversification of sources of supply. With regard more specifically to the Union's energy policy, this implies that the Union and the Member States must seek, in the exercise of their competences under that policy, to avoid taking measures likely to affect the interests of the Union and the other Member States.

It is, therefore, at the level of the “spirit of solidarity” or, rather, the “principle of solidarity” that the tensions between energy policy objectives can be recognised, confronted and reconciled. Indeed, it was emphasised in the same judgment of the Court of First Instance that the principle of solidarity includes rights and obligations for both the Union and the Member States.

On the one hand, the Union is bound by an obligation of solidarity *vis-à-vis* the Member States and, on the other hand, the Member States are bound by an obligation of solidarity among themselves and *vis-à-vis* the common interest of the Union and the policies it pursues.

It follows, as the Court held in the *OPAL* judgment (paras. 53 and 69), that the institutions of the Union and the Member States are obliged to take into account both the interests of the Union and those of the various Member States potentially affected when implementing that policy, and to balance those interests in the event of conflicts

With respect to the conduct of the principle of solidarity in relation to the European Green Deal, to deny that the perceptive content of the *OPAL* judgment can remain unimplemented in terms of its legal effects does not seem tenable.

The European Green Deal mapped out an ambitious path towards climate neutrality, clearly stating the objective of responding in a balanced manner to the economic, environmental and social challenges of the ecological transition. By providing for cross-sectoral interventions, this pathway aims to promote legislative reforms as well as innovative investments with a view to complementarity, ensuring that “no person and no place is neglected.” For the declarations of principle contained in this initiative to become feasible, coordinated and responsible action by governments and administrations at different territorial levels is needed, translating European strategies for sustainable energy and mobility, the circular economy, competitiveness and the new industrial policy into concrete actions, respecting the indispensable balances within the eco-social dimension of policies.

An example of this is the Social Climate Fund established by Regulation (EU) 2023/955 of 10 May 2023; as part of the “Fit for 55” legislative package implementing the reforms necessary to achieve the targets set by the European Green Deal, it was planned to allocate part of the revenues generated by the new ETS for the building and road transport sectors to stimulate innovation, economic growth and investment in clean technologies and to offset the potential effect of increased energy costs on end consumers, with particular reference to the most vulnerable social classes and micro-enterprises.

To this end, Regulation (EU) 2023/955 of 10 May 2023 established a new financial mechanism, the so-called Social Climate Fund (SCF), for the period 2025–2032, whose objective, within a clear framework of equity and solidarity considerations (see Recital IV), is to allocate specific funding to Member States to address the socio-economic impacts of extending the ETS to these two sectors, so as to support their decarbonisation.

More specifically, the Fund's main purpose is to support households, micro-enterprises and transport users in the most vulnerable groups by providing – albeit temporarily – direct income support to reduce energy poverty, while financing national measures and investments aimed at reducing dependence on fossil fuels in the medium and long term through increased energy efficiency in buildings, decarbonisation of heating and cooling in buildings, including the integration of energy from renewable sources, and providing better access to zero- or low-emission mobility and transport.

The concepts of sustainable development and just transition pose major social challenges, and the transition, as explicitly stated in Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund (JTF), entails social, economic and environmental effects of greater magnitude for regions that are heavily dependent on fossil fuels for energy or greenhouse gas-intensive industries. This situation creates not only the risk that the Union's transition will take place at different speeds as far as climate action is concerned, but also that it will exacerbate disparities between regions, to the detriment of the objectives of social, economic, and territorial cohesion.

But the topic must be addressed in particular in the context of the EU's energy policy objectives, and the social tensions of energy development appear to be the order of the day.

Current reflections focus on future changes affecting employment levels and the education and training sector.

The National Institute for the Analysis of Public Policies (INAPP), on behalf of the Ministry of Labour and Social Policies, has set up an information system on occupations, employment and professional requirements that has linked the economic-productive system and the education/vocational training system. This information system is designed to guarantee a double level of temporal reading of the data: short-term recruitment forecasts and contingent professional requirements; medium-term employment forecasts and a five-year anticipation of professional requirements. Within this framework, INAPP analysed future needs in the electricity, gas, water and steam supply sector, in the light of today's institutional and regulatory guidelines, with particular reference to the National Integrated Energy and Climate Plan – PNIEC, drawn up by the Ministry for the Environment and Energy Security (version June 2024).

The analysis, conducted with the help of a specially constituted team of experts, was aimed at:

- identifying the professional figures most affected and most transformed in five years' time;
- identifying the new skills and skills that have been innovated;
- updating and implementing the INAPP Professions database;
- providing suggestions on the curricular elements that should be innovated/inserted in order to adapt the professional unit to the change, thus outlining the profound transformations expected in this sector.

Lastly, it seems in line with the answer to the question, to mention the solidarity measures introduced in our system through the provision of extraordinary forms of contribution to be borne by companies in the sector.

Question 4

In a general projection, energy and environmental policies are closely linked. Energy production and consumption have a major environmental impact, generating about two-thirds of global greenhouse gas emissions, which means that the energy sector must be at the centre of global action in all climate change adaptation and mitigation processes.

In this terms, international cooperation in the energy sector is crucial in responding to the global environmental challenges expressed by the concept of climate change.

In many contexts, particularly in the context of strategic choices, energy and environmental objectives express a clear coherence in relation to the objective of promoting energy efficiency, which aims to reduce the associated impact throughout the energy chain: extraction, generation, transformation, distribution and consumption of energy, or the sustainable promotion of renewable energy sources, which reduce overall environmental and climate pressures when compared to other forms of energy.

On the other hand, the synthesis of environmental and economic objectives shows tensions in particular in the energy sector and in relation to large installations, due to the obvious effects on environmental and health protection, as can be seen from the judgment in the case of the Hinkley Point C nuclear power plant referred to in the question,⁵ a decision in

⁵ Court of Justice of the EU, Grand Chamber, 22 September 2020, in: Case C-594/18 P – Lenaerts, Pres.; Jarukaitis, Ext.; Hogan, Adv. Gen. – *Republic of Austria v. European Commission and Others*.

which, however, the spirit of solidarity and/or the principle of solidarity had no place.

In both the gas and electricity sectors, Italy has over time developed coordinated actions with other Member States and abroad in response to the country's traditional supply crisis

From a structural point of view in relation to the gas sector, in recent years Italy has pursued a strategy of diversification of supply sources, which have allowed it to reduce its dependence on Russian gas from 40% in 2021 to 19.3% in 2023.

The inflow from the Tarvisio entry point, through which most of the imports from Russia pass, fell dramatically, accounting for just 4.6% of imports. Instead, imports increased from Algeria (TRASMED gas pipeline – Mazara del Vallo), Azerbaijan (with the TAP, Trans-Adriatic Pipeline – Melendugno), Norway (TENP – TRANSITGAS – Passo Gries). A share also comes from Libya (GREENSTREAM pipeline – Gela).

Currently, the main imports come from:

- Algeria (TRASMED – Mazara del Vallo gas pipeline), which has become Italy's first partner. Supply from this country has in fact largely replaced supply from Russia.
- Azerbaijan (with the TAP, Trans-Adriatic Pipeline – Melendugno) from which Italy currently obtains 10 billion cubic metres annually, with forecasts to increase.
- Norway (TENP – TRANSITGAS – Gries Pass).

In addition, there is the supply of LNG; there are currently four regasification terminals in Italy:

- An on-shore plant in Panigaglia, in the province of La Spezia, owned by Snam, the first regasification plant built in Italy, with a maximum annual regasification capacity of 3.5 billion cubic metres.
- An offshore plant off Porto Viro, in the province of Rovigo (Adriatic LNG), owned by ExxonMobil, Qatar Petroleum and Snam, with a production capacity of 8 billion cubic metres of gas.
- A floating storage regasification unit (FSRU) offshore Livorno and Pisa (FSRU Toscana), operated by Snam, First Sentier Investors and Golar LNG, with an annual capacity of 3.75 billion cubic metres;
- A floating storage regasification unit – FRSU Golar Tundra positioned in the Port of Piombino and recently commissioned in July 2023.
- A further FSRU for the Ravenna site, BW Singapore, will come into operation in autumn 2024.⁶

⁶ V. Report 'Energy Security Policies', Chamber of Deputies 4 April 2024.

In the electricity sector, Italy has historically been a net importer.

The national electricity transmission grid is interconnected with foreign countries through 26 lines: 4 with France, 12 with Switzerland, 2 with Austria, 2 with Slovenia, 4 direct current connections (the cable with France, the cable with Greece, the cable with Montenegro and the double connection, called SACOI, with Corsica, mainland on one side and Sardinia on the other), an additional alternating current cable between Sardinia and Corsica, a 220 kV submarine and terrestrial cable connection between Italy and Malta.

In the new Mission 7 REPowerEU of the National Recovery and Resilience Plan NRP, there are investments aimed at enhancing cross-border interconnections with Austria, Slovenia, and France.

In particular:

- investment 6 – Cross-border electricity interconnection projects between Italy and neighbouring countries (M7C1- I.6.1), which aims to expand and modernise the electricity transmission infrastructure between Italy, Austria, and Slovenia.
- investment 5 – SA.CO.I.3 (M7C1-I.5.1), which aims, by August 2026, to modernise the electricity transmission infrastructure linking Sardinia to the rest of Italy, via Corsica, in order to tap into Sardinia's renewable energy generation capacity and integrate it into the national transmission grid.

Despite the complexity of energy policies in the context of interconnected networks, there have been no cross-border and bilateral tensions that have led to legal and jurisprudential developments, with the exception of the case of the gas pipeline from Greece to Italy via Albania and the Adriatic Sea (known as the Trans Adriatic Pipeline, or TAP), a project admitted for European funding as a Project of Common Interest.

The dispute, although circumscribed within the framework of the national courts (the Administrative Judge and the Constitutional Court), moved in a European scenario and in this sense, it seems appropriate to mention it.

Specifically, the Municipality of Melendugno and the Apulia Region had challenged before the Administrative Court of Lazio the Environmental Impact Assessment decree approved by the Presidency of the Council of Ministers in 2015, contesting, under various profiles, the absence on the part of the State of any negotiation aimed at reaching a result that was as shared as possible, in violation of the canon of loyal cooperation that should always inform relations between State and Regions.

Both the TAR and the Council of State rejected the appeals of the Apulia Region.⁷

The issue had also been raised by the Apulia Region before the Constitutional Court, which declared the appeal inadmissible with Sentence Constitutional Court no. 230 of 27 October 2017.

Indeed, the concepts of solidarity and energy security have not found a place in the resolution of the dispute, dwelling more on the wide discretion reserved in this matter to the State administration.

Question 5

The *OPAL* judgment, in stating that the application of the principle of energy solidarity does not mean that the Union's energy policy must in no case have a negative impact on the particular interests of a Member State, expressly recognises that the principle of energy solidarity requires the Union's institutions, including the Commission, to balance the interests at stake in the light of that principle, taking into account the interests of both the Member States and the Union as a whole.

It is, in essence, the need to find the correct balance between the intensity of the proposed measure and the objectives pursued, which is the synthesis of the meaning of the principle of proportionality to which the Court's reflections on the affirmation of the principle of energy solidarity as a legal principle of the system must be added.

On the other hand, once a general principle has been qualified as a "general principle of EU law" by the Court of Justice, this principle is necessarily destined to prevail over both secondary EU law and the national law of the Member States whenever EU law is applied, as the EU Court of Justice has made clear since the 1979 *Eridania* judgment.⁸

The answer to the question, therefore, cannot be clear-cut one way or the other and may also depend on the contingent moment when the principles mentioned above come into play.

On the other hand, EU secondary legislation has already expressed the notion that the measures that Member States might take to ensure a level playing field in the natural gas market should be based on overriding needs in the general

⁷ Judgments TAR Lazio no. 2107 and 2108 of 2016 and Council of State no. 1392/17.

⁸ Court of Justice, Judgment 02.09.1979, Case 230/78, *Eridania*, ECLI:EU:C:1979:216.

interest and that the Commission should be consulted on the compatibility of the measures with the Treaty and EU law.⁹

In the author's opinion, the *OPAL* judgment leans toward a prevalence of common denominators where it notes that the application of the principle of energy solidarity can lead to negative effects for the particular interests of Member States, since it is a principle that is closely related to the principle of loyal cooperation, enshrined in Article 4(3) TEU, under which the Union and Member States respect and assist each other in the performance of tasks arising from the Treaties.

Question 6

The crisis (on the level of not only energy) resulting from the Russia's war of aggression against Ukraine has and is profoundly affecting interstate relations and the policies of individual states with regard to energy issues, and it has resulted in the EU Commission assuming an increasingly predominant role in the regulatory definition of strategies for both security in the gas supply and electricity sectors. No stranger to this transformation is the principle of solidarity.

On May 18, 2022, the European Commission presented the REPowerEU Plan (COM – 2022), in which it emphasised the goal of reducing the EU's energy dependence on Russia by increasing renewable sources, energy efficiency, and reducing consumption. Member States were urged to introduce policies to diversify gas supply sources, making use of natural gas including through LNG, with infrastructure consistent with the deep decarbonisation scenario to 2050, along lines inspired by the principle of solidarity.

The Plan was accompanied by a package of initiatives, mostly legislative in nature, and included:

- a communication on energy conservation;
- an external mobilization strategy for energy in a changing world;
- an EU strategy for solar energy;
- a proposal to amend the directives on renewables, energy performance of buildings and energy efficiency, which was finally approved on September 12, 2023 by the EU Parliament;
- a recommendation on permitting procedures for renewable energy installations and facilitation of energy purchase and sale agreements; and
- Regulation (EU) 2023/435 of February 27, 2023, to enable Member States to include appropriate REPowerEU chapters in Recovery and Resilience Plans.

⁹ Directive 2009/73/EC of the European Parliament and of the Council of July 13, 2009 concerning common rules for the internal market in natural gas.

The aforementioned Regulation (EU) 2023/435, which entered into force on March 1, 2023, provided for the inclusion in the National Recovery and Resilience Plans (NRPs), of a chapter dedicated to the REPowerEU plan.

Think also of state aid measures to support the economy in the wake of Russia's aggression against Ukraine (see COM 2022/C 131 I/01, published in the OJEU on March 24, 2022, and supplemented in the subsequent COM 2022/C 280/01), by which specific conditions and types of aid – eligible after notification to the Commission – were identified aimed at supporting businesses, affected by high energy prices and/or reduced trade flows due to the conflict.

In the Commission's adoption of measures, the impact of the interpretation of the principle of energy solidarity, as provided by the Court in the *OPAL* judgment, has already produced clear effects, contributing to the shift toward the EU exercising greater dominance of competence in the energy sector.

The impact, for example, has been evident in Council Regulation (EU) 2022/2576 of December 19, 2022, which promotes solidarity through better coordination of gas purchases, reliable price benchmarks, and cross-border gas trade.

There is, therefore, a shift away from the spirit of solidarity, traditionally endowed with greater expansion in the hypotheses of Articles 122 and 222 TFEU (which include energy crisis among the situations likely to activate compensatory or relief mechanisms for Member States in difficulty), towards the affirmation of a transversal, collective principle of solidarity, because of what the Court explicitly held in the *OPAL* judgment, not only as a constraint on the legitimacy of acts or an interpretative parameter, but as a principle that places a general obligation on the part of the Union and the Member States, in the exercise of their respective powers, to take into account the interests of all potentially affected parties.

Question 7

Of the concept of energy security, various definitions have been given, united by the fundamental criterion that energy supply must always, at an affordable price, meet current demand so that there are no interruptions in its service. The Paris Agency has defined it as “uninterrupted availability of energy sources at an affordable price,” while the U.S. Department of Energy and Climate Change speaks of it as “the risks of interruption to energy supply are low,” while the European Union defines it as “stable and abundant supply of energy.”

Regulation 2017/1938 on measures to ensure security of gas supply recognizes how “solidarity” and “trust” constitute the “necessary components of energy security.”¹⁰

This assertion makes it possible to consider, particularly in light of the measures taken by the EU in the context of the crisis following Russia’s war of aggression against Ukraine, that the concepts of solidarity and trust in energy security are apt to make possible a construction of a common policy more firmly in the hands of European governance, in relation to energy policy objectives.

The question turns its attention to profiles related to cybersecurity threats. This is a highly topical subject matter, obviously not only in the energy sector.

In the energy sector, the complexity of cyber-attacks has increased tremendously in recent years, as have artificial intelligence-based attacks, as well as attacks sponsored by other states as a geopolitical offensive tool, as energy networks and grid infrastructure are a potentially crippling target.

Can the energy world handle cyber threats and cybersecurity regulatory requirements?

The Italian situation varies from cases of excellence to worrying realities, if one runs through the entire supply chain.

On June 10, 2024, the Council of Ministers approved a draft legislative decree regarding the EU Directive Nis 2, “network and information security.” Final transposition must take place by October 17, 2024, and the new measures strongly impact the electricity sector, as in many others.

The rationale for the regulations is to raise safety levels in essential and important services, thus also in the energy sector, which is considered by the Nis 2 Directive to be of high criticality, by introducing requirements that will not be easy to implement, not least because of the costs involved in raising safety levels.

¹⁰ See Recital 6: Energy security is one of the objectives of the Energy Union strategy set out in the Commission’s February 25, 2015, communication on a “Framework Strategy for a Resilient Energy Union, accompanied by a forward-looking climate change policy,” which further emphasizes the “energy efficiency first” principle and the need to implement existing Union legal acts in the energy sector. The communication highlights that the Energy Union rests on solidarity, a principle enshrined in Article 194 of the Treaty on the Functioning of the European Union (TFEU), and trust, necessary components of energy security. This regulation aims to strengthen both among Member States and to put in place the necessary measures to pursue this end. In evaluating the preventive action plans and contingency plans established by Member States, the Commission should also be able to draw their attention to the objectives of the Energy Union.

It is, however, noteworthy that at the increase in the threats of cybersecurity attacks recorded in recent years, the topic denotes that the issue of energy security is considered in a broader sense than security of supply in the consideration, expressed in the Nis 2 Directive, that cybersecurity preparedness and effectiveness are now more essential than ever for the proper functioning of the internal market.

Question 8

In accordance with Article 21(1) TEU, solidarity is one of the principles governing the Union's external action and, in the mind of Article 24(2) and (3) TEU, it appears among the provisions on the common foreign and security policy as "mutual political solidarity" of the Member States.

It is, therefore, clear that the principle of solidarity is intimately connected with the EU's external energy policy; what the influence of the principle of solidarity, as interpreted by the *OPAL* judgment, may be or how it may be declined, is probably a premature question to be resolved, also in relation to the uncertainty, highlighted by several parties, regarding the actual perceptive contents of the principle of solidarity, not only with reference to the stage of judicial assessment of the legitimacy of acts, but also and especially in the decision-making stage of energy policy measures.

It is true that ever since Regulation 347/2013 of the Parliament and Council of April 17, 2013 on guidelines for trans-European energy infrastructure, the need to modernise and expand Europe's energy infrastructure and interconnect networks across borders has been emphasized in order to operationalize solidarity among Member States, secure supply or transit routes and alternative energy sources, and develop renewable energy sources in competition with traditional sources, under the objective that no Member State should remain isolated from Europe's electricity and gas networks or see its energy security threatened due to lack of adequate connections.

On the other hand, the statement in the *OPAL* judgment that the institutions of the Union and the Member States are obliged to take into consideration, in the implementation of energy policy, both the interests of the Union and those of the various Member States potentially affected and to balance these interests in case of conflict, appears to be a general precept undoubtedly encompassing the EU's external energy policy.

Question 9

In order to answer the stated questions, it is deemed necessary to provide a background premise, particularly referring to the gas supply sector.

As is well known, Regulation (EU) 2018/1999 of the European Parliament and of the Council of December 11, 2018 establishes the necessary legislative basis for a reliable, inclusive, cost-effective, transparent, and predictable governance of the Energy and Climate Action Union (“governance mechanism”) that ensures the achievement of the long-term objectives and targets up to 2030 of the Energy Union.

This Regulation was revised in June 2022 – after Russia’s invasion of Ukraine – by Regulation (EU) 2022/1032, which stipulated an obligation to fill at least 80 percent of gas storage capacities in the territory of Member States before the start of winter 2022/2023 and 90 percent in the same period in subsequent years. This provision, included as a new Article 6-bis inserted in Regulation (EU) 2017/1938, applies until December 31, 2025.

The governance mechanism is based on the long-term strategies, integrated national energy and climate plans covering 10-year periods from the decade 2021–2030, corresponding integrated national energy and climate progress reports submitted by Member States, and the Commission’s integrated monitoring arrangements, applying to all five dimensions of the Energy Union: energy security; internal energy market; energy efficiency; decarbonisation; and research, innovation and competitiveness.

To promote solidarity among Member States through better coordination of gas purchases and reliable benchmarks for cross-border gas prices and trade, Regulation (EU) 2022/2576 was then also adopted. This Regulation introduced temporary emergency measures operating until December 31, 2024, according to the extension provided by Regulation (EU) 2023/2919.

The temporary measures concern:

- (a) the expeditious establishment of a demand aggregation and joint gas purchasing service by enterprises established in the Union;
- (b) secondary capacity reservation and transparency platforms for LNG facilities and gas storage facilities;
- (c) congestion management in gas transmission networks;
- (d) a temporary intra-day volatility management mechanism for excessive price changes and an ad hoc LNG benchmark defined by ACER (European Union Agency for the Cooperation of Energy Regulators); and

- (e) temporary measures, in the event of a gas supply emergency, to distribute gas equitably across borders, ensure gas supply to the most critical customers, and the implementation of cross-border solidarity measures.

As part of the initiatives taken to reduce the European Union's dependence on Russian imported fuels and in the perspective of a possible disruption of gas supplies from Russia, Regulation (EU) 2022/1369 was also approved on July 26, 2022 at an extraordinary Energy Council, committing Member States to a voluntary 15 percent reduction in gas demand between August 1, 2022 and March 31, 2024 (a deadline thus extended by Council Regulation 2023/706).

Against this backdrop, at the European level, with Communication COM(2022) 108 of March 8, 2022, "REPowerEU: Joint European Action for more affordable, secure and sustainable energy," the European Commission mapped out a path toward the gradual substitution of imports from Russia to reinforce and accelerate the measures of the "Fit for 55" package.

In relation to the issue of gas supply, the measure outlined in the REPowerEU communication indicates the goal of diversification of gas supply sources through agreements with different countries.

One of the instruments in which governance in the energy sector is realised are the Integrated National Energy and Climate Plans (NIEC), provided for in Article 3 of Regulation 2018/1999.

The NIEC adopted by the Ministry of the Environment in 2019 and profoundly revised in the June 2024 edition, fully meets the requirements of European governance required by Regulation 2018/1999 and shows that, although the issue of security of supply remains the responsibility of the national state, the gas energy policy has adequately responded to the need to ensure a structured, transparent and procedural process between the Commission and the Member States aimed at the development and subsequent implementation of the Plans themselves, including regional cooperation, and the corresponding action of the Commission.

In fact, in the gas market sector, Italy's response to the crisis has moved in synergy and coherence with the initiatives taken in the EU and has consisted of measures to ensure high storage filling; diversify the origin of imported gas; increase regasification capacity; boost domestic production; and reduce consumption.

Following the crisis resulting from the Russian-Ukrainian conflict, the possibility of access to alternative sources of supply than gas from Russia and the

possibility of using the gas present in Italian storages have created important opportunities for the Italian gas system, improving its competitiveness and highlighting its role as a support for the European domestic market, especially for countries highly dependent on gas from Russia and poorly interconnected with alternative sources of supply.

This phenomenon is confirmed by the increase during 2022 and 2023 in the frequency and volumes exported both to Austria through the Tarvisio exit point (and, therefore, potentially to other countries interconnected to it through the Baumgarten hub) and to Switzerland (and, therefore, also potentially to Germany and France).

Without wishing to cite here the individual national measures adopted in coherence with the governance framework provided in the EU Regulations, particularly in the area of supply, it can be argued that the Italian gas system appears, in the current situation, to be one of the most interconnected systems on the European continent, thanks in part to its privileged location and branched infrastructure, with access to gas resources from North Africa (Algeria and Libya) and Azerbaijan through the Trans Adriatic Pipeline – TAP – transportation system, as well as from LNG that can be regasified in the four existing plants of Panigaglia, offshore Adriatic, OLT and Piombino, the latter of which came into operation in 2023 as a result of the emergency interventions decided by the government to cope with the crisis resulting from the Russian-Ukrainian war.

Therefore, it is believed that as far as Italy is concerned, the governance model adopted so far has proven adequate.

In other respects, it must be said that the governance model in the area of security of supply is a clear expression of the principles of shared responsibility of states and the Commission set out in Articles 3 and 4 of Regulation 2017/1938; the real question is whether the impact of shared responsibility on governance has, so far, been fully effective.

It is interesting, on this issue, the debate recently initiated by the European Court of Auditors in its 2024 Report on Security of Gas Supply in the EU regarding still critical profiles of the sector.

The ECA found that it is often not possible to demonstrate whether crisis response objectives have been met, noting that despite important achievements over the years, which undoubtedly played an important role in ensuring the security of natural gas supply, particularly during the crisis, and encouraged cooperation among Member States, nevertheless, the EU's energy supply security architecture has been deficient in some key elaborates.

In addition, the EU has only recently begun to develop an affordability framework on security of gas supply; the impact of measures taken in response to Russia's use of gas supplies as a weapon is not always visible; and the EU's increased dependence on liquefied natural gas and the need to decarbonise some of the EU's gas consumption pose new challenges for the future.

In this context, the ECA made three Recommendations to the Commission regarding the completion of the EU framework on gas affordability; the optimization of the reporting process of Member States on security of gas supply; and the need for revision of the regional cooperation structure.

The Commission has responded to the Recommendations of the ECA, accepting them Recommendations and providing clarifications on the measures taken by the EU in response to the crisis and the achievement of the stated objectives.

In the author's opinion, the entry of the principle of solidarity as a principle of the legal system comprising rights and obligations for both the Union and the Member States, as declined in the Court's judgment in the *OPAL* case, pushes future challenges in the gas supply sector toward increasingly Union-led governance as a whole.

Section II: Energy solidarity, energy security and green transition¹¹ (by Paolo Gonnelli*)

Question 1

- a. "How do the considerations of fairness and solidarity, and of leaving no one behind in the context of green transition, affect the articulation of the EU's climate objectives?"

The issue is very complex. Indeed, the European Commission's package of proposals called "Fit for 55" has an organic appearance and is certainly informed by a "holistic" conception, in which no profile of the issue seems to be neglected.

In practice, however, the path to climate neutrality seems to create, in its concrete implementation, many problems about the possibility of implementation without leaving anyone behind, basically due to a limitation of economic resources.

¹¹ In drafting this report for the Rapporteur General, the author of the second and third sections have chosen the method of breaking down the Basic Questionnaire into sub-questions and reproducing them in the text, in order to contextualise the answers and to facilitate the reading.

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The ageing of the building stock, which for the vast majority of cases dates back to years in which the problem of “insulation” did not arise at all, meaning that, especially in Italy, adapting to the standards imposed for the achievement of climate goals entails costs mostly beyond the reach of landlords, including those who in the very recent past and with great expenditure of public resources achieved only a “promotion” of only two energy efficiency classes, without reaching the top one now required.

A similar argument can be made for the transportation sector (listed along with construction among the two largest contributors to current pollution).

It is obvious that such issues risk generating further forms of “poverty,” increasing the gap between those who will be able to afford such adjustments and those who will not.

In the face of this gap, the resources made available by the European Union to deal with situations of “energy poverty” (while forming the subject of careful definition) appear almost like “drops in the ocean,” risking reducing to mere utopia the “considerations of equity and solidarity, and of leaving no one behind.”

- b. “What is generally an interplay between (i) the climate neutrality, (ii) energy solidarity and (iii) security of energy of supply?”

The “near-war” economy, which, among other things, has committed all EU countries to a heavy economic burden first (and still) for support to Ukraine, then for humanitarian aid to Gaza and then for the defensive mission in the Red Sea, has made it necessary to consider the guarantee of energy supply security a priority, with the need to “reinvent” new fossil fuel supply channels.

The almost total abandonment of natural gas supplies from Russia led Italy to reach agreements with states on the Mediterranean coast of Africa to import gas via pipelines, just as Italy was provided with regasification facilities for liquid gas imported by ship from America.

And in the wake of energy solidarity among the countries of the Union, projects (also included in the REPowerEU added to our PNRR) have been launched to create natural gas “transmission lines” leaving Italy and heading to Central Europe.

But in all evidence, these are initiatives that are poorly reconciled with the goal of decarbonisation, which should be one of the strong points in achieving so-called climate neutrality.

- c. “Given important economic and political differences between the Member States in the energy field, could and should the (energy) solidarity be relied upon to ensure coherence in the process of reshaping the climate neutral future of the Union’s economy? Or, rather, is the 2050 climate neutrality objective such a powerful concept that it is gradually reshaping the meaning of energy solidarity and energy security in EU and national law?”

Since the goal of climate neutrality, although more tendentious than realistic, entails maximum effort, on all possible fronts, at both the European and national levels (as well as, of course, at the global level), it seems imperative that European legislation take into account not only the economic, but also the geographical, morphological, and social differences of each Member State, so they can make the best use of the non-polluting (or least polluting) energy resources available to it.

In this sense, the widest choice among possible solutions for achieving the least polluting energy mix and/or the most efficient energy savings in practice must be left to the Member States.

The temptation of a “tightening” of European legislation for specific “targets” to be achieved in each policy area rather than on moving closer to the substantive goal of climate neutrality seems to be unhelpful to the achievement of that substantive goal, as well as creating a potentially unnecessarily harmful conflict both among individual Member States and between them and the European institutions.

This is because of both concrete feasibility and actual need.

It is evident – in terms of feasibility – that a country such as Italy, which has chosen for decades to renounce “nuclear” fission, can benefit both from the development matured in the production of bio-fuels and from the availability of climatic and geographical conditions that facilitate the use of wind, photovoltaic or wave-movement sources.

By contrast – from the standpoint of actual necessity – one wonders whether it makes sense to impose an identical level of “energy efficiency” of buildings on all states, since some of those states face such cold as well as hot temperatures throughout the year that artificial “compensation” (energy-intensive or even polluting) is necessarily required for the guarantee of a good level of habitability, while other states, such as Italy, enjoy more temperate climates, which would dispense for long periods of the year from the need for artificial “compensation” that is not merely voluptuaries (such as claiming to enjoy 18 degrees Celsius temperature in summer or 24 in winter).

The “parcelisation” of “targets” is surely also due to the objective difficulty of measuring in “global” terms the approach to the goal of climate neutrality,

while it is much easier to measure the “progress” made or to be made in the various policy areas. But this does not seem at all a good reason to give up measuring the reduction of polluting effects rather than the parceling out of the instruments put in place to arrive at them.

It should not be forgotten, among other things, that the problem of climate and environmental protection is global in nature.

It is not for nothing that the goal for 2050 is to achieve climate neutrality by reducing emissions of CO₂ and other pollutants and increasing their “sinks” as well as to contain the global temperature increase within a certain limit.

And that is precisely what the targets should perhaps be pinned on. And it is also evident – regardless of the limits of effectiveness of European legislation, which in any case make it impossible to apply said limiting criteria on the rest of the World – that the “contribution” of the other continents to the achievement of the agreed 2050 targets can only be “differentiated.”

Question 2

- a. “What is the impact of the EU measures adopted so far in the context of ‘Fit for 55’ on the development and application of EU and national energy law and, in particular, on the concepts of energy solidarity and energy security?”

There is no doubt that, especially in recent years, projects of the most diverse sizes, aimed at energy saving or the production of energy from renewable sources, have also found considerable development in Italy. And legislation also seems to be strongly oriented in this direction.

On the other hand, a sort of “environmental fear-mongering” is developing, not intended in a good sense as a drive towards more climate-sustainable solutions, but as a fear of the application in the coming years of requirements for homes and vehicles that are very difficult to comply with: a fear that also affects market trends in the two corresponding sectors, with further repercussions on the entrepreneurial choices related to them.

- b. “Have any specific legal issues and challenges been discussed in your Member State, especially, by reference to these concepts?”

Yes. Above all, there was strong opposition to the imposition of fixed and generalised parameters for the energy efficiency of buildings and the total abandonment of vehicles with combustion engines.

Italy even voted in the Council against the approval of the so-called green-houses directive.

Question 3

- a. “Given its broad scope, could the constantly evolving principle of ‘do no significant harm’ play a significant role in the area of energy law, in particular given the integration clause contained in Article 11 TFEU, as well as the wording of Article 194 TFEU which refers to the need to preserve and improve the environment?”

At least in theory, yes.

Clearly, it would be difficult to envisage, for example, the construction of new coal-fired power stations.

Moreover, almost quite paradoxically, precisely in Article 21c of Regulation 241 of 2021, added by Regulation no. 435 of 2023 establishing the REPoweEU, a derogation from this principle was introduced for interventions “improving energy infrastructure and facilities to meet immediate security of supply needs for gas, including liquefied natural gas, notably to enable diversification of supply in the interest of the Union as a whole,” albeit subject to an assessment by the Commission of the existence of the conditions set out in paragraph 6 of the aforementioned Article 21c.

- b. “Are there any comparable national legal concepts, mirroring the EU notion of ‘do no significant harm’ or resonating with it?”

I am not aware that there was previously in our national law a principle reflecting the notion of the aforementioned European principle.

The principle, in strict adherence to the European definition, has now been introduced into the national legislation concerning the implementation of the National Recovery and Resilience Plan and has thus become a principle of our law.

Question 4

- a. “EU law includes the notion of ‘energy poverty’ which is currently encompassed also in non-energy legal acts. In the global perspective, an inevitable link between energy and sustainable development implies that the availability of energy at an affordable price for all consumers must be understood through the prism of climate change. How would you evaluate the social dimension

of green transition in the field of energy law at the Union's level and its impact at national level?"

The issue seems to be somewhat more complex, at least on a practical level. For what does it mean to say that "the availability of energy at an affordable price for all consumers must be understood through the prism of climate change"?

It does not indeed seem acceptable from the point of view of "social solidarity," and indeed of "social sustainability" itself, to come to the conclusion that, in order to achieve the goals of combating climate change, citizens must pay electricity prices that are disproportionately high in relation to their economic resources.

The concept should probably be reversed: the measures to be taken to tackle climate change must be studied through the "prism" of sustainable development, that is, of ensuring the availability of energy at an affordable price for each consumer.

Of course, this in no way means that measures must be renounced in order to achieve the goals of "climate neutrality" which on the contrary are indefectible.

But the measures to be put in place must be designed and calibrated to be socially sustainable, not least because unsustainable measures have no real chance of being implemented.

In this sense, much work must be done on the "flexibility" of measures and the "alternativeness" of solutions.

And much can be achieved through a balanced "training" of citizens and institutions in the choice of lifestyles, habits, working methods, and even domestic customs that contribute to energy and even economic savings, adaptable on a case-by-case basis. And here I want to give a banal example: if I have the possibility of going shopping on foot, provided I am not too laden, I will save fuel and avoid pollution by walking several times a week; if, on the other hand, I necessarily need a car, I will save energy and emissions by going shopping only once a week. And the examples could multiply.

Rather, if we want to address the issue of the availability of energy at an affordable price under the "prism of climate change," the question arises as to whether the regulation of the energy market should not be re-evaluated in the light of the consideration that entrusting segments of this market to public operators, bound to the principle of a balanced budget, could lead to a sig-

nificant reduction in prices compared to management by private companies, which must necessarily ensure adequate remuneration for their shareholders, and indeed in this perspective may even be induced to incentivise the use of their products and/or services,

- b. “Does the concept of energy security in your national framework encompass social components?”

In theory, yes.

In practice, budget constraints, made tighter in our country with the highest public debt, end up restricting compensatory measures for higher energy costs to a group of subjects that is far less numerous than the population that is placed, even according to statistical classifications, in a level of “poverty” *tout court*.

- c. “Has the financing under the Just Transition Fund contributed to the fair green transition in your country so far?”

The funding in question had a very limited scope within the Italian territory. Faced with a total allocation for Italy of EUR 937 million, with the State’s share of co-financing equal to 5.35% of the total, with Annex D of the Country Report published within the framework of the European Semester 2020, the European Commission, identifying the territories most affected by the ecological transition in each Member State, identified for Italy the areas of the Province of Taranto and Sulcis Iglesiente. In line with these indications, Italy drew up a “National Programme Just Transition Fund Italy 2021–2027,” allocating EUR 367.2 million to Sulcis Iglesiente and EUR 795 million to Taranto, reserving EUR 48.4 million for Technical Assistance. The Plan was approved by the European Commission with an Execution Decision of 16.12.2022. The Strategic Environmental Assessment was approved by Ministerial Decree no. 542 of 27.12.2022, issued by the Minister of the Environment and Energy Security, in agreement with the Minister of Culture. The procedures for the allocation of grants to the various types of projects included in the Plan were opened between March and April 2024, with an expected closing date of 15 May 2024.

It is therefore clear that to date, there can be no effects of any kind, even apart from the fact that the selected interventions are limited to only two of the 107 territorial areas that can be assimilated to “provinces” (albeit with a different legal system), into which the national territory is divided.

Question 5

- a. “One of the crucial aspects of the EU law is State aid control. The impact of State aid measures in the area of energy must be viewed in the context of the Union’s integrated and interconnected energy market, as well as its underlying legal principles, in particular since the rationale behind State aid may conflict with the solidarity rationale. Whilst it seems that the assessment of measures under Article 106 TFEU is open to environmental scrutiny, as confirmed in the *Hinckley Point* case, is there any potential for the energy solidarity scrutiny in the State aid context?”

Given that the Court’s ruling in the above-mentioned case is based more on the interpretation of Article 107 TFEU than on Article 106, it should be emphasised that that very ruling highlights the fact that State aid does not necessarily conflict with the requirements of energy solidarity.

It is precisely the scarcity of sources of energy production and the need for each State to provide the common “energy system” with as much electricity as possible, precisely in the light of the principle of “energy solidarity,” that may render aid intended to enable the continuation or development of an economic activity aimed at making electricity available to the entire internal market compatible with the internal market, within the meaning of the aforementioned Article 107(3)(c).

- b. “To what extent can State aid measures be reconciled with the concept of energy solidarity?”

If the overall energy produced in a state is capable of increasing the amount of energy made available to the cross-border network, it follows that any aid put in place by that state to incentivise or enable production, far from conflicting with the concept of energy solidarity, on the contrary favours greater energy availability for the entire “European system.”

In this respect, even the incentives provided for the various forms of associated production of energy from renewable sources (e.g. for Energy Communities, or companies that self-produce energy from renewable sources), even though they may not be directly aimed at feeding energy into the cross-border networks, benefit energy solidarity because, by reducing the amount of energy to be distributed to end users, they make more energy produced by “professional producers” available to the cross-border networks, that is, they reduce the need to import energy.

Question 6

- a. “The recently revised TEN-E Regulation amounts to one of the most comprehensive measures regarding the energy infrastructure. How would you define the relationship between Articles 170–172 TFEU and Article 194 TFEU?”

The criterion for determining the scope of Title XVI (Articles 170–172) and Title XXI (Article 194) of Part Three of the TFEU is different.

Title XVI, significantly entitled “Trans-European Networks,” is concerned with guaranteeing the principle of free movement of goods, persons, services, and capital (Article 26) as well as that of social and territorial cohesion (Article 174) through the establishment and development of trans-European networks in three different sectors, namely transport, telecommunications, and energy. It therefore takes into consideration the “network” infrastructural aspect, with specific reference to the cross-border sphere, and therefore not merely “within” individual states, regardless of the specific sector in which the networks perform their connective function.

The energy sector is among those covered by Articles 170 to 172, but only with regard to cross-border networks.

Conversely, Title XXI – significantly entitled “Energy” – takes into account in its sole article (Article 194) all that concerns the energy sector and not only the relevant networks, and, with express reference to the need to preserve and improve the environment, outlines the Union’s policy in the energy sector as also aimed, in a spirit of solidarity between Member States, at promoting the interconnection of energy networks.

It follows that Title XVI and Title XXI apply jointly only with regard to the interconnection of energy networks. And Article 172 is precisely referred to as the legal basis of Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022.

It is significant to note that although cross-border networks are involved, the second paragraph of Article 172 states that guidelines and projects of common interest affecting the territory of a Member State require the approval of the Member State concerned.

- b. “In particular, what is the relationship between the concept of energy solidarity and the concept of projects of common interest under Articles 170–172 TFEU and Regulation (EU) 2022/869?”

Although Article 1 of Regulation (EU) 2022/869 states that the Regulation is intended to establish guidelines for the development of infrastructures that contribute to “ensuring interconnections, energy security, market and system integration, competition for the benefit of all Member States and affordable energy prices,” it appears that the provisions of Article 4(3) of the same regulation governing the requirements (both general and for specific categories of energy infrastructure) for classification as “projects of common interest” do not contain adequate indications aimed at ensuring energy solidarity, as defined in the Court’s judgment in the *OPAL* case.

Indeed, these requirements seem more aimed at the ensuring interoperability of infrastructures and their suitability to contribute to climate neutrality goals.

Question 7

This is perhaps the most difficult question, probably even the key one of all at the pragmatic level. It is indeed evident that it is not possible to completely abandon the use of fossil fuels until one has succeeded in covering energy needs with other sources.

The effort, not only at the level of European legislation, but also at the level of national guidelines and the behaviour of individuals,¹² therefore, seems necessarily to be three-pronged.

Firstly, to incentivise energy saving in every way, either through the use of systems and equipment (from large machines to light bulbs) that require less energy consumption, and also by “limiting” unnecessary waste (such as certain “illuminations” to celebrate events or a certain type of furnishing of shops or public premises).

Secondly, by enabling and improving the efficient use of all possible sources of renewable energy, bar none, so as to exploit the different potentials of the different environmental contexts.

Thirdly, for the necessary transition period, concentrating the use of fossil fuels in large production plants for other forms of energy (electrical, thermal, etc.) in which it is possible to provide instruments for abatement of harmful which would be economically impractical for individual consumption, such as the gas water heater or domestic oven.

¹² It is not for nothing that it is said that every reform “walks on the legs of the people.”

Question 8

It is precisely Article 194 of the TFEU, which sets out in its first paragraph the four “cornerstones” of energy solidarity between the Member States and provides in paragraph 2 that the measures necessary to achieve these objectives are to be established by the European Union by ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions, guarantees in the second sentence of the same paragraph 2 that these measures “shall not affect the right of a Member State to determine the conditions of use of its energy sources, the choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).” On the other hand, the aforementioned Article 192, in laying down the legislative measures necessary to implement the actions required to achieve the environmental protection objectives set out in Article 191, provides in paragraph 1 for an ordinary legislative procedure, while in paragraph 2 it provides (and again without prejudice to Article 114) for a special legislative procedure by which the Council, acting unanimously and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

- “(a) provisions primarily of a fiscal nature
- (b) measures affecting;
 - town and country planning;
 - quantitative management of water resources or affecting, directly or indirectly, the availability of those resources;
 - land use, with the exception of waste management;
- (c) measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply.”

The comparative examination of these two rules seems to lead, first of all, to the conclusion that a possible limitation of “the right of a Member State to determine the conditions of use of its energy sources, the choice between different energy sources and the general structure of its energy supply” could be imposed only for the achievement of the environmental objectives set out in Article 191, by means of measures adopted pursuant to Article 192 TFEU, and not also for the sole requirements of energy solidarity set out in the first paragraph of Article 194. In other words, the reservation of competence in favour of the Member States provided for in Article 194(2) TFEU can be reduced only by measures adopted pursuant to Article 192(2) TFEU, as it is explicitly inferred from Article 194(2) TFEU itself.

Secondly, it seems clear that the provision for a “special” legislative procedure in Article 192(2) TFEU seems to be indicative of the need for equally ‘special’ situations justifying its use.

Above all, the circumstance that this special legislative procedure requires unanimity is significant, because this implies that the European Union cannot *de facto* make “impositions” of this kind, since the relevant legislative provisions could only be adopted, under the special procedure described above, with the express consent of all member states through unanimous voting. Thus, limits to the reservation of state competence can only exist if they are expressly accepted.

It may be said that, once adopted unanimously, such provisions bind the Member States, but it is still an expressly accepted constraint.

It therefore seems to be safe to say that there is no real limitation in European law on the freedom of Member States to define their own energy mix.

And such a limitation could not be found in energy solidarity, for the reasons already stated in the joint examination of Articles 194 and 192.

The freedom of Member States to determine their own energy mix is, moreover, explicitly affirmed precisely in the Court’s ruling in the *Hinckley Point* case.¹³

In actual fact, a limit to the Member States’ freedom to choose their own energy mix could be found, as we have already seen above, in the principle of “not causing significant damage,” which now informs both European and Italian national law, at least starting with Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Instrument, on the basis of which Italy presented its PNRR, and subsequent amendments, which were approved by the Council on the favourable opinion of the European Commission.

According to this principle, the reopening of already decommissioned coal-fired power plants would not be admissible, and probably not even the reopening of already decommissioned first-generation nuclear fission plants. Nor would technological solutions be admissible that would alter the hydro-geological balance of a location or lead to increased pollution of water bodies or the sea, or to an increase in harmful emissions into the atmosphere.

Question 9

As is well known, Italy renounced “nuclear fission power,” the only nuclear power known at the time, following a popular referendum.

¹³ Judgment of the Court in *Austria v. Commission (Hinckley Point)*, C-594/18 P, EU:C:2020:742.

In order to meet the needs imposed by the ecological transition, Italy has, with many legislative measures that have followed one another over time, incentivised the production and use of renewable sources in the production of electricity, both with incentives of a capital nature and through the “liberalisation” of the installation of renewable electricity production plants (especially photovoltaic plants).

Great impetus has also been given to the development of other forms of renewable energy production (wind power, wave motion, tidal power).

Great impetus has also been given to the production of bio fuels, the use of hydrogen and the utilisation of underground heat.

As far as buildings are concerned, the installation of photovoltaic panels for a pre-established minimum of kW for each building unit, as well as solar panels for water heating, for a volume of hot water equal to half of the presumed consumption of each dwelling, has been imposed for new buildings.

As far as auto traction is concerned, the choices are still somewhat uncertain, due to the high cost of purely electrically driven vehicles, the delay in setting up a suitable “network” of recharging facilities to allow long journeys, and the absence of a (planned) hydrogen distribution network to allow the convenient use of this propellant for auto traction.

Question 10

It seems worth noticing, first of all, that in a long-term perspective, oriented towards achieving “climate neutrality” mainly through the instrument of decarbonisation, the image of Europe as a “Gulliver in chains” due to dependence on external supplies of fossil fuels becomes, almost paradoxically, much less meaningful.

But it should be emphasised that, from the point of view of a weighted balancing of costs and benefits, these new investments, which are indispensable today precisely in the light of energy solidarity between the Member States, will become less useful in the long run, once the various stages of the (albeit “relative”) decarbonisation process are reached.

Question 11

The REPowerEU has made available to the 27 Member States a non-reimbursable contribution for a total amount of EUR 20 billion (of which

EUR 2.760 billion is earmarked for Italy), while also allowing them to finance the relevant interventions with resources from other European funds.

Availing itself of this option, Italy has requested the share of the contribution allocated to it and, in submitting at the end of July 2023 an amendment to its PNRR, has introduced into the same, on the basis of Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023, its own REPowerEU project, for an amount of over EUR 19 billion, broken down as follows:

Total REPowerEU investments – million euro (19 interventions, of which 4 scale-up PNRR)		19,155.00
Investment 1 – Networks	of which Energy: of which Gas	2,312.00 1,892.00 420.00
Investment 2 – Green Transition and Energy Efficiency		14,793.00
– of which Renewable production		533.00
– of which Production sector		6,260.00
○ of which Public assets		4,000.00
○ of which Social Ecobonus		4,000.00
Investment 3 – Supply Chains		2,050.00
Total REPowerEU Reforms – million euro (6 reform projects, of which 1 PNRR scale-up)		100.75
Total REPowerEU – million euro		19,255.75

It is evident that the REPowerEU, if it can provide support, even significant support, to the energy security policy for Italy, has a minimal impact on the cohesion policy and even less on the policy to fight energy poverty, in the light of all the considerations made so far, in relation to the huge resources needed to strive for the sectoral targets set by the European Union to achieve climate neutrality.

Efforts must therefore be made, both at national and European level, to find new solutions to ensure the green transition while respecting energy solidarity and energy security.¹⁴

¹⁴ This section of the report exclusively expresses the opinions of its author.

Section III: The EU's crisis management in the field of energy and its limits (by Paolo Gonnelli)

Question 1

- a. "In the *OPAL* case, the Court considered 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 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU must inform any action relating to EU energy policy. Thus, the principle of energy solidarity encompasses measures to be adopted in order to prevent crisis before they arise. Do you consider that Article 194 TFEU is an appropriate tool to manage an energy crisis at the Union's level both before and during potential crisis or is Article 122 TFEU a more suitable legal basis, given notably its celerity and adoption procedure?"

It should be premised that both Article 122 and Article 194 expressly refer to the principle of solidarity between Member States, so that the choice between the two "instruments" should not affect respect for the principle of solidarity, which was declared to be of general scope by the Court's ruling in the *OPAL* case.

Rather, it should be emphasised that both in the Court's judgments and in European legislation the concept of "solidarity" takes on different nuances and content from time to time.

Indeed, while the judgment in the *OPAL* case also declared contrary to the principle of solidarity the mere fact that it failed to assess whether the authorisation granted to the Federal Network Agency to reserve a share of the transport capacity of the *OPAL* pipeline could jeopardise Poland's supply possibilities via the same pipeline.

In Regulation (EU) 1854 of 2022, and in particular in Recital 57, it is stated that "tackling energy poverty and addressing the social consequences of the energy crisis, in particular to protect workers in exposed industries, are also a matter of solidarity between Member States."

Finally, in the EU Regulation 2017/1938, solidarity measures are provided for, at the simple request of a Member State, if the necessary conditions are met, with the obligation of the State against which the request is made to comply with this request, albeit by way of "compensation."

That said, it should be noted that while Article 122 TFEU offers in theory the quickest legal basis for emergency intervention in the face of an energy crisis, it is also true that the Regulations adopted under the aforementioned Article 122 have the major limitation of having a very limited duration.

- b. “Would it be justified to argue that operationalising of the Union’s legal toolbox in crisis should rely to the widest possible on expeditious recourse to Article 194 TFEU, which remains the classic legal basis of the EU energy policy, possibly combined with other legal bases? If so, why?”

A “steady-state” regulatory instrument, such as those adopted under Article 194 TFEU, actually seems more appropriate to define the lines of intervention in the event of an energy crisis, unless temporary additions under Article 122 TFEU are needed.

Paradigmatic in this respect seems to be Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard security of gas supply.

This legislation, adopted under the ordinary procedure and therefore with all the necessary weight, puts in place a series of preventive measures, such as the establishment of special Authorities, the definition of infrastructure and gas supply standards, risk assessment, the definition of preventive and emergency action plans, and regulates *a priori* the modalities and effects of a declaration of a state of crisis, emergency responses at regional and Union level and, for extreme cases, the recourse to “solidarity measures.”

The goodness of this system lies in the fact that, when a crisis arises, the measures that can be taken have already been foreseen and regulated so as not to be the result of “improvisation,” and that the activation of these measures is entrusted to already existing administrative authorities, without the need for further regulatory interventions.

This is always without prejudice to the possibility of incorporating, pursuant to Article 122 TFEU, any amendments that may be necessary for particular crisis situations, as was actually done with Council Regulation (EU) 2022/2576 of 19 December 2022, which in Articles 23–28 temporarily derogated (for one year) from certain provisions of the aforementioned Regulation (EU) 2017/1938.

Question 2

- a. “The recent energy crisis measures have demonstrated both the risks of the Union’s energy dependence and the need of enhanced energy solidarity. Such measures must, nevertheless, remain commensurate to the crisis management context. What are the limits for the role of energy solidarity in times of crisis?”

The risks arising from the Union’s energy dependence can only be mitigated or resolved in effective and lasting terms by medium- and/or long-term measures, either by diversifying sources of supply or by accelerating, in line with climate

transition objectives, the use of alternative energy sources and/or energy-saving mechanisms.

Regarding the limits of the role of energy solidarity in times of crisis, it is clear that, in the presence of a general crisis, “the deck is short.”

There can be short-term palliative interventions, such as limitations on the use of heating systems, or interventions on motor vehicle speed limits to reduce consumption, or, on a different front, the “temporary contributions,” also provided for by Regulation (EU) 2022/1854, and introduced in Italy in the form of a “temporary solidarity contribution” by Article 1, paragraphs 114 to 119 of Law no. 197 of 29 December 2022.

But it is clear that, when the crisis is of a general nature, it also becomes more difficult to implement solidarity measures does Member States, which are understandably limited by the difficulties also faced by States that could be called upon to provide solidarity.

- b. “What are the limits of Article 122 TFEU, including the possibility of extension in time of the measures adopted in the emergency framework?”

As already mentioned, the major limitation of Article 122 TFEU is that it only allows measures of a temporary nature.

But it is not the only limitation. By providing for a special legislative procedure in which the European Parliament does not intervene, it presents less “scrutiny” and thus a greater possibility of omitting due consideration of certain requirements.

Moreover, if regulations adopted under Article 122 TFEU deal with new scenarios and outline new solutions, there is a danger that they will turn into a “directive” in substance, as in practice happened with Regulation (EU) 2022/1854, which leaves not only the necessary transposition, but even the “choice” between alternative solutions to the individual Member States, thus making the “self-executing” effect impossible. The consequence of this is the almost non-existent effective duration of the provisions of the regulation, which sees its expiry when the Member States have barely had time to enact transposition rules.

- c. “Were these crisis management instruments more efficient from the security of supply perspective compared to the classic measures of EU energy legislation?”
- d. “Can you identify any legal issues related to such measures in your national legal order?”

The two questions, 2c and 2d, under consideration are answered hereunder jointly.

The intrinsic limits of the regulatory instruments adopted under Article 122 TFEU have already been mentioned.

In Italy, also taking advantage of the opportunities offered by the REpowerEU, efforts have been made to diversify the sources of gas supply, including through bilateral agreements with countries on the African coast of the Mediterranean, and for the activation of regasification plants, as well as for the transformation of gas transport lines into bi-directional lines.

In addition, in order to finance measures to support weaker companies and consumers, a tax levy, defined as a “temporary solidarity contribution,” was provided for by national law for the year 2023, to be paid by those operating in the energy sector who had an income in 2022 that exceeded by at least 10% the average total income earned in the previous four tax periods.

Question 3

The recourse to the solidarity instrument of Article 222 TFEU appears difficult to apply in order to deal with energy crisis, unless – perhaps – they affect, as a result of contingent circumstances or even natural disasters, only one of the Member States.

Apart from the intrinsic limitation concerning the conditions for the application of this article, which is constituted by the reference to terrorist attack or natural disaster, a further limitation arises in the circumstance that Article 222 provides for its application in the case where a Member State is the object of a terrorist attack or the victim of a natural disaster.

When, on the other hand, the energy crisis situation involves all or most of the Member States of the Union, as is usually the case for energy crisis, including the current one, it seems very difficult to envisage the applicability of Article 222.

This rule might, on the other hand, be applicable in the case of a localised natural disaster that disrupts the energy system of only one Member State. But even in such a case one of the measures pre-established under Article 194, such as those provided for in the gas sector by the oft-mentioned Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017, could perhaps find a better and more organic application.¹⁵

¹⁵ This section of the report exclusively expresses the opinions of its author.

LATVIA*

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(rapporteurs)

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

In Latvia's legal order, the concepts of energy solidarity and energy security (or security of energy supply) play a crucial role in shaping energy policy, legislative frameworks, and strategic planning. These concepts are primarily derived from both European Union (EU) law and Latvia's national legislation, with Latvia being an EU member state.

Energy solidarity

Latvia's energy policies are largely aligned with the EU's energy strategies, such as the Energy Union and the European Green Deal. These policies emphasize solidarity between member states, particularly in the context of potential energy crises, supply disruptions, or in situations requiring cross-border cooperation (e.g., the gas supply crisis).

For Latvia, energy solidarity manifests through participation in regional cooperation frameworks such as the Baltic Energy Market Interconnection Plan (BEMIP). The country works closely with its Baltic neighbours (Lithuania and Estonia) to enhance regional energy independence, particularly from Russian energy supplies.

Latvia has transposed EU directives into national law, ensuring that energy solidarity is embedded in national energy policy. This includes participating in mechanisms such as joint purchasing of gas (the Aggregate EU mechanism) or sharing infrastructure (e.g., gas pipelines, electricity interconnections) in line with EU regulations.

* The views expressed in this report are those of the authors and do not necessarily reflect the views of the organizations they represent.

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Energy security

Latvia's energy security is regulated by a comprehensive set of national laws, including the Energy Law (*Enerģētikas likums*) and Electricity Market Law (*Elektroenerģijas tirgus likums*). These laws outline the state's role in ensuring an uninterrupted and secure supply of energy, promoting diversification of energy sources, and securing critical energy infrastructure.

Latvia's National Energy and Climate Plan (NECP) 2021–2030 prioritizes energy security. It sets out measures to ensure resilience, particularly in the context of reducing reliance on Russian gas, improving renewable energy integration, and enhancing energy efficiency.

In addition to national regulations, Latvia's energy security is also framed by EU legislation, particularly the EU's Security of Gas Supply Regulation (EU) 2017/1938. This regulation requires Latvia to develop contingency plans and take preventive measures in the event of a gas supply disruption. Latvia's gas storage facilities, like the Inčukalns Underground Gas Storage, are critical for this purpose, providing security not only for Latvia but for the Baltic region as a whole.

Regulation (EU) 2017/1938 also mandates the establishment of risk groups. These risk groups shall serve as the foundation for enhanced regional cooperation to strengthen the security of gas supply and shall facilitate the agreement on appropriate and effective cross-border measures by all member states concerned. According to Annex I therein, Latvia is classified within the North-Eastern risk group, alongside Estonia, Lithuania, and Finland.

Latvia's energy system is closely integrated with its neighbouring countries, necessitating well-coordinated energy transition strategies across the Baltic states. The operational cooperation between neighbouring countries has become increasingly important in ensuring the security of supply following Russia's invasion of Ukraine on February 24, 2022. On March 10, 2022, Latvia and Lithuania entered into an intergovernmental agreement concerning measures to secure gas supply for vulnerable natural gas consumers. In 2023, a Memorandum of Understanding was signed between the relevant ministries of Latvia and Estonia to ensure gas supply during crisis situations.¹ The objectives of this Memorandum include enhancing preparedness for gas supply disruptions in both Estonia and Latvia, utilizing the gas infrastructure at the Port of Paikrīneeme in Estonia to safeguard the security of gas supply for both countries.

¹ The Memorandum of Understanding between the Ministry of Economic Affairs and Communications of the Republic of Estonia and the Ministry of Energy and Climate of the Republic of Latvia for a cooperation between the Republic of Estonia and the Republic of Latvia to ensure gas supply in times of crisis, https://www.mkm.ee/sites/default/files/documents/2023-05/Memorandum%20of%20Understanding_LV_EE_LNG.pdf

The new amendments to the Energy Law, which came into effect on October 1, 2024, stipulate that 4 TWh of the technical capacity of the Inčukalns Underground Gas Storage will be allocated for solidarity purposes. Beneficiaries are the countries within the unified natural gas transmission entry-exit system, specifically Estonia, Lithuania, and Finland. Energy security in Latvia is closely tied to the diversification of energy routes and sources. Historically reliant on Russian gas, Latvia has made significant efforts to diversify its supply routes. Latvia has outlawed Russian gas imports starting in January 2023. Consequently, gas supplies to Latvia are now sourced from the Klaipėda Liquefied Natural Gas (LNG) terminal in Lithuania and the Inkoo LNG terminal in Finland. Furthermore, the integration of Latvia into the Nordic-Baltic electricity market via the Nord Pool electricity exchange, which commenced in 2013, facilitated the cessation of electricity purchases from Russia as of mid-2022. Latvia also diversifies energy sources including the development of renewable energy (such as biomass, wind, and hydropower).

Latvia's laws and strategies emphasize the protection of critical energy infrastructure, such as power plants, gas pipelines, and storage facilities, which are essential for maintaining a secure energy supply. This includes ensuring resilience to cyber threats, physical attacks, and natural disasters.

Latvian law includes provisions for strategic energy reserves (particularly in gas) and the creation of emergency response mechanisms in the event of energy supply disruptions. The Inčukalns gas storage facility plays a key role in this context, offering both strategic reserves and acting as a buffer for supply disruptions.

Constitutional and legislative framework, case law

In Latvia, energy solidarity and energy security are not explicitly framed within the constitution (Latvian *Satversme*) itself. However, these concepts can be interpreted as part of broader constitutional principles, especially through national security, public welfare, and international cooperation obligations, which may be invoked in case law and legislative practices.

Several broader constitutional provisions can be interpreted as relevant to energy solidarity and security:

- Article 89 ensures Latvia's respect for human rights in line with international agreements, which could encompass the right to a stable and secure energy supply as a prerequisite for the protection of basic human rights, such as protection of human health and safety.
- Article 105 protects the right to property, which could include ensuring uninterrupted access to energy as a fundamental public service.

- Article 116 permits restrictions on certain rights (e.g., freedom of movement or economic activity) for reasons of national security, public order, or the well-being of society. This could be used to justify legislative actions aimed at ensuring energy security or solidarity in emergencies.

Additionally, Article 68 grants the authority to conclude international treaties, which is relevant because many energy solidarity measures stem from Latvia's EU obligations.

There are no landmark constitutional court cases that explicitly address the principles of energy solidarity or energy security. However, when addressing the energy market regulations related issues, the Latvian Constitutional Court observes their impact on climate and energy security goals. For example, in case No 2021-31-0103² the Constitutional Court dealt with the question of compatibility of amended state aid rules with the fundamental rights of producers of electricity and heat (through the co-generation process) from biogas. Among others, the Court noted in the ruling that the contribution of each technology used to achieving climate goals and Latvia's energy security (independence) shall be weighed against other factors, when the goals of the particular regulations are assessed.

The principle of energy solidarity would also influence Latvia's national legal system. However, there is no evidence that energy solidarity has been directly addressed by Latvian courts in a constitutional context. Nevertheless, Latvian administrative courts and higher judicial bodies may apply this principle when adjudicating disputes involving energy policy, especially when these cases touch upon cross-border energy cooperation, energy supply disruptions, or compliance with EU energy law.

Question 2

The principle of energy solidarity as a fundamental principle of EU law contributes to the cohesion of the legal framework, addresses regulatory gaps, and strengthens the overall integrity of the EU legal order. Observing its nature, it defines priorities, which must be followed by the EU member states. However, it does not explicitly outline the limits to national sovereignty because its primary function is to ensure the coherence, uniformity, and effectiveness of EU law across member states, rather than directly curbing national sovereignty. Therefore, we agree it rather is a building block of the Union's constitutional framework, reaching beyond particular national interests and forming part of the "Union's constitutional identity."

² Judgment of the Constitutional Court of the Republic of Latvia as of 27 October 2022, No 2021-31-0103.

Question 3

One of the most successful approaches to deal with different angles of energy policy in Latvia is to qualify the energy policy issues into three pillars – *energy security*, *energy affordability*, and *energy sustainability*. All these elements are closely interlinked, in particular, within the same legal framework. The EU legal framework covers and partly already regulates all three of these aspects. Each has its own set of current challenges, research and regulatory interests. The basic challenge of energy access is to prevent energy poverty among the population, in particular vulnerable groups. Sustainability, on the other hand, is concerned with ensuring the right to an unpolluted environment, the right to health, sustainable and climate-neutral economic development, etc. Energy security concerns both of the above energy policies, but in a narrower sense it is understood as the objective of Article 194(1)(b) of the Treaty on the Functioning of the EU (TFEU) for EU member states to ensure security of energy supply in the EU.

It must be underlined that in addition to energy security, Article 194(1) TFEU also includes the other objectives of the common energy policy of the EU member states, namely the common functioning of the energy market, the promotion of energy efficiency and conservation, the development of “new and renewable forms of energy” and the establishment and operation of energy transmission interconnections. All these objectives are linked by the closer integration of the EU’s internal market activities and by a shared commitment to improving and conserving environmental resources.

Question 4

The recent geopolitical tensions have precipitated an energy crisis in Europe, exacerbating the existing conflict between the continent’s need for energy security and its climate-related commitments. In response to Russia’s escalation of its energy-related disputes with Europe, the continent rapidly increased its dependence on liquefied natural gas (LNG). Additionally, some nations reinstated operations at coal-fired power plants that had previously been decommissioned. As the energy crisis begins to abate, Europe is now positioned to demonstrate to the international community that it is possible to create an energy system that is secure, competitive, and resilient.

The potential for transforming and integrating the EU electricity market within 10–15 years is almost unimaginable, ranging from the construction of large-scale electricity and hydrogen interconnections to smart energy consumption in all its forms, which would both boost the competitiveness of EU businesses and help to mitigate the rapid pace of climate change.

The specific factual circumstances of the *OPAL* case, which concerned the operation of the Nord Stream 2 natural gas interconnector and, consequently, the supply of natural gas from Russia via this pipeline to Germany, for geopolitical reasons are unlikely to be relevant for EU member states in the foreseeable future. However, the need for the European Commission to apply the principle of solidarity in other areas referred to in Article 194(1) TFEU cannot be excluded. For example, financial support for the implementation of new renewable energy projects such as wind farms in the Baltic Sea, for the study and implementation of new energy generation technologies, both hydrogen and small-scale nuclear reactors, and for the construction of the interconnections needed for these projects.

The role of the principle of technological neutrality, which in both national and EU law essentially encourages the pursuit of technology-neutral policy objectives wherever possible and proportionate, should be mentioned here. Applying the principle as often as appropriate would reduce a fear that, for example, the rapidly gaining popularity of the EU's nuclear energy policy, one of the main arguments for which is the proposal to rely on European-made equipment, could lead to a halt in the development or construction of regional-scale wind farms, for example. However, such projects would certainly compete with each other in attracting EU funding and using the capacity of regional transmission networks. Thus, the principle of technological neutrality at some point would not exclude assessing the financing from the perspective of the solidarity principle.

Regarding bilateral relations on a regional level, the Baltic states exemplify a situation characterized by more cooperation than tension. Notably, joint initiatives such as the shared use of the LNG terminal in Klaipėda (Lithuania) and the large-scale natural gas storage facility in Inčukalns (Latvia) highlight this collaborative approach. Additionally, coordinated efforts in decision-making concerning electricity interconnectors and the collective project for desynchronization from the BRELL network, followed by synchronization with the European electricity transmission grid via Poland, further demonstrate their regional cooperation.

Question 5

The importance of divergences between EU member states, especially in areas where past energy policy decisions have been made, cannot be denied. These historical differences reflect varied national priorities, resource availability, and energy infrastructure, which must be acknowledged when shaping EU energy law. However, moving forward, EU solidarity should be the primary

driver for future energy decisions. Solidarity is crucial for addressing collective challenges, such as energy security and climate change, that transcend national borders. Nevertheless, its application should be focused on core issues, ensuring that solidarity supports collective EU goals without overextending its influence into areas where national divergences are more significant. Balancing solidarity and proportionality in this way will foster a more cohesive and resilient energy policy while respecting the specific needs of member states.

The principle of proportionality plays a key role in balancing conflicting private and public interests in the energy sector. Proportionality can also serve as a legal tool to enhance regulatory dialogue between environmental and energy law, promoting better integration of environmental principles into energy regulation.

Question 6

The “spirit of solidarity between member states” in Article 194 TFEU should be interpreted as a guiding principle that emphasizes the need for cooperation and collective action in addressing energy security challenges that affect the entire EU. In the context of energy security, this notion of solidarity calls for member states to recognize their interdependence and support each other in ensuring reliable and affordable energy supplies.

This principle becomes particularly relevant in situations where disruptions in energy supply occur or when major infrastructure projects, such as interconnectors or storage facilities, require coordination across borders. The “spirit of solidarity” implies that member states should prioritize the collective good over national interests when such crises or strategic projects arise. However, the solidarity should be applied proportionally – focusing on core issues like energy supply security, crisis management, and sustainable development. While solidarity encourages mutual support and shared responsibility, it should not override the ability of member states to pursue national energy policies that reflect their unique energy mixes, resources, and economic conditions. Thus, solidarity in Article 194 TFEU should be understood as fostering a cohesive and resilient EU energy market, while allowing for flexibility where national divergences are more pronounced.

In practice, this means that solidarity will be the driving force for collective action on major shared concerns, but it will be tempered by respect for national sovereignty in areas where a uniform approach is less suitable.

Question 7

In the context of EU energy law, particularly in light of recent crises such as Russia's war of aggression against Ukraine, the concept of "security" in the energy field has evolved to encompass several critical components beyond the traditional focus on "security of supply." Both EU measures and national policies, including those of Latvia, now address a more comprehensive notion of energy security.

Security of supply remains a core element, emphasizing the uninterrupted availability of energy at affordable prices. The EU has adopted several emergency measures to diversify energy sources, enhance infrastructure (such as LNG terminals), and foster cross-border cooperation between member states. Latvia plays a strategic role with the Inčukalns gas storage facility and its integration into the Baltic energy market.

The diversification of energy sources and suppliers has become a central tenet of EU and Latvian energy policies. The crisis has highlighted the vulnerability of reliance on Russian gas, prompting the EU and Latvia to prioritize alternative supply routes, renewable energy development, and energy interconnectors with other EU states (e.g., the Balticconnector and desynchronization from the BRELL system).

Geographical factors play a key role, as Latvia and other Baltic states are particularly sensitive to their proximity to Russia. Consequently, regional coordination in energy policy and infrastructure projects, such as the synchronization with the EU grids via Poland, have been accelerated.

With increasing reliance on digital technologies in the energy sector, cybersecurity is now a critical aspect of energy security. The EU has implemented directives such as the Network and Information Systems (NIS) Directive and NIS2 to enhance cyber resilience across member states, but the preparedness might vary. Latvia is strengthening its cybersecurity frameworks, though the resilience of energy infrastructure against potential cyber threats remains a challenge. The incidents affecting pipelines like Nord Stream and Balticconnector have emphasized the need to extend the concept of energy security beyond physical supply chains to include cyber and physical risks to energy infrastructure.

Prioritizing cybersecurity is crucial to defending against evolving cyber threats, especially as the increasing sophistication of interconnected systems like smart grids raises the risk of attacks. Latvia has adopted the National cybersecurity Law in 2024 which aims to improve the security of information and communication technologies (ICT).

The energy crisis has underscored the economic impacts of energy security, such as price volatility and energy poverty. EU measures, including the REPowerEU Plan, focus on ensuring the affordability of energy for businesses and citizens, along with the rapid deployment of renewable energy to reduce dependency on fossil fuels. Latvian legislative initiatives aim to reflect these economic concerns through its energy policies aimed at reducing energy costs, promoting energy efficiency, and expanding its renewable energy sector, in line with the EU's climate goals.

In conclusion, the concept of energy security in EU and Latvian law has evolved in response to geopolitical, cybersecurity, and environmental challenges. While security of supply remains a central concern, energy security must now be understood in a broader context that includes cybersecurity, infrastructure protection, and climate resilience. This comprehensive approach ensures that both the EU and Latvia are better prepared to face future energy crises while maintaining a balance between national sovereignty and EU solidarity.

Question 8

Energy security has been a central concern in Latvia's external relations, particularly regarding its dependence on Russian gas and oil. In response, Latvia has pursued both national strategies and EU-wide initiatives to secure diverse energy sources and infrastructure.

In particular, Latvia has worked to diversify its energy supply by integrating into the European energy market. This includes the use of the Klaipėda LNG terminal in Lithuania, which has allowed Latvia to access non-Russian gas sources, and the development of regional interconnections like the Balticconnector pipeline between Finland and Estonia. Besides, Latvia's Inčukalna underground gas storage facility plays a strategic role in regional energy security, serving as a critical reserve for both Latvia and its neighbours during supply disruptions. This aligns with the EU's broader objectives of creating strategic gas reserves to protect against external shocks.

Question 9

From the perspective of Latvia and the other Baltic states, the current multi-level governance model has been largely beneficial, given the historical reliance on Russian energy supplies and the need to transition towards a more integrated EU energy market. The current status of the shared responsibility framework allows Latvia to maintain a degree of national control over its energy policies while benefiting from EU solidarity mechanisms.

While the current model is largely effective, Latvia might benefit from a more EU-driven approach in some areas, particularly in infrastructure development and supply diversification. A stronger EU role in securing alternative energy sources and negotiating collective energy agreements with third countries (such as LNG suppliers) would further enhance security.

Section II: Energy solidarity, energy security and green transition

Question 1

Given the significant economic and political differences among EU member states, including varying levels of dependency on fossil fuels, different capacities to invest in renewable energy, and different levels of renewable energy in the total energy mix achieving coherence in the transition toward climate neutrality will be challenging indeed. Latvia, for example, is more advanced in reducing its dependency on Russian energy compared to some other member states. Specifically, the high share³ of the use of hydropower has allowed Latvia to reduce its dependency on imported fossil fuels, enhance renewable energy production, and maintain a relatively low carbon footprint compared to many other European countries. But it still faces challenges in scaling up its renewable energy capacity and integrating into a fully climate-neutral European energy market.

For Latvia, achieving climate neutrality will require investments in modernizing energy grids, expanding renewable energy production, and transitioning away from natural gas dependency. Solidarity could play a crucial role in ensuring that Latvia and other smaller economies receive sufficient support in terms of financing, technology transfer, and knowledge-sharing to meet their climate targets.

Question 2

The “Fit for 55” measures have influenced the development of energy law in Latvia by requiring alignment with broader EU objectives. This has resulted in several areas of legal adaptation, where the most important ones are the following.

Renewable Energy Directives (RED II and RED III)

RED III raises the overall target for renewable energy consumption in the EU to 42.5% by 2030 and introduces sector-specific targets, such as for renewable energy in transport, heating, cooling, and industry.

³ Historically, it has accounted for around 30–40% of the total electricity production in the country.

Latvia has traditionally been a leader in renewable energy, with around 40% of its energy mix already coming from renewable sources (mostly biomass and hydroelectric power). However, the stricter criteria and sector-specific targets under RED III will push Latvia to further diversify its renewable energy sources, particularly in wind and solar energy, and implement stronger sustainability regulations.

Latvia will be required to integrate more renewable fuels, particularly advanced biofuels, renewable hydrogen, and electrification in transport. Given the country's relatively low level of electrification in transport, this will require new legal incentives for electric vehicles (EVs), charging infrastructure, and the use of renewable fuels.

Latvia has a high reliance on biomass for heating, especially in rural areas, which is renewable but is subject to stricter sustainability and GHG (greenhouse gas) criteria under RED III. In particular, Latvia's extensive forestry sector, which supplies much of its biomass, will need to adapt to the sustainability and biodiversity criteria under RED III. Legal and regulatory changes may be required to ensure that biomass harvesting does not lead to over-exploitation of forests, deforestation, or biodiversity loss, all while maintaining the economic viability of the forestry sector.

According to the National Energy and Climate Plan (NECP) Latvia plans to increase its share of renewable electricity generation substantively, with a stronger focus on solar and wind energy. Thanks to the governmental support for microgeneration and the relatively simple process of developing industrial solar parks, the generation of solar systems in Latvia has already grown significantly in the last year. In particular, in August 2024, solar power plants in Latvia produced 66 GWh, or 21% of the total amount of electricity fed into the grid, which is the highest amount ever produced by solar power plants.⁴ However, the highly seasonal production cycle of this technology in this geographic location should be noted.

In order to facilitate investments into the onshore wind energy projects the Law on the Facilitated Procedures for the Construction of the Energy Supply Buildings Required for the Promotion of Energy Security and Autonomy was introduced in Latvia in 2022 as a response to both the geopolitical situation in Europe and under the "Fit for 55" package. This law was designed especially to streamline and expedite the construction of energy infrastructure necessary to enhance Latvia's energy security. However, observing the complexity for projects to qualify for these expedited procedures the developers choose to

⁴ Source: the announcement of the transmission system operator (AST) <https://ast.lv/lv/events/augusta-jauns-saules-elektrostaciju-rekords-66-gwh-kas-veido-21-no-latvija-tikla-nodotas>

develop the projects through the conventional development process, namely, by applying the previous standard rules and procedures.

Latvia has also intensified efforts to develop its offshore wind energy sector as part of its strategy to increase renewable energy production and reduce dependency on fossil fuels. However, the development of offshore wind farms requires substantive amendments in regulatory framework to manage environmental impacts, coordinate maritime spatial planning, and to decide on the most appropriate development or seabed lease auction model. Apart from the challenges already mentioned, issues related to the undisturbed functioning of military and civil radars must also be resolved, particularly considering the country's location along the external EU border.

Among the numerous legislative initiatives related to the development of renewable energy production the draft legislation on creating renewable energy communities in Latvia must be mentioned. In particular, the government is discussing how to provide legal and financial frameworks that support the formation of such communities, observing that decentralized energy systems may be more effective.

Energy Efficiency Directive (EED)

Latvia has strengthened its legal framework to meet the new efficiency targets outlined in the EED. This involves policies and legislation around energy saving, energy audits, and financing energy-efficient projects, with a particular emphasis on building renovations.

Question 3

Latvia's development strategy, particularly within the scope of the NECP and the Recovery and Resilience Plan (RRP), adheres to the "do no significant harm" (DNSH) principle to ensure that investments, particularly in energy and infrastructure, contribute to sustainability without causing negative environmental impacts.

In particular, Latvia is focused on promoting renewable energy projects, ensuring that these projects do not significantly harm the environment. For instance, wind energy projects must ensure compliance with biodiversity protection laws, such as those governing bird migration routes, to avoid harming ecosystems. Expansions in solar power are encouraged under the DNSH framework, ensuring minimal land use impact and avoiding harm to biodiversity and soil health. Moreover, while biomass is a critical part of Latvia's energy strategy, the DNSH principle ensures sustainable sourcing of biomass, protecting forests and preventing overexploitation. Last but not least, Latvia is enhancing its

energy infrastructure, which often requires careful consideration of the DNSH principle to avoid environmental harm. Projects funded under the Recovery and Resilience Facility (RRF), such as energy grid upgrades, must demonstrate that they do not contribute to increased pollution, biodiversity loss, or climate change.

Latvian environmental organizations, such as the Latvian Fund for Nature, the “Green Liberty”, and the World Wildlife Fund, advocate for enhancing the practical application of the DNSH principle. Their plan involves developing recommendations to refine the methodology and monitoring procedures, as well as strengthening the capabilities of a broad range of environmental organizations in environmental monitoring.

Question 4

In general, the concept of energy security in Latvia’s energy policy is split from the social components, which are integrated into the energy affordability pillar (energy security vs. energy affordability and sustainability). In Latvia’s case, the financial allocation from the Just Transition Fund in total amount of 184.2 million euros is based on the envisaged phase-out of peat for energy by 2030. It is important that the conditions do not impose other restrictions or reductions in overall peat extraction, while at the same time the performance indicators on peat extraction volumes and greenhouse gas (GHG) emissions approved in the Guidelines for the Sustainable Use of Peat 2020–2030, which entered into force in November 2020, must be respected.

In Latvia energy poverty refers to a household user’s inability to maintain an adequate temperature in their dwelling or to utilize services provided by energy suppliers, or to pay for such services due to low energy efficiency or because the cost of these services constitutes a significant proportion of household income. A household affected by energy poverty is defined, in accordance with the Law on Social Services and Social Assistance. When planning support measures for energy policy, shall take into account the number of households affected by energy poverty should be taken into account. When planning energy efficiency policy measures, policy makers shall prioritize the implementation of such measures for households affected by energy poverty.

Question 5

The EU Court in *Hinckley Point* case confirmed indeed that the assessment of (state aid) measures under Article 106 TFEU cannot oust the application of, inter alia, Article 37 of the EU Charter of Fundamental Rights, which

states that “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development,” Article 11 TFEU, according to which environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development, and Article 194(1) TFEU, according to which Union policy on energy must have regard for the need to preserve and improve the environment.

In fact, the judgment in *OPAL* case renders comparable consequences. In detail, the Court refers to the solidarity value in a form of legal principle being embedded in Article 194(1) TFEU, Article 2 TEU and in the third subparagraph of Article 3(3) TEU. This allows to conclude that state aid measures must be open not only to environmental but also to energy solidarity scrutiny.

Question 6

The principle of energy solidarity underpins the rationale for identifying and prioritizing Projects of Common Interest (PCIs). In particular, projects that enhance interconnections and infrastructure contribute directly to energy security, by the same fulfilling the solidarity principle. Moreover, both energy solidarity and PCIs promote the integration of energy markets across the EU. By facilitating cross-border energy flows and improving infrastructure, PCIs contribute to a more cohesive and resilient energy market, aligned with the goals of solidarity.

Regulation (EU) 2022/869 states that when deciding how to share costs between member states, the decision must be based on the cost-benefit analysis of a specific PCI. This analysis should include evidence concerning the existence of significant positive externalities, such as security of supply and solidarity.

Besides, PCIs are useful as a crisis management support tool. In times of energy crisis, solid infrastructure (as exemplified by PCIs) enhances the ability of member states to respond collaboratively, embodying the essence of energy solidarity. By relying on interconnected networks, member states can assist one another during supply disruptions. Last, the development of PCIs contributes to the overall resilience of the energy system in the EU, thereby reinforcing the principle of solidarity.

Question 7

The relationship between decarbonization and security of energy supply can be understood as both complementary and, at times, challenging. Although the shift towards cleaner energy sources to mitigate climate change is crucial, the reliability, affordability, and availability of energy still is a concern.

Decarbonization and security of energy supply can reinforce each other in several ways. In particular, both concentrate on diversifying energy sources, promoting energy independence and increasing stability of energy prices over a long-term, as renewable energy sources, once installed, offer more predictable costs over time.

While decarbonization supports energy security in the long term, the transition poses challenges in the short-to-medium term. First, renewable generation is less stable than the generation from fossils and requires a base generation from fossils until energy storage issues are resolved. Energy storage technologies, such as batteries or hydrogen, as well as base generation systems (e.g., natural gas plants), are essential to ensure a continuous and secure supply.

Second, integrating large volumes of renewable energy into existing electricity grids presents technical challenges. Renewable energy sources are often decentralized and can cause fluctuations in power supply, which can affect grid stability. Upgrading grids and building transmission infrastructure to manage renewable energy sources and enable cross-border energy trade is critical.

Third, while decarbonization reduces dependence on fossil fuels, it increases dependence on critical minerals (e.g., lithium, cobalt, rare earth elements) required for renewable energy technologies and batteries. These resources are often concentrated in a few countries, raising supply chain vulnerabilities similar to those seen in fossil fuels.

Fourth, the transition to a decarbonized energy system requires massive investment in renewable infrastructure, grid modernization, and storage technologies.

Fifth, attention should be paid to ensure that the energy transition is just and equitable, avoiding disruptions in energy access for vulnerable populations.

The following approaches are used by the EU member states to mitigate the above-mentioned challenges:

- energy policy diversification;
- introducing flexibility measures, such as demand-response, interconnectors between countries, and smart grid technologies;

- promoting innovation in storage technologies (batteries, hydrogen), energy efficiency, and grid management;
- implementing policies that foster cross-border energy cooperation (e.g. PCIs);
- maintaining strategic reserves of transitional energy sources (such as natural gas);
- sourcing critical materials from multiple regions, investing in alternative technologies, and developing recycling infrastructure.

The same measures are at the centre of energy policy debates in Latvia, with varying degrees of focus on different aspects.

Question 8

Article 192(2)(c) TFEU is a provision within the environmental policy framework TFEU. It allows for a special legislative procedure in certain areas of environmental policy. Specifically, it requires unanimity in the Council for measures that significantly affect a member state's choice between different energy sources or affect the general structure of a member state's energy supply. This clause gives special protection to member states' sovereignty over their energy mix and energy security. It ensures that environmental measures under EU law do not interfere with a member state's right to determine its energy policy without the unanimous agreement of all member states.

Article 194 TFEU lays out the EU's energy policy objectives and provides a framework for measures to ensure the functioning of the energy market and security of energy supply in the EU, promote energy efficiency and energy savings, and develop new and renewable energy sources and promote the interconnection of energy networks. However, Article 194(2) explicitly states that such measures shall not affect a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. This ensures that while the EU may legislate on energy policy, it cannot infringe on the sovereignty of member states to make key decisions regarding their national energy mix and supply structure.

The principle of energy solidarity is rooted in Article 194 TFEU, which outlines the EU's energy policy objectives, including ensuring the security of energy supply across the Union. Although Article 194(2) TFEU explicitly protects member states' sovereignty over their energy mix, the principle of solidarity imposes certain limitations and obligations in the interest of the collective energy security of the Union. First, in *OPAL* judgment the Court ruled that national energy decisions must not conflict with the Union's overall energy security or adversely impact other member states. Second, energy solidarity

implies that member states should act in a way that contributes to shared energy security, particularly in times of crisis. In other words, a member state cannot adopt measures that would isolate itself from EU energy networks or refuse to assist other member states during energy supply crises, even if such measures align with its national energy mix priorities.

Respecting the principle of solidarity could have practical consequences in certain situations. For example, state overly dependent on coal could be required to transition away from it as part of an EU-wide effort to meet decarbonization targets and ensure long-term energy security. Or, while a member state can choose nuclear energy, the solidarity principle could require it to ensure that such a decision does not compromise the security of neighbouring states.

Question 9

With regard to the transition to clean energy, neither the right to clean energy nor the right to halt climate change is explicitly enshrined as a fundamental right in the EU Charter of Fundamental Rights. Article 37 of the Charter, which pertains to environmental protection, is considered a “principle-based right,” stating that “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

In contrast, the Preamble to *Satversme* (the Constitution of the Republic of Latvia) emphasizes the duty to act responsibly toward the environment and nature, and to promote the sustainable development of a united Europe and the world. Furthermore, Article 115 of *Satversme* establishes the obligation of the state to protect the right of everyone to live in a favourable environment. This implies both a positive obligation on the state to care for the environment and a negative obligation to refrain from actions that harm it, as well as the subjective right of individuals to live in a healthy environment. Since the right to live in a favourable environment, as set out in Article 115 of the Constitution, is historically linked to the right to health, it follows that this right includes at least the ability to demand action to prevent harmful changes to the climate.

Question 10

The *COTIF* judgment clarified indeed that even in areas of shared competence, the EU can exercise exclusive competence when an international agreement affects common EU rules or alters their scope. In the context of energy, this

means that when the EU has already legislated on specific issues – such as energy market integration or environmental standards – member states may no longer independently negotiate or conclude international agreements that affect those areas. For example, in areas where the EU has adopted comprehensive legislation, such as the internal energy market or climate action, the EU takes precedence in negotiating external energy agreements that ensure compliance with internal rules. This reflects the principle of pre-emption, where EU law displaces national laws when it occupies the field.

Nevertheless, the member states maintain the right to determine their energy mix under Article 194(2) TFEU, meaning they can choose the proportion of renewables, fossil fuels, or nuclear energy in their national energy policies. This sovereignty, *inter alia*, allows member states to pursue bilateral energy agreements with non-EU countries. For example, some member states pursue bilateral agreements with third countries for natural gas supplies, or promote nuclear energy through their bilateral partnerships, reflecting their national preferences for nuclear power.

Question 11

The amount of funding available for Latvia to implement investments under REPowerEU is EUR 134.4 million. The investment will be used for the purchase and installation of a 60 MW battery energy storage system connected to the electricity transmission system, the implementation of an IT solution for cyber security protection for the state owned electricity distribution system, the conversion of electricity overhead lines to cable lines, the construction, reconstruction or capacity increase of electricity substations, the construction of a biomethane feed-in point in the natural gas transmission system etc. Thus, REPowerEU strengthens Latvia's energy security by enabling it to diversify energy sources, enhance grid infrastructure and promote energy independence.

Section III: The EU's crisis management in the field of energy and its limits

Question 1

Solidarity under Article 194 or energy policy perspective is a significantly broader concept than solidarity under Article 122 or EU internal market's perspective. However, in practice, there are advantages to applying Article 122 TFEU rather than Article 194 TFEU. In particular, the adoption process

under Article 122 is faster, as it only requires a proposal from the Commission and approval by the Council through qualified majority voting – without the lengthy co-decision process involving the European Parliament, which is required under Article 194. Besides, the swift adoption of several EU energy policy related emergency instruments under Article 122 TFEU indicates that solidarity under Article 122 is not as politically charged as solidarity under Article 194.

Question 2

Article 122 TFEU is a flexible instrument designed for crisis management, but it has limitations, particularly in the scope, duration, and nature of the measures that can be adopted. Although this emergency framework can be extended if a crisis continues, Article 122 is not designed for structural reforms or long-term energy policy changes. Repeated extensions may weaken its legitimacy or lead to challenges in justifying emergency measures under a treaty article meant for short-term interventions.

Short-term emergency measures adopted under Article 122 require balancing competing interests, such as affordability for end users, security of supply, efficiency, and progress in the energy transition. These measures must carefully assess the costs, goals, and possible side effects. Efforts aimed at energy savings, reducing risks for consumers, or improving affordability through direct financial support or market interventions may hinder other objectives.

For example, Council Regulation (EU) 2022/1854 of 6 October 2022, concerning an emergency response to high energy prices, allows for temporarily setting electricity prices below cost (Article 13). However, subsidies to lower retail prices can negatively impact competitiveness. These measures can lead to increased resource usage, which, in times of scarcity, may affect supply security. The cross-border impacts of such measures must also be taken into account, as sustained demand in one member state can affect resource availability and use in neighbouring member states.

Both Article 122 and Article 194 have roles to play in energy crisis management, but they are suited to different stages of crisis response. Article 194 remains essential for preventing crises through a stable, resilient energy policy framework that promotes energy security over the long term.

Question 3

In combination, Article 122 and Article 194 TFEU provide the EU with a solid toolkit to handle both the urgent demands of energy crises and the long-term challenges of energy security. Nevertheless, challenges such as the need for rapid coordination among member states, which can be hampered by different national priorities and energy mixes, or a focus primarily on supply disruptions from external sources rather than broader climate-related threat limit their effectiveness.

Article 222 TFEU, often referred to as the “solidarity clause,” provides a broader legal framework that can be employed in response to major crises, including natural disasters, and could be revitalized to enhance the EU’s crisis management toolbox. Revitalizing Article 222 TFEU alongside other crisis management instruments would create a more integrated and robust response framework. This could involve strengthening cooperation between various EU institutions, member states, and relevant agencies (e.g., civil protection, disaster response) to ensure a unified response to energy-related crises that arise from natural disasters, developing comprehensive crisis response plans that incorporate climate resilience measures into energy infrastructure planning, ensuring that the energy sector can adapt and respond effectively to climate-related disruptions, and increasing awareness and training for disaster response teams at both the EU and national levels to ensure readiness for crises affecting energy supplies.

LITHUANIA*

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

The concepts of energy solidarity and energy security (security of energy supply) are of significant importance within the context of Lithuania's energy sector. However, the manner in which they are enshrined within the country's national legislation exhibits considerable variation.

The importance of security of energy supply is clearly defined in the main energy legislation of Lithuania, including the Law on Energy of Republic of Lithuania¹ and the Law on Electricity of Republic of Lithuania,² Law on Natural Gas of Republic of Lithuania.³ According to the Law on the Basics of National Security,⁴ energy is a crucial economic sector for national security in Lithuania.

The security and reliability of energy supply is one of the key objectives of energy activities, as set out in Article 3 of the Law on Energy.⁵ Article 2(35) of

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¹ Seimas of the Republic of Lithuania, 'Lietuvos Respublikos Energetikos Įstatymas', Valstybės žinios, 2002-06-07, Nr. 56-2224.

² Seimas of the Republic of Lithuania, 'Lietuvos Respublikos Elektros Energetikos Įstatymas', Valstybės žinios, 2000-08-04, Nr. 66-1984.

³ Seimas of the Republic of Lithuania, 'Lietuvos Respublikos Gamtinių Dujų Įstatymas', Valstybės žinios, 2000-10-25, Nr. 89-2743.

⁴ Seimas of the Republic of Lithuania, 'Lietuvos Respublikos Nacionalinio Saugumo Pagrindų Įstatymas', No. Valstybės žinios, 1997-01-08, Nr. 2-16.

⁵ The other listed objectives are as follows: availability and adequacy of energy sources and energy; energy source and energy efficiency; balanced and sustainable development of the energy sector through energy innovation based on smart technologies and energy digitisation; reduction of the negative impact of energy activities on the environment; protection of the rights and legitimate

the Law on Energy defines “security of supply” as the reliability and technical security of energy resources and/or energy. The definition of “technical safety” is also provided in the Article 2(33) of the Law on energy.⁶

It is the responsibility of the Government, or a government-authorised body, to ensure the implementation of measures designed to safeguard the security of energy supply (Article 5(2)(11) of Law on Energy of Republic of Lithuania). The Ministry of Energy is responsible for approving legal acts that regulate matters pertaining to the security of energy supply, the installation, operation, use, technical safety, and efficient use of energy facilities and equipment, as well as other technical issues (Article 6(2) of Law on Energy of Republic of Lithuania).

The Law on Electricity of Republic of Lithuania sets out a number of key objectives, including ensuring the safe and reliable operation of the electricity system, as well as generation, transmission, distribution and supply of electricity (Article 3(1)). The Government, the Ministry of Energy, the Council, the Lithuanian Energy Agency, electricity undertakings and network users whose installations are connected to the transmission networks are responsible for ensuring the security of electricity supply within their respective competences. The Government approves the schedule of measures to ensure security of electricity supply, which lay down the procedure for applying and implementing measures to ensure security of electricity supply, which are necessary for the prevention, preparation and management of crises in the electricity sector.

According to Article 14(2)(1) of Law on Energy of Republic of Lithuania, energy security measures must be included in national energy policy development programmes. In 2019, Lithuania prepared a National Energy and Climate Plan (NECP)⁷ for 2021–2030 in line with the requirements of the Energy Union Governance Regulation.⁸ An update of the NECP of the Republic of Lithuania was prepared and finally approved in 11 December 2024.⁹ Key strategic documents integrated into the updated NECP are:

interests of customers; creation and development of conditions for effective competition in the energy sector; promoting of the use of indigenous and renewable energy sources.

⁶ Technical safety is the set of measures and requirements established by this law and other legal acts to ensure the reliability and safety of energy facilities and installations.

⁷ ‘National Energy and Climate Action Plan of the Republic of Lithuania for 2021–2030’, accessed 29 October 2024, https://energy.ec.europa.eu/system/files/2022-08/lt_final_necp_main_en.pdf

⁸ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, Amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and Repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, 328 OJ L §.

⁹ Government of the Republic of Lithuania, Resolution No 1069 of 11 December 2024 ‘On Approval of the National Energy and Climate Action Plan 2021–2030’, TAR, 2024-12-11, Nr. 2024-21969.

1. Agenda “National Strategy for Energy Independence” approved by Resolution No. XIV-2856 of the Seimas of the Republic of Lithuania of 27 June 2024 (new recast of The National Energy Independence Strategy)¹⁰;
2. The National Climate Change Governance Agenda was adopted in June 2021.¹¹;
3. National Air Pollution Reduction Plan adopted in April 2019 and updated in August 2022¹²;
4. National Progress Plan adopted on 9 September 2020.¹³
5. Resolution No. 789 of the Government of the Republic of Lithuania of 29 September 2021 on the approval of the general plan of the territory of the Republic of Lithuania.¹⁴

The Constitutional Court of Lithuania has issued rulings on matters pertaining to energy and energy security in a number of cases. For example, the economic activity conducted in the sphere of energy, *inter alia*, the provision of all consumers with energy resources, is a specific economic activity; such an activity is characterised, among other things, by the fact that conducting this activity has a direct influence on the entire national economy (the Constitutional Court’s ruling of 3 April 2015); the options of the legislature to establish the measures in order to ensure the general welfare of the nation in the electricity sector are determined by the particularities of electricity, *inter alia*, by limited resources of electricity as well as by material, financial and other important factors (the Constitutional Court’s ruling of 2 March 2009); the *security and reliability of the energy system is a constitutionally important objective* that justifies a particular differentiated legal regulation of economic activity in this sphere on the grounds of the public interest; while regulating, in accordance with the Constitution, *inter alia*, para. 3 of Article 46 thereof, the economic activity in the sphere of energy so that it would serve the general welfare of the nation, *the legislature is obliged to establish such legal regulation that would ensure the security, stability, and reliability of the energy system, inter alia*, the opportunity to receive energy supplies from multiple sources (suppliers) under non-discriminatory conditions and at fair prices (the Constitutional Court’s ruling of 3 April 2015).¹⁵

¹⁰ Seimas of the Republic of Lithuania, ‘Dėl Nacionalinės Darbotvarkės „Nacionalinė Energetinės Nepriklausomybės Strategija“ Patvirtinimo’, Valstybės žinios, 2012-07-10, Nr. 80-4149.

¹¹ Government of the Republic of Lithuania, ‘Dėl Nacionalinės Klimato Kaitos Valdymo Darbotvarkės Patvirtinimo’, TAR, 2021-07-02, Nr. 15226.

¹² Government of the Republic of Lithuania, ‘Dėl Nacionalinio Oro Taršos Mažinimo Plano Patvirtinimo’, TAR, 2019-04-26, Nr. 6860.

¹³ Government of the Republic of Lithuania, ‘Dėl 2021–2030 Metų Nacionalinio Pažangos Plano Patvirtinimo’, TAR, 2020-09-16, Nr. 19293.

¹⁴ Government of the Republic of Lithuania, ‘Dėl Lietuvos Respublikos Teritorijos Bendrojo Plano Patvirtinimo’, TAR, 2021-10-06, Nr. 20951.

¹⁵ On public interest services in the electricity sector, No. 13/2013-34/2014 (Constitutional Court of the Republic of Lithuania 29 October 2015).

In its ruling of 29 October 2015,¹⁶ the Constitutional Court of the Republic of Lithuania cited Directive 2009/72/EC (in force at that time), including its provisions concerning the security of supply.¹⁷ The Constitutional Court of Republic of Lithuania has frequently highlighted the significance of the jurisprudence of the Court of Justice of the European Union as a source of legal interpretation, is also important for the interpretation and application of the Lithuanian law (Decisions of 21 December 2006, 15 May 2007, 4 December 2008, 27 March 2009, 22 December 2011, and 14 April 2014).

In one of the most recent cases, the Constitutional Court ruled on the constitutionality of limiting the capacity of solar energy, concluding that such limitations are justified on the grounds of energy security. The amendment to Article 13, para. 10 of the Law on Energy from Renewable Sources of the Republic of Lithuania (LRES) established that the total installed capacity of solar power plants cannot exceed 2 GW.¹⁸ By ruling of 7 November 2023,¹⁹ Constitutional Court recognised that Article 13, para. 10 of the LRES conflicted with Article 46²⁰ of the Constitution and the constitutional principles of a state under the rule of law and responsible governance, insofar as it did not establish how the relationships of the economic activities of the persons who had already started the process of installing solar power plants, but who were no longer able to continue that process due to the imposed limitation on the total installed capacity of solar power plants, should be regulated. The Constitutional Court emphasised that the Seimas, as the legislative authority, has a very broad discretion to shape the energy policy of the state and to regulate economic activity in the field of energy, *inter alia*, to set priorities for electricity generation from renewable energy sources. Due to the unusually rapid growth of the estimated installed capacity of solar power plants in Lithuania and the risk that the Lithuanian electricity system would be overloaded with this technology, the legislature sought to ensure the public interest – to ensure the reliable and safe functioning of electricity networks and the uninterrupted supply of electricity.

Energy security is subject to more extensive and detailed regulation under Lithuanian national law than energy solidarity. The Law on Natural Gas of the

¹⁶ Ibid.

¹⁷ A secure supply of electricity is of vital importance for the development of European society, the implementation of a sustainable climate change policy, and the fostering of competitiveness within the internal market (Recital 5); the security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in electricity and the integration of the isolated electricity markets of Member States (Recital 25).

¹⁸ Seimas of the Republic of Lithuania, 'Lietuvos Respublikos Atsinaujinančių Išteklių Energetikos [statymo Nr. XI-1375 2, 3, 5, 6, 11, 13...]', TAR, 2022-07-07, Nr. 14906.

¹⁹ On the limitation on the total installed capacity of solar power plants (Constitutional Court of the Republic of Lithuania, 7 November 2023).

²⁰ Article 46, para. 1 states that "Lithuania's economy shall be based on the right to private ownership, freedom of individual economic activity, and initiative."

Republic of Lithuania includes a separate article, Article 62, which addresses regional solidarity. According to Article 62(1), in order to safeguard security of natural gas supply in the internal market and integration of the national market in natural gas of the Republic of Lithuania, the Republic of Lithuania and the Council shall cooperate at the regional level with neighbouring Member States in promoting regional and bilateral solidarity. It is notable that the concept of energy solidarity is not referenced in either Law on Energy of Republic of Lithuania or the Law on Electricity of Republic of Lithuania. Accordingly, the concept of energy solidarity has not been applied in the Lithuanian national case law.

This illustrates that the principle of solidarity is predominantly implemented in Lithuania in accordance with EU law. This encompasses EU primary law (Articles 122, 194, and 222 of the TFEU) and EU secondary law (Regulation (EU) 2017/1938, Regulation (EU) 2022/2576, and others). Of particular significance is the judgment rendered in the *OPAL* case. This indicates that the Constitutional Court and other courts of Lithuania will consider the CJEU's rulings set out in the *OPAL* case when relevant to the circumstances of the case and the question at hand.

Question 2

In the *OPAL* case, the Court made several noteworthy observations regarding the principle of solidarity, which may prove relevant for conceptualizing the impact of this principle. In the EU, solidarity “underpins the entire legal system of the European Union,” and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.²¹ A review of the legislation reveals that the principle of energy solidarity in Lithuania can be primarily discussed in light of its inclusion in the TFEU, particularly in Article 194 thereof.

Interpretation of the solidarity principle in the *OPAL* ruling and under Article 194 of the TFEU seems to impose rights and obligations upon the Member States and EU institutions. In accordance with the ruling, “[...] the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the com-

²¹ Judgment of the Court of 15 July 2021 *Federal Republic of Germany v European Commission* C-848/19 P, accessed 29 October 2024.

mon interest of the European Union and the policies pursued by it.”²² Energy solidarity principle must inform any action relating to EU policy in that field.²³

The Court’s judgement references an approach that connects the principle of energy solidarity with certain procedural procedures as a form of “solidarity test.” The principle of energy solidarity requires that the EU institutions, including the Commission, *conduct an analysis* of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole.²⁴ The principle of energy solidarity entails a general obligation, for the European Union and the Member States to take *into account the interests* of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect *their interests*, as regards *security of supply, its economic and political viability and the diversification of sources of supply*, and to do so in order to take account of their interdependence and de facto solidarity.²⁵ This principle constitutes a criterion for assessing the legality of measures.²⁶

However, the aforementioned judgment does not provide detailed guidance as to how a solidarity test should be applied in practice. Furthermore, it is unclear how and in what way a Member State must take the interests of all stakeholders potentially affected into account. In our view, it is important to incorporate the solidarity considerations in particular energy law instruments to lower the ambiguity of such tests in the future.

It is for Member States to apply the principle of energy solidarity through their administrative authorities. It is anticipated that national courts, in particular administrative courts, will play a significant role in assessing government action and in applying for preliminary rulings.

In particular, we believe that the content of the principle of energy solidarity should be developed in a step-by-step approach, both in terms of the development of energy law instruments and in terms of the development of case law, in particular that of the ECJ. As stated in the Court judgment in the *OPAL* case, the EU institutions and the Member States are required to take into account “[...] *the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict.*”²⁷ The rule for balancing interests does not imply that the principle of energy solidarity is *beyond* particular national interests. Moreover, the

²² Ibid., para. 49.

²³ Ibid., para. 67.

²⁴ Ibid., para. 53.

²⁵ Ibid., para. 71.

²⁶ Ibid., para. 45.

²⁷ Ibid., para. 73.

implementation of the principle of energy solidarity does not relieve Member States of their general obligation to ensure the security of their national energy system and to provide reliable and affordable energy. Article 194(2) of the TFEU establishes 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.

It seems likely that the principle of energy solidarity will remain important as energy integration continues. Given the EU's dependence on foreign energy resources, it is evident that external solidarity in energy field is a necessity. According to Eurostat, the EU in 2022, produced around 37% of its own energy, while 63% was imported. The aforementioned provisions demonstrate the relevance of energy solidarity and the necessity of its advancement in both internal and external contexts.

Question 3

A key issue is whether the four EU energy policy objectives set out in Article 194 TFEU establish a hierarchy of priorities and, if so, how this hierarchy should be arranged. In the event that this is not carried out, a case-by-case decision will be made. As demonstrated in the answer to Question 1, Lithuania's Constitutional Court in its ruling already had to balance between the solar energy deployment (need to impose limitations on solar energy capacity) and energy security.

The applicability of the solidarity principle to all EU energy policy objectives is likely to bring additional complexity as scope of issues gets wider, including energy efficiency or renewable energy development.

It is not possible at this stage to make an unequivocal statement regarding the role of energy solidarity in triggering a green transition. Firstly, the specific requirements for the solidarity test for a Member State in the context of a green transition, the assessment of the interests of the parties involved and the potential violation of those interests will determine whether the application of the solidarity test will prolong certain green transition actions. However, the provisions of RED III do not indicate that procedures will be prolonged due to the application of the solidarity test.

Question 4

The construction of large energy facilities can have adverse environmental effects, which highlights the importance of conducting thorough environ-

mental impact assessments. The Lithuanian Ministry of the Environment disseminates information on transboundary environmental impact assessments where Lithuania is affected.²⁸ Of the last ten cases published, eight pertain to energy facility installations, including large wind farms, nuclear power plant life extensions, and the construction of small modular nuclear power plants.

One illustrative example of a proceedings between Lithuania and Belarus at Espoo Convention's Implementation committee in respect to the planned nuclear power plant in Ostrovets, Belarus.²⁹ In 2019 it was decided that Belarus had failed to fully comply with its obligations under the Espoo Convention. However, the electricity connections with Poland and Sweden, the ongoing synchronisation project, the Floating Storage Regasification Unit (FSRU), as well as development of oil and gas infrastructures significantly improved Lithuania's energy security.³⁰

Question 5

The application of the principle of energy solidarity does *not mean* that EU energy policy must never, under any circumstances, have *negative impacts for the particular interests of a Member State in that field*.³¹ As stated in the Court judgment in the *OPAL* case, the EU institutions and the Member States are required to take into account “[...] the interests both of the European Union and of the various Member States that are liable to be affected and to *balance* those interests where there is a conflict.”³²

We believe that there is no one-size-fits-all approach to achieving energy solidarity. For instance, if a decision is taken at the level of a Member State, it is essential to ensure that the balance of interests is taken into account. Integrating solidarity considerations into common legal mechanisms may result in a common denominator, but it is crucial to ensure that the process meets the requirements of the solidarity test.

²⁸ Ministry of Environment of the Republic of Lithuania, ‘Tarpvalstybinio Poveikio Aplinkai Vertinimas’, accessed 29 October 2024, <https://am.lrv.lt/lt/veiklos-sritys-1/tarsos-prevencija/planuojamos-ukines-veiklos-poveikio-aplinkai-vertinimas/tarpvalstybinio-poveikio-aplinkai-vertinimas/>

²⁹ UNECE, ‘EIA/IC/S/4 Belarus’, accessed 29 October 2024, <https://unece.org/environmental-policy/environmental-assessment/eiaics4-belarus>

³⁰ Tomas Janeliūnas, ‘Energy Transformation in Lithuania: Aiming for the Grand Changes’, in: *From Economic to Energy Transition: Three Decades of Transitions in Central and Eastern Europe*, eds. M. Mišík, V. Oravcová (Palgrave Macmillan, 2021), p. 300, doi:10.1007/978-3-030-55085-1_10

³¹ Judgment of the Court of 15 July 2021 *Federal Republic of Germany v European Commission* C-848/19 P para. 73.

³² Ibid.

Question 6

The mandate for developing an EU policy in the energy policy area is set out in Article 4 of the Treaty on the Functioning of the European Union (TFEU), which defines energy as a shared competence between the EU and the Member States. The EU and its Member States are able to legislate and adopt legally binding acts. Member States exercise their own competence where the EU does not exercise, or has decided not to exercise, its own competence. These are the rules that define competence. There are a number of other reasons for how and at what intensity shared competence is implemented.

The European experience shows how, in the spirit of solidarity, states can commit to assisting each other in addressing energy crises, provided sufficiently robust legal arrangements are created to avoid some states from free-riding on the supply security efforts of others.³³

Russian Federation's unprovoked and unjustified war of aggression against Ukraine and the unprecedented reduction of natural gas supplies from the Russian Federation to Member States threaten the security of supply of the Union and its Member States, this formed the basis for measures at the EU level. The measures of December 2022 include:

- Council Regulation (EU) 2022/2576 of 19 December 2022 on enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders;
- Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy;
- 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.

It would be appropriate to make a reference to the Council regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

It should be noted that the application of EU instruments in energy field is currently the subject of legal proceedings (Case T-802/22, case C-675/22), so there should therefore be more clarity on the scope and legal basis for their application.

This shows that acting on behalf of the EU in the face of the crisis has strengthened the EU's position in the case of gas purchases, stabilised energy

³³ Anatole Boute, 'Conclusion', in: *Energy Dependence and Supply Security*, ed. Anatole Boute (Oxford University Press, 2023), p. 218, doi:10.1093/oso/9780198890478.003.0007

markets and led to the acceleration of renewable energy. The successes of cooperation and the application of solidarity show the increasing integration in the energy field. However, the application of the solidarity principle can also be seen as a form of governance, as Member States have to take into account the interests of other countries when implementing energy policy. The application of energy solidarity principle goes beyond the limits of national decision-making focused exclusively on national interests and ensures that broader objectives are taken into account. This would allow for the development and rebalancing of the relationship between the Member States and the EU in the field of energy without necessitating a reallocation of competences, for example, the shift towards the predominant exercise of EU competence in the field of energy.

Question 7

Energy security constitutes a pivotal element of the EU's and Member States' energy policy, representing a core objective. The EU's energy security situation is shaped by its dependence on Russia, particularly in the context of gas supply. The Russian–Ukrainian gas conflict in January 2006 led to the suspension of gas deliveries from Russia to Ukraine and the cessation of gas deliveries to the Austrian gas hub. In the wake of Russia's war of aggression against Ukraine in 2022, the EU has taken decisive measures to bolster energy security, including joint gas purchases and the advancement of renewable energy sources. The aforementioned situation has led to an increased focus on the current resilience assessment and risk preparedness measures. The increasing digitalisation of the energy sector increases the threat of cyber-attacks, which we need to be prepared for.

It is important to consider the more general scientific context before discussing energy security within the legal framework.

Initially, before the oil crises in the 1970s, the meaning of energy security was self-evident as it was predominantly used to describe the supply security of oil in the developed countries. Gradually, the definition was broadened up to include other types of fuels, countries, market actors, and perspectives. At the start of the 21st century, environmental and social issues began to be regarded as part of energy security issues.³⁴ The key questions of “security for whom?” “in the name of what values?” and “from what threats?” became much more difficult to answer which lead to many groups creating their own definitions.

³⁴ Justinas Jasiūnas, Peter D. Lund, and Jani Mikkola, ‘Energy System Resilience – A Review’, *Renewable and Sustainable Energy Reviews* 150 (1 October 2021): 111476, doi:10.1016/j.rser.2021.111476

Academic research has highlighted dozens of distinct yet overlapping interpretations of energy security.³⁵ Having examined 45 different definitions of energy security, Sovacool notes that the concept has become “diffuse and often inconsistent.”³⁶ Kruyt et al. described energy security in four dimensions: availability, affordability, accessibility, and acceptability.³⁷ Cherp and Jewell are critical of the four A’s and seek to develop alternative approach that integrate the perspectives of reliability, sovereignty and resilience into the field of energy security.³⁸ Energy security, according to the International Energy Agency (IEA), is defined as the “uninterrupted availability of energy sources at an affordable price.”³⁹ In the broader sense, security of supply is comprised of three different dimensions: continuity of supply (i.e. whether consumers are connected to the electricity grid), system security (i.e. whether the power grid is operated in a stable state and remains stable even after failure events), security of supply on the electricity market (i.e. whether electricity production meets demand through the balancing of supply and demand in the electricity market).⁴⁰

Moreover, the energy security definition has changed over the years with broadening and diverging interpretations later accompanied by generalization and integration efforts.⁴¹

There also seems to be a broad consensus that the concept of and the threats to energy security depend on the structure of the energy system in question.⁴² EU Member States face different energy security challenges due to their different energy structures and needs. How energy security issues are addressed depends on both the general EU legal framework and the constitutional, economic, geographical and political specifics of each Member State. Together with economic efficiency and environmental compatibility, security of supply forms an equally important objective of energy policy (energy policy target triangle).

³⁵ Kaisa Huhta, ‘Energy Security in the Energy Transition: A Legal Perspective’, in: *The Palgrave Handbook of Zero Carbon Energy Systems and Energy Transitions*, eds. Geoffrey Wood et al. (Cham: Springer International Publishing, 2022), p. 5, doi:10.1007/978-3-030-74380-2_25-2

³⁶ Benjamin K. Sovacool, ed., *The Routledge Handbook of Energy Security* (London: Routledge, 2010), 3, doi:10.4324/9780203834602.

³⁷ Bert Kruyt et al., ‘Indicators for Energy Security’, *Energy Policy*, China Energy Efficiency, 37, no. 6 (1 June 2009): 2166–81, doi:10.1016/j.enpol.2009.02.006.

³⁸ Aleh Cherp and Jessica Jewell, ‘The Concept of Energy Security: Beyond the Four As’, *Energy Policy* 75 (1 December 2014): 415–421, doi:10.1016/j.enpol.2014.09.005.

³⁹ DGAP, ‘Energy Security’, accessed 29 October 2024, <https://dgap.org/en/research/glossary/climate-foreign-policy/energy-security>

⁴⁰ Grüner Weg, ‘Definition and Monitoring of Security of Supply on the European Electricity Markets Project No. 047/16’, 12.

⁴¹ Justinas Jasiūnas, Peter D. Lund, and Jani Mikkola, ‘Energy System Resilience – A Review.’

⁴² Kaisa Huhta, ‘Energy Security in the Energy Transition...’

Article 194 of TFEU states that one of the objectives of EU energy policy is to ensure security of energy supply in the Union. However, the TFEU does not provide the definition of secure energy supply. This illustrates that there is scope for defining and interpreting this concept through policy documents and legislation.

The issue of energy security is addressed in the European Union's energy and climate policies. According to European energy security strategy,⁴³ the key to improved energy security lies first in a more collective approach, in particular for coordinating network developments and opening up markets, and second, in a more coherent external action. It is stated that too often energy security issues are addressed only at a national level without taking fully into account the interdependence of Member States. The European energy security strategy addressed the most pressing energy security of supply issue, namely the strong dependence on Russia as a main external supplier.

The Energy Union strategy⁴⁴ has the vision of ensuring affordable, secure and sustainable energy for Europe and its citizens.⁴⁵ The key drivers of energy security are the completion of the internal energy market and more efficient energy consumption. Energy security is related with diversification of supply (energy sources, suppliers, and routes).

Through the “Clean Energy for All Europeans” package of 30 November 2016 the Union has been pursuing an ambitious decarbonisation agenda, in particular by constructing a robust Energy Union, which includes the 2030 goals for energy efficiency and deployment of renewable energy.

The European Green Deal⁴⁶ set the EU's target of achieving climate neutrality by 2050. The decarbonisation of the energy system, while recognising the need to maintain security of supply and competitiveness, is critical to achieving climate objectives.

⁴³ European Commission, 'Communication from the Commission to the European Parliament and the Council European Energy Security Strategy. / * COM/2014/0330 Final */', 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0330>

⁴⁴ 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, 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 */ (2015), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A80%3AFIN>

⁴⁵ 'Energy Union', *Consilium*, accessed 29 October 2024, <https://www.consilium.europa.eu/en/policies/energy-union/>

⁴⁶ European Commission, '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 The European Green Deal. COM/2019/640 Final', 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN>

The “Fit for 55” package⁴⁷ consists of a set of inter-connected proposals, which all drive towards the same goal of ensuring a fair, competitive and green transition by 2030 and beyond. The package strengthens eight existing pieces of legislation and presents five new initiatives, across a range policy areas and economic sectors: climate, energy and fuels, transport, buildings, land use and forestry. This package is set to further enhance the energy sector’s role in contributing to the EU climate agenda. EU energy policy documents provide an overview of the current energy security situation and an analysis of geopolitical and other energy security threats. EU policy documents also inform the EU’s need to implement an energy transition in order to achieve climate neutrality. While energy transition (e.g. deployment of RES) is aimed at achieving climate policy objectives, energy security remains a significant concern in energy law. The development of RES can enhance energy security (decreasing reliance on fossil fuels) while also introducing challenges due to the integration of variable renewable energy into the grid. Additionally, wind and solar power are subject to larger and longer-term weather variations.

EU energy legislation sets out the goal of energy security, establishing legal frameworks to guarantee energy security, infrastructure requirements, and the rights and obligations of authorities, infrastructure managers, and other key stakeholders in the sector. Energy security is a core objective and criterion in many of the authorisation and operating conditions requirements.

The Governance regulation identifies security of supply as one of the five dimensions of the Energy Union.⁴⁸ Therefore, security of supply must be included as a separate dimension in integrated national energy and climate plans with regard to: a) increased diversification of energy sources and supply from third countries, which may aim to reduce dependence on energy imports, b) increasing the flexibility of the national energy system, and c) addressing constrained or interrupted supply of an energy source, for the purpose of improving the resilience of regional and national energy systems, including a timeframe for when the objectives should be met.⁴⁹ Integrated national energy and climate plans must include policies and measures that are consistent with the preventive action and emergency plans set out in Regulation (EU) 2017/1938.⁵⁰ Furthermore, the risk preparedness plans must also be taken into

⁴⁷ European Commission, ‘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’, 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0550>.

⁴⁸ Article 1(2), 4(b) of Governance Regulation 2018/1999/EU as last amended by Regulation 2021/1119/EU.

⁴⁹ See Article 3 and Article 4 Governance Regulation 2018/1999/EU as last amended by Regulation 2021/1119/EU.

⁵⁰ ‘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, pp. 1–56.

account. The Governance Regulation also introduced an integrated reporting on energy security. In light of the wording of Article 4 of the Governance Regulation, it can be seen that the energy security category encompasses the resilience of regional and national energy systems.

Additionally, the Electricity Market Directive aims to ensure a high degree of security of supply.⁵¹ Article 2(58) of the Electricity Market Directive defines “security” as means both security of supply and provision of electricity, and technical safety. This Directive also sets out modes for Member States, regulatory authorities and transmission system operators to cooperate towards the creation of a fully interconnected internal market for electricity that increases the integration of electricity from renewable sources, free competition and security of supply. Distribution system operators and transmission system operators play a key role in ensuring a secure, reliable and efficient electricity system in accordance with Articles 31 and 40 of Electricity Market Directive. The Regulation 2019/941⁵² sets out a common framework of rules on how to prevent, prepare for and manage electricity crises, bringing more transparency in the preparation phase and during an electricity crisis and ensuring that measures are taken in a coordinated and effective manner. It requires Member States to cooperate, at regional level and, where applicable, bilaterally, in a spirit of solidarity. It also sets out a framework for the effective monitoring of security of electricity supply in the Union via the Electricity Coordination Group

Decision No 1313/2013/EU⁵³ sets out requirements for Member States to develop risk assessments at national level or at the appropriate sub-national level every three years, and to develop and refine their disaster risk management planning at national level or at the appropriate sub-national level.

Commission Regulations (EU) 2017/1485⁵⁴ and (EU) 2017/2196⁵⁵ constitute a detailed rulebook governing how transmission system operators and other relevant stakeholders should act and cooperate to ensure system security. Those technical rules should ensure that most electricity incidents are dealt with effectively at operational level.

⁵¹ ‘Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU’, OJ L 158 14.6.2019, p. 125, art. 1.

⁵² ‘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.

⁵³ ‘Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism’, OJ L 347, 20/12/2013, pp. 924–947.

⁵⁴ ‘Commission Regulation (EU) 2017/1485 of 2 August 2017 Establishing a Guideline on Electricity Transmission System Operation C/2017/5310’, OJ L 220, 25/08/2017, pp. 1–120.

⁵⁵ ‘Commission Regulation (EU) 2017/2196 of 24 November 2017 Establishing a Network Code on Electricity Emergency and Restoration C/2017/7775’, OJ L 312, 28/11/2017, pp. 54–85.

Energy security is an important objective of Lithuania's energy policy and plays an important role in Lithuania's energy policy and legislation.

Lithuania in its National Energy and Climate Plan sets objectives for energy security, notably on diversifying sources, as well as for renewables and energy efficiency promotion. National Energy and Climate Plan reveals the distinctive features of Lithuania's energy security landscape. By becoming an EU member in 2004, Lithuania joined the single EU framework, becoming part of the EU's single economic market, which enabled rapid growth of the Lithuanian economy and other areas of national significance. However, in the energy context, the conditions remain almost unchanged as Lithuania has remained systematically and infrastructurally linked to the Russian energy system. Following the definitive closure of Unit 2 of Ignalina Nuclear Power Plant on 31 December 2009, Lithuania's dependence on a single external energy supplier has been further reinforced. Considering that it did not have energy interconnections with the EU mainland and that all natural gas and most of electricity were purchased from a single monopolistic supplier, Lithuania started implementing infrastructure projects of regional importance to interconnect the Lithuanian and EU energy systems.

Lithuania's National Energy and Climate Plan indicates that strengthening the EU's external energy policy, coordinated action by EU Member States and solidarity in the event of crises also contribute to Lithuania's security and, therefore, efforts will be continued to intensify the EU dialogue with key energy suppliers, notably the US, Canada, Norway and Australia.

A new recast of Lithuania's National Energy Independence Strategy (LNEIS) has been approved by the Seimas (Parliament) in June 26, 2024.⁵⁶ Lithuania is continuously emphasising the importance of energy security in its energy strategy. The document aims to make Lithuania a fully energy-independent country by 2050 that produces energy for its own needs and exports it. Lithuania's first strategic energy objective is to ensure a secure and reliable energy supply to all consumers (LNEIS, para. 39). Energy security is guaranteed by the integration of the EU and Lithuanian energy infrastructure, markets, systems and sectors. This is achieved by developing a sustainable domestic renewable energy source generation capacity to meet energy consumption needs, maintaining and developing balancing and reserve generation capacities of the electricity system, and developing flexibility and capacities of the electricity system through the creation and implementation of the necessary mechanisms.

⁵⁶ Seimas of the Republic of Lithuania, Dėl Nacionalinės darbotvarkės 'Nacionalinė energetinės nepriklausomybės strategija' patvirtinimo, TAR 2024-06-28.

According to the LNEIS (para. 41), the following objectives will be pursued to achieve a secure and reliable energy supply for all consumers:

1. Synchronisation of the Lithuanian electricity system with the Continental European electricity grids (hereinafter ‘the CEG’). It shall be ensured that the electricity system of the Republic of Lithuania is ready for synchronous operation with the CEG via the electricity system of the Republic of Poland by the end of 2024 and interconnected with the CEG by February 2025, and that the Harmony Link project between Lithuania and Poland continues to be implemented.
2. Ensuring capacity and flexibility of the electricity system. Ensure the adequacy of the electricity system and establish mechanisms to maintain and develop reserve capacity for electricity generation, while also ensuring the effective development and operation of the market for flexibility and balancing, and the introduction of flexible electricity demand measures and technologies.
3. Development of electricity transmission and distribution infrastructure to ensure reliable and secure electricity supply, to meet the need for connection of facilities enabling new measures for generation, consumption and flexibility of the electricity system.
4. Ensuring the supply of natural and other gas, oil and petroleum products during the transition to a climate-neutral economy by maintaining the Klaipėda Liquefied Natural Gas (LNG) terminal and a reliable gas infrastructure network, the Klaipėda terminal for the handling of liquids (petroleum, bio-fuels, chemical products, and synthetic fuels), the Būtingė oil terminal and other necessary infrastructure.
5. Crisis preparedness and resilient infrastructure in Lithuania’s energy sector – strengthening the ability to respond to military, economic, political and climate crises, stockpiling of natural gas, crude oil and petroleum products required to implement international commitments, and other necessary stocks in the event of disruptions and/or breakdowns of energy supply. The physical and cyber security capabilities of the energy sector are also being strengthened to prevent any breach of physical security and cyber security. The security and reliability of energy supply is one of the key objectives of energy activities, as set out in Article 3 of the Law on Energy.⁵⁷ Article 2(35) of the Law on energy defines “security of supply” as the reliability and technical security of energy resources and/or energy. The definition of “technical safety” is also provided in the Article 2(33) of the Law on energy.⁵⁸

⁵⁷ The other listed objectives are as follows: availability and adequacy of energy sources and energy; energy source and energy efficiency; balanced and sustainable development of the energy sector through energy innovation based on smart technologies and energy digitisation; reduction of the negative impact of energy activities on the environment; protection of the rights and legitimate interests of customers; creation and development of conditions for effective competition in the energy sector; promoting of the use of indigenous and renewable energy sources.

⁵⁸ Technical safety is the set of measures and requirements established by this law and other legal acts to ensure the reliability and safety of energy facilities and installations.

The Law on Electricity establishes the foundations for safe and secure operation of the electricity system and the generation, transmission, distribution, and supply of electricity.

Article 23(1) of that Law provides that the electricity transmission system operator is responsible for the stability and reliability of the operation of the electricity system, the performance of the national balancing function in the territory of the Republic of Lithuania, the provision of system services, the operation, maintenance, management and development of interconnections with the electricity systems of other countries, by reducing the capacity constraints in the transmission networks and taking into account the needs of electricity system and electricity grid users.

Article 76(1)(2) of the same Law stipulates the National Energy Regulatory Council should cooperate with foreign national energy regulators to ensure that the transmission system operator has one or more integrated system(s) at regional level covering two or more Member States for capacity allocation and for ensuring the security of the electricity network. The supply of electricity in the event of an emergency is limited or suspended in accordance with the Rules of Electricity Supply and Use.⁵⁹ The Lithuanian natural gas transmission system, operating in normal mode, is able to ensure the supply of natural gas without restrictions, and once the LNG terminal in Klaipėda is operational, natural gas can be supplied to the country from alternative sources. As a result, risks to gas supply are significantly reduced, in particular due to geopolitical factors. An alternative gas supply also reduces the risk of gas supply due to technical failures.

In 2022, Lithuania adopted a plan on risk-preparedness in the electricity sector⁶⁰ in accordance with Regulation (EU) 2019/941 on risk preparedness in the electricity sector. In the plan it is stated that Lithuania's electric power system operates within a synchronous system of the Commonwealth of Independent States (IPS/UPS) that joins together the electricity systems of Belarus, Russia, Estonia, Lithuania and Latvia (BRELL). The frequency of the BRELL power sub-systems is centrally managed and coordinated by the Energy System of the Russian Federation (Russian Unified Energy System). Therefore, the Baltic States – Lithuania, Latvia, and Estonia that are the European Union (EU) Member States seek to interconnect their electricity systems for synchronous operation with the Continental European networks. Cross-border links with Poland (LitPol Link) and Sweden (NordBalt) are also operated in

⁵⁹ Minister for Energy of the Republic of Lithuania, 'Dėl Elektros Energijos Tiekimo Ir Naujojo Taisyklių Patvirtinimo', *Valstybės žinios*, 2010-02-18, Nr. 20-957, pp. 1-38.

⁶⁰ 'Plan on Risk-Preparedness in the Electricity Sector, Approved by Order No 1-32 of the Minister for Energy of the Republic of Lithuania of 17 January 2022', accessed 29 October 2024, https://energy.ec.europa.eu/document/download/66ab5058-026b-457c-839f-0ed5de91e798_en?filename=LT_RPP_electricity.pdf

Lithuania. The plan on risk-preparedness in the electricity sector: 1) submits the summary of regional and national crisis scenarios in the electricity sector; 2) specifies roles and responsibilities of the competent authority as well as tasks assigned to other state institutions; 3) describes national procedures and measures applied in the event of a crisis in the electricity sector; 4) describes regional and bilateral procedures and measures applied in the event of a crisis in the electricity sector; 5) specifies the crisis coordinator and defines its role; 6) describes the stakeholder consultation mechanism and consultations results; 7) provides information about testing of the procedures identified in the Plan.

Russia's war of aggression against Ukraine has brought into sharp focus the extent of EU Member States' energy dependence and demonstrated that the affordability of energy, particularly gas, is a crucial consideration in energy security. The cost of energy has risen significantly for consumers and businesses alike, emphasising the importance of affordable energy sources. The International Energy Agency defines energy security as the uninterrupted availability of energy sources, as well as their affordability.

There is a growing emphasis on accessibility, resilience and risk preparedness at both EU and Lithuanian national levels. This is evident in the legislation that has been adopted at the EU level and in the recently announced plan in Lithuania. In order to effectively assess potential threats, it is essential to consider all aspects of the energy system, including the institutional, market, and physical components.

The question has been raised whether, in the light of the recent incidents with gas pipelines (Nord Stream, Balticconnector), the concept of energy security should be seen in a broader sense than "security of supply." As highlighted in the aforementioned literature, the concept of energy security is broadening in general, and a broader approach can be taken in the aforementioned case if the context requires it. Furthermore, we believe that in the face of threats, the concept of energy security could be complemented by the concept of resilience.

Question 8

After Russia's war of aggression against Ukraine, security of energy supply became even more critical priority for the EU. The current energy security policy includes coordination measures and rules to prevent and respond to accidents on offshore installations and disruptions to energy supply and emergency oil and gas stocks, including exploration and production licences.⁶¹

⁶¹ 'Energy Policy: General Principles | Fact Sheets on the European Union | European Parliament', 29 February 2024, <https://www.europarl.europa.eu/factsheets/en/sheet/68/energy-policy-general-principles>

The EU's trans-European infrastructure policy is covered by the Trans-European Networks (TENs) regulations. Adopted in June 2022, the TEN-E regulation on trans-European energy infrastructure⁶² identifies 11 priority corridors in different geographic regions for electricity, offshore grid and hydrogen infrastructure.⁶³ It defines EU projects of common interest within EU countries and projects of mutual interest between the EU and non-EU countries, ends support for new natural gas and oil projects and introduces mandatory sustainability criteria for all projects.

Article 18 (2)(a) states that projects of common interest falling under the energy infrastructure categories set out in Article 24 and in point (1)(a), (b), (c), (d) and (f) of Annex II and point (3) of Annex II shall also be eligible for Union financial assistance in the form of grants for works where they fulfil all of the following criteria: the project specific cost-benefit analysis provides evidence concerning the existence of significant positive externalities, such as security of supply, system flexibility, solidarity or innovation. It is therefore essential to consider the significant positive externalities in terms of both security of supply and solidarity when evaluating the award of grants. It is important that both of these factors play a role at an early stage in the decision on how to finance the project.

The Commission Delegated Regulation (EU) 2022/564⁶⁴ includes in its annex the Union list of projects of common interest. The list of projects of common interests is established every two years.⁶⁵

TEN-E regulation on trans-European energy infrastructure⁶⁶ repealed the Regulation on Guidelines for Trans-European Energy Infrastructure of 2013 which already determined provisions for identifying Project of Common Interest necessary to implement priority energy corridors for electricity and gas infrastructures. Paragraph 4 of the Preamble Regulation on Guidelines for Trans-European Energy Infrastructure of 2013 stated that “the European Council of 4 February 2011 underlined the need to modernise and expand Europe’s energy infrastructure and to interconnect networks across borders, in order to make solidarity between Member States operational, to provide

⁶² ‘Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on Guidelines for Trans-European Energy Infrastructure, Amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and Repealing Regulation (EU) No 347/2013’, OJ L 152, 03/06/2022).

⁶³ ‘Energy Policy’...

⁶⁴ ‘Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 Amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as Regards the Union List of Projects of Common Interest C/2021/8409’, OJ L 109, 08/04/2022, pp. 14–31.

⁶⁵ *Ibid.*, para. 1.

⁶⁶ Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013.

for alternative supply or transit routes and sources of energy and to develop renewable energy sources in competition with traditional sources.” It can be assumed that expression of the Member States’ energy solidarity for extended period of time is expressed via identification of a Projects of Common Interest.

Projects of Common Interest may result in diversification of supply routes and creating new routes which should decrease the EU’s dependence on a single supplier. It is important to note that the delivery and investment in such infrastructure projects is a key aspect. Another critical factor is determining the most appropriate approach to addressing energy supply concerns: Should this be handled at the country level or on the EU scale? The ongoing war in Ukraine has highlighted the need for a coordinated approach to energy security at the EU level to enhance resilience in the face of potential energy weaponisation by a major supplier.

Responding to the energy crisis brought about largely by Russia’s war of aggression against Ukraine, the role of EU energy diplomacy were reinforcing in the EU external energy engagement in a changing world⁶⁷ presented as part of the REPowerEU Plan aiming to strengthen energy security and reduce Europe’s dependency on Russian energy imports. EU energy diplomacy presented supports a global, clean and just energy transition to ensure sustainable, secure and affordable energy, boosting energy efficiency and the development of renewables; accelerate a just and inclusive green energy transition globally.⁶⁸

Securing alternative gas supplies for Europe, EU and Azerbaijan enhance bilateral relations, including energy cooperation.⁶⁹ A Memorandum of Understanding on Strategic Partnership in the field of energy between the European Union represented by the European Commission and the Republic of Azerbaijan (hereinafter ‘Memorandum of Understanding’) has been signed between Azerbaijan and the European Union.⁷⁰ One of the points of Memorandum of Understanding is to double the supply of gas from Azerbaijan to the European Union and to expand the Southern Gas Corridor.⁷¹

⁶⁷ ‘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 § (2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN%3A2022%3A23%3AFIN>

⁶⁸ EEAS, ‘Energy Diplomacy’, accessed 29 October 2024, https://www.eeas.europa.eu/eeas/energy-diplomacy_en

⁶⁹ ‘EU and Azerbaijan Enhance Bilateral Relations’, text, *European Commission – European Commission*, accessed 29 October 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4550

⁷⁰ Official website of President of Azerbaijan Republic, ‘Azerbaijan, European Union Signed MoU on Strategic Partnership in Field of Energy’, accessed 29 October 2024, <https://president.az/en/articles/view/56689>

⁷¹ ‘Statement by President von Der Leyen with President Aliyev’, text, *European Commission – European Commission*, accessed 29 October 2024, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4583

This event is a reflection of the EU's new energy diplomacy with the European Commission assuming a more prominent role. As long as the European Commission carries out the EU's energy diplomacy and acts more effectively than individual Member States in ensuring energy security, that is, uninterrupted energy supplies at affordable prices, this policy must continue.

Question 9

Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action sets out the necessary legislative foundation for a cost-efficient, transparent, and predictable governance of the Energy Union and Climate Action. The aim is to ensure the achievement of the objectives of the Energy Union and the long-term Union greenhouse gas emissions commitments consistent with the Paris Agreement, and, in particular, of the targets and objectives in the field of greenhouse gas emission reduction, energy from renewable sources and energy efficiency.

The Energy Union strategy⁷² has five mutually-reinforcing and closely inter-related dimensions designed to bring greater energy security, sustainability, and competitiveness:

- energy security, solidarity and trust;
- a fully integrated European energy market;
- energy efficiency contributing to moderation of demand;
- decarbonising the economy, and
- research, innovation, and competitiveness.

The key drivers of energy security are the completion of the internal energy market and more efficient energy consumption. It depends on more transparency as well as on more solidarity and trust between the Member States.

Is the current governance model a number of energy-related matters are coordinated at the EU level functionally (e.g. Integrated National Energy and Climate Plans, trans-European energy infrastructure) and institutionally (ACER, ENTSO, EU DSO, Electricity Coordination Group, Gas Coordination Group).

In light of the above, we are inclined to accept the view that “in an integrated European energy market, security of supply and efficient market functioning are no longer exclusively a national consideration, but should be addressed as

⁷² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, 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.

a regional and pan-European issue.”⁷³ This leads to the following conclusions that resource adequacy should be addressed and coordinated at regional and European level to maximize the benefit of the internal market and to avoid adverse distortionary effects.⁷⁴

In answering the question of whether the current multi-actor governance model at national and Union level is adequate or whether it should evolve towards a Union-driven model, several aspects should be considered. First, a comprehensive assessment of the functioning of the energy governance model in the EU and in the Member States needs to be carried out. Second, the principle of subsidiarity should be respected. If security of supply remains a Member State responsibility, Member States must have the tools, instruments and resources to fulfil this function. Thirdly, there is a greater emphasis in Lithuania on fulfilling the functions of the existing governance model, and there are currently no clear indications that the EU governance model as a whole needs to be reviewed.

Section II: Energy solidarity, energy security and green transition

Question 1

It is challenging to envisage a climate-neutral future for the European Union that does not encompass a spirit of solidarity. The EU and all its member states have signed and ratified the Paris Agreement and are strongly committed to its implementation.⁷⁵ European Climate Law⁷⁶ sets down in legislation the EU’s objective of becoming climate-neutral by 2050. This goal followed the commitment made by the EU and its member states on signing the Paris Agreement in 2015.

European Climate Law acknowledges that achieving climate neutrality should require a contribution from all economic sectors for which emissions or removals of greenhouse gases are regulated in Union law (para. 10). The transition to climate neutrality requires changes across the entire policy spectrum and a collective effort of all sectors of the economy and society, as highlighted

⁷³ Alberto Pototschnig and Martin Godfried, ‘The Regulators’ View: Capacity Mechanisms and the EU Internal Electricity Market’, in: *Capacity Mechanisms in the EU Energy Markets: Law, Policy, and Economics*, eds. Leigh Hancher et al. (Oxford University Press, 2022), p. 52, doi:10.1093/oso/9780192849809.003.0002

⁷⁴ Ibid.

⁷⁵ ‘Paris Agreement on Climate Change’, *Consilium*, accessed 29 October 2024, <https://www.consilium.europa.eu/en/policies/climate-change/paris-agreement/>

⁷⁶ ‘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’, OJ L 243, 09/07/2021, pp. 1–17.

in the European Green Deal (para. 25). According to European Climate Law (para. 34), fairness and solidarity across and within Member States (in light of their economic capability, national circumstances, such as the specificities of islands, and the need for convergence over time), should be taken into account when taking the relevant measures at Union and national level to achieve the climate-neutrality objective. The concept of energy solidarity must be embraced in order to guarantee the coherence of the process of reshaping the climate-neutral future of the Union's economy.

The alignment of climate neutrality and energy transition policy objectives is demonstrated through the approach to renewable energy. The utilisation of renewable resources mitigates the necessity for fossil fuels, facilitates the advancement of clean energy, diversifies energy supply sources and enhances energy security. From a climate neutrality perspective, a significant challenge is the complexity of the transition to clean energy in numerous industries.

The design and implementation of energy transition policies is a complex process. It is essential to consider the evolving energy trilemma when developing these policies. The trilemma addresses three areas: energy security, affordability, and sustainability. When setting energy policy, it is a constant challenge to balance these three, especially when it comes to security versus sustainability during the energy transition.⁷⁷

In our preceding responses (see Section I), we observed that the notion of energy security has undergone a process of evolution and broadening over time. Environmental and social concerns have begun to be acknowledged as integral to the domain of energy security. As the objective of climate neutrality is being pursued and is already being implemented, this should gradually alter the conceptualisation of energy security. The pursuit of the objective of climate neutrality, given that it has been agreed that it is necessary, will also modify the concept of solidarity and its operational mechanisms.

Question 2

This EU package “Fit for 55” aims to mitigate climate change and reduce greenhouse gas (GHG) emissions by 55% by 2030 and to make Europe the world's first climate-neutral continent by 2050.

⁷⁷ ‘The Energy Trilemma: What Is It and How Does It Influence EU Energy Policy – Ramboll Group’, accessed 29 October 2024, <https://www.ramboll.com/insights/resilient-societies-and-liveability/the-energy-trilemma-what-is-it-and-how-does-it-influence-eu-energy-policy>

According to NECP,⁷⁸ Lithuania will follow the objectives of the EU's energy policy which include implementation of the targets of the EU's climate change and energy policy. The balanced development of EU's renewable energy sources and energy efficiency improvement is encouraged. Obligations related to the development of local and renewable energy sources and energy efficiency improvement after 2020 will be based on the burden sharing principle, which ensures the respective contribution of each EU Member State in the pursuance of the objectives relating to renewable energy sources and energy efficiency improvement on the EU level by 2030.

Lithuania's National Energy Independence Strategy (LNEIS)⁷⁹ aims to make Lithuania a fully energy independent country by 2050 that produces energy for its own needs and exports it. Lithuania's first strategic energy objective is to ensure a secure and reliable energy supply to all consumers (LNEIS, para. 39). Energy security is guaranteed by the integration of the EU and Lithuanian energy infrastructure, markets, systems and sectors. This is achieved by developing a sustainable domestic renewable energy source generation capacity to meet energy consumption needs, maintaining and developing balancing and reserve generation capacities of the electricity system, and developing flexibility and capacities of the electricity system through the creation and implementation of the necessary mechanisms.

Lithuania is taking all necessary measures to implement EU legislation related to the "Fit for 55" package. In 2024, the Seimas approved the draft amendment to the Law on Climate Change Management⁸⁰ prepared by the Ministry of the Environment, which transposes and implements the provisions of the newly adopted European Union's "Fit for 55" legislative package into national law.⁸¹ The law will reinforce the stipulations of the EU Emissions Trading System (EU ETS), extending it to maritime transport and, from 2027, to buildings, road transport, and additional sectors.

Lithuanian legislation aims to mitigate climate change and reduce greenhouse gases without compromising energy security. These objectives are pursued with the utmost respect for the principle of solidarity.

The achievement of ambitious climate goals and a transformation of the energy system has its consequences. The adoption of the EU Green Deal and the

⁷⁸ 'National Energy and Climate Action Plan of the Republic of Lithuania for 2021–2030'.

⁷⁹ Seimas of the Republic of Lithuania, *Dėl Nacionalinės darbotvarkės 'Nacionalinė energetinės nepriklausomybės strategija' patvirtinimo*, TAR 2024-06-28.

⁸⁰ Seimas of the Republic of Lithuania, *'Lietuvos Respublikos Klimato Kaitos Valdymo Įstatymo Nr. XI-329 Pakeitimo Įstatymas'*, TAR, 2024-06-30, Nr. 12129.

⁸¹ Ministry of Environment of the Republic of Lithuania, *'Seimas pradeda svarstyti Klimato kaitos valdymo įstatymo pakeitimo projektą'*, accessed 29 October 2024, <https://am.lrv.lt/lt/naujienos/seimas-pradeda-svarstyti-klimato-kaitos-valdymo-istatymo-pakeitimo-projekta/>

transition will put considerable pressure on the most GHG-intensive industries in Lithuania. The three biggest GHG emitters in Lithuania (Achema, Orlen Lietuva and Akmenės cementas) are directly and indirectly responsible for more than 25 thousand jobs or 2% of total employment in the whole country.⁸²

Question 3

EU regulators introduced the principle of “do no significant harm” (DNSH) to prevent myopic investment processes, which would focus on a particular environmental or social objective without sufficient consideration for other such objectives.⁸³ “Do no significant harm” means not supporting or carrying out economic activities that do significant harm to any environmental objective, where relevant, within the meaning of Article 17 of Regulation (EU) 2020/852.⁸⁴ In Regulation (EU) 2019/2088,⁸⁵ the definition of sustainable investment is linked to the application of the “do no significant harm” principle.⁸⁶

In answering your question whether the evolving principle of “do no significant harm” could play a significant role in the field of energy law, it should be considered that Article 194 TFEU refers to the need to preserve and improve the environment. Under Article 11 of the TFEU, environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development. The wording of Article 194(1) TFEU establishes an explicit bridge between energy regulation and the environmental provisions of Articles 191–193 TFEU and Article 11 TFEU.⁸⁷ Consequently, Article 194(1) TFEU brings the environmental objectives and principles of Articles 191–193 TFEU and Article 11 TFEU into the realm of energy regulation, including the principles of precaution, prevention, and rectifying pollution at the source, the polluter pays principle and the principle of sustainability. This applicability

⁸² ‘Preparation of Territorial Just Transition Plans for Lithuania’, *Trinomics*, accessed 29 October 2024, <https://trinomics.eu/project/preparation-of-territorial-just-transition-plans-for-lithuania/>

⁸³ Bloomberg Professional Services, ‘What Does It Mean to “Do No Significant Harm”? | Insights’, *Bloomberg Professional Services*, 4 March 2022, sec. Sustainable Finance, <https://www.bloomberg.com/professional/insights/sustainable-finance/what-does-it-mean-to-do-no-significant-harm/>

⁸⁴ European Commission, ‘Do No Significant Harm’, accessed 29 October 2024, https://knowledge4policy.ec.europa.eu/glossary-item/do-no-significant-harm_en

⁸⁵ ‘Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-related Disclosures in the Financial Services Sector’, OJ L 317, 09/12/2019, pp. 1–16, para. 17.

⁸⁶ ‘Sustainable investment’ means an investment in an economic activity that contributes to an environmental objectives.

⁸⁷ Laura Kaschny, ‘Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy’, *Transnational Environmental Law* 12, no. 2 (July 2023): 270–294, doi:10.1017/S2047102523000110

was also confirmed in *Austria v. Commission (Hinkley Point)*, in which the CJEU held that the Euratom Treaty does not preclude the application of the environmental principles enshrined in Articles 191(2) and 11 TFEU.⁸⁸

EU law sets the framework for energy policy, which takes into account the need to preserve and improve the environment, including environmental principles. However, it is not clear from the question how the principle of “no significant harm” will be integrated into energy law. Consequently, it is challenging to ascertain the legal implications of this principle. Furthermore, it is not clear how this would complement or modify existing regulations. However, the current wording of Article 194, “preserve and improve the environment,” is not only focused on refraining from harm, but also imposes an obligation to improve the environment. It is therefore important that the “do no significant harm” principle does not narrow the scope of the environmental objectives.

In Lithuania, environmental regulation does not set forth a separate principle of avoiding doing any “significant harm.” However, there are provisions related to this concept.

The Constitution of the Republic of Lithuania,⁸⁹ adopted on 25 October 1992, became the legal basis for the establishment and development of national environmental policy. Of particular importance are Articles 53(3) and 54 of the Constitution:

Article 53

The State and each individual must protect the environment from harmful effects.

Article 54

The State shall secure the protection of the natural environment, wildlife and plants, individual objects of nature and protected areas and shall supervise a sustainable use of natural resources, their renewal and replenishment.

The devastation of land and the subsoil, the pollution of waters and air, radioactive impact on the environment as well as depletion of wildlife and plants shall be prohibited by law.

When interpreting the provisions of the Constitution that establish the foundations of environmental protection, the Constitutional Court has stated that these provisions express one of the objectives of the State’s activity – to ensure the rights of citizens to a healthy and clean environment, and that environmental protection is the concern and duty of the State and individual citizens (Constitutional Court decisions of 1 June 1998, 31 January 2011, 9 May 2014, 16 December 2015 and 30 May 2017).

⁸⁸ Ibid.

⁸⁹ Constitution of the Republic of Lithuania, accessed 29 October 2024, <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=x4249kwzg&documentId=TAIS.239805&category=TAD>.

The Law on Environmental Protection⁹⁰ generally regulates social relations in the field of environmental protection, establishes the system of institutions operating in the field of environmental protection and their main functions, and defines the main rights and obligations of legal and natural persons in the field of environmental protection. Article 4 of the Law on Environmental Protection establishes principles of environmental protection. It is stated that environmental protection shall be the concern and duty of the State and each resident thereof. The policy and practice of the administration of environmental protection must direct public and private interests towards the improvement of the quality of the environment, encourage the users of natural resources to seek the ways and means to avoid or reduce adverse effects on the environment, and to make production ecologically safe.

A review of the Lithuanian legal framework reveals the general aspects of the principle “do no significant harm.” However, there is a lack of detailed guidance on its practical application, particularly in the area of energy.

Question 4

Recent events, such as the war in Ukraine, have highlighted the critical importance of energy resource affordability.

In accordance with Article 3(2) of the Governance regulation, the integrated national energy and climate plans shall assess the number of households in energy poverty taking into account the necessary domestic energy services needed to guarantee basic standards of living in the relevant national context, existing social policy and other relevant policies, as well as indicative Commission guidance on relevant indicators for energy poverty.

A key aspect of a sustainable internal market is the availability of energy services to all citizens in order to ensure the basic needs and health of consumers. However, Lithuania faces the problem of energy poverty, where it is difficult or impossible for residents to enjoy adequate heating of their homes or access to essential energy services such as lighting or transport.

According to Lithuania’s NECP, energy poverty is caused by four main problems: energy inefficiency, high energy prices and low household incomes, as well as lack of consumer awareness. The problem of energy poverty is also reflected in energy poverty indicators:

- According to the EU income and living conditions survey, more than a quarter (27.9%) of the population could not afford adequate heating of

⁹⁰ Seimas of the Republic of Lithuania, ‘Lietuvos Respublikos Aplinkos Apsaugos Įstatymas’, Lietuvos aidas 1992, Nr. 20-0; Žin. 1992, Nr. 5-75.

their homes in 2018. This is the second highest rate among the EU Member States, which is much worse than the EU average of 7.4%. In Lithuania, the proportion of individuals who cannot afford adequate heating dropped by more than 11%, from 31.1% in 2015 to 20% in 2023.

- In Lithuania, 17.1% of households spent a large part of their income on energy in 2016. This indicator shows the percentage of households in which the share of energy expenditure (electricity, gas, other fuels, heat) in disposable income was more than double the median share of energy expenditure.

EU data also point to hidden energy poverty, where households may spend too little and not acquire sufficient services. According to Statistics Lithuania, 14.9% of Lithuanian households experienced hidden energy poverty in 2016. More specifically, the indicator of hidden energy poverty shows the percentage of households whose energy expenditure was less than 50% of the median energy expenditure.

Energy poverty affects socially vulnerable groups in particular: seniors, children, people with chronic diseases, single parents, and the unemployed. Tackling this pressing social challenge requires a comprehensive political approach combining social and environmental policies.

In order to address energy poverty, the National Progress Programme 2021–2030 sets the target of “reducing energy poverty among the population,” identifying three national indicators with targets for 2025 and 2030.

The LNEIS has set out Lithuania’s fourth strategic energy objective, which is the availability of energy resources to consumers.

Access to energy supply is a basic service that should be available to all. Those who lack the financial means to access this service must be provided with support measures. In response to energy price spikes and supply disruptions, EU Member States have taken unified action to enhance the protection of the EU wholesale energy market and combat manipulation. This has involved strengthening transparency and oversight mechanisms within the wholesale energy market, as well as creating conditions for market reform.

To achieve the objective of making energy resources available to consumers, the following principles must be applied:

- (a) Priority must be given to promoting energy efficiency. This should be achieved through the implementation of effective and targeted measures designed to address the root causes of energy poverty. These measures should include improvements in energy efficiency, the renovation of buildings, the retrofitting of heating systems (depending on the nature of the

buildings), access to energy-efficient appliances, and access to renewable energy. Additionally, targeted measures should be introduced to improve energy affordability. These could include targeted income support, social tariffs, and temporary support for energy-poor households. It is essential that these measures do not encourage inefficient energy consumption.

- (b) The implementation of smart energy metering systems that provide consumers with up-to-date data on their energy consumption, enable them to manage their energy use and benefit from advances in energy technology and digitisation.
- (c) It is crucial to intensify information campaigns on energy efficiency, focusing on energy-poor households, to guarantee that these groups receive bespoke information and guidance, while leveraging energy advice networks and one-stop shops.

Solutions that can help to reduce energy poverty include the improvement of energy efficiency and the introduction of renewable energy sources. S. Gentvilas, the Minister of Environment of Lithuania, issued a statement in which he says that “Lithuania provides 100% support for the payment of credit for renovated housing and the interest on renovated housing for residents receiving a heating allowance. Additionally, vulnerable households are reimbursed for the costs of preparing and maintaining the renovation project, meaning low-income households bear no costs for the renovation.”⁹¹

The Just Transition Fund will target the most affected regions, in Kaunas, Šiauliai and Telšiai counties, which rely on a small number of highly greenhouse-gas-intensive industrial plants. Thanks to the adoption of its Territorial Just Transition Plan (TJTP) Lithuania will receive €273 million from the Just Transition Fund (JTF) to support a just climate transition to a more attractive and greener economy.⁹²

It is essential that the decarbonisation and green transformation of the energy sector is carried out in a socially fair and inclusive manner, with priority given to supporting socially vulnerable households and consumers, who will face the greatest difficulties as a result of this transformation.

⁹¹ Ministry of Environment of the Republic of Lithuania, ‘Adaptation to climate risks, a just transition and the circular economy are at the heart of discussions between Environment Ministers in Brussels’, accessed 29 October 2024, <https://am.lrv.lt/en/news/adaptation-to-climate-risks-a-just-transition-and-the-circular-economy-are-at-the-heart-of-discussions-between-environment-ministers-in-brussels/>

⁹² European Commission, ‘EU Cohesion Policy: €273 Million for a Just Climate Transition in Lithuania’, accessed 29 October 2024, https://ec.europa.eu/regional_policy/whats-new/newsroom/14-12-2022-eu-cohesion-policy-eur273-million-for-a-just-climate-transition-in-lithuania_en

Question 5

On 1 January 2022, the revised Guidelines of the European Commission on State aid for climate, environmental protection and energy entered into force, extending the scope of the previous Guidelines to new areas in order to achieve the goal of reaching climate neutrality by 2050. The compatibility test requires the Commission to assess whether the aid helps develop certain economic activities (positive condition) and does not affect trading conditions to an extent contrary to common interests (negative condition).⁹³

It is not explicitly stated in the Guidelines that the solidarity test should be applied, nor is it specified how it should be applied. However, following the Court's clarification in the *OPAL* case that energy solidarity principle, like general principles of EU law, constitutes a criterion for assessing the legality of measures adopted by the EU institutions, this is a potential area of concern that should be addressed.

Question 6

At the same time, the provisions of this Regulation should 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, in accordance with Article 194 TFEU (para. 8 of the preamble to the Regulation (EU) 2022/869).

Article 4 of the Regulation establishes criteria for the assessment of projects by the Groups. Under Article 4(2) a project of mutual interest shall meet the general criteria. "Security of supply based, *inter alia*, on diverse sources, co-operation and solidarity" as criteria is set forth in Article 4 (2)(e)(ii). The term "solidarity" is used in Article 16(6)(c), 18(2)(a), 18(4).

It is evident that there are endeavours to integrate energy solidarity considerations into the Regulation.

Question 7

The LNEIS indicates that decarbonisation will encompass nearly all areas, with dedicated sections for the heat and transport sectors.

⁹³ EUR-Lex, '2022 guidelines on State aid for climate, environmental protection and energy', accessed 29 October 2024, <https://eur-lex.europa.eu/EN/legal-content/summary/2022-guidelines-on-state-aid-for-climate-environmental-protection-and-energy.html>

The LNEIS has identified four priority areas: reducing the impact on climate change and ambient air pollution, reliability, competitiveness and involvement of the country's businesses in the efforts towards energy progress. Those four areas correlate directly with the main dimensions of the National Plan identified in the Governance of the Energy Union Regulation: decarbonisation, energy efficiency, energy security, internal energy market and research, innovation and competitiveness.

Under the Paris Agreement, Lithuania together with the EU and its Member States, has made a binding commitment to reduce GHG emissions from all sectors of economy by at least 40% by 2030, compared to 1990, using EU's internal efforts. According to Lithuania's NECP Lithuania is implementing GHG emission reductions on the basis of the National Strategy for the Climate Change Management Policy, which sets short-term (until 2030), indicative medium-term (until 2040), and long-term (until 2050) targets and objectives for climate change mitigation.

In sectors covered by the EU Emissions Trading System (EU ETS), in which Lithuanian operators participate together with operators from other EU Member States participating in the EU ETS, emissions must be reduced by 43% compared to the 2005 levels.

Non-ETS sectors (transport, agriculture, waste management, industrial enterprises engaged in other activities or fuel burning installations with boilers with installed capacity below 20 MW (small district heating enterprises), public sector buildings, households, fisheries, construction, services and other sectors) will have to comply with Lithuania's annual emission reduction limits (tCO₂eq) and achieve at least a 9% reduction in 2030 compared to 2005.

The primary drivers of change in the heat supply sector up to 2050 will be the increased energy efficiency of buildings, the transition towards environmentally friendly technologies (e.g., heat pumps), and the growing utilisation of RES technologies. One of the fundamental principles of decarbonising the transport sector is the effective integration of alternative fuels, ensuring a technology-neutral energy mix.

It is advisable to construct carbon capture facilities in companies whose production processes make it unfeasible for them to achieve climate neutrality targets and who have no other options for decarbonisation. These facilities should be located in major biofuel and waste incineration facilities, as well as in areas where several sources of biogenic carbon dioxide are concentrated.

Lithuania has the potential to produce other hydrogen derivatives, such as ammonia, which could contribute to both national decarbonisation targets and the export of energy products. There is also an opportunity to increase industrial electrification and decarbonisation (the use of hydrogen and hydrogen derivatives in industry).

In the context of decarbonisation and energy transition, to guarantee the security of the energy system is one of the most crucial priorities. The transition to a decarbonised energy system presents new challenges in ensuring energy security. For example, by transitioning from fossil fuels to renewable energy sources, a country can become energy self-sufficient, reducing its reliance on external suppliers and enhancing its energy security. However, decarbonisation also presents challenges. In particular, electricity grids have been designed to accommodate consistent energy flows, making the integration of renewable energy sources a significant challenge in terms of grid integration and maintaining energy balance within the grid.

Question 8

Article 194 (2) TFEU also contains a rule regarding the right of the Member States to be free in choosing their energy sources or energy supply structure. This freedom is restricted by the environmental competence of Article 192 (2) (c) TFEU. That provision allows the EU to adopt measures significantly affecting a Member State's choice between different energy sources and its energy supply structure when deciding unanimously.⁹⁴ This particularly raises questions regarding the limits to EU measures that aim to promote the decarbonisation of the energy transition and the development of renewable energy sources.⁹⁵

The Court was confronted with this exact question in *Poland v. Parliament and Council* (Case C-5/16).

However, the Court held that environmental policy objectives inherently affect Member States' energy sectors and that recourse to the special legislative procedure may be relied upon only in cases where the "primary outcome sought by that measure" is to significantly affect a Member State's choice of energy source and its general structure of energy supply. Moreover, as a derogation and competence limitation, Article 192(2)(c) is to be interpreted narrowly, es-

⁹⁴ Renate Pirstner-Ebner, *European Energy Law Market System for Electricity and Gas – Energy Supply Security – Green Energy System of the Future (Green Smart Grid, Nomos)*, doi.org/10.5771/9783748913627

⁹⁵ Laura Kaschny, 'Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy...'

pecially as questions of environmental policy cannot ignore energy concerns. A broader interpretation of Article 192(2)(c) and Article 194(2) TFEU by analogy would render EU energy policy measures extremely limited and reduce the ability to address the promotion of renewable energy sources.⁹⁶

Question 9

The LNEIS objective is to ensure that Lithuania produces as much energy as it consumes and that the energy sector becomes fully climate neutral by 2050. In order to achieve the Lithuanian energy vision, the strategic energy target is to achieve climate neutrality for Lithuania and the region. To achieve the objectives set out in the Green Deal Lithuania will transition to climate-neutral energy sources exclusively. The development of renewable energy sources (RES) will continue, both offshore and onshore, as will the assessment of new sources of electricity generation. The necessary infrastructure for electricity generation will be developed in Lithuania to enable the export of energy products. The transition to climate-neutral energy sources and the use of alternative fuels will be promoted across a number of sectors, including heat generation, transport, industry and others. By 2030, a positive energy balance in the electricity sector must be achieved, ensuring that the country generates more electricity than it consumes. The ultimate goal is a climate-neutral energy sector based on indigenous energy production by 2050.

The sources of energy production will consist of renewable energy sources and technologies that ensure the production of energy without polluting the environment. The LNEIS defines aim is to further increase the share of RES in Lithuania's domestic electricity generation and final electricity consumption balance until it reaches 100%, thus reducing dependence on fossil fuel import and increasing domestic electricity generation capacity. It is estimated that 10 GW of onshore wind power plants and 9 GW of solar photovoltaic power plants will be developed by 2050. Lithuania plans to build enough electricity generation facilities to become an exporter of energy products, especially with a particular focus on hydrogen, by year 2050. Consumers will be enabled to produce their own energy to meet their needs.

As indicated by the data provided by the electricity transmission system operator, the most significant advancement in the electricity sector has been achieved in 2023. In 2023, local electricity production increased by 75.78 % (from 3.22 to 5.66 TWh) in comparison to 2018. This accounted for 45% of total electricity demand in Lithuania.⁹⁷ This represents a significant shift,

⁹⁶ Ibid.

⁹⁷ The data on renewable energy is provided in the recast LNEIS, 2024.

given that in 2018 local electricity generation accounted for just 25.05% of total electricity demand in Lithuania.

Electricity production growth was driven by the increased capacity for renewable energy sources in Lithuania. In 2023, compared to 2018, the production of wind and solar power plants increased by 159% and reached 3.16 TWh. Most electricity in 2023 was produced by wind power plants – 2.52 TWh, or 121% more than in 2018, but the highest growth was recorded in the production of solar power plants, which reached 0.63 TWh, or almost 7 times more than in 2018. The installed capacity of wind power plants in 2023 increased from 533 MW in 2018 up to 1,228 MW, and solar power plants – from 82 in 2018 up to 1,108 MW. The aggregate installed capacity of wind and solar power plants has increased by approximately threefold.

The NECP set out that the sources of energy production will consist of renewable energy sources and technologies that ensure the production of energy without polluting the environment.

Question 10

The EU is taking action to reduce its dependence on fossil fuels (especially natural gas). The use of renewable energy requires the input of rare metals and other materials that the EU does not have at its disposal, which creates new dependencies. The scarcity of resources emphasises the need to diversify energy supplies and to enhance trade relationships with worldwide partners. In response to Question 6, Section I we outlined the measures that have been implemented at the EU level.

The Federal Republic of Germany brought to the Court an action on the basis of Article 263 of the TFEU for partial annulment of Council Decision 2014/699/EU of 24 June 2014 establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, and to the Appendices thereto.⁹⁸ The European Union is a party to COTIF. In its judgment of 5 December 2017, the ECJ dismissed the action brought by the Federal Republic of Germany.

The main problem in the case was the interpretation of Article 218(9) of the TFEU in the context of its application to international agreement with shared

⁹⁸ Judgment of the Court (Grand Chamber) of 5 December 2017. *Federal Republic of Germany v Council of the European Union*, Case C-600/14.

competence. The Court was to determine whether, for the stage of implementation of international agreement with shared competence, the existence or nature of the EU competence is of a decisive character. The existence of EU (shared) competence is sufficient not only for the EU to become a party, but also for execution of rights and obligations under international agreement with shared competence.⁹⁹

In other words, the existence of the EU external competence is a decisive factor for the conclusion and execution of an international agreement. If the EU shares competence with the Member States over the whole agreement, it may be concluded by the EU only. Moreover, as follows from the commented judgment, the EU may also be the only entity empowered to make decisions at the stage of the implementation of an international agreement with shared competence. This is supposed to be the way to get rid of problematic mixity in EU external relations.¹⁰⁰

The conclusion of agreements as “mixed,” that is jointly by the European Union and its Member States, is a legal phenomenon peculiar to the EU legal order. It is a consequence of the *sui generis* nature of the Union: unlike inter-governmental organisations, the Union has been granted extensive internal and external competences by the Treaties which, in certain areas, are (or may become) exclusive. Essentially, two main forms of mixity are distinguished: facultative mixity and obligatory mixity. In conclusion, COTIF has made it clear that the Court had by no means intended to reject the idea of facultative mixity. Insofar as an agreement does not include areas subject to Member States’ exclusive competences, the EU may conclude it as EU-only or mixed, that choice normally falling within the political discretion of the Council.¹⁰¹

Given the EU’s reliance on external suppliers in energy sector, there is a strong case for a unified negotiating position, which would enhance both the terms of acquisition and the position of individual countries. This is corroborated by the case law of the Court, which acknowledges the competence of the EU institutions to conclude international agreements.

Question 11

The “REPowerEU” will address challenges related to green transformation, with a particular focus on reducing GHG emissions, including in the transport sector.

⁹⁹ Monika Niedźwiedź, ‘Case C-600/14 Germany v Council (OTIF)’, *Polish Review of International and European Law* 8, no. 1 (2019): 141–164, doi:10.21697/priel.2019.8.1.07

¹⁰⁰ Ibid.

¹⁰¹ Luca Prete, ‘Some Thoughts on Facultative and Obligatory Mixity after Singapore and COTIF, and before CETA’, *Verfassungsblog*, 13 October 2018, doi:10.17176/20181017-093930-0

It will also look at ways to increase energy efficiency in buildings and transport, and to stimulate the creation of additional electricity generation capacity from renewable energy sources. The total budget for this is EUR 747.56 million.¹⁰²

On 30 June 2023, Lithuania submitted a modified national RRP, including a REPowerEU chapter in accordance with Article 21c of Regulation (EU) 2021/241, to the Commission.¹⁰³ In component 8 (REPowerEU), Lithuania proposed to add an investment consisting of the implementation of a financial instrument to promote the deployment of renewable energy.

The REPowerEU chapter includes one reform and three investments. 1) The reform (H.1.3.) aims at improving the investment environment for developers of renewable energy sources. In particular, the reform aims at streamlining and speeding up permitting and other administrative processes, including by reducing the number of required permits, shortening the timeframe for obtaining them and regulating hybrid power plants. 2) The REPowerEU chapter increases the funding for renovation of multi-apartment buildings, which improves the energy efficiency of buildings and reduces heating costs for residents. 3) The third investment (H.3.1.) consists of loan support to business entities (including public entities engaged in similar activities as the private entities) to invest in projects supporting the creation of additional renewable energy sources generation capacity (solar and wind).

Section III: The EU's crisis management in the field of energy and its limits

Question 1

Concerning the relationship of Article 194 (1) (b) TFEU and Article 122 TFEU, the latter has the quality of a “*lex specialis*.”¹⁰⁴ This provision allows adopting measures outside ordinary legislative procedure should severe difficulties in the energy supply arise. In this case, the council can issue appropriate measures “in a spirit of solidarity. Here, the parliament is not involved, ensuring a rapid procedure in the event of an energy supply crisis.”¹⁰⁵

¹⁰² ‘Apie planą „Naujos kartos Lietuva“, 2021-2027 ES investicijų interneto svetainė, 24 November 2021, <https://www.esinvesticijos.lt/2021-2026-m-planas-naujos-kartos-lietuva/apie-plana-naujos-kartos-lietuva>

¹⁰³ European Commission, ‘Proposal for a Council Implementing Decision Amending Implementing Decision (EU) (ST 10477/21 INIT; ST 10477/21 ADD 1) of 20 July 2021 on the Approval of the Assessment of the Recovery and Resilience Plan for Lithuania’, accessed 29 October 2024, https://commission.europa.eu/document/download/0b6328cb-4217-4294-b613-8435ecd4005a_en?filename=COM_2023_685_1_EN.pdf

¹⁰⁴ Renate Pirstner-Ebner, *European Energy Law Market System for Electricity and Gas – Energy Supply Security – Green Energy System of the Future (Green Smart Grid, Nomos*, doi.org/10.5771/9783748913627

¹⁰⁵ Ibid.

Given the severe difficulties in the supply of certain products as outlined in Article 122 of TFEU, it is reasonable to conclude that this article should be applied in particular to those cases.

Question 2

While energy solidarity does not eliminate the EU's energy dependence, it is an effective tool to increase the EU's resilience and improve its ability to cope with emerging crises. The EU's main dependence on fossil fuels comes from Russia, and the EU's renewable energy development also requires rare metals, the extraction of which is controlled by non-democratic states.

Question 3

The Treaties provide a succinct overview of the Union's energy crisis management measures. The actual construction and functioning of these measures are most clearly reflected in the implementing mechanisms (secondary EU law), the actions of the EU institutions and the involvement of Member States.

NETHERLANDS

Barbera Bastein

Contributors*: *Peter van Asperen, Sebastiaan Cnossen, Berend Jan Drijber, Wiarda Geelhoed, Sjoerd Kalisvaart, Walter Kuks, Erik van Leeuwen, Hans Vedder, Sybe de Vries, Maarten de Wit*

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

We note that, considering this question, a distinction can be made between the concept of energy solidarity under Article 194(1) TFEU, as interpreted in the *OPAL* case, and the concepts of energy solidarity and security of supply as applied in the Dutch (national) context. In the *OPAL* case, the concept of energy solidarity was given a role in the relationship between Member States. That case also solely pertains to Union policy. It is highly questionable whether the EU law concept of energy solidarity also applies to situations within a single Member State. Since the *OPAL* ruling, no recalibration or adjustment of policy and/or legislation has taken place, as far as we know, in connection with the Court's interpretation of the principle of energy solidarity in its judgement.

Therefore, this question is answered specifically from a national context. Dutch legislation and regulations concerning energy markets does address the assurance of security of supply and supply security in the national context. In the case of supply security, a distinction is made between supply security at the consumer level and supply security at the national level. These obligations are laid down in the Dutch Electricity Act of 1998 and the Gas Act, along with regulations based on these laws, such as the Electricity Security of Supply Decree of 1998. It is expected that a new Energy Act will come into force in 2025, replacing the Electricity Act of 1998 and the Gas Act.

We provide a few examples below. These are not intended to offer an exhaustive overview.

* All contributors are members of the Dutch Association for European Law (NVER).

Examples of provisions aimed at ensuring supply security at the consumer level:

- The Energy Act contains provisions ensuring that supply to the end-user continues if the supplier goes bankrupt and is no longer able to meet its obligations to consumers.¹
- The Energy Act imposes obligations on suppliers to take preventive measures to protect defaulting customers, preventing them from being disconnected.²
- Considering the current grid capacity shortages, regulations are being developed requiring grid operators, deviating from the “first come, first served” principle, to prioritise transport requests from parties serving public interests.

Examples of provisions aimed at ensuring supply security at the national level:

- The Energy Act contains provisions obliging grid operators (TSO and DSOs) to maintain a network with sufficient capacity and to ensure the safety and reliability of the system.³ These (and other) guarantees can partly be traced back to the Gas Directive and Electricity Directive, which have been implemented in the aforementioned legislation.
- Furthermore, the Energy Act requires that changes in control over certain (essential) electricity production installations, LNG installations, and/or LNG companies be reported to the Minister. The Minister has the authority to deny approval for such changes (or to impose conditions on approval) in connection with supply security or security of supply.⁴
- The Electricity Grid Code contains an obligation for electricity producers to inform the TSO with a ten-year forecast of production units to be commissioned or decommissioned.⁵
- The Energy Act stipulates that shares in a TSO must be held directly or indirectly by the State of the Netherlands. For a DSO, shares must be held by public entities. This so-called privatisation ban prevents the ownership of transmission systems from falling into private hands, serving the purpose of ensuring supply security.⁶

Dutch case law also frequently addresses the importance of supply security. Some examples include:

¹ Article 2.24 Energy Act.

² Article 2.25 Energy Act.

³ Article 3.25, 3.26 Energy Act.

⁴ Article 6.3 Energy Act.

⁵ Article 13.11 Electricity Grid Code.

⁶ Article 3.14 Energy Act.

- The Supreme Court ruled, in proceedings related to the Dutch government’s intent to introduce the privatisation ban (see the previous example), that “the importance of supply security can be regarded as an overriding reason of public interest, which may justify restrictions on the free movement of capital under the proportionality principle, even when public order or public safety are not at issue.”⁷
- The District Court of the Hague ruled, in a case concerning the closure of Dutch coal-fired power plants, that “The Dutch electricity market is closely linked to the market in other European countries, which is clearly reflected in the scenarios. Interventions in the Netherlands also have effects abroad due to this interconnection. In scenarios where interventions in the Dutch electricity market reduce electricity production at Dutch coal-fired power plants, it is evident that, in order to continue meeting electricity demand in the Netherlands, this lost electricity production will be partly compensated by electricity plants abroad, particularly in Germany. [...]”⁸ – The District Court of Midden-Nederland ruled, in a case regarding a municipality’s refusal to take enforcement action against two illegal masts erected by the grid operator (due to the absence of required permits), that “it is acceptable that the competent authority refrained from enforcement, among other things, because enforcement would be disproportionate considering other interests, including supply security.”⁹

Question 2

From a national perspective, these questions should not lead to any changes in the answers to Question 1 above.

Question 3

We observe that at the level of policy making, there might be a tension between the various objectives of the European energy policy. There might for example be a tension between energy security and the development of renewable forms of energy, if energy from renewable sources only covers a relatively small part of the total demand for energy. Within limitations resulting from EU legislation, Member States can decide how to deal with these tensions. The social and fundamental rights might also be a factor Member States need to weigh in on in their decision. We do not expect that energy solidarity will substantially change the balance between these various objectives.

⁷ Supreme Court June 26, 2015, ECLI:NL:HR:2015:1727.

⁸ District Court of the Hague November 30, 2022, ECLI:NL:RBDHA:2022:12635.

⁹ District Court of Midden-Nederland March 14, 2024, ECLI:NL:RBMNE:2024:1568.

The question as to whether energy solidarity is liable to trigger legal effects in relation to the green transition is very openly worded. Refining this question to address the invocability and scope of application of energy solidarity in national procedures, we suggest a differentiation along the lines that govern the scope of application of the EU Charter of Fundamental Rights. If the national measure that is challenged cannot be seen as implementing EU energy legislation and/or policy, the EU principle of energy solidarity cannot be invoked in the national procedure. When the national measure does implement EU energy law and/or policy, the principle could be invoked and trigger the illegality of the national measure and the EU act on which this is based. Such questions of legality shall then be referred to the Court since only the Court has the power to declare a Union provision illegal.

Question 4

Cross-border interests in terms of security of supply as well as energy solidarity played a role in the (gradual) phasing-out and eventual closure of the Groningen gas field. The Netherlands, more specifically GasTerra (a gas wholesaler in which the state holds 50% of the shares), had long-term supply commitments for low-calorific gas to Germany, France, and Belgium, which were at risk due to the phase-out of gas production from the Groningen gas field. This was particularly the case with Germany, as it had ceased gas production in the Wadden Sea, had low gas reserves at the beginning of 2022, and was failing to meet climate targets for energy savings in households and businesses. In consultation with the relevant governments, the demand for low-calorific gas from Groningen from these countries was quickly reduced, allowing for the closure of the Groningen gas field.¹⁰ This did not result in any legal disputes.

Security of supply also played a role in the revocation of a concession granted to a company for the construction of a direct line aimed at delivering electricity produced in the Netherlands to the Belgian grid. The court ruled that the Netherlands was allowed to revoke the granted permit by invoking the importance of security of supply and redispatching net capacity for the Dutch electricity supply.¹¹

Question 5

We find it impossible to answer this question. In this regard we point to the absence of an (explicit) normative framework to determine whether the balance is “proper.” We further note that there is no real contrast between “taking

¹⁰ House of Representatives, session 2021–2022, 33 529, no. 902.

¹¹ District Court of Zeeland-West-Brabant of April 4, 2023, ECLI:NL:RBZWB:2401.

into account divergences” and being “based on a common denominator.” If the denominator is sufficiently broadly formulated, divergences can be taken into account.

Question 6

We find it difficult to give a precise answer to this question. In a general manner it is unmistakably true that the more national markets are interconnected the less scope is left for “a purely national energy policy.” However, from an economic and factual point of view the “European internal market” is not necessarily a single market area. This also follows from the definition of energy markets in competition cases. Shortages of electricity in one Member State, for whatever reason, should not cause other Member States to take measures with a view to reducing the consumption of electricity in their territory. It is clear, however, that Member States when taking policy measures should bear in mind what the effects of those measures could be for other Member States, in particular neighbouring states. In this regard we point to several decisions by the Commission that found infringements of EU law in the actions of a transmission system operator that curtailed interconnection or transmission capacity in relation to energy flows with neighbouring countries.¹² It could be helpful if in the statement of reasons for a national measure some explanation is given regarding the likely impact (or lack of impact) of the measure on the market in other Member States.

Question 7

In the absence of a clear methodology to define the “main” components, we find it impossible to answer this question with any specificity. It is obvious that the Union’s policy and legislative measures in this regard conceptualise security as encompassing more than the actual flows of energy. Directive 2022/2557 on the resilience of critical entities, for example, casts the net considerably wider than just the energy streams, also in recognition of a broad range of risks that may affect critical services. We are unable to assess the current resilience and risk preparedness given that there is no universally accepted methodology or metric on the basis of which this can be done.¹³

¹² Case AT.39351, *Swedish Interconnector (Svenska Kraftnät)* and AT.40461, *DE/DK interconnector*.

¹³ On the methodological challenges involved see: I. Linkov, B.D. Trump, *The Science and Practice of Resilience*, Springer, 2019, <https://doi.org/10.1007/978-3-030-04565-4>, pp. 99 *et seq.*

Question 8

We understand the concept of energy solidarity to refer to the application of this principle at the EU level (see our answer to Question 5, Section II of this report). The analogy we may indicate here is the principle of sincere cooperation as enshrined in Article 4(3) TEU in shaping the powers of the Member States in shared competences. In this regard we point to the judgment in the *Swedish POPs* case that concerned the unilateral action of Sweden as part of the EU's involvement in the Stockholm Convention on Persistent Organic Pollutants.¹⁴ The Convention envisaged the submission by the parties of a list of substances to be banned and, because the agreement was signed by both the EU and the Member States, the Commission considered that only a joint list could be submitted. When Sweden did submit its own list, this infringed the principle of unity in the EU's external representation.¹⁵ The principle of energy solidarity can have similar, albeit weaker, effects on the division of competences between the EU and the member states, as the energy sovereignty clauses, Articles 192(2)(c) and 194(2) TFEU, clearly envisage a more significant role for the member states in securing their energy supply.¹⁶

Question 9

We find it difficult to answer this question since this would mean a complete assessment on the EU policy and governance structure within the EU regarding energy security.

Section II: Energy solidarity, energy security and green transition

Question 1

This question is of a political nature and cannot be meaningfully answered by referring solely to legal methods.

Question 2

This question concerns political decision and policy-making. We cannot say more about this than that the parliamentary papers indicate that the Dutch

¹⁴ Case C-246/07, *Commission v Sweden*, ECLI:EU:C:2010:203.

¹⁵ *Ibidem*, para. 104.

¹⁶ Cf. the opinion of Advocate General Campos Sánchez-Bordona in Case C-848/19 P *Germany v. Poland (OPAL)*, ECLI:EU:C:2021:218, paras. 78, 79.

government will ensure that “Fit for 55” actually results in the reduction target of at least 55% in 2030 compared to 1990, on the way to climate neutrality in 2050. More recently, there is some attention for the increases in network tariffs (prompted by the investments that are necessary to accommodate the increase in (renewable) electricity) and the fair distribution of those tariffs over the various categories of network users.¹⁷ This may entail elements of energy solidarity.

Question 3

The “do no significant harm” (DNSH) principle was introduced in the EU legal order by means of the Taxonomy Regulation.¹⁸ The Taxonomy Regulation focuses on transparency in financial markets by establishing clear criteria for “green” investments. The DNSH principle aims at qualifying investments as green only if they actually contribute to environmental objectives by “not seriously impairing” the environmental objectives specifically mentioned in that regulation. Given the need for (private) financing of large-scale energy activities, the implementation of the DNSH principle by means of the Taxonomy Regulation will already –albeit indirectly – impact energy activities. In addition, the Commission also applies this principle as part of its state aid supervision.¹⁹ The environmental aspects of the principle are closely related to the precautionary principle,²⁰ and this principle is similarly relevant to the energy sector.²¹ It is also relevant in the form of the various pieces of EU law that concern the impact of energy-related activities on, for example, nature and water quality.²² We also find the principle in the form of the Industrial Emissions Directive (IED) that requires permits to ensure that “no significant pollution should be caused and a high level of protection of the environment

¹⁷ See ACM: Eerlijke verdeling kosten elektriciteitsnet nog belangrijker door verwachte forse stijging nettarieven, accessible via <https://www.acm.nl/publicaties>

¹⁸ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ 2020 L 198/13. Note that the principle was mentioned already in the 2019 Regulation, see footnote 19, that is amended by the Taxonomy Regulation.

¹⁹ 2022 Guidelines on State aid for climate, environmental protection and energy, OJ 2022 C 80/1, para. 72.

²⁰ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector OJ 2019 L 317/1, Recital 17 of the preamble.

²¹ For example, in the regulation of CCS or nuclear activities, cf. Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide, OJ 2009 L 140/114, notably Annex I, step 3.

²² For example, the Habitats Directive, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7, notably where Article 6(2) contains a standstill principle according to which the member states shall take the appropriate steps to avoid deterioration of habitats and protected species.

taken as a whole should be achieved.”²³ A further interesting relation with energy law concerns the possibility for Member States to include emissions limit values for greenhouse gases in IED permits, and thus interfering with the ETS Directive, when this is necessary to avoid “significant local pollution.”²⁴ This tells us that there is room to accommodate local harm in Union-wide legal instruments. When we extend the harm to also include the social impact, it is also clear that the current legal framework provides for measures to address energy poverty²⁵ and the impact of measures related to rare earth mining on indigenous peoples and their cultures.²⁶ Note, however, that these measures do not go as far as to require the absence of significant harm.

There is no *directly* comparable principle in Dutch law. However, it could be argued in a particular case that, in the context of achieving certain climate and environmental objectives, the Dutch State should take measures or refrain from taking certain measures on the basis of more general national (civil law) principles such as the DNSH principle and/or the precautionary principle.²⁷ For (large) companies too, an obligation could follow from general liability law, in particular from the unwritten standard of care pursuant to Book 6 Section 162 Dutch Civil Code which means that acting in conflict with what is generally accepted according to unwritten law is unlawful, to act in a way that contributes to or does not compromise certain climate and environmental objectives.²⁸ It is conceivable that the DNHS principle will have certain interpretational value in this type of (liability) cases, namely, in the concrete interpretation of the general standard of care in the context of tort.

Question 4

In the Netherlands, the impact of targeted policies addressing energy poverty in relation to the green transition is relatively limited. However, the Dutch gov-

²³ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ 2010 L 334/17, Recital 16 and Article 11(c).

²⁴ Ibidem, Article 9(1).

²⁵ For example, Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ 2018 L 328/1, Articles 3(3)(d) and 24.

²⁶ Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials, OJ L 2024/1252, Recital 17, 20 and Article 6(1)(c).

²⁷ Cf. On Oct 9, 2018, the Hague Court of Appeal concluded that the Dutch State should, on the basis of Articles 2 and 8 of the ECHR, do “its part” in combating dangerous climate change.

²⁸ Cf. The district court in the Hague ordered Shell in 2021 to cut its absolute carbon emissions by 45% by 2030 compared to 2019 levels on the basis of general Dutch tort law (ECLI:NL:RBDHA:2021:5339), see for the English translation: <https://uitspraken.rechtspraak.nl/de tails?id=ECLI:NL:RBDHA:2021:5339>

ernment has stressed that the green transition can only count on support if it is, and remains, affordable for everyone.²⁹ The Dutch policy is primarily aimed at addressing poverty in a general sense through the means of social policy.³⁰ This includes measures such as social benefits for people with a limited income and access to social housing. Specifically with regards to the green transition, the Dutch government aims to accelerate the sustainability of social housing.³¹

Specific (sectoral) regulations addressing energy poverty and the green transition are largely absent. However, Dutch law provides for a prohibition on disconnection from electricity and gas of consumers (including small non-household customers) who are in default on their energy bills without the need to first arrange payment arrangements between the customer and the energy supplier. Besides this, there is a general ban on disconnecting non-paying “vulnerable consumers” for whom the termination of electricity or gas supply poses serious health risks to the consumer or their household members.³² Besides this, there is no specific sectoral policy aimed at protecting consumers affected by energy poverty.

For this reason, the draft proposal for a new Dutch Energy Act, which implements the Electricity Directive (Directive 2019/944 EU), does not include specific provisions defining energy poverty pursuant to Article 28 of the Electricity Directive.³³ Nonetheless, a recent amendment has allowed for the possibility of defining energy poverty in lower regulations related to the new Energy Act at a later stage, which also includes the obligation of issuing an annual report on the extent of energy poverty and measures taken in reducing it.³⁴

Additionally, the Dutch Organisation for Applied Scientific Research (Nederlandse Organisatie voor Toegepast Natuurwetenschappelijk Onderzoek, TNO) and the Authority for Consumers and Markets (Autoriteit Consument en Markt, ACM) have issued studies in which they propose ways to tackle the issue of energy poverty.³⁵

²⁹ Letter to the Parliament (‘Kamerbrief’) of 17 September 2021, *Information on new Commission proposals, fiche 14: Regulation establishing a social climate fund*, p. 5.

³⁰ Ministry of Economic Affairs and Climate Policy, *Integraal Nationaal Energie- en Klimaatplan 2021-2030*, paragraph 2.4.4.

³¹ Letter to the Parliament (‘Kamerbrief’) of 17 September 2021, *Information on new Commission proposals, fiche 14: Regulation establishing a social climate fund*, p. 5.

³² Paragraphs 2–4 of the Regulation on the Disconnection Policy of Retail Consumers from Electricity and Gas (‘Regeling afsluitbeleid voor kleinverbruikers van elektriciteit en gas’).

³³ Parliamentary Papers, Lower House (‘Tweede Kamer’), 2022–2023, 36 378, no. 3, p. 40.

³⁴ Parliamentary Papers, Lower House (‘Tweede Kamer’), 2023–2024, 36 378, no. 29, *Amendment by Parliament Member Kröger regarding an Annual Survey on Countering Energy Poverty*.

³⁵ TNO, *Preventing Energy Poverty*, accessible via: <https://www.tno.nl/nl/duurzaam/systeemtransitie/sociale-innovatie/energiearmoede-voorkomen/> and ACM, *Policy Options for Addressing Energy Poverty among Vulnerable Households*, accessible via: <https://www.acm.nl/nl/publicaties/beleidsopties-voor-aanpak-energiearmoede-bij-kwetsbare-huishoudens>

Furthermore, during the recent energy crisis, following the Russian invasion of Ukraine, the Dutch government took measures to compensate households for high energy costs. This involved the introduction of a price cap which partly compensated energy costs through the means of subsidies. The compensation was only awarded for the use of energy below a certain threshold, encouraging households to consume less energy.³⁶ Moreover, for low-income households there was also a possibility of applying for an additional energy subsidy which was not linked to the amount of energy used.³⁷ It has recently been reported that partly as a result of these measures, the share of Dutch households affected by energy poverty has decreased.³⁸

For the implementation of the Just Transition Fund (JTF), the Netherlands has designated several regions and sectors where the JTF funds are being allocated. These are regions and sectors significantly affected by the socio-economic consequences of the climate transition, particularly the fossil fuel industry. The annual report of the Dutch JTF monitoring committee outlines the steps taken within the designated regions and sectors for the implementation of the aims of the JTF.³⁹

Question 5

It would be for the European Commission to assess the reconciliation of the concept of state aid and the principle of energy solidarity when revising the 2022 Guidelines on state aid for climate, environmental protection and energy.⁴⁰

We note that in the present Guidelines energy solidarity is already explicitly mentioned as one of the conditions relevant for the assessment of state aid for energy infrastructure involving third countries. In that regard, energy solidarity could function as a criterion to find that aid for such infrastructure is incompatible when the third country involved does not support the internal energy market based on, *inter alia*, energy solidarity.⁴¹ We finally see this reflected in the Court's jurisprudence according to which an Article 108 procedure may not result in a decision that is contrary to the specific provisions of the Treaties.⁴² This includes the observance of the general principles of Union

³⁶ For more information, see: <https://www.rijksoverheid.nl/actueel/nieuws/2022/10/04/vanaf-1-januari-lagere-energierekening-door-verruimd-prijsplafond>

³⁷ For more info, see: <https://www.rijksoverheid.nl/onderwerpen/koopkracht/energietoeslag-2023>

³⁸ For more info, see: <https://www.cbs.nl/nl-nl/nieuws/2024/27/compensatie-en-energiebesparing-remden-energiearmoede>

³⁹ Meeting Papers Monitoring Committee JTF, 29 November 2023, attachment ('bijlage') no. 7.

⁴⁰ OJ 2022 C 80/1, para. 69.

⁴¹ Ibidem, paras. 380(b) and 282(a).

⁴² For example: Case C-353/21 P, *Ryanair v Commission*, ECLI:EU:C:2024:437, para. 65.

law, which arguably include the principle of energy solidarity, insofar as this concerns modalities that are indissolubly linked to the object of the aid that it is impossible to evaluate them separately.⁴³

Question 6

Articles 172–174 TFEU (hereafter ‘Title XVI’) and Article 194 TFEU both operationalise a shared competence. As a result, their relationship is primarily defined in terms of the substance of the policies involved. Title XVI concerns networks, *inter alia*, for energy, whereas Article 194 concerns energy policy. This means that there can be an overlap. In a case involving a possible overlap between Article 194 and Article 337 TFEU, the Court reiterated that Article 194 applies “without prejudice” to the more specialised legal bases in the TFEU.⁴⁴ As a result, all measures that are “necessary” for the implementation of the Union’s energy policy fall under the energy legal basis, whereas Title XVI is available for measures that are not necessary for the attainment of the energy policy. The concept of energy solidarity at the Union level by definition requires trans-European networks, so the operationalisation of this concept as part of the Union’s energy policy is likely to extend the scope of Article 194 TFEU to the detriment of that of Title XVI. Solidarity is mentioned as one of the criteria to find a project of mutual interest in the TEN-E Regulation.⁴⁵

Question 7

From the perspective of the Netherlands, the recent discussions surrounding the Critical Raw Materials Act, for instance, show that both security of supply as well as climate neutrality play an important role. In the “non-paper on the Action Plan on Critical Raw Materials and the Critical Raw Materials Act” the Netherlands has called upon the EU to focus on five areas, which also reflect this double aim of economic security and sustainability and which are: (1) the expansion of EU capacity in critical parts of the mineral value chain, including through sustainable mining and refining capacity in the EU, (2) the diversification of supply through international partnerships, (3) the support for circularity and Research & Development & Innovation, (4) analysis and monitoring and (5) sustainable value chains and just transition.⁴⁶

⁴³ For example, Case C-284/21 P, *Commission v Braesch*, ECLI:EU:C:2023:58, para. 97.

⁴⁴ Case C-490/10, *Parliament v Council*, ECLI:EU:C:2012:525, para. 67.

⁴⁵ Regulation 2022/869, OJ 2022 L 152/45, Art. 4(2)(e)(ii). Note that it is mentioned as one of three elements, mentioned as examples, to be considered as part of the contribution to security of supply.

⁴⁶ See: <https://www.rijksoverheid.nl/documenten/publicaties/2023/02/02/nl-non-paper-on-the-action-plan-on-critical-raw-materials-and-the-critical-raw-materials-act> (accessed: 3.07.2024).

Question 8

We have not observed any limits to the member states' freedom to set their own energy mix because of the concept of energy solidarity.

Question 9

The main legal instruments to adjust the energy mix in view of the energy transition are the following.

The Stimulation of Sustainable Energy Production and Climate Transition (SDE++)⁴⁷ provides subsidies to companies and non-profit organisations that generate renewable energy or reduce CO₂ emissions on a large scale. The SDE subsidy reimburses the difference between the cost of generating green energy and the market price of energy. When energy prices are high, this difference is smaller, and the subsidy is therefore lower.

Homeowners, business users of premises and owners of monumental buildings may be eligible for a subsidy under the Investment Subsidy for Sustainable Energy and Energy Saving (ISDE).⁴⁸

The Netherlands also has tax measures to influence the energy mix. The Environmental Taxes Act (Wbm) includes taxes on electricity and gas.⁴⁹ The first of these is the Regulatory Energy Tax (REB). Its purpose is to encourage consumers and companies to use energy economically and efficiently. This tax is further increased by the Storage of Sustainable Energy (ODE). The money from the ODE is used to stimulate the production of sustainable energy. The Environmental Taxes Act is also the legal basis for a CO₂ tax for industry.⁵⁰

⁴⁷ The SDE++ consists of the Decree of October 16, 2007, Official Journal ('Staatsblad') 2007, 410, containing rules on the provision of subsidies for the production of renewable electricity, renewable gas and electricity generated by means of combined heat and power (Decree on the stimulation of sustainable energy production), the Regulation of the Minister of Economic Affairs of February 28, 2008, no. WJZ 8024263, laying down general implementation rules for the provision of subsidies pursuant to the Decree on the stimulation of sustainable energy production (General Implementation Regulation on the stimulation of sustainable energy production) and regulations and instructions based on it.

⁴⁸ EZK and LNV National Grants Regulation, Government Gazette ('Staatscourant') 2014, 20679, Title 4.5.

⁴⁹ Environmental Taxes Act, Official Journal ('Staatsblad') 1994, 925 and regulations circulars based thereon.

⁵⁰ Act of December 16, 2020, amending the Environmental Taxes Act and the Environmental Management Act to introduce a CO₂ tax for industry (Industry CO₂ Tax Act), Official Journal ('Staatsblad') 2020, 544.

As the energy transition progresses, electricity is occupying an increasingly large place in the energy mix. This leads to a high demand for transmission capacity on electricity grids. This results in grid congestion. The Netherlands is therefore taking measures to increase capacity on electricity grids and combat grid congestion. In cooperation with market parties, the Netherlands has developed the National Grid Congestion Action Program.⁵¹ Although this is not a strict legal instrument but a series of policy intentions and agreements, it does have a certain binding effect. In addition, the National Regulatory Authority (the Authority for Consumers and Markets, ACM) has taken some legally binding measures to combat grid congestion. The ACM established the Grid Code social prioritisation on the basis of which certain categories of parties are eligible for priority in their transmission requests.⁵² These include parties that mitigate grid congestion and those that serve a major social interest, such as hospitals. Previously, the ACM established a Congestion Management Code.⁵³ Based on this, network operators must purchase flexibility from connected parties in order to effectively resolve anticipated congestion.

The Netherlands is also building large-scale wind farms in the North Sea. For this purpose, there is the Offshore Wind Energy Act,⁵⁴ which provides for lot decisions and a licensing system for the construction and operation of offshore wind farms. Under this Act, the Minister can designate certain areas as plots for wind farms and grant permits to market parties for the construction and operation of wind farms. Also, on the basis of the Environment and Planning Act,⁵⁵ decisions are made to spatially fit renewable energy production facilities on land.

Increasingly, generation and sharing of renewable energy by energy communities is also important. These will receive legal regulation in the new Dutch Energy Act.⁵⁶ Energy communities may also be eligible for subsidies under the Cooperative Energy Generation Subsidy Scheme.⁵⁷

⁵¹ Parliamentary Papers, Lower House ('Tweede Kamer'), 2022–2023, 29023 no. 358.

⁵² Decision of the Authority for Consumers and Markets of April 12, 2024, reference ACM/UIT/605893 to amend the conditions referred to in Section 31(1)(a) in conjunction with Section 32(2) of the Electricity Act 1998 regarding the prioritisation space in transmission requests, Government Gazette ('Staatscourant') 2024, 12928.

⁵³ Decision of the Authority for Consumers and Markets of May 24, 2022, reference ACM/UIT/577139 to amend the conditions referred to in Section 31 of the Electricity Act 1998 concerning rules around transmission scarcity and congestion management, Government Gazette ('Staatscourant') 2022, 14201.

⁵⁴ Offshore Wind Energy Act, Official Journal ('Staatsblad') 2015, 261.

⁵⁵ Act of March 23, 2016, containing rules on the protection and utilisation of the physical environment (Environment and Planning Act, 'Omgevingswet'), Official Journal ('Staatsblad') 2016, 156.

⁵⁶ Regulations on Energy Markets and Energy Systems (Energy Act) Parliamentary Papers, Senate ('Eerste Kamer'), 2023–2024, 36 378, no. A. See, among others, Articles 1.1, 2.4 and 2.17.

⁵⁷ Cooperative energy generation subsidy scheme, Government Gazette ('Staatscourant') 2021, 11080.

Furthermore, the RED II Directive is also important.⁵⁸ In the Netherlands, the RED II obligation is being introduced in the form of percentages of renewable energy for fuel suppliers. The term for this is 2022–2030. The legal basis is formed by Title 9.7 of the Environmental Protection Act.⁵⁹ The mandatory percentage of renewable energy hereby increases from 16.4% in 2020 to 27.1% in 2030). The actual level of the annually increasing annual obligation is set in the Transport Energy Decree.⁶⁰

Question 10

The legal basis of the Critical Raw Materials Act is Article 114 TFEU, the internal market legal basis, which has not been contested by the Netherlands.⁶¹ In fact, as appears from the national raw materials strategy, according to the Netherlands, the EU has an important role to play by “entering into raw materials partnerships by means of trade agreements or by concluding independent partnerships.” Furthermore, trade agreements may, in the view of the Netherlands, “include undertakings to reduce or prevent trade-restrictive measures for critical raw materials (e.g. duties and quotas), promote sustainable extraction and improve market access for European businesses.” The relationship between the EU and the Netherlands can be described as mutually reinforcing through the support of EU raw materials partnerships on the one hand, and the enhancement of the network of diplomatic missions and the examining of the role of Dutch businesses in international supply chains on the other.⁶²

Question 11

On March 1, 2023, the REPowerEU regulation came into effect. A total of €735 million has been allocated to the Netherlands under REPowerEU. Member States can access these funds by expanding their existing Recovery and Resilience Plan (RRP) with a REPowerEU chapter.

The Dutch government announced its approach for REPowerEU in a letter to Parliament dated April 26, 2023. The Dutch government has aimed to secure funds that align as closely as possible with the objectives of REPowerEU, while

⁵⁸ Directive (EU) 2018/2001.

⁵⁹ Environmental Protection Act, Official Journal (‘Staatsblad’) 1979, 442.

⁶⁰ Transport Energy Decree, Official Journal (‘Staatsblad’) 2018, 134

⁶¹ Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ 2024, L 1252.

⁶² National raw materials strategy: material resources for the major transitions, December 9, 2022

minimising administrative burdens. The search was for investment measures that meet three criteria: (i) aligning with the REPowerEU objectives, (ii) already part of departmental budgets, and (iii) building on measures already included in the existing RRP. The proposal is contained in an addendum to the RRP, which already includes a REPowerEU component.

Considering the administrative burden and the ambitious deadlines set by the European Commission, the decision was made to limit the scope to one investment and one reform.

- The **investment** concerns a proposed scaling up of the Investment Subsidy for Sustainable Energy and Energy Saving (ISDE), which includes subsidies for (hybrid) heat pumps, solar boilers, insulation measures, district heating connections, and electric cooking systems. This scheme promotes the green transition and addresses four of the six REPowerEU objectives: increasing energy efficiency in buildings, tackling energy poverty, reducing energy demand, and accelerating the integration of renewable energy sources.
- The **reform** involves several amendments to proposals for the Energy Act, aimed at mitigating grid congestion and simplifying the permitting process for renewable energy infrastructure projects. This includes, among other things, the legal anchoring of the Multi-Year Energy and Climate Infrastructure Programs (MIEK) to support the energy transition, as well as introducing the possibility of flexible and time-bound contracts, such as alternative transport rights, for parties connected to the energy grid.

The European Commission has since approved these proposals.⁶³

Section III: The EU's crisis management in the field of energy and its limits

Question 1

In general, Article 194(2) TFEU would appear to be the appropriate procedure because under that Treaty provision the ordinary legislative procedure is to be followed, meaning that the European Parliament has the right of co-decision. Under Article 122(1) TFEU, the Parliament does not have any formal right to participate in the legislative procedure which is precisely one of the reasons why the increased use of Article 122 has been widely criticised. In addition, also under Article 194(2) TFEU a Member State's right to determine its own choice between different energy sources shall not be affected. This being said, in case of a real energy crisis, recourse to Article 122 TFEU should not be excluded because of its expediency. The measures taken to combat the energy

⁶³ Letter from the Minister of Finance to the House of Representatives dated October 23, 2023.

crisis caused by the start of the war in Ukraine show that Article 122 TFEU may be an expedient instrument. It is suggested that a measure based on Article 122 TFEU contains a sunset clause, limiting their validity to a defined period of time, where appropriate various time limits depending on the provision in question. See also the answer to the next question.

Question 2

The Dutch Cabinet supports the chosen route of Article 122 TFEU that allows member states to act jointly and quickly.⁶⁴ We have not identified any legal issues related to the mentioned measures in our national legal order.

Question 3

In the absence of any indication of a methodology to determine the robustness as well as a normative framework within which the sufficiency can be established, the first question cannot be meaningfully answered. Article 222 TFEU cannot – according to its wording – be used for threats to the energy security of the Union unless this threat can be construed as a “disaster.” Given that the concept of a threat relates to situations that have not manifested themselves, whereas the concept of a disaster refers to an actual situation, this seems unlikely. We note furthermore, that Article 222 TFEU clearly refers to Member States and their political authorities which rules out its application at the level of the Union.

⁶⁴ Parliamentary Papers, Lower House (Tweede Kamer), 2022-2023, 29 023, no. 346.

NORWAY

*Ingvild Ånestad**

*Gullik-André Fjordbo***

(rapporteurs)

Introduction

Norway is not a Member State of the EU but is a party to the EEA Agreement. We will therefore give a brief introduction to some central elements of the relationship with Norway and the EU regarding energy policy before we answer the questions.

Norway's status in the European electricity market

Norway has been integrated into the EU internal market for exactly 30 years through the Agreement on the European Economic Area (EEA).¹ The Norwegian energy system is closely integrated with the other Nordic systems, both in physical terms and through market integration. The Nordic market is integrated with the rest of Europe through cross-border interconnectors to the Netherlands, Germany, the Baltic states, and Poland.²

Hydropower accounts for most of the Norwegian power supply. This is a significant difference compared to the rest of Europe where security of supply is mainly ensured by thermal power plants, with fuels available in the energy markets. Norway has half of Europe's reservoir storage capacity, and more than 75% of Norwegian production capacity is flexible. Production can be rapidly increased and decreased as needed, at low cost.³

Norway has traditionally been an exporter of energy, both in terms of electricity and petroleum. However, in dry years, Norway is dependent on import from surrounding countries.

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¹ The Agreement on the European Economic Area (EEA) [1994] OJ L1/3 was signed in Porto Portugal on May the 2nd 1992 and entered into force the 1st of January 1994. For a general introduction in English, see Halvard Haukeland Fredriksen, Christian N.K. Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On'. *Common Market Law Review* (2015) 52, pp. 629–684. For further details, see e.g. Finn Arnesen et al. (eds), *Agreement on the European Economic Area: A Commentary* (Nomos 2018).

² Norwegian Ministry of Energy, 'The Power Market', *Energy Facts Norway*, <https://energifaktanorge.no/en/norsk-energiforsyning/kraftmarkedet/>, accessed 22 May 2024.

³ Ibid.

Norway has had a surplus of energy production. The Norwegian Water Resources and Energy Directorate expects, however, that the average power balance will become weaker towards 2028.⁴ A weaker power balance means that Norway has fewer hours of power exports during the year and more hours of power imports.

The status of the principle of energy solidarity and the objective of energy security in EEA law

The EEA Agreement does not contain a provision corresponding to Article 194 TFEU. Thus, there is some uncertainty regarding the status of the principle of energy solidarity and the objective of energy security in EEA law.

It is not clear whether the principle of *energy solidarity* exists within EEA law. In the *OPAL* case, the Court referred amongst others to Article 194 TFEU, the EU Treaty's preamble, and several provisions in TEU with reference to solidarity.⁵ None of these have a corresponding text in the EEA Agreement. The term solidarity is not mentioned anywhere in the main part of the EEA Agreement. Contrary to the EU treaties, the EEA Agreement has remained substantially unchanged. There is therefore a widening gap between the texts of the EU treaties and the EEA Agreement.⁶ However, the objective of the Contracting Parties to the EEA Agreement is to arrive at "an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition."⁷ The aim stated in Article 1 of the EEA Agreement "is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, *and the respect of the same rules*, with a view to creating a *homogeneous European Economic Area*, hereinafter referred to as the EEA" (our emphasis).

A relevant question is therefore to what extent the principle of solidarity, although not explicitly mentioned in the EEA Agreement, will still have impact in EEA law due to the homogeneity principle. We do not assess this further here.

⁴ The Norwegian Water Resources and Energy Directorate, 'Kortsiktig Kraftbalanse 2023 – Forventer Kraftoverskudd i Norge Fram Mot 2028' (14 August 2023), <https://www.nve.no/media/16231/nves-forventninger-om-utvikling-av-kraftbalansen-til-2028.pdf>, accessed 27 May 2024. For a recent evaluation of the current situation in Norway when it comes to the energy market, and especially the energy prices, please see the report from Strømprisutvalget, an expert committee appointed by the government Olje- og energidepartementet, 'Rapporten fra strømprisutvalet levert til olje- og energiministeren', *Regjeringa.no* (12 October 2023), <https://www.regjeringen.no/nn/aktuelt/rapporten-fra-strømprisutvalet-levert-til-olje-og-energiministeren/id2999734/>, accessed 22 May 2024.

⁵ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598, point 39.

⁶ See Case E-28/15 *Jabbi*, para. 62.

⁷ EEA Agreement 15th preface.

The Norwegian Government's official position regarding the status of *security of supply* in the EEA Agreement was stated in 2012 in a White Paper to the Norwegian Parliament as follows:

[T]he position of the EEA EFTA States has been that the EEA Agreement does not cover security of energy supply. In the light of this, Norway did not consider Council Directive 2004/67/EC on security of natural gas supply or Council Directive 2006/67/EC on the maintenance of minimum stocks of crude oil and/or petroleum products to be EEA relevant. However, if the substance of an act is considered to affect the functioning of the internal market, a different decision may be reached. For example, Directive 2005/89/EC on the security of electricity supply was incorporated into the EEA Agreement because of its clear impact on the internal market.⁸

Challenges with determining EEA relevance of EU legislation concerning energy

Before the EEA Joint Committee incorporates new EU acts into the Annexes or Protocols of the EEA Agreement, as provided for in Article 98 EEA, the legislation is scrutinised to ensure that it falls within the scope of the EEA Agreement. Usually, the Commission will indicate whether the act is “EEA relevant”, and the legal basis for the legislation will be stated in the act. The Commission's indication of EEA relevance is not determinative, and the EEA EFTA States will thoroughly evaluate whether the act should be incorporated into the EEA Agreement.⁹

The legal basis used by the Commission will give another indication to the EEA EFTA States of whether legal act is EEA relevant. The fact that security of a supply, with a legal basis in Article 194 TFEU, is more and more frequently used as a legal basis for EU's legislation within the energy sector, is a challenge for the EEA EFTA States.¹⁰ According to the Norwegian government, security of supply falls – as a starting point – outside the scope of the EEA Agreement.¹¹ The main focus of the EEA Agreement is internal market legislation and market integration, which will typically have a legal basis in Article 114 TFEU, an internal market provision.¹²

⁸ Meld. St. 5 (2012–2013) Report to the Storting (White Paper) The EEA Agreement and Norway's other agreements with the EU, p. 12 (original translation).

⁹ Protocol 31 to the EEA Agreement facilitates for cooperation in specific fields outside the four freedoms. This means that there is no legal obligation for the EEA EFTA States to incorporate new EU acquis into the EEA Agreement, but that this is done on a voluntary basis.

¹⁰ See e.g. NOU 2024: 7 Norge og EØS: Utvikling og erfaringer, p. 169.

¹¹ Meld. St. 5 (2012–2013) Report to the Storting (White Paper) The EEA Agreement and Norway's other agreements with the EU, p. 15.

¹² For instance, Directive 2005/89/EC had a legal basis in the provision regarding internal market, Article 95 TEC (corresponding to Article 114 TFEU). The Directive is in the EU replaced by regulation 2019/941 on risk-preparedness in the electricity sector, with legal basis in Article 194 (2) TFEU regarding energy. This regulation is marked as EEA-relevant by the Commission.

If EU legislation is not EEA relevant, or if the parties disagree on whether it is EEA relevant, the EEA Agreement Protocol 31 may be used to incorporate it on a voluntary basis. For instance, in 2019, the Effort Sharing Regulation and the Regulation on Land, Land-Use Change and Forestry (LULUCF) was incorporated into Protocol 31. The government-appointed committee tasked with assessing the experiences of the EEA Agreement explains that Norway wanted this to be a separate agreement outside the EEA, while the Commission believed it belonged in the EEA Agreement's Annex XX on the environment.¹³ The solution was to include the regulations in Protocol 31, but with an adaptation that makes it clear that the EEA Agreement's normal system of monitoring, judicial control and dispute resolution shall apply.¹⁴

Backlog of the incorporation of EU energy regulations

There are a number of directives and regulations in the energy sector that are not incorporated into the EEA Agreement. One example is Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration. The ministry's EEA memo regarding this regulation from 4 December 2018 states:

The Emergency and Restoration Regulation has been assessed as EEA-relevant by the Commission. Co-operation on security of electricity supply falls outside the narrow scope of the EEA Agreement.^[15] The Norwegian authorities have not completed their assessment of EEA relevance. As an extension of the EEA relevance assessment, the need for any EEA adaptations must also be further assessed.¹⁶

As of 27 May 2024, the Norwegian authorities have not completed their assessment of EEA relevance. A government-appointed committee tasked with assessing the experiences of the EEA Agreement recently recommended that Norwegian authorities should quickly determine the EEA relevance of pending legal acts and reduce the backlog of the incorporation of EU energy regulations into the EEA Agreement.¹⁷

The Norwegian Government has however not decided whether the updated legislation is EEA relevant. Directive 2005/89/EC was implemented into the EEA Agreement in Annex IV Energy. When an act is incorporated into an annex it can normally – according to the Governments position from 2012 – “be assumed that later legislation relating to the same field will also be incorporated into the Agreement,” see Meld. St. 5 (2012–2013) Report to the Storting (White Paper) The EEA Agreement and Norway's other agreements with the EU, p. 14.

¹³ NOU 2024: 7 Norge og EØS: Utvikling og erfaringer, p. 42.

¹⁴ Ibid.

¹⁵ Original footnote: ‘St. prp. nr. 100 (1991-92) *Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS)*, pkt. 4.10.4.’

¹⁶ EEA database, ‘Nettkode om nødsituasjoner og gjenoppretting’ *Regjeringen.no* (December 2018), <https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2016/sep/nettkode-om-nodsituasjoner-og-gjenoppretting/id2512505/>, accessed 27 May 2024 (translated here).

¹⁷ NOU 2024: 7 Norge og EØS: Utvikling og erfaringer, p. 19.

The EU Commissioner for Energy also addressed this issue in a letter to the Norwegian Minister for Energy on 13 March 2024. The Commissioner stated that “EU and EEA core energy legislation are diverging to a very worrying degree, creating at present genuine legal and level playing field issues that are negatively affecting a range of actors in both Norway and the EU.” In the absence of progress, “the Commission shall consider any steps necessary that may need to be taken to preserve the integrity of our joint EEA Single Market.”¹⁸ For more on this, see our answer to Question 2, Section II.

The Questionnaire responses

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

The concept of energy solidarity with EU Member States is not clearly addressed in any Norwegian laws or judicial practice. If a principle of energy solidarity forms part of primary EEA law, this is however also a part of Norwegian law with precedence over other provisions that regulate the same matter.¹⁹ As the question points out, there is a close link between energy solidarity and energy security.

Norway has legislation with elements of security of supply and measures to ensure a satisfactory quality of energy supply. See for instance regulation on quality of supply in the power system,²⁰ regulation on safety and emergency preparedness in the power supply,²¹ and regulation on the management of energy shortages and power rationing.²²

Energy security has also been on the Government’s agenda in recent years. In the summer of 2024, a law on strengthening the security of energy supply came into force. The Watercourse Regulation Act’s new purpose clause states that the Act “shall facilitate that watercourse regulation and transmission jointly contribute to good security of supply for electric energy in Norway.”²³ A well-functioning system where hydropower can be used to balance an intermittent and volatile energy market in Norway will also be of value for Europe’s security of supply.

¹⁸ The letter can be ordered here.

¹⁹ The Norwegian EEA law § 1 and 2.

²⁰ FOR-2004-11-30-1557.

²¹ FOR-2012-12-07-1157.

²² FOR-2023-12-19-2161.

²³ Watercourse Regulation Act § 1a (translated here).

Question 2

As mentioned in the introduction, it is not clear whether there exists a principle of energy solidarity in EEA law. In the *OPAL* case, the Court referred amongst others to Article 194 TFEU, the EU Treaty's preamble, and several provisions in TEU with reference to solidarity.²⁴ None of these have a corresponding text in the EEA Agreement. The term solidarity is not mentioned in the main part of the EEA Agreement.

Question 3

See Question 2 above.

Question 4

The Government has stated in its political platform that it “will not approve any new interconnectors to foreign countries during this parliamentary term” (2021–2025).²⁵ When the Government in February 2022 announced its major initiative to promote offshore wind power, the Minister of Finance said that “as we now work to expand offshore wind power, we will not be looking to establish new interconnectors that increase electricity export capacity from mainland Norway.”²⁶ The Government decided that the first large offshore wind farm should receive up to 23 billion Norwegian kroner and only be connected to Norway. We do not know whether this has led to bilateral tensions, but the largest opposition party in Norway wanted the project to be developed together with an interconnector and less state aid.²⁷

In 2023, the Norwegian Ministry of Energy rejected an application for an interconnector between Norway and the UK.²⁸

The Norwegian leader of the Centre Party and Minister of Finance has said that he did not want to renew two interconnectors to Denmark that expire in

²⁴ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598, point 39.

²⁵ The Government's political platform: A government for ordinary people (2021–2025), p. 28 (translated here).

²⁶ Office of the Prime Minister, ‘Major Initiative to Promote Offshore Wind Power’ (*Government.no*, 12 February 2022) accessed 2 May 2024.

²⁷ The Conservative Party, ‘Conservatives vote against billions in subsidies for offshore wind’ (*hoyre.no*, 31 May 2023) accessed 2 May 2024.

²⁸ Finlay Scott, ‘Explainer: Fatal Blow for Scotland's Norwegian Green Energy Dream’, *The Herald* (11 July 2023), <https://www.heraldsotland.com/politics/viewpoint/23645464.explainer-fatal-blow-scotlands-norwegian-green-energy-dream/>, accessed 27 May 2024.

2026. His party believes there is no reason to renew the licences and that the time has passed for large, new interconnectors.²⁹ The deputy CEO of Green Power Denmark said that it seemed strange to them that “Norway only wants to sell oil and gas, but not green electricity to Europe.”³⁰ However, the Minister of Energy (from the Labour Party) stated that “the current cables to Denmark are maintaining energy security.”³¹ There thus seems to be a conflict within the Norwegian Government on this issue.

In terms of other bilateral cooperation within the energy sector, Norway has had a cooperation with Sweden, where an electricity certificate market was created to facilitate for more renewable energy projects. This project was finalised in 2022. The market was based on a bilateral agreement between Norway and Sweden with a basis in the cooperation mechanism under the EU Renewable Energy Directive (2009/28/EC).

Questions 5 and 6

As mentioned in the introduction, it is not clear whether the principle of energy solidarity exists within EEA law. We do therefore not have a particular view regarding these specific questions.

Question 7

According to the Government, the war in Ukraine, damage to subsea cables in the Baltic Sea and the sabotage of the Nord Stream pipelines in 2022 have shown how important it is to protect subsea infrastructure on the Norwegian continental shelf. The Government states that it is implementing the following measures: Conduct surveys of key subsea fibre routes, acquire technology that can be used to monitor subsea fibre and acquire equipment that can detect interference with satellite-based services (GNSS), such as GPS, on the Norwegian continental shelf.³²

²⁹ NTB, ‘Danskene reagerer på Vedums ønske om å kutte kraftkabler’ (*Tu.no*, 9 December 2023), <https://www.tu.no/artikler/danskene-reagerer-pa-vedums-onske-om-a-kutte-kraftkabler/540910>, accessed 27 May 2024.

³⁰ Ibid. (translated here).

³¹ Ibid. (translated here).

³² Ministry of Digitalisation and Public Governance and Ministry of Defence, ‘Increased security for critical infrastructure on the Norwegian shelf’ (*regjeringen.no*, 2 February 2024), accessed 2 May 2024 (translated here).

Question 8

The Government has not decided whether it regards the TEN-E Regulation³³ from 2013 as EEA relevant.³⁴

Question 9

The Minister of Petroleum and Energy had a speech at the Energy Conference between Norway and the EU where he stated that “when Russia started using energy as a weapon, Norway quickly increased our production of gas to strengthen European energy security” and that the Government will do what they can “to facilitate that the Norwegian continental shelf will continue as a reliable source of gas to Europe.”³⁵

Section II: Energy solidarity, energy security and green transition

Question 1

We do not have a particular view regarding this question.

Question 2

The EU measures adopted so far in the context of “Fit for 55” have not yet been implemented into the EEA Agreement. There is a large backlog in the implementation of EEA-relevant legal acts. The EU Commissioner for Energy pointed this out in a letter to the Norwegian Minister for Energy on 13 March 2024. She explained that Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast) (RED II) and the amending Directive 2023/2413 (RED III) still remains non-transposed in the European Economic Area. The Commissioner stated that “EU and EEA core energy legislation are diverging to a very worrying degree, creating at present genuine legal and level playing field issues that are negatively affecting a range of actors in both Norway and the EU.” In the absent of progress, “the Commission shall consider any steps necessary that may need to be taken to preserve the integrity of our joint EEA Single Market.”³⁶

³³ Regulation (EU) No 347/2013 of the European Parliament and of the Council.

³⁴ EEA database, ‘TEN-E Regulation’ (*regjeringen.no*, 8 May 2017), accessed 2 May 2024 (translated here).

³⁵ Minister of Energy, ‘The Minister of Petroleum and Energy’s speech at the Energy Conference between Norway and the EU’ (*regjeringen.no*, 24 October 2024), accessed 2 May 2024.

³⁶ The letter can be ordered here.

The letter was discussed in Norwegian media and at the Norwegian parliament. The parliamentary leader of the Centre Party (one of the two parties represented in the Government) told Montel News that this was a completely new tone from the EU, and that “The Centre Party finds it difficult to take it seriously that one party in a trade agreement sets deadlines for the other party, while at the same time announcing countermeasures against Norway if we do not comply.”³⁷

The Prime Minister was asked in the Parliament if he was concerned that the EU could suspend parts of the EEA Agreement in the absence of progress relating to the adaption of the Directive. The Prime Minister replied that Norwegian industry benefits from having broad agreement on the regulations, but as an EEA country, we review and evaluate each of these Directives. The EEA Agreement could theoretically include these types of measures – in the absence of an agreement and a complete stop. He did not think we would get there and mentioned that we have not got there through 30 years with the EEA.³⁸

Question 3

The closest Norwegian legal concept to the EU notion of “do no significant harm” is probably found in the Nature Diversity Act. The Act contains amongst others a precautionary principle for official decision-making in Section 9: “When a decision is made in the absence of adequate information on the impacts it may have on the natural environment, the aim shall be to avoid possible significant damage to biological, geological or landscape diversity.”³⁹

³⁷ Petter Udland, ‘Senterpartiet fnyser av EUs trusler’, *MONTEL* (5 April 2024), <https://montelnews.com/nordic/news/af7e3509-89eb-4ce1-a22f-fb345a716491/senterpartiet-fnyser-av-eus-trusler>, accessed 22 May 2024 (translated here).

³⁸ The Storting, ‘Meeting Wednesday 17 April 2024 – item 1’, *Stortinget.no*, <https://www.stortinget.no/nn/Saker-og-publikasjoner/publikasjoner/Referat/Stortinget/2023-2024/refs-202324-04-17?m=1>, accessed 22 May 2024 at 10:59:36. His statement in Norwegian: “Norge er tjent med å ha bred regelverkenighet. Det er bra for næringslivet vårt, men vi er altså et EØS-land som gjennomgår og vurderer hvert av disse direktivene, og i EØS-avtalen kan det teoretisk sett komme slike typer tiltak – hvis man ikke kommer til enighet, og det blir en full stopp. Jeg tror ikke vi kommer dit, og vi er til nå heller ikke kommet dit gjennom 30 år med EØS. Jeg tror ikke vi gjør det nå heller.”

³⁹ Ministry of the Environment, ‘Nature Diversity Act’, *Government.no* (19 June 2009), <https://www.regjeringen.no/en/dokumenter/nature-diversity-act/id570549/>, accessed 22 May 2024. (Translation by the Norwegian Government).

Question 4

Electricity pricing policy was widely debated in Norway when electricity prices became very high. The Government set up a committee to assess what short- and long-term measures could ensure lower and more predictable prices for electricity users, within the scope of the EEA Agreement.⁴⁰ The Government has provided households with electricity subsidies since December 2021.⁴¹ The scheme is set to last until December 2024.⁴²

The Government has suggested changes in the legislation to strengthen the position of the consumers in the electricity market. The main focus is to ensure that consumers can evaluate the quality of agreements for the delivery of electricity and to ensure that the customers can terminate the agreements.⁴³

Question 5

As mentioned, the Government decided that the first large offshore wind farm (Sørlige Nordsjø II) should receive up to 23 billion Norwegian kroner and only be connected to Norway. The largest opposition party in Norway wanted the project to be developed together with an interconnector and less state aid.⁴⁴ The EFTA Surveillance Authority (ESA) approved the state aid in the form of a contract for difference (CfD) for phase 1 of Sørlige Nordsjø II. There was no assessment of the possibility for developing the offshore wind farm as a hybrid project connecting to other EU Member States.⁴⁵

Question 6

The Government has not decided whether it regards the TEN-E Regulation⁴⁶ from 2013 as EEA relevant.⁴⁷

⁴⁰ Olje- og energidepartementet (n 6).

⁴¹ Office of the Prime Minister, 'Government Launches Electricity Support Package Worth Billions', *Government.no* (11 December 2021), <https://www.regjeringen.no/en/aktuelt/government-launches-electricity-support-package-worth-billions/id2891839/>, accessed 22 May 2024.

⁴² See the Norwegian Electricity Subsidy Act, Section I.

⁴³ Prop. 83 L (2023–2024), *Endringer i energiloven mv.* (tiltak for et mer forbrukervennlig strømmarked). The proposal has been on a hearing and is being assessed at the Parliament, Sak – stortinget.no

⁴⁴ The Conservative Party, 'Conservatives vote against billions in subsidies for offshore wind' (*hoyre.no*, 31 May 2023), accessed 2 May 2024.

⁴⁵ ESA, 'Phase I of Sørlige Nordsjø II', Decision No. 194/23/COL, 19 December 2023.

⁴⁶ Regulation (EU) No 347/2013 of the European Parliament and of the Council.

⁴⁷ EEA database, 'TEN-E Regulation' (*regjeringen.no*, 8 May 2017), accessed 2 May 2024 (translated here).

Question 7

Norway is a large export-country of gas to Europe. A government-appointed committee tasked with assessing the experiences of the EEA Agreement recently wrote the following regarding Norway's gas market policy:

While energy security is usually discussed in terms of “security of supply,” Norway has sought “security of demand” from the EU. In the years leading up to the energy crisis, the EU's gas market policy shifted towards more short-term exchange trading of gas (spot) rather than long-term gas agreements. This change was reflected in the organisation of trade in Norwegian gas to Europe. In the face of more short-term contracts, a Norwegian strategy – for Norwegian governments as well as for petroleum companies – has been, as far as possible, to secure political signals from the EU and EU states on long-term demand for gas. The motive is to create predictability for long-term investments on the Norwegian continental shelf, because investments in the extraction and transport of petroleum are made a long time in advance and are costly.⁴⁸

Questions 8, 9, and 10

We do not have a particular view regarding these questions.

Question 11

The acts in REPowerEU have not been incorporated into the EEA Agreement.

Section III: The EU's crisis management in the field of energy and its limits

Questions 1, 2, and 3

The EEA Agreement does not contain a provision mirroring Article 122(1) TFEU. As the question refers to, there has been a change in legal basis for EU's energy policy due to the energy crisis in 2022, this is a potential challenge for Norway and the other EEA EFTA States (see our Introduction).

According to the government-appointed committee tasked with assessing the experiences of the EEA Agreement, crisis management measures adopted under Article 122 TFEU are not EEA relevant.⁴⁹ For instance, one of the

⁴⁸ NOU 2024: 7 Norge og EØS: Utvikling og erfaringer, p. 171 (our translation).

⁴⁹ NOU 2024: 7 Norge og EØS: Utvikling og erfaringer, p. 165.

regulations adopted on the basis of Article 122 TFEU, Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, was not marked as EEA relevant by the Commission. However, some provisions of that regulation have also been included in an amendment to the Renewable Directive (EU) 2023/2413, which the Commission *has* marked EEA relevant. The latter directive has TFEU 194 as the legal basis.

POLAND

Ilona Przybojewska*

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

With regard to the effectiveness of the principle of energy solidarity from the perspective of EU law, the EU legislature has not only elevated the meaning of “solidarity” in treaty law as a general value of primary law, but has also established it as the only value with regard to energy. Solidarity is mentioned in the declaratory part of the TEU and repeated in the specific part of the TFEU concerning obligations related to the functioning of the energy market. It is therefore impossible to consider this principle as incomplete and to marginalise its importance. It is also worth mentioning that the *principle of solidarity* has been extensively addressed in the Regulation on the security of gas supply,¹ which states, *inter alia*, that “the Energy Union rests on solidarity, enshrined in Article 194 of the Treaty on the Functioning of the European Union (TFEU), and trust, which are necessary features of energy security.”² The Regulation obliges a Member State to which another Member State requesting solidarity is directly connected to ensure the supply of gas to that Member State, without prejudice to its national energy security. An example of this is the reverse flow of natural gas from Germany to Poland via the Yamal-Europe

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¹ 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 EU L of 2017 No 280, as amended)

² Cf. Recital 6 of Regulation 2017/1938.

transit pipeline³ after the Russian gas transmission system operator Gazprom cut off gas supplies.⁴ The system directive for the EU electricity market also refers to “solidarity.” In this respect, the recitals of the Directive state that it is necessary for the European Commission to be involved in the process of certification regarding a transmission system owner or transmission system operator which is controlled by a person or persons from a third country, in order to exercise control over compliance with the unbundling rules.⁵ In this sense, *energy solidarity* is an expression of ensuring that the electricity market is subject to the same rules in all EU Member States, thus preventing the creation of energy monopolies and maintaining competitiveness. In light of the above, it is crucial to determine the effectiveness of the principles of energy solidarity and energy security in the context of national law, by answering the question of whether the said principles are directly effective and provide a self-standing legal basis for claims.

With regard to *energy security*, it should be noted that security and energy are areas of shared competence between the EU and the Member States.⁶ For this reason, these areas are regulated by many EU institutions and national authorities within their respective spheres of competence. Shared competence allows for co-legislation, whereby the scope of Member States’ competence in these areas extends to the extent that the EU has ceased to exercise its competence.⁷ Therefore, in areas of shared competence between the EU and the Member States, there is a need for interaction, which is reflected in the co-existence of EU and national legislation.⁸

The value of *security* to be ensured by the EU and Member States also applies to energy. According to the primary legislation, one of the aims of Union policy on energy is to “ensure security of energy supply in the Union.”⁹ The meaning of *energy security* is context-dependent,¹⁰ that is, it depends largely on the state of the global energy market, its stability, the development of energy

³ See press release on the *Rzeczpospolita* website of 2 August 2022, <https://energia.rp.pl/gaz/art36800381-gaz-znow-plynie-do-polski-teraz-rerwersem-z-niemiec>

⁴ See press release on the GAZ-SYSTEM website of 26 April 2022, <https://www.gaz-system.pl/pl/dla-mediow/komunikaty-prasowe/2022/kwiecen/26-04-2022-pgnig-i-gaz-system-informacja-w-sprawie-dostaw-gazu-w-kontrakcie-jamalskim.html>

⁵ Cf. Recital 78 of Directive 2019/944.

⁶ Article 4(2) i-j TFEU.

⁷ J. Barcz, ‘Zasady podziału kompetencji i rodzaje kompetencji Unii Europejskiej’, in: *Od lizbońskiej do postlizbońskiej Unii Europejskiej. Główne kierunki reformy ustrojowej procesu integracji europejskiej*, Warszawa 2020.

⁸ A. Serlikowska, ‘Podstawowe pojęcia i zagadnienia dotyczące urzędowej kontroli żywności’, in: *Oplaty i inne należności ustalane lub pobierane przez organy urzędowej kontroli żywności*, Warszawa 2020.

⁹ Article 194(1)(b) TFEU.

¹⁰ R. Skinner, R. Arnott, *The Oil Supply and Demand Context for Security of Oil Supply to the EU from the GCC Countries*, Oxford 2005, p. 25.

commodity prices, the relationship between buyers and sellers, the level of import and export dependencies, and the interdependence of producers and consumers.¹¹ *Energy security* in the classical sense is ensuring an adequate and reliable level of energy supply at reasonable prices in a way that does not threaten the fundamental values and objectives of the state.¹² The EU Communication: An energy policy for Europe,¹³ defines energy security as “ensuring that energy demand is met based on Community sources and strategic reserves, that energy will be provided at economically justifiable prices and from diversified, constant and available sources.” At present, there are also calls to add an element of minimising the negative impact of the energy sector on the environment,¹⁴ especially as energy independence can ensure energy security, and such independence can be achieved through the development of both local and large-scale national renewable energy projects. Moreover, *energy security* is an extension of the general value of *security*, just as *energy solidarity* is a derivative of the general principle of *solidarity*. The value of energy security undoubtedly has a public dimension that is in the common interest of the EU. This is reflected in the fact that the energy market is not left to operate freely, but is subject to specific sectoral regulation.

Energy security requires the development of international cooperation,¹⁵ given the trans-European or global distribution of fuel and energy supply chains and the resulting raw material or technological dependence of EU Member States.¹⁶ It is therefore necessary for the EU to take into account the UN’s energy objectives, to cooperate in the energy security dimension within NATO, or to deepen inter-operator cooperation within ENTSO-E.

The national regulatory and doctrinal perspective on the principle of energy solidarity

Solidarity is a value adopted in EU and national legal acts of a systemic nature, that is, both in the treaties and in the Constitution, where it appears alongside justice and freedom. These values, which form a coherent system of axiological

¹¹ K. Pronińska, ‘Bezpieczeństwo energetyczne w stosunkach międzynarodowych – aspekty strategiczne’, in: E. Haliżak, R. Kuźniar, G. Michałowska, S. Parzymies, J. Symonides, R. Zięba (eds.), *Stosunki międzynarodowe w XXI wieku*, Warszawa 2006, p. 413.

¹² D. Yergin, ‘Energy security in the 1990s’, *FA* 1988, No 1, p. 111; D. Yergin, ‘Ensuring energy security’, *FA* 2006, No 2, pp. 70–71.

¹³ Communication from the Commission to the European Council and the European Parliament: An energy policy for Europe (COM/2007/0001 final).

¹⁴ M. Nowacki, in: *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom II (art. 90-222)*, eds. K. Kowalik-Bańczyk, M. Szwarc-Kuczer, A. Wróbel, Warszawa 2012, Article 194.

¹⁵ M. Nowacki, ‘Prawne i instytucjonalne aspekty międzynarodowej współpracy w zakresie bezpieczeństwa energetycznego’, in: *Prawne aspekty bezpieczeństwa energetycznego w UE*, Warszawa 2010.

¹⁶ I. Przybojewska, ‘Dostarczanie czystej, przystępnej cenowo i bezpiecznej energii w świetle zamierzeń Europejskiego Zielonego Ładu’, *Europejski Przegląd Sądowy* 2022, No. 2, pp. 15–16.

guarantees, are considered to be incomplete and subsidiary norms in relation to specific norms,¹⁷ but they complement the latter axiologically and provide directional guidelines for the interpretation of *ius cogens* norms.

In the Polish Constitution, *solidarity* appears in the preamble, as part of a list of programme setting, optative values,¹⁸ and as a value attributed to the principle of a social market economy.¹⁹ It is linked to the values of freedom of economic activity, private ownership, dialogue and cooperation between social partners. Solidarity is a guideline for balancing the interests of all parties involved in socio-economic life, that is, employees and employers, producers and consumers.²⁰ It is a value that obliges both the state and all participants in economic processes to contribute to the proper functioning of these processes. The implementation of the principle of solidarity in relation to the economy may require a balance to be struck between the public interest and the individual interest with regard to the common good in question.²¹ On the one hand, “the concepts of ‘solidarity, dialogue and cooperation’ do not have a clearly defined legal content,” but on the other hand, “although these concepts also remain highly abstract, it is possible – both from a historical and comparative perspective – to derive from them specific legal consequences” in terms of decision-making in economic and social processes, in the field of substantive and procedural law.²²

The Constitution does not explicitly link solidarity to the functioning of the energy sector, but the link between solidarity and the social market economy means that this value has far-reaching implications, including that it undoubtedly extends to a market-based energy sector.

The principle of solidarity is implemented on the basis of the Polish Energy Law, which obliges the minister responsible for the management of energy resources to cooperate with the authorities of other EU Member States in order to ensure the security of gas fuel supply in line with *regional solidarity* by preventing the occurrence of a state of emergency in relation to the security of gas fuel supply and by cooperating in the event of crisis situations,²³ in accordance

¹⁷ M. Zubik, W. Sokolewicz, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, wyd. II, ed. L. Garlicki, Warszawa 2016, Article 2.

¹⁸ P. Tuleja, in: P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziejewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wyd. II, Warszawa 2023, Preambuła.

¹⁹ Article 20 of the Constitution of the Republic of Poland.

²⁰ P. Tuleja, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz...*, Article 20.

²¹ L. Garlicki, M. Zubik, in: M. Derlatka, K. Działocha, P. Sarnecki, W. Sokolewicz, J. Trzciński, M. Wiącek, L. Garlicki, M. Zubik, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, wyd. II, Warszawa 2016, Article 20.

²² *Ibidem*.

²³ Article 15f (2) of the Energy Law Act of 10 April 1997 (Journal of Laws of 2024, item 266, as amended), hereinafter referred to as the ‘Energy Law’.

with the relevant EU Regulation concerning measures to safeguard the security of gas supply.²⁴ In general, the aforementioned provision of the Energy Law empowers the national regulatory authority and the minister responsible for the management of raw materials to cooperate with the authorities of other Member States in order to create a competitive fuel and energy market. The minister responsible for the management of energy resources (currently the Minister of Industry²⁵) cooperates with the competent authorities of other EU Member States in order to safeguard the security of gas supply and to promote regional solidarity in safeguarding such security. The aim of this cooperation is to prevent any threat to the security of gas supply and to facilitate cooperation in the event of a crisis. The said norms refer directly to the above-mentioned EU Regulation on security of gas supply, but the national legislature transposed them into a statute. The legislation in this area shows that, although EU regulations do not require transposition, the national legislature aimed to align EU and national law as closely as possible in this respect. It should also be noted that preventive measures are taken within the competence of the competent national authorities. However, in the event of a crisis, these authorities will cooperate, that is, they will take joint action and help each other to achieve common objectives, while remaining on an equal footing.²⁶ There is no doubt that security is a sovereign sphere of action for the Member States, although national sovereignty is limited by the EU interest, which is binding on Member States. It is also worth mentioning that the development of the Energy Union and the trans-European energy projects implemented by Member States create a need for cooperation in the face of common threats.

National case law perspective on the principle of energy solidarity

With regard to national case law on energy solidarity, it should be noted that this principle has not been the subject of national case law because it has no normative character at the national level (it remains only a directional guideline in accordance with the pro-European interpretation). At the same time, it is important to note that, given the importance of this principle in the light of EU law, it is binding on individual public authorities. The principle of solidarity is present in the Polish legal system and is being extended in a special way to the energy sector in the light of the Europeanisation of law. In other words, the (market) energy sector is covered by the constitutionally guaranteed solidarity of partners in the social market economy. Moreover, the interaction between EU and national legislatures in the field of energy law leads to the incorporation of the principle of energy solidarity into the national legal system in the

²⁴ Regulation 2017/1938.

²⁵ Ordinance of the Prime Minister of 5 July 2024 amending the Ordinance on the detailed scope of activities of the Minister of Industry (Journal of Laws of 2024, item 999).

²⁶ E. Ura, 'Zadania w zakresie koordynacji, współpracy i współdziałania', in: *System Prawa Pracy*. Tom VIII. *Prawo rynku pracy*, eds. K. W. Baran, M. Włodarczyk, Warszawa 2018.

form of legislative guidelines, case law guidelines and a basis for decisions by public administrative bodies. The principle of energy solidarity does not have an independent status under national law, but it determines the making and application of law. Therefore, several important theses can be derived from Polish case law in this respect:

- “The Tribunal [...] emphasised that social solidarity means that all social groups must bear the consequences of the economic crisis (cf. e.g. the judgment of 21 March 2000, Case No. K 14/99, OTK ZU No. 2/2000, item 61), as well as ‘the constitutional obligation [...] of the social partners, and thus also of employers, to bear the costs of social transformation’ (Case No. K 17/00; cf. e.g. – with regard to the regulations on working time – the judgement of 24 February 2004, Case No. K 54/02, Constitutional Tribunal Case Law OTK ZU No. 2/2004, item 10, p. 191).” – judgement of the Constitutional Tribunal of 7 May 2014, Case No. K 43/12.
- “With regard to the meaning of the concept of social solidarity, the Tribunal would also like to refer to its previous judgments in which it expressed the view that the concepts of social equality and solidarity require that the burden of the economic crisis be borne by all social classes and not particularly affect only some of them (judgment of 11 February 1992, Sheet 14/91, Constitutional Tribunal Case Law OTK in 1992, part I, item 7) and that social solidarity is the basis of the redistributive function of the principle of social justice (judgement of 1 February 1993, Sheet 13/92, Constitutional Tribunal Case Law OTK in 1993, part I, item 4). Today, the solidarity referred to in Article 20 means that the social partners, and therefore also employers, have a constitutional obligation to jointly bear the costs of social transformation. It should also be understood that this value expresses a preference for negotiation as a method of resolving contentious social issues and, in light of Article 1 of the Constitution, which defines the Republic of Poland as the common good of all its citizens, this value should be understood to mean that all citizens are obliged, within the limits of their abilities, to sacrifice certain self-interests for the common good.” – judgement of the Constitutional Tribunal of 30 January 2001, Case No. K 17/00.
- “The Court of first instance noted that the Treaty of Lisbon ensures the protection of services of general interest in the European Union [...] Such services contribute to achieving the objectives of solidarity and equality and include: [...] services of general economic interest (basic services in the field of electricity supply, telecommunications, postal services, transport, agricultural and sewage management, waste management, etc.).” – judgment of the Supreme Administrative Court of 9 March 2016, Case No. I OSK 2960/14.
- “It should also be noted that the Treaty of Lisbon provides for the protection of services of general interest in the European Union. It added to the founding treaties the “Protocol on services of general interest” (No. 26), which

has the same legal force as the treaties. “Services of general interest” are services provided in the public interest and subject to specific public service obligations. A classic example of such an obligation is the requirement to provide a service throughout the country, at affordable prices and comparable levels of quality, regardless of the profitability of individual operations. Such services contribute to the objectives of solidarity and equality and include: a) non-market services (i.e. compulsory education, social security, etc.); b) state obligations (i.e. security, justice, etc.); c) services of general economic interest (basic services in the field of electricity supply, telecommunications, postal services, transport services, agricultural and sewage management, waste management, etc.)” – judgment of the Supreme Administrative Court of 2 December 2014, Case No. I OSK 2052/14.

It follows from the above that *solidarity* means that the whole of society bears public burdens (such as the effects of the economic crisis or the costs of transformation). Services of general interest, such as energy services, which enable the EU’s solidarity objectives to be achieved, have been granted special protection under the treaty. The adoption of specific acts for the electricity,²⁷ heat,²⁸ and gas²⁹ markets in relation to the energy crisis is an example of a regulation which, in relation to the energy sector, demonstrates the value (principle) of solidarity, which obliges all entities to contribute to the common interest. These regulations have a legal basis in the EU Regulation,³⁰ which makes extensive reference to the value of solidarity, indicating that Member States need to work together to counter the negative social consequences of high energy prices.³¹ However, the application of these solidarity measures must remain temporary due to their non-market nature.

A national regulatory and doctrinal perspective on the energy security principle

Energy security is not a constitutionally regulated topic, although the Constitution places great emphasis on the value of security in general. Security is a priority in all areas of socio-economic life, and its role is particularly important in relation to critical infrastructure (including energy infrastructure). The aforementioned environmental security in the context of current climate goals

²⁷ Act of 7 October 2022 on special solutions for the protection of electricity consumers in 2023 and 2024 in connection with the situation on the electricity market (Journal of Laws of 2023, item 1704, as amended) and Act of 27 October 2022 on extraordinary measures to limit electricity prices and support certain customers in 2023 and 2024 (Journal of Laws of 2024, item 190, as amended).

²⁸ Act of 15 September 2022 on special solutions for certain heat sources in connection with the situation on the fuel market (Journal of Laws of 2023, item 1772, as amended).

²⁹ Act of 26 January 2022 on special solutions for the protection of gaseous fuel customers in connection with the situation on the gas market (Journal of Laws of 2022, item 202, as amended).

³⁰ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ EU L of 2022, item 261).

³¹ Recital 6 of Regulation 2022/1854.

is closely linked to energy security, meaning that environmental values influence and in a way *force* certain changes in the energy sector, which is currently the most emission-intensive industry. Energy security is therefore realised in activities concerning the current shape of the energy sector and the rights and obligations of all entities that are actively engaged in this sector (including activities aimed at achieving specific objectives in the future) and entities that use the products and services that this sector produces.³²

Energy security has been explicitly identified as one of the state's objectives in the energy sector.³³ The Energy Law Act introduces a legal definition of energy security, namely "a condition of the economy that enables the current and future demand of customers for fuels and energy to be met in a technically and economically justifiable manner, while complying with environmental protection requirements."³⁴ The current normative definition lists the constituent elements of energy security such as: (i) the ability to meet energy demand; (ii) the ability to ensure the supply of fuels and energy in technical and economic terms; and (iii) the assurance of environmental standards. In the literature, this is understood as "ensuring the continuity of energy supply at optimal cost, while maintaining political independence and in accordance with the principles of sustainable development."³⁵ This definition is constantly discussed in the literature, not only with regard to its possible extension, but also with regard to the understanding of its components. Unlike in previous years, now the focus is not only on the supply of fuels and energy to meet demand, but also on the sources and places from which these fuels and energy are sourced, as a prerequisite for ensuring stability of supply at an acceptable price and for ensuring that fuels and energy are low- or zero-emission. Whatever the challenges of a given period, continuity of supply will undoubtedly remain a key element of energy security.³⁶ At present, with the drive to change the energy mix in favour of dominant renewable generation, ensuring energy security requires the search for stabilising technologies that enable a constant production and supply of energy.

National case law perspective on the principle of energy security

The principle of energy security has been directly or indirectly examined by national courts. In this respect, the case law states that:

³² S. Dudzik, 'Konstytucyjne ramy polskiego prawa energetycznego', in: P. Kardas, T. Sroka, W. Wróbel (eds.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, tom I, *Zagadnienia szczególne*, SIP 2012.

³³ Article 1(2) Energy Law.

³⁴ Article 3(16) Energy Law.

³⁵ A. Gradziuk, W. Lach, E. Posel-Częścik, K. Sochacka, 'Co to jest bezpieczeństwo energetyczne państwa?', *Biuletyn Polskiego Instytutu Spraw Międzynarodowych* 2002/103, p. 708.

³⁶ F. Grzegorzczuk, in: *Rynek mocy. Komentarz*, ed. U. Wiśniewska, Warszawa 2021, Article 1.

- “[...] it is the duty of the public authorities to ensure the energy security of the country, and thus to endeavour to satisfy both existing and anticipated energy needs under the conditions set out in Article 74(1) of the Constitution, that is, taking into account the ecological security of current and future generations. The fulfilment of this obligation justifies subjecting the energy economy to restrictions on the freedom of economic activity that are characteristic of a regulated market and based on Article 31(3) of the Constitution. The freedom of economic activity in the energy sector may be restricted in particular for reasons of safety and environmental protection, these restrictions may be imposed “only by statute, and only when necessary in a democratic state,” however they may not “violate the essence of freedoms and rights” – judgment of the Constitutional Tribunal of 25 July 2006, Case No. P 24/05.
- “[...] it is the duty of the public authorities to ensure the energy security of the country, and this task is carried out by both public administration bodies and other entities. The court hearing this case fully shares the view expressed in the judgment of the Supreme Administrative Court of 18 August 2010 (I OSK 851/10), according to which the term ‘public tasks’ is a broader concept than the term ‘tasks of public authorities’ (Article 61 of the Polish Constitution). [...] In this sense, ‘public tasks’ are universal and beneficial to the public, and they also contribute to the achievement of the objectives set out in the Constitution or statutes. The fulfilment of public tasks is always connected with the realisation of basic public subjective rights of citizens. Energy companies, due to the fact that they are entrusted with tasks related to ensuring the country’s energy security, are public utility companies and perform public tasks within the meaning of Article 4 of the Act on Access to Public Information [...] the distribution of electricity and other tasks performed by an energy company are ‘public tasks’ due to the importance of electricity for the development of civilisation and the standard of living of citizens, and thus for the realisation of the common good referred to in Article 1 of the Polish Constitution [...]” – judgment of the Supreme Administrative Court of 15 October 2013, Case No. I OSK 1212/13.
- “Energy security, understood as the stable supply of electricity, heat and gas to domestic industrial and household customers and national public institutions, is undoubtedly a constitutional value, as it is one of the guarantees of the independence of the State and the security of its citizens (Article 5 of the Polish Constitution).” – judgment of the Supreme Court of 22 January 2020, Case No. I NSK 105/18.
- “Energy security is part of economic security in the broad sense, as energy and energy resources are strategic products with a real impact on all elements of the proper functioning of a state. They are therefore a determining factor in the functioning of state institutions, not only in the economic, but also in the political, environmental and social spheres.” –

judgment of the Supreme Administrative Court of 17 December 2014, Case No. I OSK 1361/14.

The selected case law presented above shows that energy security is in the public interest, and therefore its achievement requires the participation of public administration authorities and other entities (bearing in mind that public tasks can be performed not only by the state apparatus). Furthermore, energy security is the state of universal access to energy, which is a common good. Energy security is a constitutional value that determines the independence of the state and the security of its citizens. It is also one of the dimensions of economic security, and energy and energy resources are strategic products indispensable for the proper functioning of the state.

Question 2

Solidarity in general is a concept permeating the primary law of the EU.³⁷ However, to a certain extent it is “an amorphous concept whose contours change depending on the legal areas and the actors involved, and which generates differing levels of commitment.”³⁸ The reconstruction of the meaning of the principle of solidarity in EU law is difficult due to the fact that references to solidarity, clearly understood in very different ways, may be found in numerous treaty provisions. For instance, Article 3(3) paragraph 3 TEU obliges the EU to “promote economic, social and territorial cohesion, and solidarity among Member States,” whereas Article 80 TFEU states that the policies of the EU, as well as their implementation, “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.” Especially in the past, and rarely today, the principle of loyal and sincere cooperation set forth in Article 4(3) TEU has been referred to as the solidarity principle. It requires that Member States and the European Union respect one another and provide mutual support in fulfilling the obligations arising from EU primary and secondary law. As confirmed by the Court in *Zwartveld*,³⁹ the obligations arising from the principle of solidarity are incumbent not only on the Member States, but also on the European Union. As the wording of the provision in question suggests, the principle of loyal and sincere cooperation is focused on the issue of mutual cooperation between Member States and the EU institutions in achieving the objectives of the European Union as a whole. However, it seems that within

³⁷ See, e.g., I. Badanova, ‘Making Sense of Solidarity in International Law: Input from the Integration of the European Gas Market’, *European Journal of Legal Studies*, vol. 11, 2019, pp. 116–126.

³⁸ E. Küçük, ‘Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?’, *Maastricht Journal of European and Comparative Law*, vol. 23, issue 6, 2016, p. 965.

³⁹ Judgment of the Court in case *Criminal proceedings against Zwartveld and others*, C-2/88, ECLI:EU:C:1990:440.

the framework of Article 4(3) TEU we are dealing with solidarity in a vertical dimension, between the European Union and the Member States (in both directions, although it seems to be working more towards the EU), but not between the Member States. Thus, the principle of solidarity referred to by the Court in the *OPAL* case is broader than the principle of loyal and sincere cooperation. While the latter encompasses mutual cooperation of the EU and the Member States in order to achieve a common goal, the principle of solidarity as invoked in *OPAL* case comprises the former, but adds an additional piece in the form of “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” – that is, both the EU, as well as respective Member States have to consider “the interests of both the European Union and the various Member States and to balance those interests where there is a conflict” (as expressly stated by the Court in *OPAL* case). This is the angle of solidarity that seems to be conveyed by Article 3(3) paragraph 3 TEU.

Turning to the notion of energy solidarity,⁴⁰ if it included solely the aforementioned two dimensions, its impact on the principle of solidarity would be quite modest – it would be a reflection of the principle of solidarity in the energy policy, albeit with some interesting embodiments, like the “Gazprom clause” related to admission to perform the function of a transmission system operator within the intra-EU energy market through a certification mechanism.

By virtue of Article 72(3)(b) of the Gas Directive,⁴¹ the national regulatory authority is obliged to refuse certification “if it has not been demonstrated [...] to the regulatory authority or to another competent authority designated by the Member State, that granting certification will not put at risk the security of energy supply or the essential security interests of the Member State and the Union.” In turn, Article 72(8) of the Gas Directive in its third sentence states that “In any event a Member State shall have the right to refuse certification where granting certification puts at risk the Member State’s security of energy supply or the security of energy supply of another Member State.” Theoretically (since the practical enforcement of these provisions has not brought spectacular effects related to taking into account security of other Member States), the stipulations in question go pretty far as regards the second component of solidarity. Some researchers highlighted that “in its previous meaning [i.e. before the *OPAL* case], the nature of energy solidarity was considered solely

⁴⁰ For detailed analysis of the energy security and the solidarity in general see also I. Przybojewska, ‘Energy Solidarity Revisited’, *The European Green Deal and the Impact of Climate Change on the EU Regulatory Framework. Searching for coherence*, edited by Alicja Sikora and Inga Kawka, Presses universitaires Saint-Louis Bruxelles, 2024, pp. 144–157.

⁴¹ Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast) (OJ L, 2024/1788, 15.07.2024).

ex post. Formally, this solidarity was ‘activated’ only when there was a crisis situation concerning supplies or the functioning of the internal gas market. The Judgement of the Court discussed, instead, changes the current state of affairs. It obliges both the EU and individual Member States to consider the interests of other Member States ex ante, that is, in the process of developing their energy policy.”⁴² This is true as far as the widespread perception of the notion of energy solidarity is concerned, but in fairness, instruments related to that dimension of the energy solidarity, such as the aforementioned “Gazprom clause,” have existed long before the *OPAL* case.

However, within the framework of the concept of the energy solidarity, another important component substantially enriching the general principle of solidarity is developed.

Since the EU legislator has neither created a uniform legal definition of the concept of energy solidarity (which appeared as a doctrinal denomination), nor has it indicated explicitly what should be understood by the phrase “in the spirit of solidarity” in Article 194(1) TFEU, the notion of energy solidarity was (and to a certain extent still is) left open to interpretation. Thus, the notion of energy solidarity should be deemed subject to clarifications by indices derived from the EU law and its interpretation by the European Court of Justice. Elucidation of the content and meaning of the concept of energy solidarity should be made taking into account the primary law, secondary law (including soft law) of the European Union, as well as the jurisprudence of the General Court and the Court. That dependence on such elements when construing the notion of energy solidarity actually means that the interpretation would have to be dynamic, changing with legal provisions and possible developments of the line of jurisprudence. We are of the opinion that there is nothing wrong with such flexibility; in particular it does not undermine the status of the energy solidarity as a legal principle. The above-mentioned vagueness of principles actually occurs frequently, and if it were to have the effect of depriving them of the legal value, it would lead to the depreciation of many fundamental principles. In this context, it is worth quoting N. de Sadeleer’s view on the legal principles of environmental protection expressed in Article 191(2) TFEU, in particular the principle of prevention, the precautionary principle and the “polluter pays” principle. The general nature of the analysed principles observed by that author and a certain lability in their interpretation as models of thinking in environmental protection law evolve do not, in his opinion, prevent them from being considered legal principles (and not only policy principles). The mentioned features only increase the flexibility and possibility of broad application

⁴² M. Krzykowski, J.J. Zięty, ‘Milestone for Energy Solidarity Principle – Implication of the Judgment of the General Court of 10.09.2019 (T-883/16) for energy policy’, *Przegląd Ustawodawstwa Gospodarczego*, no. 4, 2020, p. 42.

of these principles, which is sometimes perceived as an advantage. That author further points out that the nature of a legal principle is not intended to be the subject of an exhaustive definition in positive law; what is desirable is a flexible standard capable of adapting to the variety of cases in which it will be applied; any attempt to define a legal principle in overly precise terms would certainly limit its scope of application, eliminating or seriously restricting its usefulness. Moreover, although a legal principle may remain unclear, its scope will be gradually translated by the application in different contexts.⁴³ This view corresponds to the previous observation about the dynamic nature of the principle of energy solidarity.

An important dimension brought by the energy solidarity as an added value when compared to the aforementioned perception of the general principle of solidarity is, without a doubt, the legal duties related to providing assistance to Member States in trouble as regards continuity of supplies of energy and its carriers (threatened or actual interruption of supply). This element is a true novelty in terms of solidarity; it seems that outside the field of energy, no similar duty exists in the EU law.

The most prominent examples of applying such aspect of the energy solidarity are provided by stipulations of the Regulation 2017/1938.⁴⁴ This regulation encompasses obligations of Member States to employ solidarity measures aimed at aiding recipients from other Member States in case of disruptions in natural gas supplies. There is an interesting picture of the dynamic and continuously deepening nature of energy solidarity that may be noticed by following the content of acts related to energy solidarity focused on natural gas, replacing one another (Directive 2004/67/EC⁴⁵ – Regulation 994/2010⁴⁶ – Regulation 2017/1938). Although Directive 2004/67/EC did provide some measures applicable in case of crisis, not only were those measures inadequate, but the preconditions for their application were construed in a way that actually hindered their use as an aid for Member States from Eastern and Central Europe. In terms of energy solidarity, crucial provisions were included in Article 9, describing the following mechanism: “If an event occurs that is likely to develop into a major supply disruption for a significant period of time,” or if a Member State indicates events that, according to them, “cannot be adequately managed

⁴³ N. de Sadeleer, ‘Environmental Principles. From Political Slogans to Legal Rules’, Oxford University Press, 2020, p. 304.

⁴⁴ 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).

⁴⁵ Directive 2004/67/EC concerning measures to safeguard security of natural gas supply [2004] OJ L127/92, no longer in force.

⁴⁶ Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard the security of gas supply and repealing Council Directive 2004/67/EC [2010] OJ L295/1, no longer in force.

with national measures,” the Gas Coordination Group was to be convened by the Commission; having examined the situation, the Group might “assist the Member States in coordinating the measures taken at national level to deal with the major supply disruption”; should national measures prove insufficient, the Commission might (in consultation with the Group) “provide guidance to Member States regarding further measures to assist those Member States particularly affected by the major supply disruption.” The final step could be the proposal concerning undertaking other necessary measures, which could be submitted by the Commission to the Council. Apart from the problem of whether the aforementioned procedure was actually capable of providing the actual help, the definition of a “major supply disruption for a significant period of time” (construed on the basis of Article 2(2) and Recital (17) of the Directive 2004/67/EC) was too narrow to be of use for many states, including Poland. It encompassed only those situations when the EU would be exposed, for at least eight weeks, to the risk of losing over 20% of its supplies from third countries. Actually, it might be alleged that the definition was discriminatory. According to it, an interruption in gas supplies to Member States on the EU eastern border lasting for a year or so would not qualify as a “major supply disruption,”⁴⁷ and such a result was not, to put it mildly, reasonable.

Regulation 994/2010, which replaced the aforementioned directive, was certainly a step in the right direction. As regards the issue of energy solidarity, the most important provisions concerned the procedure applicable in the event of an emergency. Three levels of alerts may be introduced: early warning, alert, and emergency. Due to such a division, the regulation provided instruments of action for various types of situations, abandoning the idea of a “major supply disruption.” In the case of an emergency alert declared on the national level, the Commission could declare “a Union emergency or a regional emergency for a specifically affected geographical region” (Article 11(1) of the Regulation 994/2010). After completing the verification procedure, the Commission was obliged to declare it at the request of two competent authorities (bodies designed at the national level), which had declared an emergency alert. Obviously, there was a certain procedure to follow during the emergency alert. The provisions were very detailed, unlike those in the Directive 2004/67/EC, and – what is worth noting – the system of alerts was gradual. For as long as it was possible, market players were expected to deal with the disturbances on their own, but at some point the introduction of non-market solidarity instruments was permitted.

The further consolidation is introduced by the currently binding Regulation 2017/1938. It creates solidarity mechanisms activated in the event of a threat to

⁴⁷ M. Nowacki, ‘Prawne aspekty bezpieczeństwa energetycznego w UE’, Wolters Kluwer Polska, 2010, p. 140.

the security of supply (in particular, the emphasis is put on the issue of energy security in the pan-European perspective, which implies the development of a common approach characteristic of the concept of energy solidarity). The most important elements are: cooperation between EU countries in regional groups to assess common supply risks (Common Risk Assessments), and to develop joint preventive and emergency measures, facilitate permanent bi-directional capacity on all cross-border interconnections between EU countries via transmission service operators (unless an exemption is granted), as well as solidarity arrangements to be concluded between Member States. As some researchers rightly point out, under Regulation 994/2010 “only additional gas amounts were at stake and could be shared with the Member State in an emergency,” and this is not the case in the context of the provisions of Regulation 2017/1938, where “customers other than households, essential social services and district heating cannot continue to be supplied with gas in a given Member State – even if it is not in an emergency situation – as long as households, essential social services and district heating are not being supplied in another Member State in emergency to which the first country’s transmission network is connected.”⁴⁸

The continuous deepening of the level of protection provided by the analysed angle of the concept of energy solidarity in successive legal instruments has been a bumpy road, where sequential steps have been triggered mainly by repeated threats resulting from Russia’s conduct as regards supplies of natural gas. Within the field of energy, increasingly greater emphasis has been placed on the altruistic element of the solidarity concept – providing support to Member States in jeopardy as regards continuity of supplies – and this is the fruit of the aforementioned legal changes rooted in factual challenges.

The current understanding of the notion of energy solidarity is evolving jointly with legislative and jurisprudential developments affecting the domain of the energy policy, so it is possible that new components will be added or present ones modified in the future. Currently, the three basic constituents of the principle of energy solidarity include:

- 1) the necessity of cooperation to achieve a common goal in the form of guaranteeing broadly construed⁴⁹ energy security, encompassing ensuring continuity of supplies for affordable prices, a liberalised and competitive energy market and compliance with requirements of environmental protection (the aspect shared with the principle of loyal and sincere cooperation);
- 2) the need to take into account the interests of other stakeholders, meaning also individual Member States and applicable both to Member States, as well as to the EU (reflection of the general principle of solidarity in the field of

⁴⁸ I. Badanova, ‘Making Sense of Solidarity in International Law...’, p. 124.

⁴⁹ See answer to Question 7, Section I for further clarification.

- energy with some special embodiments like “Gazprom clause”), as well as;
- 3) legal duties related to providing support to Member States in trouble as regards continuity of supplies of energy and its carriers (threatened or actual interruption of supply) – which constitutes an additional element brought by the notion of energy solidarity.

Nevertheless, it seems that one swallow does not make a summer, and the last facet of the energy solidarity has not permeated other fields of application of the principle of solidarity yet, and it may be (but does not have to be) the wave of the future (depending primarily on developments as regards the shape, less as regards the interpretation of the EU law).

When it comes to Polish legal order, there is no separate legal principle of solidarity in Polish Constitution,⁵⁰ although there are parts invoking solidarity. At the end of the preamble of the Constitution, there is a piece: “All those who will apply this Constitution for the good of the Third Republic, we call on them to do so while ensuring the preservation of the inherent dignity of man, his right to freedom and *duty of solidarity with others*, and to consider respect for these principles to be the unshakable foundation of the Republic of Poland.” Article 20 of the Constitution, touching upon the economy, states as follows: “A social market economy based on freedom of economic activity, private property *and solidarity*, dialogue and cooperation of social partners is the basis of the economic system of the Republic of Poland.” Energy solidarity does not have any impact on the constitutional notion of solidarity. There are no traces of the energy solidarity in Polish Energy Law,⁵¹ except for a reference to a regional solidarity in Article 15f(2) of that Act, providing for cooperation of the minister responsible for the management of energy resources with the authorities of other EU Member States for the purpose of guaranteeing “the security of the supply of gaseous fuels” and “promoting regional solidarity in ensuring that security,” including situations mentioned in the Regulation 2017/1938. This is just a reflection of stipulations of that EU legal act.

As regards perceiving the energy solidarity as a corrective tool delineating borders of the national sovereignty in the field of energy in the name of common interest, in our opinion it could actually be a double-edged sword. Nothing in the wording of Article 194(1)TFEU limits the scope of application of the principle of energy solidarity only to the scope of application of EU law relating to energy. This would mean that the need to apply the principle of energy solidarity would come into play in the context of all decisions relating to the energy sector, including, of course, decisions of national authorities that may have cross-border implications. Such broad range of the principle in question

⁵⁰ Constitution of the Republic of Poland of 2 April 1997 (OJ 1997 No. 78, item 483, as amended).

⁵¹ The Act of 10 April 1997 – the Energy Law, OJ 2024, item 266, as amended.

was expressly confirmed by the Court in the *OPAL* case. In this context the energy solidarity may act as a brake on the common energy policy. If it is supposed to be a balancing tool between the interests of the Member States and the EU, as well as between the interests of individual Member States, and it is not clear how this should be done (of course we could refer to proportionality and this may be appealing from a theoretical point of view, but rarely delivering a concrete solution in practice), in specific cases it may turn out that the interests of individual Member States will prevail.⁵² It is not guaranteed that any and all actions of the EU (its bodies) or, in particular, actions of individual Member States always actually would aim to achieve the goals set out in Article 194(1) TFEU. Thus, the corrective value of the principle of energy solidarity may turn out to be useful in a situation where the above-mentioned actions, which in the declarative dimension may be directed to implement these goals, in the pragmatic dimension would go astray. It could be both a challenge and a chance, and the actual result would depend on practical implementation of the principle of energy solidarity in a given case.

Bearing in mind that the notion of energy solidarity enshrines the additional element of providing support for Member States in jeopardy as regards the continuity of supplies of energy and its carriers, and that the range of that element seems to be limited to the field of energy, in our opinion the limited scope of application is an argument against the possibility of recognising this principle as a part of the EU constitutional identity. However, we agree with the opinion that obviously, Article 194 TFEU – and the energy solidarity derived from that provision – is applicable both to internal and external relations.⁵³

Question 3

Since Article 194(1) TFEU prescribes the implementation of the objectives of the EU energy policy in the spirit of energy solidarity, the scope of influence of the concept of energy solidarity is extremely broad and includes the entirety of measures taken in order to achieve any of the major goals of the EU energy policy, that is, to ensure the functioning of the energy market, the security of energy supply in the Union, to promote energy efficiency, energy saving, and the development of new and renewable forms of energy, as well as the interconnection of energy networks. Energy solidarity is therefore a holistic

⁵² Such risk is pointed out also by M. Iakovenko, 'Case C-848/19 P: *Germany v Poland* and its outcomes for EU energy sector: an extended case note on the European Court of Justice judgment in the *OPAL* case: Judgment of the Court (Grand Chamber) of 15 July 2021, C-848/19 P, *Germany v Poland*, ECLI:EU:C:2021:598', *The Journal of World Energy Law & Business*, vol. 14, issue 6, 2021, p. 439.

⁵³ K. Talus, 'EU Energy Law and Policy: A Critical Account', Oxford University Press, 2013, p. 280.

concept, affecting all issues related to the EU energy policy, and extending beyond the strict treaty framework of this sphere of activity. Therefore, we can risk a statement that this concept has a character similar to the cross-sectional clause in the field of energy – where the field of energy would be construed in a broader way than formally delineated EU energy policy (in particular, construction of trans-European energy networks should also be performed “in a spirit of solidarity” as referred to in Article 194(1) TFEU, especially as the goal of promoting the interconnection of energy networks lays in between the energy policy and the policy on trans-European networks⁵⁴). The energy solidarity should permeate all legal acts, decisions and actions of the EU and/or the Member States influencing the energy security, construed as a triangle incorporating security of supplies (continuity of supplies), a liberalised and competitive energy market (with affordable prices) and observance of environmental requirements. Moreover, state of the energy security perceived as the aforementioned triangle should be treated as including states of energy security in different Member States and in the EU as a whole.

Three areas of the EU energy policy, namely energy security, liberalisation of the energy market and compliance of the energy sector with requirements of environmental protection, could be differentiated. These spheres correspond to the elements referred to in Article 194(1) TFEU – classically understood energy security reflects the objective of ensuring the security of energy supplies in the Union, the liberalisation of the energy market may be associated with the goal of ensuring the functioning of the energy market, while compliance with the requirements of environmental protection matches the promotion of energy efficiency and energy savings, as well as the development of new and renewable forms of energy; but the importance of environmental protection has been highlighted to a greatest extent by explicitly stated obligation to take into account the need to preserve and improve the natural environment in the EU energy policy. The last, complementary element is the requirement to support interconnections between energy networks, the reference to which establishes a close connection between energy policy on the one hand and the construction of trans-European energy infrastructure (as a part of the EU policy on trans-European networks) on the other hand. At the same time, it is an element directly aimed at ensuring security of supply (underlining the importance of the technical aspect of the security of supply).

The picture of the EU energy policy is, therefore, quite complex, and in practice twofold tensions could be observed between various puzzles, in particular between energy security and environmental protection. Such tensions may be

⁵⁴ See answer to Question 8, Section I for further explanation.

noticed also at the higher level, between the energy policy and the environmental policy of the EU.⁵⁵ However, in our opinion a conclusion about necessarily contradictory nature of energy security versus market liberalisation and environmental protection would be an exaggeration. From a theoretical point of view, these goals could be reconciled if the measures created to achieve them are thoroughly considered and tailored to each other. Visible contradictions in the EU energy policy (and with the environmental policy) result from a combination of factual circumstances and dependencies in the field of energy (often not properly accounted for), the way of understanding the hierarchy of the goals of the energy policy, and, consequently, faulty shaping of actions aimed at achieving environmental protection without proper taking into account remaining objectives of the EU energy policy.

In this respect, issues that should be faced and taken into account by the European legislator include, in particular, the following circumstances:

- 1) generally, the territory of the EU is not affluent in energy resources, apart from resources the combustion of which generates high emissions of greenhouse gases (like coal);
- 2) high import dependence of the EU as regards energy resources puts the EU in jeopardy bearing in mind the often non-reliable nature of countries exporting fossil fuels such as natural gas and oil, using the business as a political tool;
- 3) renewables such as solar or wind energy are rather clean sources of energy (although it is true that “the only non-polluting energy is the one not generated”⁵⁶), but at the same time often variable and unstable;
- 4) lack of technical and economic possibility to replace in full, in a short-term and medium-term perspective, the supply of energy from fossil fuels with the energy from renewables;
- 5) there are no legal grounds for assuming precedence of environmental protection over the energy security; although it is commonly accepted that, according to the overarching principle of sustainable development, environmental protection requirements play a corrective role in relation to development considerations, the corrective impact of this principle is actually bidirectional, so development considerations also blunt the edge of environmental requirements; thus, none of the above-mentioned interests should be given primacy over the other, but they should be adequately balanced;
- 6) combating climate changes with instruments such as emissions trading with interferences aimed at rendering the prices of carbon emission allow-

⁵⁵ Traditionally it is considered that relations between those two spheres of activity of the EU are complicated and troublesome. See B. Barton et al., ‘Energy Security in the Twenty-First Century’, *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment*, eds. Barry Barton et al., Oxford University Press, 2004, p. 470.

⁵⁶ T. Lauriol, ‘Energy Law in France’, *Energy Law in Europe. National, EU and International Regulation*, eds. Martha Roggenkamp et al., Oxford University Press, 2007, p. 617.

ances high not only does not have any significant impact on the climate (especially bearing in mind the modest role of the EU in global anthropogenic emissions of greenhouse gases), but is also costly and cumbersome for the EU economy and its competitiveness; it is not justified either in terms of environmental or economic effectiveness;

- 7) including the energy sector in the scope of application of emissions trading undermines the energy security by contributing to rising energy prices which – apart from endangering the energy security– further boost up the widespread inflation;
- 8) array of measures introduced in order to reduce emissions of greenhouse gases should not be contradictory, as it is at present with the “unhappy marriage”⁵⁷ between emissions trading on the one hand, and promotion of renewable energy and increasing energy efficiency on the other hand, because such contradiction further undermines the environmental and economic effectiveness of the “climate policy” of the EU.

Bearing in mind the aforementioned could allow for reconciling the apparently contravening concerns of the EU energy policy by striking the right balance between them and employing measures which, while contributing to achievement of one goal of the energy policy, do not act to the detriment of another one. In the context of energy security – environmental protection dilemma it would be worth considering focusing on improvement of energy efficiency (rightfully perceived as one of energy sources⁵⁸) and pursuing the solutions aimed at changing the model of the linear economy to a circular one (i.e. the economy where “the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimized”⁵⁹). That would be a chance to nip in the bud environmental problems like pollution, biodiversity loss, depletion of the ozone layer, acid rains, soil degradation, climate changes etc., and not only try to act when they are in full blossom, which entails inevitably the reduced degree of effectiveness of such efforts. Such actions would reflect better the principles of prevention and proximity (rectification of environmental problems at its source). We hope

⁵⁷ As J.B. Skjærseth pointed out, “climate and energy policy instruments intended to be mutually reinforcing have developed into a relationship characterized by conflict, caused mainly by a combination of the economic crisis and institutional design: the unhappy marriage between the EU ETS and policies to promote renewables, energy efficiency and access to external CDM credits. The resultant low carbon price undermines funding for CCS, renewables and other low-carbon solutions” – J.B. Skjærseth, ‘Linking EU climate and energy policies: policy-making, implementation and reform’, *International Environmental Agreements: Politics, Law and Economics*, vol. 16, 2016, p. 521.

⁵⁸ B.N. Stram, ‘Key challenges to expanding renewable energy’, *Energy Policy*, issue 96, 2016, p. 728.

⁵⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 02 December 2015 – *Closing the loop – An EU action plan for the Circular Economy* (COM(2015)0614 final), p. 2.

that the aforementioned proposal would be a starting point for discussion, because especially nowadays, in times of various crises and troubles, reconciliation of energy security and environmental protection is a matter of utmost importance. It should be rethought carefully.

We perceive the energy solidarity as a notion separate from the green transformation.

As regards social and fundamental rights dimension, the energy solidarity is related to counteracting the energy poverty (protection of vulnerable energy recipients). However, such protection⁶⁰ does not, in our opinion, amount to a specific “right to energy.”

Question 4

In considering the relationship between environmental and economic objectives, it is worth starting with an introductory note on the development of EU legislation, in which environmental values play an increasingly important role. As a result of the European Commission's numerous policy acts, which increasingly emphasise environmental and climate values, appropriate legal changes have been made in line with the pro-environmental and pro-climate legislative orientation. The national legal system is therefore permeated by the need to find a new balance between environmental and economic objectives.

In the case of Polish law, in addition to the principle of solidarity described above, the Constitution also protects the environment and guarantees the functioning of the State in accordance with the principle of sustainable development. Undoubtedly, environmental protection measures and the legal origins of the principle of sustainable development can be found in United Nations law. The Convention on Climate Change,⁶¹ the Convention on Biological Diversity⁶² and the Convention to Combat Desertification⁶³ are just a few examples. At the same time, as a result of the cyclical climate summits of the UN (as the supreme authority of the above-mentioned Convention on Climate Change) since 1995, a number of multilateral agreements on environmental and climate protection have been concluded. The provisions of the aforemen-

⁶⁰ See answer to Question 4, Section II for its analysis.

⁶¹ United Nations Framework Convention on Climate Change, done in New York on 9 May 1992 (Journal of Laws of 1992, No. 53, item 238).

⁶² Convention on Biological Diversity, done in Rio de Janeiro on 5 June 1992. (Journal of Laws of 2002 No. 184 item 1532).

⁶³ United Nations Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly those in Africa, done in Paris on 17 June 1994 (Journal of Laws of 2002 No. 185 item 1538).

tioned international law obligations have been incorporated into national legal systems and, since all UN Member States are also EU Member States, EU legislation is also bound by these legal regulations. Also of great importance is the 2030 Agenda for Sustainable Development,⁶⁴ in which the UN has set 17 Sustainable Development Goals to which Member States have committed themselves and which they will achieve by implementing appropriate measures in accordance with national circumstances. It is worth noting that climate, environment and energy are particularly important among the Sustainable Development Goals. Returning to the analysis of the relationship between environmental and economic objectives under the Polish Constitution, it is important to place the principles of environmental protection and sustainable development within the same norm. In the literature it is pointed out that the protection of the environment as expressed in the Constitution should be understood in a broad sense, taking into account all its elements and the principle of sustainable development, which is well established in international policy and law. It is argued that the principle of sustainable development goes beyond issues strictly related to environmental protection and also covers, *inter alia*, infrastructure development and spatial planning.⁶⁵ The constitutional norm of environmental protection is considered a programme-setting/guideline norm, which obliges public authorities to apply this principle in their actions within the limits of their competence.⁶⁶ Environmental protection is a public objective, a constitutional principle and an obligation for everyone to care for the environment.⁶⁷ It is important to note that there are those who argue that the principle of sustainable development is conciliatory in nature, seeking a balance between different legally protected values, especially when they are in natural conflict.⁶⁸ Such a conflict exists between the simultaneous pursuit of economic growth and the intensification of environmental protection measures. Indeed, the Constitution recognises that a social market economy based on freedom of economic activity is the basis of the Polish economic system. The constitutional principle of the freedom of economic activity means that the freedom to conduct economic activity is a public subjective right, including the right to start and conduct economic activity, to choose the legal and organisational form of operation, to freely make economic decisions and the right to terminate economic activity. The constitutional legislature has

⁶⁴ UN General Assembly resolution of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development.

⁶⁵ P. Tuleja, in: P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radzewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej*. Komentarz, wyd. II, Warszawa 2023, Article 5.

⁶⁶ P. Sarnecki, in: *Konstytucja Rzeczypospolitej Polskiej*. Komentarz. Tom I, wyd. II, eds. L. Garlicki, M. Zubik, Warszawa 2016, Article 5.

⁶⁷ *Ibidem*.

⁶⁸ B. Rakoczy, 'Elastyczność zasady zrównoważonego rozwoju w kontekście adaptacji do zmian klimatu', *Gdańskie Studia Prawnicze* 2021, No. 3, p. 23, <https://sip.lex.pl/#/publication/151424987/rakoczy-bartosz-elastycznosc-zasady-zrownowazonego-rozwoju-w-kontekscie-adaptacji-do-zmian-klimatu?cm=URELATIONS>

defined the scope and limits of the freedom of economic operators and the interference of public authorities. Consequently, measures that interfere with the free market character of economic activity (e.g. monopolistic operation of an enterprise or the granting of public aid) may be applied only in exceptional cases and on the basis of detailed rules. At the same time, it should be noted that the constitutional legislature did not define the social market economy and that the meaning of the term will evolve according to changing economic and social conditions.⁶⁹ At the constitutional level, therefore, there is no axis of conflict between environmental and economic values. In practice, the predominantly profit-oriented nature of economic activity marginalises or completely prevents the achievement of environmental objectives.

The energy sector is characterised by a special relationship between environmental and economic objectives. The energy market, which is mainly based on fossil fuels, has an impact on the environment. In fact, the emission-related nature of energy operations based on the exploitation of natural resources has been the reason for the adoption of regulations defining the principles of rationing activities in this sector or imposing the obligation to carry out an environmental impact assessment of such energy projects. However, regardless of whether the energy source is fossil or renewable, the energy sector involves disputes due to tensions between environmental and economic objectives. Selected examples of such cases are presented below:

- **[Turów lignite mine]** The Turów lignite mine is operated by PGE Górnictwo i Energetyka Konwencjonalna S.A. (hereafter 'PGE GiEK'). As the mine is located in the Polish-Czech-German border area, open-cast mining has a cross-border environmental impact. Since 2016, trilateral talks have been taking place to reduce the negative impacts of the mine. On 3 February 2022, a Polish-Czech intergovernmental agreement⁷⁰ was signed on cooperation in the field of, among other things, strengthening environmental monitoring of the mine, building an earth embankment to reduce noise, light and air pollution, and building a groundwater protection barrier. At the same time, in 2019, PGE GiEK applied for a six-year extension of the mining licence, which was valid until 30 April 2020. In 2020, the competent Regional Director for Environmental Protection in Wrocław (hereafter 'Regional Director') issued an environmental decision for the mine, which became immediately enforceable. Environmental NGOs appealed the decision. The Minister of Climate and the Environment (hereafter 'Minister') subsequently granted

⁶⁹ P. Tuleja, in: P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radzewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wyd. II, Warszawa 2023, Article 20.

⁷⁰ Agreement between the Government of the Republic of Poland and the Government of the Czech Republic on cooperation in dealing with the effects on the territory of the Czech Republic of the operation of the Turów open-cast lignite mine in the Republic of Poland, signed in Prague on 3 February 2022 (Official Journal of the Government of the Republic of Poland M.P. of 2022, item 276).

the Turów mine a mining licence until 2026. In 2021, the Court of Justice of the European Union (hereafter ‘CJEU’) issued two rulings on the case; the first order⁷¹ to immediately cease coal mining at the Turów mine and the second order⁷² requiring Poland to pay the European Commission a penalty payment of EUR 500,000 per day from the date of notification of the order to the Republic of Poland until that Member State complies with the former order. In 2022, the Chief Director for Environmental Protection (hereafter ‘Chief Director’) issued an environmental decision for the Turów mine. As a result, the aforementioned environmental organisations filed an appeal with the Provincial Administrative Court in Warsaw (hereafter ‘PAC in Warsaw’). In 2023, the Minister issued a decision on the extension of the licence to conduct mining activities at the Turów mine. In turn, the PAC in Warsaw, in its judgment of March 2024, overturned the environmental decision⁷³ and decided to suspend the implementation of the environmental decision issued by the Chief Director.⁷⁴ Subsequently, the Supreme Administrative Court (hereafter ‘SAC’) overturned the decision of the PAC in Warsaw to suspend the implementation of the Chief Director’s environmental decision.⁷⁵ In 2024, the PAC in Warsaw overturned the appealed environmental decision issued by the Chief Director.⁷⁶ Subsequently, PGE GiEK filed a last resort appeal to the SAC.

The trigger for the Czech Republic’s bringing an action to the Court was Poland’s violation of EU law, that is, issuing the administrative decisions necessary for the project to proceed in disregard of the obligations under the previously concluded Polish-Czech intergovernmental agreement. For their part, the NGOs that appealed the environmental decision claimed, *inter alia*, that the provisions of the above-mentioned Polish-Czech intergovernmental agreement had not been taken into account, including the obligation to construct an earth embankment and a water protection barrier, and that the measures taken to minimise the project’s environmental impact were ineffective in the light of surveillance information. The PAC in Warsaw, in a judgement overturning the environmental decision, found that the scope of the Chief Director’s investigation procedure when issuing the environmental decision was limited and that the decision did not take into account the provisions of the Polish-Czech intergovernmental agreement.

⁷¹ Order of the Vice-President of the Court of 21 May 2021 (C-121/21).

⁷² Order of the Vice-President of the Court of 20 September 2021 (C-121/21).

⁷³ Judgment of the Provincial Administrative Court in Warsaw of 13 March 2024, Case No. IV SA/Wa 654/23.

⁷⁴ Decision of the Provincial Administrative Court in Warsaw of 31 May 2023, Case No. IV SA/Wa 654/23.

⁷⁵ Decision of the Supreme Administrative Court of 18 July 2023, Case No. III OZ 331/23.

⁷⁶ Judgment of the Provincial Administrative Court of 13 March 2024, Case No. IV SA/Wa 654/23.

In the context of the above, it is relevant to this analysis that the Turów mine is responsible for 7–8% of Poland's electricity production, covering the electricity needs of approximately 3.7 million households. It is also the only source of heat energy for the town and commune of Bogatynia. At the same time, in the Zgorzelec district, which includes the town of Bogatynia, ZKlaster currently produces 100 MW of electricity from renewable energy sources (20 times less than the Turów mine). At present, it is not possible to meet the demand for electricity from renewable energy sources (RES) in the same way. This does not mean that economic objectives take precedence over environmental ones, but rather that it is currently impossible to close this mine in favour of renewable capacity. However, the rapidly increasing number of new “green” generation capacities will change the situation in this respect. The case of the Turów mine shows that, beyond the issues of legal error that led to the dispute, climate and environmental objectives cannot be achieved in a way that compromises energy security.

- [onshore wind energy] A further example that illustrates the complexity of the barriers to achieving environmental objectives in the energy sector is the *status quo* of onshore wind energy in Poland. This does not concern a specific, single case decided by the Court, but a number of factors that limit the development of onshore wind energy in Poland. Firstly, one of the obstacles is the low level of acceptance of wind energy projects by local communities. The main concerns are the shadow cast by the blades, the disruption to the landscape and the negative impact on birds and bats. At the same time, it should be noted that public awareness of the impact of wind energy on the environment and human life is changing, and the latest public opinion polls show 85% support for the development of onshore wind energy in Poland and 75% support in the place of residence.⁷⁷ Secondly, a specific law was adopted that set the minimum distance of a wind turbine from the nearest residential buildings at ten times the height of the turbine, including the blade at its highest point (the so-called 10H rule). The adoption of this rule limited the planning powers of municipalities. The practical effect of this rule was to exclude approximately 75% of wind farm projects.⁷⁸ The revised rule, which was not adopted until 2023 and allows municipalities to set a minimum distance of 700 metres, has not significantly contributed to an increase in wind energy projects, as it is estimated to

⁷⁷ Cf. Ministry of Climate and Environment, *Jednotematyczne badanie świadomości i zachowań ekologicznych mieszkańców Polski – energia wiatrowa – lądowa i morska*, 2020, <https://www.gov.pl/attachment/52646388-6f36-4850-8984-08108bb33838>

⁷⁸ United Nations, *Global Compact Network Poland, Energetyka wiatrowa na lądzie – założenia, reformy i propozycja ustawy*, Warszawa 2021, pp. 36–39, <https://ungc.org.pl/raport-energetyka-wiatrowa-na-ladzie-zalozenia-reformy-i-propozycja-ustawy/>

reduce the areas eligible for wind farm siting by 50%.⁷⁹ It should be noted that, in accordance with the ordinance that identifies projects that always have a significant impact on the environment and therefore always require an environmental impact assessment and are subject to the obligation to apply for a decision on environmental conditions, wind farm projects are subject to the said obligations.⁸⁰ A number of environmental factors are therefore currently being considered, including ensuring the participation of the local community in public consultations. The entire administrative process for the implementation of wind farm projects is undoubtedly a lengthy one, taking up to several years. Investors therefore seek to have individual administrative decisions declared immediately enforceable. The current Polish administrative procedure allows the use of this legal instrument only in strictly defined circumstances, such as: protection of human health or life, protection of the national economy against serious losses, other social interests or exceptionally important interests of a party.⁸¹ In practice, public authorities do not see the urgent need to develop renewable energy projects in the light of international and EU commitments. There is no conviction that wind farms are needed now rather than in the long term, given the escalating negative effects of climate change or the rising prices of fossil fuels. In the case of wind farm projects, environmental and economic objectives could be achieved simultaneously through the phasing out of fossil fuels and the consequent reduction in greenhouse gas emissions, as well as a reduction in energy prices due to the variety of models for trading renewable energy and public levies flowing into the municipal budget, for example from land lease or electricity generation. An amendment to the act on the minimum distance of wind turbines from the nearest buildings is currently being drafted, proposing to replace the so-called 10H rule with 500 m. This distance is accepted by scientists,⁸² and is considered by industry experts as “unblocking” the majority of wind projects.⁸³ However, it is questionable whether a “rigid” distance regulation is necessary and justified, or whether local authorities should decide on the implementation of wind energy projects according to local environmental, energy and social conditions.

⁷⁹ Polskie Stowarzyszenie Energetyki Wiatrowej, *Energetyka wiatrowa w Polsce*, Warszawa 2023, pp. 9–11, https://www.psew.pl/wp-content/uploads/2023/12/Energetyka-wiatrowa-w-Polsce_2023_internet-1.pdf

⁸⁰ §2(1)(5) of the Ordinance of the Council of Ministers of 10 September 2019 on projects likely to have a significant impact on the environment (Journal of Laws 2019, item 1839, as amended).

⁸¹ Article 108 §1 of the Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws 2024, item 572).

⁸² Polska Akademia Nauk, *Elektrownie wiatrowe w środowisku człowieka*, Warszawa 2022, <https://pan.pl/komitet-inzynierii-srodowiska-pan-elektrownie-wiatrowe-sa-bezpieczne-dla-zdrowia/>

⁸³ Cf. Polskie Stowarzyszenie Energetyki Wiatrowej, *5 zasad dobrej ustawy dla wiatraków*, <https://www.psew.pl/nowe-otwarcie-energetyki-wiatrowej-5-zasad-dobrej-ustawy-dla-wiatrakow/>

Question 5

In order to answer the question of the negative impact of EU energy policy on the interests of individual Member States and to show how the principles of solidarity and proportionality can be balanced, it seems appropriate to first explain the meaning of the principle of proportionality (the principle of solidarity has been discussed in detail above). This will then be related to EU and national energy policy acts.

The principle of proportionality is a principle enshrined in both EU primary law and the Polish Constitution. Starting with treaty law, Article 5(4) TEU states that “under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.” The literature argues that: (i) the principle of proportionality applies to all areas of EU competence (both exclusive and non-exclusive); (ii) it covers both the activities of the EU and those of the Member States; and (iii) it requires that an EU measure does not impose unnecessary burdens on a Member State or individuals – if there is a choice between measures that are suitable for achieving a given objective, the least restrictive measures should be chosen.⁸⁴ In the Polish Constitution, the principle of proportionality refers to the extent of permissible interference with constitutional rights and freedoms. In accordance with Article 31(3) of the Constitution “any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.” The principle of proportionality is seen as a limiting provision and a conflict rule for resolving conflicts between individual constitutional freedoms. The principle of proportionality comprises three specific principles: (i) the principle of suitability – the limitation of constitutional rights is permissible only by the use of legal means which can achieve the objective justifying the limitation; (ii) the principle of the least restrictive measure (the principle of necessity), which requires that where there are several possible ways of limiting a given constitutional right for a constitutionally justified purpose, the least burdensome measure should be chosen; and (iii) the principle of proportionality *sensu stricto*, which consists in weighing two or more conflicting principles and indicating which of them takes precedence in given factual and legal circumstances.⁸⁵

⁸⁴ R. Grzeszczak, in: *Traktat o Unii Europejskiej. Komentarz*, ed. D. Kornobis-Romanowska, Warszawa 2023, Article 5.

⁸⁵ P. Tuleja, in: P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziejewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wyd. II, Warszawa 2023, Article 31.

Therefore, the principle of proportionality means seeking a balance between the public burdens imposed. It is therefore crucial in the energy sector, where the public interest must be balanced against individual interests, and where the ability to maintain energy security is closely linked to the cooperation of countries in joint trans-European energy projects.

Applying this to EU energy policy, EU energy policies form a system of soft law acts of varying scope and effectiveness. The fundamental EU energy policy is the Energy Union Framework Strategy.⁸⁶ This strategy defines five areas of the Energy Union aimed at achieving energy security, stability and competitiveness: (i) energy security, solidarity and trust; (ii) a fully integrated European energy market; (iii) energy efficiency contributing to moderation of demand; (iv) decarbonising the economy; and (v) research, innovation and competitiveness. *Solidarity*, as understood in this strategy, is linked to the simultaneous pursuit of security and competitiveness. *Energy solidarity* refers to the general principle of *solidarity* enshrined in the treaties and implies strengthening the integration of Member States in the energy market in case of emergencies in the energy supply chains. It requires cooperation for the purpose of maintaining energy security, which is in the common interest, and the development of the internal energy market to reduce dependence on fuel and energy imports. It is explicitly stated that “The spirit of solidarity in energy matters is explicitly mentioned in the Treaty and is at the heart of the Energy Union.” A strategy adopted in the form of a communication is not a legally binding act, but should be classified as an innominate (*sui generis*) act, which, although not binding, must comply with primary law.⁸⁷ Often, such acts are issued because the EU institution concerned does not have the competence to issue a binding act of secondary legislation, or because the EU legislature fails to reach a consensus on the adoption of a legal regulation in a given area, in which case the innominate act fulfils a so-called pre-law role⁸⁸ with regard to future law. Therefore, energy solidarity expressed in the Energy Union Framework Strategy (EU Communication), in which this principle has a direct reference to the treaties, should be treated as an extension of the treaty principle of solidarity.

It is worth noting that the Strategy states that its successful implementation depends on the political commitment of all actors concerned (EU institutions, Member States, the European Investment Bank and other stakeholders at all

⁸⁶ Energy Union Package, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, 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).

⁸⁷ M. Cesarz, ‘Porządek prawny Unii Europejskiej’, in: *Procesy integracyjne i dezintegracyjne w Europie*, eds. A. Paczeński, M. Klimowicz, Wrocław 2014, p. 192.

⁸⁸ M. Pietrzyk, ‘Soft law i hard law w europejskim prawie administracyjnym: relacja alternatywy, uzupełnienia, wykluczenia oraz przejścia’, in: *Administracja publiczna wobec wyzwań i oczekiwań społecznych*, eds. M. Giełda, R. Raszewska-Skałicka, Wrocław 2015, pp. 139–140.

levels), in line with the principles of subsidiarity and proportionality. Therefore, energy investments made by the EU as a whole or by Member States must not jeopardise the energy security of any Member State. The interdependence between the principles of solidarity and proportionality is twofold. First, a joint EU energy project may require changes in the national energy system to the extent necessary to achieve common objectives, with the limits of this intervention being determined by the ability to ensure energy security. Second, an energy project undertaken by a Member State or a group of Member States must not jeopardise the energy security of another Member State or of the EU as a whole.

The REPowerEU⁸⁹ plan is another (and not the last on the list) EU energy strategy based on the value of energy solidarity. Released in a situation where the internal energy market was threatened by the Russian Federation's aggression against Ukraine, the plan proposed measures based on the value of energy solidarity. It was explicitly stated that solidarity is a defining principle of the European Green Deal,⁹⁰ another EU communication that sets out an overall vision for transforming the EU economy into a climate neutral one. According to the literature, the value of solidarity is presented as an independent legal existence with its own mechanisms of action and political objectives.⁹¹ Energy solidarity is a value (concept) based on cooperation, on Member States supporting each other within the EU to ensure access to energy, energy security and energy crisis management.⁹² The above-mentioned Communications do not specify that solidarity is energy-related, but refer to the treaty principle of solidarity and apply it to the energy sector as part of the internal market, which operates according to the principle of solidarity.

At the same time, it should be noted that EU policies aimed at developing renewable energy sources (through the market model and the public aid system) may also affect the right of Member States to determine their own energy mix. In this respect, the principles of proportionality and solidarity may potentially conflict, hence the importance of balancing these three values.

⁸⁹ 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 – REPowerEU Plan (COM/2022/230 final).

⁹⁰ Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions – The European Green Deal (COM/2019/640 final)

⁹¹ R. Zajdler, 'Synergia czy antagonizm – wpływ sprawiedliwej transformacji i solidarności energetycznej na przeciwdziałanie negatywnym zmianom klimatu', in: *Współczesne wyzwania prawa ochrony klimatu*, eds. A. Barczak, M. M. Kenig-Witkowska, M. Stoczkiewicz, Warszawa 2024.

⁹² R. Zajdler, 'Solidarność energetyczna Unii Europejskiej w kontekście przeciwdziałania zmianom klimatu', in: *Współczesne wyzwania prawa ochrony klimatu*, eds. A. Barczak, M. M. Kenig-Witkowska, M. Stoczkiewicz, Warszawa 2024.

Question 6

The fact that the energy policy falls within the sphere of competences shared between the Member States and the EU obviously does not deprive the EU of the right to take actions. Actually, in the light of Article 2(2) TFEU, Member States may take actions in this area only to the extent that the Union has not exercised or has decided to cease to exercise its competences. Therefore, there is a rebuttable presumption of occupied field in favour of the EU, not the Member States. This alone indicates the EU as the leader of the energy policy.

It should be emphasised that the European Union law in the field of energy is, at least to a significant extent, an expression of the conclusion that due to mutual interdependencies, ensuring energy security by individual Member States acting separately is, in a vast majority of instances, not viable. Therefore, cooperative angle of the energy policy gains crucial importance. As already mentioned, one of weighty facets of the concept of energy solidarity is based on cooperation of the EU and the Member States in order to achieve common goals (one of such common goals of the EU energy policy is the security of supplies), and another one – on mutual support if a Member State is (some Member States are) in jeopardy as regards ensuring continuity of supplies. Co-operation takes place, first of all, *pro foro interno*, which involves the adoption of an appropriate set of legal regulations to ensure the proper functioning of the internal energy market, including guaranteeing effective mechanisms in situations of various types of energy crises. However, this cooperation also has a *pro foro externo* dimension, which involves conducting a common policy towards third countries, mostly acting as suppliers of energy carriers. Energy solidarity conforms and contributes to the reinforced role of the EU in the energy policy. But the increasingly greater role of the EU in performing the energy policy stems predominantly from factual circumstances. These are obstacles jeopardizing the energy security, which often originate from factors outside of control of Member States, but sometimes also from actions of some Member States that could have detrimental effects on the level of energy security of other Member States. And, as already mentioned, the energy security referred to in Article 194(1) TFEU should be construed as comprising states of energy security of all Member States and of the EU as a whole.

The growing importance of energy security in the European Union's energy policy is part of a general trend in which it is increasingly becoming an entity in which political issues play an important role from a regional organisation of a purely economic nature. The advantage of such a situation is undoubtedly the fact that, as a regional integration organisation, the European Union has a much greater potential, compared to individual Member States acting independently, to guarantee energy security.

The external dimension of the EU energy policy includes not only the classically understood energy security (i.e. continuity of energy supplies and its carriers), but also regulations regarding the functioning of the intra-EU energy market (related to a specific definitional aspect of the energy security, that is, ensuring a liberalised and competitive energy market), as well as environmental protection in the energy sector (related to the complementary definitional element of energy security).⁹³ In the light of the failures in striving to export EU legislative solutions⁹⁴ in the field of energy market regulation by their voluntary incorporation into the legal orders of third countries (exemplified by Russia's refusal to ratify the Energy Charter Treaty and recent termination of the treaty in question by the EU), the European Union is currently forcing adaptation to the rules it is introducing, in particular with regard to the issue of market liberalisation (an example may be the mechanism for certification of system operators transmission from third countries or developing a common position with regard to energy contracts by introducing a mechanism of their transparency). The carrot is increasingly often replaced by a stick. It is also noticeable when it comes to environmental protection (for instance in the example of Carbon Border Adjustment Mechanism⁹⁵).

However, a full shift of the privilege and burden of leading the energy policy to the EU obviously cannot be made due to the legally prescribed nature of the energy policy as an area of shared competence, but also due to the fact that the energy policy is a very sensitive sphere for sovereignty of Member States.⁹⁶ Energy and its carriers are indispensable commodities for functioning of societies and states, with strategic importance. It is reflected in the wording of Article 194(2) TFEU, by virtue of which measures adopted within the framework of the EU energy policy "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)." It is hard to strike the right balance here, the more that relationship between Article 194(2) and Article 192(2)(c) are not fully clear.⁹⁷

⁹³ See answer to Question 7, Section I for further analysis.

⁹⁴ See R. Riedel, 'Supranationalisation of Energy Security in Europe. Theoretical Approaches', Centrum Europejskie Natolin, 2010, *passim*.

⁹⁵ See Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (OJ L 130, 16.5.2023, pp. 52–104).

⁹⁶ See answer to Question 8, Section II for further analysis.

⁹⁷ See *ibid*.

Question 7

It should be pointed out that the EU law, apart from using the concept of energy security without defining it, also presents definitions specific to individual elements of the energy sector, which are characterized by a significant degree of detail, but for this reason they are of limited usefulness for the purposes of considerations concerning a broader context. For instance, the Regulation 2019/941,⁹⁸ pertaining to risk-preparedness in the electricity sector, defines “security of electricity supply” as “the ability of an electricity system to guarantee the supply of electricity to customers with a clearly established level of performance, as determined by the Member States concerned” (Article 2 point 1). The Electricity Directive⁹⁹ perceives security as “both security of supply and provision of electricity, and technical safety” (Article 1 point 58). Interestingly, there is no definition of security, energy security or gas security in the latest Gas Directive.¹⁰⁰ However, the Regulation 2017/1938 in its Article 2 point 1 expressly makes a reference to the definition of the notion of security included in point 32 of Article 2 of the already repealed Directive 2009/73/EC,¹⁰¹ by virtue of which security should be deemed as “both security of supply of natural gas and technical safety.” The usefulness of the quoted fragmentary definitions is therefore limited to a precisely determined context; these definitions can only help in identifying some out of many factors affecting the state of energy security.

However, in the aforementioned definitions we may notice the element of the *technical safety* which draws the attention to the EU provisions related to protection of critical infrastructure (including the already mentioned Regulation 2019/941, but also, without limitation, Directive 2022/2557,¹⁰² concerning resilience of critical entities). Technical safety is a factor seriously affecting security of supplies of energy and its carriers; *de lege lata*, bearing in mind the legal definitions invoked hereinabove, it is a separate element of the energy security; however, in our opinion it should rather be perceived as an important aspect of security of supplies.

⁹⁸ 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).

⁹⁹ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) (OJ L 158, 14.06.2019, pp. 125–199, as amended).

¹⁰⁰ Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast) (OJ L, 2024/1788, 15.07.2024).

¹⁰¹ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.08.2009, pp. 94–136), repealed by the Directive 2024/1788.

¹⁰² Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC (OJ L 333, 27.12.2022, pp. 164–198).

As regards the current resilience and risk preparedness at the Union's level and in Poland, there is always an area for possible improvement, but frankly speaking we do not think it is possible to shape and implement the law in such a manner that would allow for avoiding and counteracting any incidents undermining technical safety of the infrastructure and cybersecurity with an absolute certainty. The Council Recommendation on a Blueprint to coordinate a response at Union level to disruptions of critical infrastructure with significant cross-border relevance¹⁰³ marks a similar thought. Both at the level of the EU and in Poland we may notice further reinforcement of protection of critical infrastructure in response to current incidents. Furthermore, as pointed out by researchers, while the initial focus of the protection of critical infrastructure was on terrorism as a major source of risks of disruptions, it has been extended to an all-hazards approach.¹⁰⁴

In general, we think it is justified to identify the three-element structure of energy security, which would consist of: 1) guaranteeing continuity of supplies (classic definitional element, including also technical safety of the infrastructure); 2) ensuring a liberalised and competitive energy market with affordable prices (specific definitional element); 3) compliance with requirements of environmental protection (complementary definitional element). Energy security can therefore be defined as an optimal state characterised by the joint implementation of all the above elements, which is influenced by both factual circumstances (including, for example, the geopolitical situation) and legal factors (the shape of the relevant regulations). Therefore, national legal and factual circumstance will have an impact on the level of energy security of a given Member State, but not on its definition. Certainly, the energy security should be deemed to have a broader range than the notion of security of supplies.

The differentiated components of energy security, which largely overlap conceptually with the fundamental aspects distinguished within the EU energy policy, are *de lege lata* equiponderant in the sense that it is not possible to assign, in an abstract and *a priori* manner, absolute primacy to any of them. Any conflicts between these elements should be resolved taking into account the factual and legal circumstances of a given case, by balancing, not by abandoning the implementation of any of them. As a *de lege ferenda* postulate, it seems reasonable to point out that nowadays greater emphasis than before should be put on security of supply, which can be justified by referring to the significant difficulties in ensuring it in increasingly frequent crisis situations.

¹⁰³ Council Recommendation of 17 June 2024 on a Blueprint to coordinate a response at Union level to disruptions of critical infrastructure with significant cross-border relevance (10653/24).

¹⁰⁴ D. Rübhelke, S. Vögele, 'Impacts of climate change on European critical infrastructures: The case of the power sector', *Environmental Science & Policy*, vol. 14, issue 1, 2011, p. 54.

In Polish Energy Law the energy security is defined as the state of the economy allowing for meeting the current and prospective demand for fuels and energy in a technically and economically justified manner, while maintaining environmental protection requirements (Article 3 point 16). There is also a separate notion of the security of electricity supply – with the definition identifying such security with the ability of the power system to ensure the security of operation of the power grid and to balance the supply of electricity with the demand for this energy (Article 3 point 16a). In addition, Polish legislator differentiates security of operation of the power grid as the uninterrupted operation of the power grid, as well as fulfilling the requirements regarding the quality parameters of electricity and quality standards of customer service, including permissible interruptions in the supply of electricity to end users, under predictable operating conditions of that network (Article 3 point 16a). Those definitions also suggest that the range of energy security is not limited to the security (continuity) of supplies, but incorporates in particular the technical and environmental aspects.

Similar broad construction of the energy security was presented by Polish Constitutional Tribunal,¹⁰⁵ in a ruling issued as a result of the Tribunal's examination of the constitutionality of the provisions of Polish Energy Law imposing an obligation on certain energy companies to purchase energy and heat from renewable sources. The Tribunal *obiter dicta* stated that the duty of public authorities is to ensure the energy security of the country, and therefore to strive to meet both existing and anticipated energy needs in the conditions specified in Article 74(1) of Polish Constitution, thus taking into account the ecological safety of current and future generations. The implementation of this obligation justifies subjecting the energy market to restrictions on the freedom of economic activity typical of a regulated market and based on Article 31(3) of Polish Constitution, by virtue of which the freedom of economic activity in may be limited in particular for reasons of public safety and environmental protection, these restrictions may only be established by statute and only when they are necessary in a democratic state, but they must not violate the essence of freedom and rights. It should be emphasised that when creating the working definition of energy security, the Constitutional Tribunal was guided by the way of defining the principle of sustainable development. Although constructing an unquestionable and fully complete definition of this principle is difficult, its indispensable element is generally considered to be, apart from the mechanism of balancing the development needs with requirements of environmental protection, the aim to meet both the present and future needs (intergenerational equity).

¹⁰⁵ Judgment of the Constitutional Tribunal of 25 July 2006, case reference number P 24/05.

Question 8

Energy solidarity conforms and contributes to the reinforced role of the EU in the energy policy, also in its external aspect.¹⁰⁶ An exemplary legal instrument embodying such trend is the regulation enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders.¹⁰⁷ The interplay of the principle of energy solidarity and the goal of ensuring energy security entails increased role of the EU in relations with third countries (and energy enterprises from third states) pertaining to supply of energy and its carriers. It is applicable not only in the context of measures directly related to security of supplies, but also the ones in connection with market liberalisation (proceedings instituted by the European Commission against Gazprom may be a good example in case of the latter aspect).

As far as projects of common interests are concerned, formally this is the matter of a separate policy of the EU, devoted to trans-European networks. Although energy solidarity is enshrined in Article 194(1) TFEU, placed within the title devoted to the energy policy, solidarity should play an important role also within the framework of construction of trans-European energy infrastructure.¹⁰⁸

Question 9

The aforementioned Energy Union Strategy identifies five key dimensions of the Energy Union, including energy security. This strategy is implemented by Regulation 2018/1999 on the Governance of the Energy Union, which introduces governance measures in these five key areas of the Energy Union. One such measure is the integrated national energy and climate plans, in which Member States periodically assess their national capacities to achieve common objectives (Energy Union objectives) and plan actions in this regard. Therefore, and in line with the above considerations, energy policy acts do not have binding force on their own, but are a presentation of substantive law regulations and a means of achieving the obligations adopted or of having the relevant obligations imposed (formulated) in legally binding legal acts. As part of the integrated plans mentioned above, Member States also provide forecasts on security of supply, infrastructure and market integration. In this way, the EU can interact effectively with Member States, being aware of individual national circumstances and thus taking EU-wide action without jeopardising the en-

¹⁰⁶ As described in details in answer to Question 6, Section I.

¹⁰⁷ 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, pp. 1–35.

¹⁰⁸ For the assessment of actual state in this respect see answer to Question 6, Section II.

ergy security of individual countries or, conversely, seeking to enhance energy security without leaving these matters exclusively to the national level, since the EU's energy security is built by all Member States.

The security of the gas market is defined as “both security of supply of natural gas and technical safety.”¹⁰⁹ The revision of the systemic regulations for the natural gas market¹¹⁰ by extending it to include renewable fuels (including hydrogen) has introduced many new regulations in the field of gas security. Currently, gas security in the EU means, among other things, the use of tariffs that allow for the integration of the gas market; the diversification of gas supplies; taking into account the ownership and commercial situation of operators in relation to their gas storage capacity; any other circumstances of the case (this general wording therefore does not exclude heterogeneous geopolitical factors), or the cybersecurity of gas infrastructure. Similarly, the directive, which is part of the so-called systemic regulation of the electricity market, defines security of the electricity market as “both security of supply and provision of electricity, and technical safety.”¹¹¹ In the regulation on measures to be taken in a situation of risk in the electricity sector, the security of electricity supply is defined as “the ability of an electricity system to guarantee the supply of electricity to customers with a clearly established level of performance, as determined by the Member States concerned.”¹¹² In this context, in accordance with applicable law, ensuring energy security means ensuring the continuity of supply and the technical safety of the energy infrastructure. However, the origin of supply and the type of supply source are also important for the ability to supply gas and electricity. Recently adopted EU energy policy documents strongly emphasise the need for diversification, not only in terms of increasing the share of renewable energy sources in the gas and electricity mix, but also in terms of the origin of gas and electricity, which is equally important.

The 2022 energy crisis was not the first crisis in the global energy market, but its dynamics required an urgent response. An energy policy (REPowerEU) was therefore the most effective legal instrument. This not only demonstrates the

¹⁰⁹ Article 2(1) of Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard security of natural gas supply and repealing Regulation (EU) No 994/2010 (OJ EU L of 2017, No 280, as amended).

¹¹⁰ Article 2(58) of 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 (recast) Text with EEA relevance (OJ EU L of 2024, item 1789).

¹¹¹ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ EU L of 2019, No 158, as amended)

¹¹² Article 2(1) of Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC (OJ EU L of 2019, No 158).

multi-level governance of energy security in the relationship between the EU and its Member States, but also means that more institutions within the EU itself are becoming involved in ensuring energy security. The European Commission plays an important role in initiating the adoption of future legislation through policy acts (communications). As there must be coherence between the different policies, the European Commission is responsible for ensuring their consistency. It should also be noted that the European Commission reviews the above-mentioned integrated national energy and climate plans and thus receives information from the Member States not only on the state of development of their national energy systems in relation to the common objectives, but also on the security of these systems. There is therefore a need for cooperation between the EU and its Member States to ensure energy security. Similarly to the EU level, Member States distribute the competences in the field of energy security among: the minister responsible for energy, who monitors the security of supply of gaseous fuels and electricity¹¹³; the President of the Energy Regulatory Office, who performs tasks in the field of security of supply of gaseous fuels and electricity,¹¹⁴ and the energy network operators, who ensure the security of network operation.¹¹⁵ Energy security, as understood by Polish law, is “a condition of the economy which enables meeting the customers’ present and prospective demand for fuels and energy in a technically and economically justifiable manner, with the observance of the environment protection requirements.”¹¹⁶ It therefore requires a horizontal distribution of competences and cooperation between the various entities mentioned above within the limits of their competences.

With regard to the gas market, from the perspective of Polish law, the state’s gas security is “a condition that enables the current and prospective satisfaction of customers’ demand for natural gas, in a certain volume and time, in a technically and economically justifiable manner, to the extent necessary for the proper functioning of the economy.”¹¹⁷ The energy company that trades in gas with foreign countries (GAZ-SYSTEM) maintains mandatory reserves of natural gas.¹¹⁸ The energy company dealing with gas transmission is responsible for grid operation in the transmission system, the long-term operational safety of this system, the operation, maintenance, repair and necessary expansion of the transmission grid, including its connections to other gas systems.¹¹⁹ An energy company dealing with gas distribution is responsible

¹¹³ Article 12(2)(3) Energy Law.

¹¹⁴ Article 23(2)(20)(f) Energy Law.

¹¹⁵ Article 7a(1) item Energy Law.

¹¹⁶ Article 3(16) Energy Law.

¹¹⁷ Article 2(1)(1a) of the Act of 16 February 2007 on stocks of crude oil, petroleum products and natural gas, and on rules of procedure in the event of risks to national fuel security and disruptions on the oil market (Journal of Laws of 2024, item 1281).

¹¹⁸ Article 24(2) of the aforementioned Act.

¹¹⁹ Article 3(24) Energy Law.

for grid operation in the gas distribution system, the ongoing and the long-term operational safety of this system, the operation, maintenance, repair and the necessary expansion of the distribution grid, including its connections to other gas systems.¹²⁰ This is, of course, not an exhaustive list of responsibilities, but a general framework. It should be noted that, according to the so-called EU gas market liberalisation packages, there is an obligation to separate the responsibilities of the individual players in the gas market. Furthermore, the gas and hydrogen package adopted by the EU, which extended the natural gas market to include decarbonised gases, has led to the emergence of new entities operating on the gas market, thus increasing the fragmentation of gas market management. This will lead to the emergence of separate hydrogen and possibly biomethane network operators in the future. The gas infrastructure will consist of networks managed by public and private operators (direct networks). However, this model is an EU concept, developed and jointly created by the Member States. It seems that the diversification of competences in the gas market, due to the decentralisation of the gas market and the dispersion of generation sources, will make gas security management more flexible.

Section II: Energy solidarity, energy security and green transition

Question 1

In our opinion, energy solidarity is not an appropriate tool to achieve climate-related goals. Energy solidarity include:

- 1) the necessity of cooperation to achieve a common goal in the form of guaranteeing energy security (the aspect shared with the principle of loyal and sincere cooperation);
- 2) the need to take into account the interests of other stakeholders, meaning also individual Member States and applicable both to Member States, as well as to the EU (reflection of the general principle of solidarity in the field of energy with some special embodiments like “Gazprom clause”); as well as,
- 3) legal duties related to providing support to Member States in trouble as regards continuity of supplies of energy and its carriers (threatened or actual interruption of supply) – which constitutes an added value brought by the notion of energy solidarity.¹²¹

Although the energy security referred to in the first point should be perceived as comprising also the component of observance of environmental requirements – it is only the complementary aspect of the energy security, and cooperation

¹²⁰ Article 3(25) Energy Law.

¹²¹ As already mentioned in the answer to Question 2, Section I.

to achieve energy security is one out of three elements of the energy solidarity, while no other element involves environmental protection. The focus of the energy solidarity is mainly on ensuring continuity of provision of energy and its carriers for affordable prices (mixture of two components mentioned hereinabove), and not on environmental protection. It would not be possible to identify energy security (defined in any reasonable manner) without seeing to security of supplies. It is hard not to get the impression that the absolutisation of the climate agenda of the EU, with increasingly ambitious and far-reaching goals related to reduction of emissions of greenhouse gases, visible in recent years (changing rather rapidly than gradually¹²²) takes its toll on the level of energy security *sensu stricto* (contained to security of supplies and availability of energy and its carriers for affordable prices), due to reasons elaborated on hereinabove.¹²³

In the context of security of supply, it is hard not to notice that the EU climate agenda favours those energy sources that the EU does not have or has only a little (such as natural gas) or sources the deployment of which is quite cost-intensive and which, for various reasons, including technological ones, are not capable of replacing fossil fuels in the full scope (renewables). At the same time, rising costs of implementing increasingly stringent greenhouse gas emission reduction targets (in particular by emissions trading) clearly translate into increases in energy prices and as such hinder achievement of the energy security goal; this relationship is further strengthened by such moves by the EU legislator as recognizing emission allowances as financial instruments¹²⁴ (which increase the demand for them, thereby increasing their prices) or a drastic reduction in the number of carbon allowances available on the market by freezing them under the market stability reserve mechanism.¹²⁵ Within the framework of declared tasks and pursued legal initiatives under the umbrella of the European Green Deal and “Fit for 55,” we see that the European legislator has not abandoned that path, but follows it even more firmly (extension of the emissions trading to sectors such as construction and transport¹²⁶ and

¹²² It is worth pointing out the following sequence of reduction goals, comprising intended decrease of emissions of greenhouse gases (mainly carbon dioxide) compared to their levels from 1990: by 20% up to 2020, by 40% up to 2030 (declared by the EU for the purpose of the Paris Agreement), then switching to 55% by 2030 and declaring the goal of climate neutrality to be achieved in 2050. Not to mention we are in 2025 now, so the very ambitious goal for 2030 is a short-term one.

¹²³ That is, in answer to Question 2.

¹²⁴ Amendment introduced by the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (OJ L 173, 12.06.2014, pp. 349–496, as amended).

¹²⁵ The mechanism of market stability reserve was introduced by the Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (OJ L 264, 9.10.2015, pp. 1–5, as amended).

¹²⁶ By the Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance

intended removal of gratuitous carbon allowances for sectors prone to carbon leakage due to introduced Carbon Border Adjustment Mechanism¹²⁷ are clear marks of maintaining such approach).

Of course, solidarity in general (not the energy solidarity though) should influence also pursuing the climate agenda of the EU. Here we can identify twofold solidarity which encompasses cooperation to achieve a common goal (climate protection, mainly by significantly reducing emissions of greenhouse gases – at least to required levels) and the need to take into account the interests of other stakeholders (as the judgment of the Court issued in *OPAL* case clearly suggests that aspect lays within the framework of the solidarity in general, and therefore, should be considered not only in case of energy solidarity). The solidarity in case of climate agenda (which we may call “climate solidarity” for simplification purposes) reveals many divergences when juxtaposed to energy solidarity. There are differences like another subject and lack of the third component inherent for the energy solidarity (supporting Member States in trouble) – the latter leads to shifting the burden of the “climate solidarity” to cooperation for the purpose of achievement of a common goal. But “climate solidarity” also has a different external angle originating from the wording of the fourth basic goal of the EU environmental policy set forth in Article 191(1) TFEU, namely “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.” Indeed, the EU is engaged to a great extent in encouraging (or forcing) external stakeholders to adopt and perform increasingly higher greenhouse gas emission reduction targets. It is aimed at reducing possible damages suffered by the Union as a consequence of pursuing an ambitious climate agenda. Scholars¹²⁸ pointing out that solidarity in the field of environmental protection is essentially an egoistic type of solidarity are right then, whereas from our point of view energy solidarity displays a bipolar nature: altruistic – consisting in providing assistance to Member States in trouble as regards continuity of supplies of energy and its carriers and taking into account interests of other stakeholders, and egoistic – in particular entailing mutual cooperation in order to attain a common goal.

trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system (OJ L 130, 16.05.2023, pp. 134–202, as amended).

¹²⁷ See Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (OJ L 130, 16.05.2023, pp. 52–104).

¹²⁸ See H.P. Hestermeyer, ‘Reality or Aspiration? – Solidarity in International Environmental and World Trade Law’, *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum: Volume I*, eds. Holger P. Hestermeyer et al., Martinus Nijhoff Publishers, 2012, pp. 45–63. This author considers solidarity directed in an altruistic way and solidarity directed in an egoistic way on the examples of trade and environmental protection, respectively.

As regards the aspect of cooperation in order to attain a common goal, the shape of “climate solidarity” is influenced – however, to a significantly greater extent at the level of the international law than at the level of the EU law – by the overarching principle of common but differentiated responsibilities, vesting the leadership in climate protection and the heavier burdens related thereto with developed countries. Provisions embodying such principle have been present in international climate agreements (UNFCCC, Kyoto Protocol, Paris Agreement), but not so much in the climate related acts of the EU – in particular as far as the emissions trading is concerned, with uniform prices of carbon allowances irrespective of great differences between economies of the Member States, which clearly put the newer Member States in disadvantageous position with regard to the ones of the “old Union.”

Question 2

Instruments implemented and yet to be implemented under the umbrella of the European Green Deal and “Fit for 55” are inextricably linked to energy issues.¹²⁹ Not only is achieving the two main goals (i.e. climate neutrality and separating economic growth from resource use) of the European Green Deal intrinsically dependent on the mode of energy use, that being complemented by the fact that supplying clean, affordable and secure energy is one of a few main pillars of the strategy in question – but in fact, the functioning of the energy sector in each of its chain links is crucial in terms of the success or failure of those packages. Obviously, this is due in part to the enormous pressure that the energy sector exerts on the environment (in particular as regards greenhouse gases emissions; it is estimated that the production and use of energy across economic sectors accounts for over 75% of the total EU greenhouse gas emissions¹³⁰), but even more because energy is a good of strategic value, which is irreplaceable and indispensable for society and business.

Alas, a closer look at the set of initiatives proposed by the European Commission under that pillar of supplying clean, affordable, and secure energy reveals that, again, the focus is on clean energy, with far less attention devoted to its security and affordability. Also, the traces of solidarity are relatively modest. Both conclusions are justified by the results of the analysis of the three initiatives within the framework of legislation concerning trans-European energy

¹²⁹ For analysis of the relations between the European Green Deal and the energy solidarity see also I. Przybojewska, ‘Energy Solidarity Revisited’, *The European Green Deal and the Impact of Climate Change on the EU Regulatory Framework. Searching for coherence*, eds. Alicja Sikora, Inga Kawka, Presses universitaires Saint-Louis Bruxelles, 2024, pp. 159–163.

¹³⁰ Communication from the Commission - The European Green Deal (COM(2019) 640 final).

infrastructure,¹³¹ energy efficiency,¹³² and renewable energy sources.¹³³ Major emphasis there is on climate protection.

Regulation 2022/869 on guidelines for trans-European energy infrastructure focuses on sustainability as a new criterion, which must be fulfilled by common interest projects, that is, to put it simply, those investment projects that can benefit from EU support under the policy on trans-European networks. Namely, a project is expected to contribute to ensuring climate change mitigation, “in particular by not hindering the capacity of the third country to phase out fossil fuel generation assets for its domestic consumption, and to sustainability, including through the integration of renewable energy into the grid and the transmission and distribution of renewable generation to major consumption centres and storage sites” (Article 4.2(a) of the Regulation).

The Regulation does not provide for further support for oil infrastructure, but above all for traditional infrastructure for the transmission of natural gas (except for a few projects keeping their previous status in accordance with the derogation provided), which is a revolutionary change, given the fact that the latter type of infrastructure has benefited extensively from support under the regulation – although its share in the total number of common interest projects has been gradually decreasing. The act in question does not include any provisions related to the concept of energy solidarity. It is dubious whether it would in fact increase the level of energy security, although some researchers indicate that the European Green Deal “establishes alternative means of energy security, while it reduces the likelihood of crisis onset associated with exposure to the pressures of external geopolitical and economic relations in the international system, thereby contributing to the alleviation of risks related to energy insecurity.”¹³⁴ It is true that shifting to new forms of energy (like hydrogen) may contribute to increased energy security, but the question if and when such forms would be fully able to replace fossil fuels like natural gas (especially as it is not only used for the purpose of energy generation) remains open; the question about the price also remains unanswered.

¹³¹ Regulation (EU) 2022/869 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure, amending Regulations (EC) 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) 347/2013 ([2022] OJ L152/45).

¹³² 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 (recast) (OJ L231/1).

¹³³ Directive (EU) 2023/2413 of the European Parliament and of the Council 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 L2023/2413).

¹³⁴ O. Christou, ‘Energy Security in Turbulent Times Towards the European Green Deal’, *Politics and Governance*, vol. 9, no. 3, 2021, p. 366.

Another idea conceived under the thread of supplying clean, affordable, and secure energy is the modification of the directive on energy efficiency.¹³⁵ Reasons justifying the draft refer to energy efficiency as a remedy for difficulties related to rising energy prices, caused by the growing level of stringency of the European Union Emissions Trading System, also including an anticipated price leap entailed by the intended reform of that instrument. Consolidating energy efficiency through the planned reform of the legal framework is placed in the context of the element of affordable energy prices, and, more precisely, reducing the vulnerability of consumers to increases in energy prices.

The legislation amending the current RES Directive¹³⁶ is focused predominantly on the increase of ambitions related to the EU goal in terms of the share of energy from renewable sources from the currently assumed level of 32% to 42.5% by 2030.

According to some researchers, we have been witnessing a paradigm shift in which, at the top of the triangle, the classically understood energy security (i.e. security of supply) is replaced by considerations of environmental protection.¹³⁷ This reflection corresponds to the ideas and initiatives conveyed under the umbrella of the European Green Deal and “Fit for 55.”

Compared to previous development strategies, it may be noticed that now a very strong emphasis is placed on environmental issues. Consideration of environmental protection (first and foremost: climate protection) are highlighted as being of primary importance, intensively adjusting development aspirations; this direction of the relationship between environmental protection and development is characteristic of a one-sided interpretation of the principle of sustainable development (although in fact the impact of this principle is two-way, because development considerations should also play a corrective role towards requirements of environmental protection; in this context the pursuit of clean energy does not take precedence but should be balanced against other considerations, such as the need to ensure affordable and safe energy). Requirements of environmental protection remained an element of

¹³⁵ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC ([2012], OJ L315/1 as amended) (Energy Efficiency Directive).

¹³⁶ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) ([2018], OJ L328/82, as amended) (RES Directive).

¹³⁷ C. Levoyannis, ‘The EU Green Deal and the Impact of the Future of Gas and Gas Infrastructure in the European Union’, *Aspects of the Energy Union. Application and Effects of European Energy Policies in SE Europe and Eastern Mediterranean*, ed. Michalis Mathioulakis, Palgrave Macmillan, 2021, p. 202.

the narrative of previous development strategies only to a limited extent¹³⁸ and they were rather blunted for the sake of development goals.

In our opinion the current narrative does not sufficiently take into account the fact that EU climate agenda (perceived by the European legislator as by far the most important part of the drive towards clean energy) may adversely affect the other components of the triad of energy security. Changes intended or already adopted within the context of the European Green Deal and “Fit for 55” are aimed primarily at the reinforcement of climate related aspects of clean energy, while issues related to affordable energy and, in particular, secure energy, do not receive a comparable degree of attention. Although outside the umbrella of the European Green Deal and “Fit for 55,” the EU adopts measures to strengthen energy security (with reference to the concept of energy solidarity), that do not limit the far-fetched climate goals of these strategies – which may be an obstacle for properly dealing with the energy crisis, and ensuring the security and affordability of energy and its carriers. Furthermore, the European Green Deal and “Fit for 55” refer to solidarity only to a limited extent, and mainly in a dimension consisting in mutual cooperation in order to achieve a common goal. Energy security, construed in a narrow manner as the continuity of supplies of energy and its carriers for affordable prices, is set aside in favour of climate ambitions.

An exception providing taking into account the solidarity aspect, deserving honourable mention, is the Social Climate Fund.¹³⁹ As set forth in Article 1 of the Regulation 2023/955: “Social climate fund [...] shall provide financial support to Member States for the measures and investments included in their Social Climate Plans [...]. The measures and investments supported by the Fund shall benefit households, micro-enterprises and transport users, which are vulnerable and particularly affected by the inclusion of greenhouse gas emissions from buildings and road transport within the scope of Directive 2003/87/EC, in particular households in energy poverty or households in transport poverty.”

Also other developments of the EU law related to preventing and counteracting the energy poverty should be mentioned as marking some aspect of the energy solidarity.¹⁴⁰

¹³⁸ S. Paleari, ‘The Impact of the European Green Deal on EU Environmental Policy’, *The Journal of Environment & Development*, vol. 31, issue 2, 2022, p. 197; S. Schunz, ‘The “European Green Deal” – a paradigm shift? Transformations in the European Union’s sustainability meta-discourse’, *Political Research Exchange*, vol. 4, issue 1, 2022, p. 12.

¹³⁹ Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 (OJ L 130, 16.05.2023, pp. 1–51, as amended).

¹⁴⁰ See answer to Question 4, Section II for further considerations.

Ambitious objectives related to reduction of greenhouse gases have been highly contentious in Poland. Current troublesome times in terms of security, including, in particular, risks related to energy security, have been raised as a major counterargument against further reinforcement of the EU climate agenda which is often perceived as lacking deeper understanding in this regard.

Question 3

Undoubtedly, clauses such as “do no significant harm” or “energy efficiency first” are becoming increasingly common in EU legislation, in regulations relating not only directly to the functioning of the energy sector, but also, for example, to construction or waste management. Environmental principles permeate not only the way companies operate in the energy market, but also other areas of socio-economic life. Climate change commitments have a particular impact on the energy sector, yet most sectors of the economy are set to be electrified or decarbonised through new energy technologies. Therefore, it is clear that the EU’s environmental clauses set the direction of change in the energy sector, meaning that energy sector activities must not only aim to ensure access to fuel and energy, but must also be environmentally and climate-neutral.

It is worth noting that the above principles are based on the concept of sustainable development adopted by the UN Member States. As early as the 1960s, the report of the World Commission on Environment and Development (*Our Common Future*) highlighted the need to link economic and environmental goals and to achieve them without conflict.¹⁴¹ The UN has also adopted a long-term sustainable development policy – the 2030 Agenda for Sustainable Development¹⁴² – which explicitly refers to the link between the environment and the economy, including in particular the energy sector. The five pillars of the 2030 Agenda (people, planet, prosperity, peace and partnership) state, among other things, that signatories are “determined to ensure that all human beings can enjoy prosperous and fulfilling lives and that economic, social and technological progress occurs in harmony with nature.” One of the goals of the 2030 Agenda is to ensure clean and accessible energy, which means not only guaranteeing an uninterrupted supply of energy, but also ensuring that the sector does not have a negative impact on the environment. The concept of sustainable development is also reflected in the concept of ecological development, which stems from the United Nations Secretary-General’s 1969 report

¹⁴¹ See: Report of the World Commission on Environment and Development “Our Common Future,” where: “The environment does not exist as a sphere separate from human actions, ambitions, and needs, and attempts to defend it in isolation from human concerns have given the very word ‘environment’ a connotation of naivety in some political circles.”

¹⁴² UN General Assembly resolution of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development.

Problems of the human environment, and is based on the belief that development cannot be achieved without respect for the environment.¹⁴³

Sustainable development and related concepts are also emphasised in Polish law. Without going into detail, but just to give an outline, the principle of sustainable development is a constitutional principle and is also stated as an objective of the Energy Law Act, on which further consideration will be focused. Among the objectives of the said act, the first priority is to create conditions for the sustainable development of the country and, subsequently, to ensure energy security, economical and rational use of fuels and energy, development of competition, counteracting the negative effects of natural monopolies, taking into account environmental protection requirements, obligations arising from international agreements and balancing the interests of energy companies and fuel and energy consumers. This shows that the energy sector must not only operate according to the principles of security, stability and continuity of supply, but must also comply with the principles of sustainability, strive for energy efficiency and not compromise on environmental protection requirements. New forms of active participation in the energy market, such as the citizen energy community, which aims to deliver environmental, economic or social benefits to its members,¹⁴⁴ or, by analogy, energy clusters,¹⁴⁵ also place a strong emphasis on the absence of negative environmental impacts. Among other things, compliance with environmental requirements is crucial for obtaining a grid connection,¹⁴⁶ the functioning of grid operators¹⁴⁷ and for the objectives of the state's energy policy.¹⁴⁸ This shows the common direction of the EU and Poland to transform the energy sector to operate without negatively impacting the environment. This explains the drive to build a decentralised citizen energy sector, distributed among various smaller RES.

In Polish law, the environmental clause “the polluter pays” can be mentioned. It was included in the Environmental Protection Law and means that “whoever causes environmental pollution shall bear the costs of remedying the effects of such pollution, and whoever may cause environmental pollution shall bear the costs of preventing such pollution.”¹⁴⁹ Although the wording of the provision does not indicate that the legislature decided to narrow the list of entities

¹⁴³ See: Report *Problems of the human environment*, where: “Accompanying population growth and urbanization is the accelerated impact of industrialization, and of an advanced technology that is often poorly integrated with human needs and environmental necessities.”

¹⁴⁴ Article 3(13)(f) Energy Law.

¹⁴⁵ Article 2(15a) of the Act of 20 February 2015 on Renewable Energy Sources (Journal of Laws 2024, item 1361), hereinafter referred to as the ‘RES Act’.

¹⁴⁶ Article 7(1)(5) Energy Law.

¹⁴⁷ Article 9c(1) Energy Law.

¹⁴⁸ Article 13 Energy Law.

¹⁴⁹ Article 7 of the Act of 27 April 2001 Environmental Protection Law (Journal of Laws of 2024, item 54, as amended), hereinafter referred to as ‘Environmental Protection Law’.

covered by the rule in question, in practice it is of particular importance for economic entities whose activities cause pollution and greenhouse gas emissions. This principle is a recommendation to prevent negative impacts on the environment. It is implemented by means of economic instruments (fees) for the use of the environment or fines for the introduction of pollution in violation of the conditions specified in a given environmental permit.¹⁵⁰ Polish case law on this principle has stated, *inter alia*, that: “the polluter pays’ principle under Article 7 of the Environmental Protection Law provides interpretative guidance for the remaining provisions of this law”¹⁵¹ or “the concept of environmental fees is based on ‘the polluter pays’ principle, which is a general principle of environmental law. It is one of the oldest general principles of environmental law, applicable under international and Community law.”¹⁵² “The polluter pays” principle extends to a number of environmental procedures (including, for example, water permits, integrated permits, permits to release gases or particulate matter into the air) or sanctions for breaches of the rules on the conduct of activities that have an impact on the environment.

A kind of extension of these principles of “sustainable development” and “the polluter pays” is, for example, the principle of *prevention and precaution*, according to which “anyone who undertakes an activity that may have a negative impact on the environment is obliged to prevent such impact, and anyone who undertakes an activity whose negative impact on the environment is not yet fully identified, is obliged to take all possible preventive measures, guided by prudence.”¹⁵³ This principle best realises the concept of sustainable development; it is generally accepted that it is easier to prevent negative effects than to restore a degraded environment to its original state.¹⁵⁴ Another principle, specific to the Waste Act – the *principle of proximity*-- is addressed to entities operating in the waste management chain, which are obliged to manage waste as near as possible to its place of production.¹⁵⁵ Given that the environment as a whole consists of the earth’s surface, minerals, water, air, landscape, climate and other elements of biodiversity, as well as the interactions between these elements, there is a close correlation between the ways companies operate in particular environmental value chains, where the scope and manner in which business activities are conducted are constrained by environmental protection standards.¹⁵⁶

¹⁵⁰ K. Gruszecki, in: *Prawo ochrony środowiska*. Komentarz, wyd. VI, Warszawa 2022, Article 7.

¹⁵¹ Judgment of the Supreme Administrative Court of 6 February 2014, Case No II OSK 2136/12.

¹⁵² Judgment of the Supreme Administrative Court of 24 November 2009, Case No II OSK 1758/08.

¹⁵³ Article 6 Environmental Protection Act.

¹⁵⁴ K. Gruszecki, in: *Prawo ochrony środowiska*. Komentarz, wyd. VI, Warszawa 2022, Article 6.

¹⁵⁵ Article 20 of the Act of 14 December 2012 on Waste (Journal of Laws of 2023, item 1587, as amended).

¹⁵⁶ Article 3(39) Environmental Protection Act.

Question 4

Another sphere belonging to the domain of the concept of energy solidarity comprises actions aimed at helping recipients that cannot be reasonably expected to incur costs of energy related services (affected by energy poverty), although it consists in vertical relations (state-consumers) rather than horizontal ones (for instance states-states). From our point of view, measures adopted in pursuit of combating energy poverty and ensuring protection of vulnerable recipients do enshrine the concept of energy solidarity at the level of recipients. Moreover, if we include economic element in the concept of energy security (like availability of energy for affordable prices) we cannot escape conclusion that energy security at horizontal level influences level of protection of vulnerable recipients, that is, the level of ensuring their energy needs are satisfied.

The new Energy Efficiency Directive addresses the issue of preventing energy poverty in a relatively broad manner. This concept is granted a legal definition in EU law, because Article 2(49) of the Energy Efficiency Directive defines it as meaning “a household’s lack of access to essential energy services that underpin a decent standard of living and health, including adequate warmth, cooling, lighting, and energy to power appliances, in the relevant national context, existing social policy and other relevant policies.”

A wide array of measures aimed at counteracting this phenomenon is described in the Directive. To a significant extent they are relatively general, so their effectiveness will be, to a great extent, dependent on implementation by the Member States. In any case, the introduction of measures to combat energy poverty and increase the level of protection of vulnerable recipients may be perceived as another dimension of the energy solidarity, with the extended field of application to households and individuals. This corresponds to the view expressed by some scholars, who say that “characteristics of energy security such as energy poverty and a just transition have moved the usage of the term towards the social sphere of interaction.”¹⁵⁷ There are indeed instruments employed within the framework of the European Green Deal and “Fit for 55” strategies that are devoted to social aspects of the energy solidarity and energy security, such as the measures aimed at preventing and counteracting the energy poverty, the Social Climate Fund or the Just Transition Fund. Financial means from these funds, if properly used, could alleviate the problems of households grappling with the energy poverty. Also reinforcing energy efficiency is useful in this regard. Some researchers even perceive the energy efficiency as one of the sources of energy.¹⁵⁸

¹⁵⁷ O. Christou, ‘Energy Security in Turbulent Times Towards the European Green Deal’, *Politics and Governance*, vol. 9, no. 3, 2021, p. 366.

¹⁵⁸ B.N. Stram, ‘Key challenges to expanding renewable energy’, *Energy Policy*, issue 96, 2016, p. 728.

Clearly, energy poverty clearly remains in causal nexus with inadequate level of energy efficiency.

Legal definitions related to the notion of energy security existing in Polish Energy Law¹⁵⁹ do not include express references to social components. Nevertheless, it does not mean that the national law is deprived of instruments aimed at supporting households affected or jeopardized by the energy poverty. The system comprises primarily a determined lump sum for vulnerable recipients with regard to electricity that shall be granted to them by communes. Moreover, vulnerable electricity recipients as well as vulnerable gas recipients are vested with right to demand installation of prepayment metering systems. Such solution is destined to decrease expenses incurred for supply of electricity and gas, because in case of utilisation of such metering systems, vulnerable consumers will use the amount of energy they paid for in advance. The law divides vulnerable recipients into two categories, depending on what they rely on – electricity or gas. What is more interesting, there are definitions of vulnerable recipients of both categories, being crucial factor in their identification and, therefore, decision on granting of certain rights thereto. Namely, Article 3 point 13c of the Energy Law defines vulnerable recipient with regard to electricity as the person who was granted a dwelling allowance, who is a party to a master agreement or agreement for sale of electrical energy concluded with an energy enterprise and who resides in place of delivery of energy. Article 3 point 13d of the Energy Law mentions similar premises to be fulfilled apart from the condition referring to the dwelling allowance – instead, it sets forth the requirement that a vulnerable recipient of gas fuels shall be granted lump sum for purchase of combustible.

Both dwelling allowance, as well as lump sum for purchase of combustible and rules for their granting are mentioned in the Act on dwelling allowances.¹⁶⁰ The aforementioned act provides for the right to receive the dwelling allowance on the basis of criteria of threshold average monthly income for a member of the given household and area of the dwelling (the lower both values, the more probable is granting a dwelling allowance). Stricter criteria are imposed when deciding on granting a lump sum for purchase of combustible – as Article 6(7) of the Act on dwelling allowances states as follows: “If a dwelling is not equipped with installation leading heat energy for the purposes of heating, with installation of hot water or conduit gas from external source outside the dwelling, to a person entitled to a dwelling allowance there shall be granted a lump sum for purchase of combustibles, constituting a part of the dwelling allowance.”

¹⁵⁹ Invoked in answer to Question 7, Section I.

¹⁶⁰ Act of 21 June 2001 on dwelling allowances (uniform text OJ 2013, item 966, as amended).

The right to receive energy allowance is exercised by a vulnerable recipient with regard to electricity solely upon request. Also according to court rulings, there is no possibility of granting the energy allowance otherwise than upon application of interested party¹⁶¹ and there is no automatism in that respect.¹⁶²

Due to the problem of rapidly rising energy prices a special act introducing temporary instruments of support for years 2023–2024 was enacted.¹⁶³ Those instruments comprised guaranteed “frozen” prices of electricity up to a given quantity limit for chosen categories of recipients (including households) and electrical bonus for electricity recipient in a household, if the main source of household heating is powered by electricity.

While the energy allowance is available solely for vulnerable recipients with regard to electrical energy, the complementary instrument in the form of installation of prepayment metering systems is possible to be obtained by both categories of vulnerable recipients, also these with regard to gas fuels. By virtue of Article 6f of the Energy Law, in case when a vulnerable recipient with regard to electrical energy or gas fuels apply for that, an energy enterprise dealing with distribution of electrical energy or gas fuels is obliged to install prepayment metering system within 21 days as of receipt of the application, at its cost.

In our opinion, the most effective among traditional, command-and-control instruments to struggle with energy poverty is a ban or restriction on suspension of energy supply to vulnerable recipients. At present, in accordance with Article 6b(1) of the Energy Law, an energy enterprise leading commercial activity within the scope of transport or distribution of gas fuels or energy may withhold supply of gas fuels or energy *inter alia* if the recipient is in default with payment for the services provided, at least for the period of 30 days after expiry of deadline for payment. When the recipient is in default with payment, an energy enterprise is obliged to notify them of intention to withhold supplies if the recipient does not pay overdue and currently due amounts within the period of 14 days as of receipt of notification or fails to submit an application for an alternative solution to the suspension of electricity supplies within this deadline (Article 6b(3) of the Energy Law). Interesting issue consists in use by Polish legislator in Article 6b of the Energy Law of

¹⁶¹ Judgement of the Voivodeship Administrative Court in Szczecin of 15 June 2016, case reference number II SA/Sz 618/15.

¹⁶² Judgment of the Voivodeship Administrative Court in Cracow of 6 May 2016, case reference number III SA/Kr 1421/15.

¹⁶³ Act of 7 October 2022 on special solutions to protect electricity consumers in 2023 and 2024 in connection with the situation on the electricity market (uniform text OJ 2024, item 1288, as amended).

the word “default,” not “delay,” as it seems to suggest that the aforementioned provisions apply only if lack of payment is due to fault of a recipient. In case of vulnerable recipients, mandatorily applicable alternative solution is a ban on interrupting the supply of electricity to such recipient in the period from November 1 to March 31 and on Saturdays, on days statutorily recognized as non-working days and on the days preceding non-working days (Article 6b(3d) of the Energy Law). There is a wide array of other alternative solutions that may be applied to other recipients: they may relate to sources of support to avoid interruption of electricity supply, pre-payment schemes, energy audits, electricity advisory services, alternative payment plans, debt management advice or interruption of electricity supply for a specified period and must not result in additional costs for household electricity consumers who are at risk of interruption of electricity supplies (Article 6b(3b) of the Energy Law).

Poland is said to be the greatest beneficiary of the Just Transition Fund, receiving over PLN 17 billion for the 2021–2027 period.¹⁶⁴ The European Commission has accepted all five Polish Operational Programmes with Territorial Just Transition Plans, worth more than €3.85 billion under the Just Transition Fund and aimed at supporting a just climate transition in Polish coal regions of Silesia, Małopolska, Wielkopolska, Lower Silesia, and Łódzkie.¹⁶⁵

As a rule the intended and actual use of means from the Just Transition Fund in Poland is assessed as reasonable. In the report devoted to analysis of plans of spending the funds for just transformation,¹⁶⁶ it is claimed that planned activities may contribute to acceleration of the energy transformation (in case of investments in renewable energy sources) and mitigation of social consequences of the transformation, in particular employment problems related to extinguishing of some industries. According to the author of the report in question, assessment of the actual effects of actions will require further monitoring, but plans can be assessed so far as satisfactory, although some of the planned activities may be considered not fully consistent with just transition objectives.

¹⁶⁴ A. Gawlikowska-Fyk, K. Smętek, ‘Just transition: what number to call?’, 2024, <https://www.forum-energii.eu/en/just-transition-what-number-to-call/>. Accessed 1 January 2025.

¹⁶⁵ *EU Cohesion Policy: €3.85 billion for a just transition toward climate neutral economy in five Polish regions*, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7413/. Accessed 1 January 2025.

¹⁶⁶ K. Doroszewska-Chyrowicz, ‘Sprawiedliwa transformacja: analiza planów wydatkowania środków’, <https://frankbold.pl/p/sprawiedliwa-transformacja-analiza-planow-wydatkowania-srodkow/>. Accessed 1 January 2025.

Question 5

The EU's internal market is based on principles such as sustainable economic growth, price stability and a highly competitive market economy.¹⁶⁷ Therefore, the EU's special support for specific sectors interferes with free market values. On the other hand, the granting of State aid is permissible if the conditions set out in the Treaty in this respect are met, and the European Commission, in the procedure for notification by the State of the intention to grant State aid, agrees to the application of this measure. The above shows that Member States do not have full decision-making power in the field of public financing (regardless of the instrument¹⁶⁸) of given national projects, but share them with the EU (the European Commission, as the "guardian of the Treaties," verifies the legitimacy of the state's "favouring" of selectively chosen projects). State aid is classified as a privilege of conferring an advantage to a given beneficiary that they would not have obtained under normal market conditions, which makes it, by its very nature, a discriminatory measure that results in unequal treatment. The TFEU distinguishes between two categories of State aid: the first, which is by law compatible with the internal market if it meets the criteria of proportionality and transparency; and the second, where the European Commission holds discretionary powers that serve as a safeguard against the misuse of aid measures.¹⁶⁹ The second category, where the granting of State aid is conditional and subject to control by the European Commission, includes, among others, "aid intended to support the implementation of important projects of common European interest or to remedy a serious disturbance in the economy of a Member State, as well as aid intended to facilitate the development of certain economic activities or of certain economic regions, provided that it does not alter the conditions of trade to an extent contrary to the common interest."¹⁷⁰ Undoubtedly, in the ongoing process of energy transition, a number of large-scale energy projects of strategic importance can be identified, which fall within the scope of interest of the entire EU. The implementation of these projects – whether at the regional, national, or trans-European level – also serves to prevent serious disturbances in the economy.

From the Polish perspective, the development of offshore wind energy can serve as an example. In 2020, a special act was adopted in Poland with the aim of implementing offshore wind farm projects. One of the elements of this regulation was the support system (State aid). Hence, Poland was obliged to

¹⁶⁷ Article 3(3) TEU.

¹⁶⁸ Ł. Grzejdzia, 'Pomoc państwa – między obiektywną koncepcją a subiektywnym stosowaniem', in: *Regulacja finansowania usług publicznych w Europie*, Warszawa 2015.

¹⁶⁹ J. Kociubiński, 'Stosowanie pomocy państwa do minimalizacji skutków zaburzeń gospodarczych – analiza krytyczna najnowszych trendów interpretacyjnych', *Europejski Przegląd Sądowy* 2023, No. 6, p. 13.

¹⁷⁰ Article 107(2) TFEU.

notify the Act and to request the approval of the European Commission for the public funding of the offshore support scheme. The European Commission has approved¹⁷¹ the introduction of the support scheme for Polish offshore wind farm projects, justifying it, among other reasons, by stating that “against this background, it is unlikely that, absent the aid, the development of the economic activity of generation of electricity from offshore wind in Poland would occur, or would occur to the same extent. The Commission therefore considers that the notified scheme is necessary.” and, in addition, that “on the positive side of the balance, the Commission notes that the scheme can be expected to have a range of positive effects because the eligible activities contribute directly to renewable energy production from offshore wind in Poland, and indirectly to environmental protection. The aid will induce positive indirect effects in terms of environmental gains as reduction in emissions of greenhouse gases.” It cannot be denied that enabling the development of offshore wind energy in Poland will positively contribute to improving environmental protection, reducing greenhouse gas emissions, as well as achieving the common goals of the Energy Union. With the aim of integrating the energy system throughout the EU, including the interconnection of national energy systems, energy generated from offshore sources will be able to power interconnections, and in the case of surplus, it will be stored and used at a later period. Securing the country’s energy demand is in the interest of the entire EU, also in order to reduce the risk of having to provide emergency electricity supplies to countries facing energy security threats. In connection with the implementation of the *sector coupling* concept, the number of joint energy projects in the EU will increase. These projects will not conflict, but will increasingly align with the principle of energy solidarity.

On the other hand, another area of State aid can be pointed out, where the principle of energy solidarity and State aid issues may not be in direct conflict, but their mutual relationship still raises a number of concerns. These are the issues of capacity markets. Capacity markets are a type of support in which a state – most often the transmission system operator – makes payments to energy producers for maintaining capacity in the system to ensure energy production in the event of a shortage. These systems are currently exclusively national, but in the event of energy shortages (usually caused by the unavailability of renewable energy sources), electricity also flows to neighbouring countries. The issue here is not the fact that, in the event of an energy shortage, a country that has the capability (e.g., through maintaining capacity markets) shares its energy (which is a form of solidarity), but the fact that the countries benefiting from this do not bear any costs for maintaining these reserve capacities. In this case, a possible solution could be the regionalisation of capacity markets.

¹⁷¹ European Commission decision of 20 May 2021, State Aid SA.55940 (2021/N) – Poland. Offshore Wind scheme, https://ec.europa.eu/competition/state_aid/cases/1/202126/293712_2289315_113_2.pdf

Question 6

The TEN-E Regulations shares the vision inherent in the European Green Deal and “Fit for 55,” where the attention is given mainly to climate-related matters. It is noticeable even at first glance when reading its Article 1, setting forth “the guidelines for the timely development and interoperability of the priority corridors and areas of trans-European energy infrastructure [...] that contribute to ensuring climate change mitigation, in particular achieving the Union’s 2030 targets for energy and climate and its climate neutrality objective by 2050 at the latest, and to ensuring interconnections, energy security, market and system integration and competition that benefits all Member States, as well as affordability of energy prices.” Also Article 4(2)(a) of the TEN-e Regulation as the first condition for a project of mutual interest states that the project have to contribute significantly “to the objectives referred to in Article 1(1), and those of the third country, in particular by not hindering the capacity of the third country to phase out fossil fuel generation assets for its domestic consumption, and to sustainability, including through the integration of renewable energy into the grid and the transmission and distribution of renewable generation to major consumption centres and storage sites.” Of course, the operative part of the Regulation contains also references to security of supplies, but the emphasis is obviously on climate protection (not even on environmental protection in general). There are only slight references to solidarity.

Nonetheless, there is an interrelationship of trans-European energy networks and the EU energy policy. The operation of these networks is subject to the legal regime not of the title dedicated to trans-European networks, but the one regulating the EU energy policy, jointly with the appropriate secondary law. Both the construction and operation of the trans-European energy infrastructure contribute to fulfilment of all objectives of the EU energy policy, that is, ensuring the functioning of the energy market (Article 194(1)(a) TFEU), ensuring security of energy supply in the EU (Article 194(1)(b) TFEU), promoting energy efficiency and energy saving and the development of new and renewable forms of energy (Article 194(1)(c) TFEU), promoting the interconnection between energy networks (Article 194(1)(d) TFEU). However, the relationship in question is bilateral, because the objectives of the EU energy policy (should) influence the choices made as part of the construction of trans-European energy infrastructure.

The condition and shape of the energy infrastructure determines *inter alia* the degree of diversification of sources, routes and suppliers of energy and its carriers, which affects the overall structure of energy supply. Energy security in general should be perceived as a state depending on the energy infrastructure.

It is also interesting to notice the links between solidarity and construction of TEN-E. In one of communications by the European Commission¹⁷² it was claimed that “the obligation of solidarity among Member States will be null and void without a sufficient internal infrastructure and interconnectors across external borders and maritime areas.” Therefore, it seems justified to draw the conclusion that also relations between solidarity and TEN-E are bilateral. Solidarity at the stage of building trans-European energy networks is combined with the idea of cohesion – in particular in its economic and territorial aspect. Secondly, this concept is implemented in the process of construction and development of energy infrastructure, because the appropriate condition of such infrastructure allows for the concept of energy solidarity to be implemented at the stage of network operation (embodying energy solidarity in practice is strictly dependent on the existence and proper functioning of the energy infrastructure).

The context in which references to the concept of energy solidarity were made very often in Poland was the Nord Stream project, or rather the controversies related to it (which, to some extent, resurfaced with construction of the second line). After the inclusion in Decision 1364/2006/EC,¹⁷³ with the consent of all Member States, of the construction of Nord Stream as a project of common interest, the energy solidarity clause in Article 194(1) TFEU did not create an effective defense mechanism. However, in light of the findings of the Court in *OPAL* case (setting forth the principle of energy solidarity as a legal criterion applicable for controlling the legal acts of the EU and the Member States), alleging invalidity of recognising Nord Stream as one of projects of common interest due to infringement of the principle of energy solidarity (constituting “infringement of the Treaties or of any rule of law relating to their application,” as mentioned by Article 263 TFEU) could have been considered. Actually, the project was contentious even bearing in mind the criteria stipulated by the Decision 1364/2006/EC for projects of common interest. The problem consisted in the fact that the principle of energy solidarity formally belongs to the sphere of energy policy, and not the trans-European networks policy. However, we should bear in mind one of the objectives aimed at achieving the construction and development of trans-European networks, including trans-European energy networks, that is, strengthening the social, economic and territorial

¹⁷² Communication of 10.11.2010 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* (COM/2010/0639 final).

¹⁷³ Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC (OJ L 262, 22.09.2006, pp. 1–23), repealed by the regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (which was in turn repealed by the currently binding TEN-e Regulation).

cohesion of the European Union combined with the concept of solidarity. Although the above-mentioned formulation is quite vague and has not been defined normatively, it should be assumed that its meaning partially overlaps with the content of the principle of energy solidarity, derived through logical reconstruction – it cannot be justified to conclude that the construction of a gas pipeline that bypasses natural transit countries in favor of a connection that is incomparably more expensive and poses a much greater threat to the environment¹⁷⁴ leads to strengthening the cohesion of the European Union. It can be argued that the construction of the northern gas pipeline was in stark contrast to the considerations of territorial cohesion, if one takes into account its economic consequences for the countries that opposed it. Such considerations lost their weight due to enormous change in factual circumstances, but they show that the idea of applying solidarity in the context of trans-European energy networks actually appeared – albeit from a political, not a legal perspective, since no formal actions against the Decision 1364/2006/EC and later against the Regulation 347/2013 in respect of their support for Nord Stream were instituted by Poland.

Question 7

In contrast to *energy security*, *decarbonisation* is not a normative concept. However, it appears in a number of EU sectoral policies and recitals in legal acts. By way of example, in the message *A Clean Planet for all*, it was indicated, among others, that: “energy efficiency will play a central role in decarbonising industrial processes” and “[i]n niche applications and with a fully decarbonised electricity system, these technologies could use CO₂ as a feedstock captured from industrial processes.”¹⁷⁵ In turn, the system directive for the electricity market indicated that: “with the objective of progress towards a completely decarbonised electricity sector that is fully free of emissions, it is necessary to make progress in seasonal energy storage.”¹⁷⁶ Intuitively, we also understand that decarbonisation is the pursuit of eliminating the use of coal in the economy for energy purposes, as well as the eventual phase-out of other fossil fuels. Due to the transformation of the structure of sources in the energy mix – from fossil fuels to renewable energy sources and the so-called decarbonised gases – energy security is a state of ensuring the continuous and stable functioning of renewable energy supply chains.

¹⁷⁴ Those objections are analysed in: J.D.A. Tarasov, ‘The making of empires: Russia’s gas-exporting pipelines v. Nabucco’, *The Journal of World Energy Law & Business*, vol. 4, no. 1, 2011. The author invokes both the arguments of proponents and opponents of the Nord Stream.

¹⁷⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank – *A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy (COM/2018/773 final)*.

¹⁷⁶ Recital 64 in Directive 2019/944.

The need to reduce the consumption of fossil fuels in the EU is not solely grounded in the necessity to counteract climate change, the occurrence of which leads to negative consequences for the economy, and as a result, legally binding climate commitments have been made. It is also crucial to become independent from fossil resources found in importing countries, which do not guarantee the supply of these resources on commercial terms, but instead involve high geopolitical risks. The main importers of fossil fuels to the EU, such as the Gulf states and, until recently, the Russian Federation, are not the guarantors of contractual certainty. The political systems adopted in the above-mentioned countries do not allow for long-term supply planning, limiting price fluctuations, and undoubtedly reducing greenhouse gas emissions in supply chains (not to mention ESG standards). Therefore, EU Member States must switch suppliers to stable trading partners such as the Scandinavian countries, as well as increase domestic production capacities.

There is no doubt that the gradually decreasing economic profitability of the operation of the conventional energy sector is caused by the mechanisms of fees charged to the high-carbon sectors. At the same time, the legitimacy of the use of economic measures does not raise doubts regarding the depletion of energy resources and the scaling-up of the negative effects of climate change. In the emerging new renewable energy sector, the fundamental condition for its proper functioning remains the assurance of energy security. However, the ways of ensuring it are changing due to the decarbonisation of the energy mix, including the different characteristics of RES. The integration of renewable energy sources (RES), the Demand-Side Response (DSR) system, energy storage systems, and flexibility services play a key role in the ability to ensure energy security. Mechanisms stabilising the work of the new renewable energy sector are constantly being implemented by the EU and national legislators. The latter, that is, flexibility services, were introduced by the latest reform of the EU electricity package.¹⁷⁷

Regardless of the above, at present, it seems that the aforementioned solutions are not capable of fully ensuring energy security. Consequently, it is essential to maintain and build new gas and nuclear capacities that will contribute to ensuring energy security. And while nuclear capacities produce clean energy, gas units do not. According to the EU taxonomy, in particular, gas is treated as a transitional fuel. Therefore, it is to help achieve the decarbonisation goal, but it is not a clean fuel.

¹⁷⁷ 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 EU L of 2024, item 1747) and 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 EU L of 2024, item 1711).

As a consequence, it can be pointed out that to some extent decarbonisation goals and energy security remain in conflict, at least for now.

Question 8

Traditionally, protection of natural resources against their excessive use that could lead to scarcity and/or negative environmental effects would be in the domain of Member States. In the legal context, that may be a reminiscence of the principle of sovereign power over the resources of a given state, formulated in the resolution of the United Nations General Assembly No. A/RES/1803(XVII) of 14 December 1962¹⁷⁸ and repeated numerous times in other UN resolutions, and, in terms of newer legal elements – of Article 192(2)(c) and Article 194(2) paragraph 2 TFEU. The approach that Member States have the power to decide on such issues used to be highlighted in the past. This corresponds to the aforementioned principle of sovereign disposal of their own natural resources by states that own them. At present, that rule has the status of customary norm of international law.¹⁷⁹ Permanent sovereignty over natural resources means that resources are “under the sole jurisdiction of the State concerned. Consequently, for instance, if the State does not exploit them, no other State can.”¹⁸⁰

In case of EU energy policy, measures adopted under the ordinary legislative procedure “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)” (Article 194(2) paragraph 2 TFEU). Article 192(2)(c) TFEU subjects actions taken within the framework of the EU environmental policy constituting “measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply” to a special legislative procedure with the unanimity in the Council required for adoption of such measures. The latter provision was intended as the basis for actions that are primarily aimed at achieving environmental objectives, actions specific in the sense that they have ramifications both on the choice of

¹⁷⁸ General Assembly resolution 1803 (XVII) of 14.12.1962 – Permanent sovereignty over natural resources.

¹⁷⁹ According to researchers: “The notion of permanent sovereignty over natural resources, although originally asserted in nonbinding international instruments [UN resolutions], has gained strong currency through the evolution of state practice (and *opinio iuris*) and is now generally accepted to have emerged to the status of customary international law” – see R. Pereira, ‘The Exploration and Exploitation of Energy Resources in International Law’, *Environmental and Energy Law*, eds. Karen Makuch, Ricardo Pereira, Wiley-Blackwell, 2012, p. 222.

¹⁸⁰ N. Sánchez Castillo, ‘Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers’, *Review of European Community & International Environmental Law*, vol. 24, issue 1, 2015, p. 9.

a Member State with regard to energy sources and the overall structure of its energy supply.

A separate question remains, whether the formal distinction that the EU legislator makes between measures in the field of two policies that are so close to each other should actually lead to the conclusion that only energy policy measures should not violate “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.”

The scope of Article 192(2)(c) TFEU largely coincides with Article 194(2) paragraph 2 TFEU. However, it omits the issue of determining the conditions for the use of Member States’ energy resources, which leads to a conclusion that the EU legislator clearly detaches this issue from the environmental policy and assigns it to the energy policy.

It seems that the noticeable difference between Article 194(2) paragraph 2 TFEU and Article 192(2) letter c) TFEU as regards the consequences (requirement of a special legislative procedure versus absolute prohibition) highlights the importance of considerations related to environmental protection and the power of the integration clause comprised by Article 11 TFEU. Since Article 194(2) paragraph 2 TFEU suggests a ban on infringing the prerogatives of the Member States specified in this provision as part of measures taken in the field of energy policy, whereas Article 192(2)(c) TFEU secures these rights in a limited manner only by requiring action to be taken in a special legislative procedure subject to unanimity, their comparison indicates that the EU legislator considers environmental protection to be capable of prevailing even over crucial interests of Member States in the field of energy policy. This corresponds to the position expressed in the opinion of the Advocate General in *Kingdom of Spain* case.¹⁸¹ However, as already mentioned, doubts must be raised about the possibility of circumventing the effect of Article 194(2) paragraph 2 TFEU by arbitrarily choosing the legal basis for a given normative act, especially since the criteria for this choice specified in the case law of the Court can hardly be considered strict.

Nevertheless, it should definitely be pointed out that in reality both Article 192(2) letter c) TFEU, as well as Article 194(2) paragraph 2 TFEU remain dead letter. Firstly, no legal act has ever been issued on the basis of the former

¹⁸¹ Opinion of Advocate General Léger delivered on 16 May 2000 in case *Kingdom of Spain v Council of the European Union*, C-36/98, EU:C:2000:246. The Advocate General found that the provision with content analogous to the current Article 192(2) letter c) TFEU should be interpreted as meaning that only environmental protection measures which significantly affect a Member State’s choice between different energy sources and the overall structure of its energy supply must be taken in accordance with the procedure laid down for the situation in that provision.

provision (never the unanimous special legislative procedure has actually been applied for measures matching the substance of this provisions; they have been enacted with the use of ordinary legislative procedure requiring only majority of votes in the Council). This state of affairs may be surprising, in particular in light of the obvious overlapping between the EU environmental policy and its energy policy. Secondly, it is actually pretty hard to find the measures placed within the sphere of the energy policy (and invoking Article 194 as the legal basis) that would not have a serious impact on determination of conditions for exploiting its energy resources, choice between different energy sources and the general structure of energy supply of the Member States.

The influence on a Member State's decisions regarding the energy sources used or the structure of its supply seems to be primarily of a factual nature, resulting from the impact of given regulations on reality. In fact, the measures adopted by the EU, no matter whether they have been formally anchored with the environmental or energy policy (as far as indication of a chosen legal basis is concerned) have often deeply interfered with the rights of Member States to determine the conditions for the use of their energy resources, the choice between various energy sources and the general structure of energy supply. Examples of instruments adopted within the formal framework of the EU environmental policy comprise, *inter alia*, the European Emissions Trading System¹⁸² (substantially affecting the choice of energy sources in favour of those generating less or zero emissions of greenhouse gases in the combustion process performed in order to produce electricity or heat). When it comes to regulations adopted on the basis of the competence provision in the field of energy, a good example of a significant influence on the aforementioned issues may be provisions of the current RES Directive. The Directive in question sets forth a very ambitious goal of achieving an EU-wide renewable energy share of 42.5% by 2030. It is, therefore, hard to claim reasonably that this act does not significantly affect the choice of Member States between different energy sources and the overall structure of their energy supply. Therefore, the RES Directive should have been adopted on the basis of Article 192(2)(c) TFEU, and not, as actually happened, under Article 194(2) TFEU. Within the framework of the EU energy policy, there is no legal possibility to adopt acts that significantly interfere with such choices of Member States (the absolute ban results from the paragraph 2 of Article 194(2) TFEU). It seems that the EU legislator does not abide by the restrictions resulting from any of the aforementioned stipulations.

¹⁸² Regulated primarily in the Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, pp. 32–46, as amended).

Question 9

There is no doubt that climate change presents the greatest challenges, primarily for the energy sector, as it is the most carbon-emitting.¹⁸³ Poland's legal obligations regarding climate commitments, undertaken both within the framework of the UN and the EU, make the energy transition an inevitable process. However, the measures aimed at achieving climate goals in the energy sector are undertaken in an individualised manner within the framework of national regulation. Under Polish domestic law, a number of solutions have been adopted in favour of "greening" the energy mix. Selected examples will be synthetically presented below.

Firstly, the implementation in 2016 of the renewable energy auction system, which involves the state ordering a specific amount of renewable energy. An auction is organised for its purchase, in which producers of the ordered renewable energy participate. Producers of energy from biogas, biomass, photovoltaic, onshore wind energy, and geothermal installation are eligible to participate in the auction.¹⁸⁴ The national regulator, that is, the President of the Energy Regulatory Office, organises RES auctions at least once a year.¹⁸⁵ The auction is won by the producer who offers the lowest price for producing the required amount of energy. The maximum price [PLN/MWh] at which the energy can be sold by producers through auction is determined by regulation.¹⁸⁶ Initially, the auction system was supposed to be phased out in 2021, but was extended until 2027 by decision of the European Commission.¹⁸⁷ However, in recent years, there has been a discussion about the validity of continuing this support system due to low prices in the auction system in previous years and the occurrence of a positive balance in relation to high market prices from the second half of 2021. Given that renewable energy producers, who entered into long-term contracts after winning a renewable energy auction, achieved lower prices than the weighted average market prices, it made the operation in the auction system no longer profitable.

A similar example could be the support system for the production of electricity from offshore wind farms, which was adopted in the special offshore law.¹⁸⁸ Offshore energy producers have been granted the option to apply for the

¹⁸³ Cf. data from the International Energy Agency, *Global CO2 emissions by sector, 2019-2022*, 2023, <https://www.iea.org/data-and-statistics/charts/global-co2-emissions-by-sector-2019-2022>

¹⁸⁴ Article 77(5) RES Act.

¹⁸⁵ Article 73 RES Act.

¹⁸⁶ Article 77 paragraph 3 RES Act.

¹⁸⁷ Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union – Cases where the Commission raises no objections Text with EEA relevance (OJ EU C 511 of 2021).

¹⁸⁸ Act of 17 December 2020 on the promotion of electricity generation in offshore wind farms (Journal of Laws 2024, item 182).

right to cover a negative balance either by decision of the President of the Energy Regulatory Office or through auction. Originally, the legislator introduced offshore into the general auction basket for other RES, but in fact this solution did not work due to the incomparably greater need to support the development of offshore wind farms. In the first aforementioned mode, projects with a power of up to 5.9 GW could receive support. Support can also be granted to projects with a total installed capacity of 4 GW in the auction organised in 2025 and 2027, and 2 GW in the auction organised in 2029 and 2031.

Another example includes origin guarantees, which are issued for energy produced from RES: electricity, biomethane, heat and cold, renewable hydrogen, biogas and agricultural biogas. These are electronic documents that certify to the final recipient that the specified quantity of electricity, biomethane, heat or cooling, renewable hydrogen, biogas, or agricultural biogas [MWh] has been generated in RES installations and introduced into the respective electricity, gas, or heating or cooling networks, to which at least one recipient other than the entity producing the respective electricity, biomethane, heat or cooling, renewable hydrogen, biogas, or agricultural biogas is connected.

Certificates of origin are transferable and are issued at the request of the producer from the above sources. Polish Power Exchange (Towarowa Giełda Energii – TGE) maintains a register of certificates of origin, where trading of these certificates takes place.

At the same time, the capacity market in Poland is designed mainly for available capacities that are able to ensure the safe operation of the system. Capacity markets must be maintained, because RES will not secure the operation of the system, and due to the construction of energy markets (merit order prefers sources with low marginal cost), available capacities are not able to remain in the system. This results in subsidies to maintain them in the form of payments within the capacity market.

The inability to subsidise high-emission sources (coal sources are excluded from capacity payments) means that in practice the right of Member States to shape their own energy mix is excluded, which raises serious doubts in the context of this Treaty entitlement.

Question 10

Demand for resources keeps rising, triggered by growing population, intensified urbanization and widespread and constantly deepening consumerism.¹⁸⁹ As some researchers rightfully point out, accelerated exploitation of natural resources takes its toll in decreased resource quality and increased spending of energy and waste generation, and excessive use of the environment is conducive to aggravation of other environmental problems.¹⁹⁰ Such state of facts has been deemed a paradox, since “globally the depletion of natural resources (and associated carbon emissions) continues to accelerate while paradoxically mountains of waste (and associated pollution) are still piling up.”¹⁹¹

However, in fact what we are dealing with is not the depletion of natural resources in general (the scarcity of resources *stricto sensu*), but rather the more and more difficult, costly and detrimental to the environment exploitation of existing deposits as compared to the exploitation of the more accessible ones. That is illustrated by the increasing indicators of return of energy with regard to the energy invested (EROEI – Energy Returned on Energy Invested). In the past, dozens or even hundreds of oil barrels could be obtained and processed with an energy equivalent of one oil barrel invested; now investing the amount of energy corresponding to one oil barrel allows only for gaining a few in exchange.

By tightening the resource extraction and use, we may kill two (and actually more) birds with one stone, because the aforementioned environmental problems may, at least to a great extent, be attributed to excessive resource extraction and use – not to forget that, as numerous incidents with Russia have shown with ruthless clarity, it is not always wise to solve the problem of lack of or limited deposits of certain resources in the territory of the EU by resorting to increasing import dependence. In addition, preventing and

¹⁸⁹ B. Lee et al., ‘Resources Futures. Executive Summary and Recommendations’, Chatham House, 2013, *passim*; T. Prior et al., ‘Resource depletion, peak minerals and the implications for sustainable resource management’, *Global Environmental Change*, vol. 22, issue 3, 2012, pp. 577–587, after: K. Hobson, N. Lynch, ‘Diversifying and de-growing the circular economy: radical social transformation in a resource-scarce world’, *Futures*, no. 82, 2016, p. 2.

¹⁹⁰ G. Bridge, ‘Material Worlds: Natural Resources, Resource Geography and the Material Economy’, *Geography Compass*, vol. 3, issue 3, 2009, p. 1224. As he wrote: “Year-on-year increases in the quantity of materials drawn from the earth are all the more remarkable given that generally they have been secured from progressively lower quality resource stocks. This secular decline in resource quality is a function of both the physical properties of many resources and the fact that humans have normally exploited the best quality resources first. Producing successive units of copper, oil or fish, therefore, has required the application of more energy, and the disposal of larger amounts of waste.”

¹⁹¹ A.P.M. Velenturf, P. Purnell, ‘Principles for a sustainable circular economy’, *Sustainable Production and Consumption*, vol. 27, 2021, p. 1437.

counteracting the problem of scarcity of resources may bring positive effects not only in terms of the environment, but also for the economy; sooner or later the problem in question would result in supply-demand imbalances and rising prices of resources, but also commodities and services provided with the use of such resources. Therefore, combating scarcity of resources construed in such way is a task worth taking from environmental, but also economic point of view – which is another feature distinguishing scarcity of resources among the wide array of environmental problems experienced nowadays. Moreover, it is a problem widely perceived as the fundamental one, as demonstrated by social surveys showing that the matters considered and regulated by the EU environmental policy, in the eyes of respondents, merge into one basic problem, consisting in the unsustainable use of resources.¹⁹² The desired response is gradual implementation of the circular economy – referring to the type of the economy where “the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimized”¹⁹³ – and improvement of the energy efficiency, according to the declared “energy efficiency first” principle.

As regards security of supplies concerning energy resources, roles of the EU and individual Member States are evolving in the direction entailing intensified efforts at the side of the EU.¹⁹⁴ The example here could be the regulation pertaining to coordination of gas purchases.¹⁹⁵

Question 11

REPowerEU can be seen as an updated EU energy security strategy, which not only introduces short-term measures to stabilise energy security, but also long-term measures in this area as part of the energy transition process. REPowerEU consists of two main policy acts that respond to what measures are necessary to diversify supply and increase energy independence. Of course, this plan applies to the entire EU, but in particular to Poland due to the import of natural gas – until 2022 – predominantly from one direction. In the first

¹⁹² A. Fischer et al., ‘Climate Change? No, Wise Resource Use is the Issue: Social Representations of Energy, Climate Change and the Future’, *Environmental Policy and Governance*, vol. 22, no. 3, 2012, p. 173.

¹⁹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2.12.2015 – *Closing the loop – An EU action plan for the Circular Economy* (COM(2015)0614 final), p. 2.

¹⁹⁴ For deepened considerations about the external dimension of the EU energy policy and the role the EU plays when it comes to ensuring security of supplies of energy and its carriers please see answers to Questions 6 and 8, Section I.

¹⁹⁵ 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, pp. 1–35).

REPowerEU plan,¹⁹⁶ it was estimated which fuel and energy technologies can be equivalent to the demand for natural gas. In this regard, attention has been drawn to biomethane (with a production capacity of 35 billion m3 per year by 2030) and renewable hydrogen (with a production capacity of 15 million tonnes by 2030). This was stated bearing in mind that Poland has favourable conditions for the development of both above-mentioned energy technologies, because the potential for biomethane production in Poland is estimated at 3–6 billion m3 per year. On the other hand, Poland is currently the third low-emission hydrogen producer in Europe, and the potential for renewable hydrogen production is constantly increasing, as the installed capacity from RES increases. REPowerEU shows which sources will be particularly supported by the EU, on the one hand, to reduce the emissivity of the energy sector, and, on the other hand, to ensure multi-directional supply. However, it is the Member States that decide what investments will allow them to achieve the REPowerEU objectives, that is, energy savings, diversification of supplies, acceleration of the transition towards clean energy and smart investments.¹⁹⁷ Undoubtedly, the adoption of the so-called hydrogen gas package by the EU makes it possible to translate the above-mentioned goals into specific investments in the so-called decarbonised gases that Poland intends to implement (including, for example, national and trans-European hydrogen networks, gas blending networks and hydrogen hubs). It is also worth noting that as part of the REPowerEU package, the *Electricity Market Design strategy was adopted*,¹⁹⁸ which was the first step in the revision of the so-called EU electricity market package. In the referenced strategy, flexibility-related solutions are identified as the key proposed legislative change. As a consequence, legal regulations in this area were adopted.¹⁹⁹ For Poland, the key is the newly adopted solution by the EU introducing flexible connections due to the challenges related to network capacity limitations, which make it impossible to fully realise the potential of “green” energy.

¹⁹⁶ 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, Joint European Action for more affordable, secure and sustainable energy (COM/2022/108 final).

¹⁹⁷ 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, REPowerEU plan (COM/2022/230 final).

¹⁹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Short-Term Energy Market Interventions and Long Term Improvements to the Electricity Market Design – a course for action (COM/2022/236 final).

¹⁹⁹ 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 (Text with EEA relevance) (OJ L., 2024, item 1747) and 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 (Text with EEA relevance) (OJ L., 2024, item 1711).

Undoubtedly, Poland is applying for EU support for energy investments. Examples include the trans-European hydrogen transmission network (Nordic-Baltic Hydrogen Corridor), which will also run through Poland. The project was granted the status of a Project of Common Interest in the energy sector under the first *PCF*²⁰⁰ list. Another example is the allocation of EUR 16 billion out of a total amount of approx. EUR 60 billion from the National Recovery Plan in the form of preferential loans for investments supporting Poland's energy transition (including the construction and modernisation of electricity networks, construction of RES, construction of electricity storage, construction of infrastructure for the production of biomethane, second generation biofuels and renewable hydrogen). The above investments, both in *green* technologies and in improving grid capacity, are crucial for Poland's ability to reach net zero emissions.

Section III: The EU's crisis management in the field of energy and its limits

Question 1

By way of introduction, it is worth recalling some of the arguments in the *OPAL* judgement. According to the Court:

[argument 69] “The ‘spirit of solidarity’ referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity between the Member States [...]”

[argument 70] “[...] the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.”

[argument 71] “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, contrary to what the Commission asserts, the principle of energy solidarity cannot be restricted to such extraordinary situations which would exclusively involve the competence of the EU

²⁰⁰ Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No. 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No. 347/2013 (OJ L, 152, 2022).

legislature – a competence implemented by secondary law, by the adoption of Regulation No 994/2010 (replaced by 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 No 994/2010 (OJ 2017 L 280, p. 1)).”

[argument 72] “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.”

[argument 73] “As regards, more specifically, the energy policy of the European Union, that policy requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures 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.”

The Court has adopted an interpretation extending the application of the *energy solidarity principle* as not only a means of responding to the effects of the emergency situation in the energy market, but also a preventive clause, excluding the implementation of energy projects that pose a risk to energy security of both one, a group or all EU Member States. The Court points out *expressly* that Member States are obliged to avoid situations that cause the risk of disrupting the energy security of any of the EU countries. It is impossible to not agree with the Court’s assessment, taking into account the role of individual EU institutions. As the guardian of the Treaties, the European Commission is an institution that promotes the general interest of the EU, supervises the application of EU law, performs coordination, executive and management functions.²⁰¹ The European Commission supervises the State aid procedure,²⁰² which is granted to a significant number of strategic energy investments. The European Commission also assesses the planned actions of countries in achieving the energy transition goals. Hence, it is an institution that, at an early stage of planned investments, can already identify risks and recommend appropriate changes. It may, at the stage of applying for State aid, “block” an investment that would pose a threat to the Energy Union. In turn, EU legislators, the European Parliament and the Council, while qualifying given energy projects for the PCI list, also examine the impact of such projects on the internal electricity market. These are just a few of the many examples that show how the individual competences of the EU institutions are sufficient

²⁰¹ Article 17 TEU.

²⁰² Article 108 TFEU.

at the planning stage of a given energy project to assess the possible negative repercussions for other Member States. Moreover, the close relationship described earlier between legal acts and policy instruments – where the latter serve to concretise and implement obligations arising from legally binding norms – demonstrates the importance of the principle of *energy solidarity* as expressed in both *hard law* and soft law instruments.

Question 2

When analysing the tools at the disposal of the EU and their limitations in the event of an energy crisis, it should first be pointed out that the energy sector falls within the scope of shared competences between the EU and the Member States. Therefore, the EU and the Member States may both legislate in the field of the energy market, with the scope of action of the Member States extending insofar as the EU has not exercised its competence, or where the Member States are re-exercising their competence to the extent that the EU has decided to cease exercising its own.²⁰³ This means that the EU and Member States are guided by the principle of loyal cooperation in the area of shared competences.²⁰⁴ The scope of EU competences in the field of application of intervention measures in the energy market is wide due to the specific “priority” of the EU to regulate the energy market, but the restrictions will result from: the principles and values of the functioning of the energy market, the type of intervention instrument used and the scope of competences of individual EU institutions. In this regard, reference should be made to the previously presented values, such as *energy security* or *energy solidarity*. The measures adopted by the EU, which concern a strategic sector, must not lead to a disruption of energy security nor infringe upon energy solidarity, and therefore must not undermine the public interest of the Member States. Undoubtedly, intervention solutions should be considered as temporarily limited and not distorting the functioning of the internal market, which must remain highly competitive, ensure sustainable economic growth, aim at full employment and social progress, a high level of protection and improvement of the quality of the environment, and support scientific and technical progress.²⁰⁵ Therefore, excessive and too long-lasting interference in the functioning of the energy sector market would result in depriving this sector of its market-based nature, despite the fact that the energy sector is a regulated sector. It is therefore necessary to balance the actions taken. In this regard, for example, Polish law provides that the national regulator “takes action to shape, protect,

²⁰³ C. Mik, *Porządek prawny Unii Europejskiej po Traktacie z Lizbony...*, p. 8.

²⁰⁴ Article 4(3) TEU, cf. A. Bodnar, A. Śledzińska-Simon, ‘O potrzebie ratyfikacji Konwencji ONZ o Prawach Osób z Niepełnosprawnością’, *Europejski Przegląd Sądowy* 2012, No. 5, p. 14.

²⁰⁵ Article 3(3) TEU.

and develop competition in the energy market, including: removing existing market barriers that hinder end users from exercising their right to switch suppliers, ensuring equal treatment of system users by distribution and transmission system operators,”²⁰⁶ and “cooperating with the competent authorities to counteract anti-competitive practices by energy companies”²⁰⁷ – primarily through cooperation with EU bodies.

Considering the limitations on the use of interventions by the EU in the energy market, it is also important to view them through the lens of the type of instrument being used. For example, if the measures are considered State aid, they must fall within the category of actions for which State aid can be deemed compatible with the internal market, and their granting will be subject to oversight by the European Commission.²⁰⁸ When the EU issues legal acts, it justifies their adoption in the recitals and explains their compliance with the applicable legal system. Therefore, the adoption of intervention measures could not undermine the principles governing the internal energy market.

Undoubtedly, the restrictions on the use of specific intervention measures in the energy market result from the scope of competences of individual EU institutions.²⁰⁹ The European Commission²¹⁰ is entitled to take a legislative initiative, and thus can show the EU legislators the need to adopt legislation in this area. The European Commission does not represent the EU’s security interests towards third countries. As an example, the REPowerEU plans issued by the European Commission identified the measures that, in the opinion of the European Commission, should be adopted in the face of an energy crisis. These plans were issued in the form of communications, and therefore lacked binding force. These activities were aimed at strengthening the EU internal market for the diversification of sources and directions of supply and the development of EU production sources. The REPowerEU objectives were then reflected in the previously mentioned regulations aimed at stabilising the situation in the energy market. In turn, the European Parliament²¹¹ and the Council of the EU²¹² co-create the law on a proposal submitted by the European Commission and adopt it by voting, in the reading procedure in both institutions (*ordinary legislative procedure*). In special cases, such as the conclusion of international trade agreements, the Council of the EU is the only legislator, with the consent or consultation of the European Parliament (*special legislative procedure*).

²⁰⁶ Article 23 (2) (13a) Energy Law.

²⁰⁷ Article 23 (2) (14) Energy Law.

²⁰⁸ M. Stoczkiewicz, ‘Refleksja końcowa’, in: *Pomoc państwa dla przedsiębiorstw energetycznych w prawie Unii Europejskiej*, Warszawa 2011.

²⁰⁹ Article 13 (1) TEU.

²¹⁰ Article 17 TEU.

²¹¹ Article 14 TEU.

²¹² Article 16 TEU.

Although it is the European Parliament and the Council of the EU that adopt the law, it is subject to extensive consultation with advisory bodies, that is, the Economic and Social Committee and the Committee of the Regions.²¹³ Hence, for example, the adopted *Electricity market design* package was assessed by the above-mentioned Committees, and then subjected to three readings by EU legislators. In this way, the adopted law is preceded by a wide consultation process.

Considering the presented mechanisms limiting the freedom of intervention in the energy market, it should be noted that such special solutions can largely be adopted by the EU. At the same time, the EU is bound by the limitations on the competences of individual initiating or legislative institutions, as set out in the Treaties. On the other hand, legislation is adopted with the broad involvement of EU institutions (increasingly, the legislative initiative of the European Commission is preceded by a *soft law* act issued by several EU institutions) and advisory bodies of the EU (which provide opinions on future legislation). Intervention measures in the energy market must align with the values and principles of the functioning of the energy market, be limited in time, and be adopted by balancing the need to protect entities affected by an emergency situation in the energy market with the maintenance of a competitive energy union.

Question 3

As far as energy crises are concerned, Article 122(1) and (2) TFEU, as well as Article 222 TFEU seem to create legal bases that may be applied, whereas in case of serious climate related threats Article 122(2) and Article 222 TFEU (comprising express references to natural disasters) should be considered as particularly suitable (although in our opinion Article 222(2) also cannot be excluded as a possible solution in the latter case, because this provision does not limit the array of circumstances “severe difficulties [...] in the supply of certain products, notably in the area of energy, could stem from”). However, all the aforementioned provisions are not free from drawbacks. In our opinion, the Treaties do provide a sufficiently wide Union energy crisis management toolbox in such a manner that it is not necessary to create other legal bases; nevertheless, in order to have the robust toolbox, the existing mechanisms should be modified to reinforce and deprive them of current ambiguities. However, any wording of these clauses would not be able to guarantee effective implementation, as it is more the problem of the law in action than the law in the books.

²¹³ Article 13 (4) TEU.

Article 122 TFEU is general and give wide leeway to the Council in determining which measures will be applied in a given case, and whether to take any measures at all (optional nature of measures); the clause itself does not create an effective protective mechanism that would guarantee the obligation to provide assistance in energy supply in the event of a cut-off, especially in comparison with the provision of Article 222 TFEU, which includes a general solidarity clause triggering mobilisation by the Union of all instruments at its disposal in the event of a terrorist attack, or natural or man-made disaster affecting a Member State. Article 122 TFEU is therefore much weaker than Article 222 thereof; in fact, quite apart from the optional nature of taking any action in the cases falling within the scope of the former provision, attention should be drawn to the indefinite range of measures “appropriate to the economic situation,” in particular when juxtaposed to the Union’s commitment to mobilise all the instruments at its disposal within the framework of Article 222 TFEU (even if mobilisation is not tantamount to their use). The contrast is even stronger when we consider delegating to the Council decision-making concerning the setting out of conditions for the application by the Union of the general solidarity clause of Article 222 TFEU (the authorisation in this regard is included in Article 222(3) TFEU). It would be better if Article 122(1) TFEU comprised an obligation, and not an option, of applying some measures. It would also be worth considering whether including a non-exhaustive array of possible measures could be useful.

Article 222 TFEU differentiates two providers of support: the EU (Article 222(1) TFEU) and Member States (Article 222(2) TFEU), and respective sections reveal significant divergence in the degree of specificity. Within the framework of these provisions, we are dealing with solidarity between the European Union and the Member States (directed to Member States), but also – which is less common in the EU law – solidarity in a horizontal dimension, between respective Member States. At the same time, these provisions concern threefold threats: terrorism, natural disasters and man-made disasters. Article 222(1) TFEU requires the Union to “mobilise” all instruments at its disposal. In this context, the actual meaning of the phrase “shall mobilise” used in this provision may be dubious, as it is not known what measurable result it is actually intended to bring. In turn, Article 222(2) TFEU indicates that if a Member State is “the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.” It should be noted that the stipulation regarding the reaction of the EU (Article 222(1) TFEU) has much sharper blade than the one concerning the actions of Member States (Article 222(2) TFEU). This is confirmed by the content of Declaration 37 relating to Article 222 TFEU. The Declaration states as follows: “Without prejudice to the measures adopted by

the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State.”

Since the form of assistance provided to a state affected by extraordinary circumstances referred to in Article 222(2) TFEU depends solely on the will of individual states, the obligation of the Member States to provide support cannot be deemed to be directly effective. It is true that declarations attached to EU treaties do not have the value of binding law, but they may create a forecast for the future as to the way in which individual provisions of primary law will be interpreted. Even without this Declaration, it should be assumed that Article 222(2) TFEU does not meet the criteria of direct effectiveness because it is not sufficiently precise.

This issue looks different under Article 222(1) TFEU, relating to the obligations of the EU as a whole. In the legal scholarship, the position was expressed that in the absence of arrangements specifying the application of the solidarity clause, it is not possible for it to have a direct effect.²¹⁴ It was pointed out that the solidarity clause also in relation to the EU contains a legal obligation, but of a general nature.²¹⁵ However, the application of the solidarity clause in relation to the actions of the EU was made more specific by the decision of the Council, issued on the basis of the authorisation contained in Article 222(3) TFEU.²¹⁶

The provisions of Article 222 TFEU do not comprise a definition of a natural or man-made disaster, in which cases the obligation of the Union and the Member States to provide assistance to a country affected by such circumstances is to be triggered. In the absence of such a definition, it was pointed out that the EU legislator admits a wide scope of these concepts.²¹⁷ The above-mentioned Decision confirmed correctness of that view. In light of its Article 3(a), the notion of a disaster should be considered as “any situation which has or may have a severe impact on people, the environment or property, including cultural heritage.” This is a very vague formulation, opening up the possibility of applying the solidarity clause in virtually every case of extraordinary circumstances that – actually or potentially – may have a significant

²¹⁴ M. Fuchs-Drapier, ‘The European Union’s Solidarity Clause in the Event of a Terrorist Attack: Towards Solidarity or Maintaining Sovereignty?’, *Journal of Contingencies and Crisis Management*, vol. 19, no. 4, 2011, *passim*.

²¹⁵ M. Gestri, ‘EU Disaster Response Law: Principles and Instruments’, *International Disaster Response Law*, eds. Andrea de Guttry et al., Springer, 2012, p. 126.

²¹⁶ Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (OJ L 192, 1.07.2014, pp. 53–58, as amended).

²¹⁷ M. Gestri, ‘EU Disaster Response Law: Principles and Instruments’, *International Disaster Response Law*, eds. Andrea de Guttry et al., Springer, 2012, pp. 110–111.

negative impact on people, the natural environment or property. The scope of application of the solidarity clause is also wide in the territorial context. Pursuant to Article 2(1) of the Decision, it is applied to the events specified in this legal act “irrespective of whether it originates inside or outside the territory of the Member States.”

Recital 4 of the decision reads as follows: “The implementation of the solidarity clause by the Union should rely on existing instruments to the extent possible, should increase effectiveness by enhancing coordination and avoiding duplication, should function on the basis of no additional resources, should provide a simple and clear interface at Union level to Member States, and should respect the competences conferred upon each Union institution and service.”

Indeed, the analysed Decision does not establish any new measures but mainly concerns the procedural aspects of the implementation of the solidarity clause in the event of occurring triggers. In this context, it is worth paying attention to its Article 4(1), allowing a given Member State to invoke the solidarity clause: “[...] if, after having exploited the possibilities offered by existing means and tools at national and Union level, it considers that the crisis clearly overwhelms the response capabilities available to it.” Article 222 TFEU is therefore intended to be the last resort.

In our opinion, the wording of Article 222(1) TFEU should be amended by replacing the reference to “mobilisation” (evoking doubts as to the actual meaning thereof) with a reference to “use” or “application.” Also within the framework of Article 222 adding an exemplary catalogue of supporting actions that could be taken by the EU (Article 222(1) TFEU) and its Member States (Article 222(2) TFEU) should be considered. Actually, the present shape of Article 222(2) TFEU, jointly with the Declaration 37, renders this provision toothless. Its application could easily end up with expressing condolences. However, it is hard to strike the right balance; it would not be reasonable to introduce binding and specific solidarity obligations at the level of the Treaty (without adjustment to factual circumstances of a given case), but at the same time the margin of discretion granted to the Member States as regards their support seem too wide. Thus, also when it comes to the support by the Member States (and not by the EU), there should be an authorization for the Council similar as the one already included in Article 222(3) TFEU which is applicable to instruments to be employed by the EU.

PORTUGAL

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

The concepts of energy solidarity and energy security in the Portuguese legal order do not find an explicit provision in the constitutional framework. The Constitution of the Portuguese Republic (Constituição da República Portuguesa – hereafter ‘CRP’) in its Article 81(m) establishes as priority of the Portuguese state, within the economic and social realm, the adoption of “a national energy policy, with the preservation of natural resources and ecological balance, promoting international cooperation in this domain.” However, these are fundamental concepts in Portuguese energy law and policy, integrated due to European legislation.

The energy and climate policy instrument for the decade 2021–2030 in Portugal is the National Energy and Climate Plan 2030 (NECP2030), approved by Resolution of the Council of Ministers No. 53/2020, of July 10. In NECP2023, both concepts assume significant relevance and are expressly mentioned as two of the energy policy objectives, with reference to which the main measures of action are established.

In particular, energy solidarity is directed towards the declared objective of improving the functioning and development of the internal energy market, ensuring its stability and integration. Among the measures defined for its implementation are: (i) the promotion of the development of interconnections and (ii) the promotion of the digitalization of the energy system.

Energy security is achieved through the guarantee of supply security, taking into consideration the objectives of decarbonization and the specificities of energy systems, aiming to increase their resilience. Among the measures for

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achieving this objective are: (i) the diversification of energy sources, (ii) the use of the complementarity of renewable resources, (iii) ensuring supply from third countries, and (iv) the development of energy storage solutions, which in the medium and long term will contribute to reducing external energy dependence.

Although the NECP2030 tends to lack normative character, it has the virtue of manifesting the country's vision for the sector and serves as a political axis for the laws and decisions of the Government in the matter.

In national legislation, the concept of energy solidarity has been scarcely used, and sometimes with a different scope, such as energy solidarity between different regions of the country, instead of energy solidarity between Member States. One example is in Decree-Law No. 15/2022, of 14 January, establishing that the entities participating in the national electricity system (hereafter 'NES') have the public service responsibility of ensuring "convergence of the NES translated into solidarity and cooperation with the electricity system of the Portuguese autonomous regions."¹

Question 2

The impact of this conceptualization is still unclear. While it might open the door to extracting new obligations based on the principle of solidarity in EU law, it is unlikely to be interpreted as changing the nature of the principle of solidarity. It is not the first time that this principle has given rise to a conclusion that the Member States had failed to fulfil certain of their obligations under EU law.²

There is no comparable principle of energy solidarity in the Portuguese national law. The closest constitutional reference to international interests impacting energy policy can be found in Article 81 of the CRP, according to which the State ought to "[promote] international cooperation" in this area. Albeit the value of cooperation with third countries is acknowledged, it has never given rise to an explicit obligation to assess foreign interests or value them when designing national policy.

EU energy solidarity as it is currently formulated has limited scope as a corrective tool of national policies. The CJEU established that this obligation binds the Member States in their exercise of EU energy policy. Even then, Member States might have a broad margin of discretion, with Advocate General Cam-

¹ Decree-Law no. 15/2022, of 14 January, Article 9(3)(e).

² Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598, §42.

pos Sánchez-Bordona cautioning against a broad/substantive review of this assessment by the courts.³ It is our preliminary understanding that such obligation does not directly affect the development of national law policy – only to the extent that it reflects EU law or policy. This is particularly evident if national measures are enacted in the areas listed in Article 194(2) TFEU, that is, the article concerning the rights of Member States to determine the conditions for the exploitation of energy resources and for the definition of their energy mix.

Furthermore, this is an obligation drawn from the principle of solidarity applied in Article 194 TFEU but is difficult to determine that it is a part of EU's national constitutional identity and would consequently override national law. It is our understanding that the EU's constitutional identity, as defined in *Poland v Parliament / Council* C-157/21 – paragraph 264 – includes the *values* in Article 2 TEU which are “an integral part of the very identity of the EU as a common legal order, values that are given concrete expression in principles comprising legally binding obligations for the Member States.” Furthermore, the values listed in the first phrase of Article 2 TEU do not include solidarity. Preparatory works have emphasized that the first sentence was justiciable, unlike the second sentence.⁴ It is our view that neither the Rule of Law Conditionality Judgements nor the *OPAL* judgement entail that this particular expression of the solidarity principle – energy solidarity, under Article 194 TFEU – amounts to a part of a “common constitutional tradition which they have undertaken to respect at all times” and which ultimately prevails over separate national identities and, as such, over national legal and policy options.

Question 3

There is widely discussed tensions regarding the many objectives of the EU's energy policy as formulated in the Energy Union Strategy.⁵ EU's green transition objectives (the means to attain a high level of environmental protection) and energy security are two priorities of EU energy policy whose weight shifts constantly.⁶ The need to ensure energy security implies that fossil fuels such as

³ Opinion of Advocate General Campos Sánchez-Bordona in *Germany v Poland*, C-848/19 P, ECLI:EU:C:2021:218. §49.

⁴ E. Küçük, ‘Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?’, *Maastricht Journal of European and Comparative Law*, no. 23(6), 2016, pp. 965–983, <https://doi.org/10.1177/1023263X1602300604>, p. 50.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, 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.

⁶ K. Talus, *EU Energy Law and Policy: A Critical Account*, Oxford University Press, 2013, p. 187.

gas and oil are present in the energy mix, with gas remaining a transition fuel⁷ as per the REPowerEU Plan.⁸

Furthermore, the Energy Union⁹ encompasses the objectives of fighting energy poverty which may be affected by transition investments. This tension underlies the creation of tools such as the Just Transition Mechanism and the resulting Just Transition Fund which aim to promote the economic diversification and modernization of territories affected negatively by the green transition, for instance due to its negative impact on employment.¹⁰

While Advocate General Campos Sánchez-Bordona in the *OPAL* ruling proposed a limited technical review which is argued to essentially ensure a reference to the assessment under the principle,¹¹ the Court of Justice of the EU (hereafter “the Court”) seemed to opt for a broader review¹² – determining that different interests of the EU and Member States liable to be affected are taken into account and balanced.¹³ The Court acknowledges the solidarity principle is subjacent to the four EU energy policy objectives listed in Article 194 TFEU,¹⁴ not only energy security. The Court did not provide elements regarding a potential next step of substantive judicial review of the balance between different competing interests under 194 TFEU. It is our understanding that the Court should have a limited substantive review to ensure that national interests are not manifestly overlooked.¹⁵ If necessary, the principle of proportionality under Article 5(4) of the Treaty on European Union (TEU) is better suited to balance the weight of competing interests under Article 194 TFEU.

⁷ L. Hancher, ‘EU Energy Market Regulation, after the 2022 Energy Crisis: the reforms so far and the challenges ahead’, *European Policy Analysis*, January 2024, SIEPS – Swedish Institute for European Policy Studies, accessed at: EU Energy Market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead), p. 8.

⁸ 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 REPowerEU Plan COM/2022/230 final.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, 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.

¹⁰ Regulation (EU) 2021/1056 of 24 June 2021 establishing the Just Transition Fund, Recitals 5–8.

¹¹ K. Talus, ‘The interpretation of the principle of energy solidarity – A critical comment on the Opinion of the Advocate General in *OPAL*’, *oxfordenergy.org*, the Oxford Institute for Energy Studies, April 2021.

¹² K. Huhta and L. Reins, ‘Solidarity in European Union Law and its application in the Energy Sector’, *ICQL*, Vol 2, no. 72, July 2023, pp. 771–791.

¹³ Judgement of the CJEU, 15 July 2021, *Germany v Poland*, C-848/19 P, ECLI:EU:C:2021:598.

¹⁴ Judgement of the CJEU, 15 July 2021, *Germany v Poland*, C-848/19 P, ECLI:EU:C:2021:218, §47, §43.

¹⁵ Opinion of AG Sanchez-Bordona, 18 March 2021, *Germany v Poland*, C-848/19 P, ECLI:EU:C:2021:218, §166.

It is also our understanding that energy solidarity is liable to trigger legal effects in relation to green transition measures. Measures pursuing green transition objectives, if adopted in the exercise of competences in respect of EU energy policy, must observe the principle of energy solidarity.¹⁶ It is also worth noting that the *OPAL* ruling does not entail that the “need to preserve and improve the environment” under Article 194 TFEU holds a similar fundamental value as the principle of energy solidarity.¹⁷

We believe the Social and Fundamental Rights dimension is less relevant in this context. Compliance of a measure with social and fundamental rights should take place under relevant legal instruments such as the Charter of Fundamental Rights of the European Union (CFREU). Albeit there are references to solidarity in the social and fundamental rights framework, in particular in Chapter IV of the CFREU, the energy solidarity concept does not appear to encompass this particular dimension of the solidarity principle.

Question 4

A paradigmatic example of tension between Member States in the electricity sector dates back to 2017, when the Spanish Government imposed taxes on power plants within its territory. This led to higher pool prices in the Iberian electricity market, creating a distortion in competition, with Portuguese electricity producers benefiting from windfall profits. In response to such cross-border market tensions, the Portuguese government introduced the clawback mechanism, aimed at restoring competitive balance in the wholesale electricity market in Portugal when the pool market price is impacted by “off-market events.” This economic adjustment mechanism was designed to capture the windfall profits reaped by power plants located in Portugal, ensuring fairer competition, promoting a more cohesive regional energy market, and stabilizing the market, thereby contributing to the long-term security of supply.

The ongoing discussion about strengthening the Iberian energy market’s integration with the broader European market also highlights tensions between Member States, particularly regarding energy solidarity and security. In the hydrogen field, significant process was made with France, Portugal, and Spain signing an agreement in 2022 to create the Green Hydrogen Corridor, connecting Barcelona to Marseille via an underwater pipeline to avoid environmental concerns in the Pyrenees. However, no satisfactory agreement has been reached in the electricity field between the three countries. For this reason,

¹⁶ Judgement of the CJEU, 15 July 2021, *Germany v Poland*, C-848/19 P, ECLI:EU:C:2021:598.

¹⁷ L. Kaschny, ‘Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy’, *Transnational Environmental Law*, 19 June 2023, p. 282.

and based on recent public declarations,¹⁸ the Portuguese and Spanish governments are planning to escalate the issue to the European level, arguing that, despite their significant renewable energy potential, the weak interconnection with the rest of Europe prevented them from helping other countries during the crisis, putting the energy security of the European Union at risk.

Another example of a cross-border dimension of the development of energy projects is the weighing-in of transboundary implications within the environmental licensing. National legislation, in accordance with EU law, subjects projects, particularly in the energy sector, that are likely to cause significant environmental impacts to an environmental impact assessment (hereafter 'EIA') procedure. When these projects are likely to cause transboundary effects, they are also subject to consultation with the affected Member State(s).

Considering Portugal's geographical location, any cross-border considerations with neighboring Member States regard exclusively the Kingdom of Spain. To regulate the approach to environmental assessments of plans, programs, and projects with transboundary effects, the Kingdom of Spain and the Republic of Portugal signed a protocol on 19 February 2008. This protocol establishes four phases: (i) an initial phase of notification of the start of the EIA procedure for a project with potential transboundary effects, during which the potentially notified State must indicate whether it has an interest in participating in this procedure; if the State expresses interest in participating in the procedure; (ii) a second phase of transboundary consultations follows; subsequently, once a final decision is issued within the EIA procedure; (iii) a phase of communication of the final decision; and (iv) a final post-assessment phase (optional), in case follow-up measures of interest to the affected State are established.

In this context, the Portuguese state has notified the Kingdom of Spain and, whenever determined, consulted the Kingdom of Spain on the environmental effects of projects on its territory and on the measures planned to avoid, minimize, or compensate for these effects. The same has occurred in the opposite direction.

Of particular interest are: (i) the expansion project of the Mina do Barroso (lithium), in which the Kingdom of Spain, having been consulted, determined that it was not expected to affect Spanish territory; (ii) the project, in the preliminary study phase, for the construction of a 400 kV transboundary power line connecting Ponte de Lima to Fontefría, in which the Kingdom of Spain, having been notified, expressed interest in participating in the EIA procedure; (iii) the Portuguese State was recently consulted in the context of the

¹⁸ See <https://www.jornaldenegocios.pt/empresas/energia/detalhe/portugal-e-espanha-unem-se-para-forcar-interligacoes-energeticas-com-franca>

EIA procedure for a hydroelectric project to be installed in Spanish territory, the outcome of which is currently unknown, but which involves significant diplomatic tensions. This is because Portugal and Spain share a large portion of their water resources, making water management a highly relevant issue in bilateral relations. Disagreements often center around how water is allocated, as Spain benefits from a privileged position upstream of the main rivers shared by both countries, which impacts the availability of resources in Portugal.

This illustrates the main points: there are mostly synergies between Portugal and Spain in the energy sector (even when economic and financial objectives are at stake). However, whenever the security of water resource supply is concerned, tensions intensify.

Question 5

The application of the energy solidarity test is not complete without a proportionality analysis. The assessment of differences between Member States is required by the principle of proportionality (Article 5(4) TEU) insofar as it implies that a measure must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved. The degree and severity of the impact of a measure necessarily vary according to the different characteristics of the Member States. This understanding is implicit in design and execution of some EU energy policy measures, which have sought to consider characteristics such as geographical features and existing infrastructure. As widely discussed, and acknowledged by the European Commission (Commission), the strategies for consumption reduction due to energy supplies concerns in the EU following Russia's war of aggression against Ukraine needed to take into account the different characteristics of EU Member States regarding infrastructure and their energy mix.¹⁹ As an example, Portugal's lack of gas interconnections hinders the contribution to the expected solidarity²⁰ which in turn rendered the country eligible for a lower reduction target.

This balance between solidarity and proportionality should be assessed on a case-by-case basis.

¹⁹ 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 – RePowerEU Plan, COM(2022) 230 final, Brussels, 18.05.2022.

²⁰ Portuguese Government Website, Portugal insists on the need for European interconnections to guarantee energy security – XXIII Government – Portuguese Republic, accessed at 15 July 2024.

Question 6

The EU has been increasingly exercising this shared competence, despite historical Member States' reluctance in giving up sovereignty in their field due to its links with national security (hence the Article 194(2) TFEU safeguard).²¹ This has happened, for instance, when adopting measures under Article 122 TFEU to respond to the energy crisis and geopolitical crisis (namely based on the REPowerEU Plan),²² which, despite its temporary design, may have wider implications for the future of national policy regarding the energy mix.²³

While energy solidarity is an important expression of the principle of solidarity (and closely linked to sincere cooperation), shared competences' exercise by the EU is limited by different principles such as conferral, proportionality, and subsidiarity.²⁴

It is our understanding that this principle will have an impact in the national sphere when applying measures under EU energy policy in fields where these are liable to harm other states' interests or Union interests. This impact is however limited. This vertical and horizontal dimension cannot be interpreted to (further) narrow the margin for Member States' intervention in what concerns their exercise of national energy policy. The obligation to carry a solidarity assessment pertains solely to the "exercise of their respective competences in respect of EU energy policy" (paragraph 71, CJEU, Case C-848/19 P). States should preserve a degree of freedom and autonomy. In particular when enacting measures under Article 194(2), paragraph 2, concerning Member States' energy mix and determining the exploitation of Member States' resources, the principle of energy solidarity may not be applied.

Question 7

The concept of energy security is a fundamental element of the Energy Union Strategy.²⁵ It is also closely linked with security of supply and the necessity to

²¹ K. Huhta, 'The Scope of State Sovereignty under Article 194(2) TFEU', *ICLQ*, vol. 70, October 2021, p. 993.

²² L. Hancher, 'Solidarity on Solidarity Levies and a Choice of Energy Mix', *Verfassungsblog.de*, *Verfassungsblog*, 8 February 2023, <Solidarity on Solidarity Levies and a Choice of Energy Mix – *Verfassungsblog*>

²³ L. Hancher and A. De Hauveclocque, 'Strategic Autonomy, RepowerEU and the Internal Energy Market: Untying the Gordian Knot', *Common Market Law Review*, Vol. 61, 2024, p. 80.

²⁴ K. Huhta, 'The Scope of State Sovereignty...', p. 993.

²⁵ Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee, 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.

“[reduce] (EU) dependency on particular fuels, energy suppliers and routes.”²⁶ It has generally been considered to concern: (i) oil security of supply, (ii) natural gas security of supply, (iii) electricity security of supply, and (iv) development and protection of critical energy infrastructures.²⁷ It also encompasses diversification of gas routes, gas storage infrastructures and tackling cybersecurity challenges, in line with an increasing digitization of the energy system.²⁸ It has, additionally, adopted an energy transition dimension, with the focus on renewable energy systems and decarbonization (in particular, having in mind the natural resources available in the EU).

The Portuguese law adoption of the concept of energy security is aligned with EU law. In NECP2023 energy security is linked to objectives such as: (i) diversifying energy sources, (iii) reducing dependency from third countries, and (ii) increasing the flexibility of the national system through domestic sources, demand response and storage. In Decree-Law No. 15/2022, of 14 January, energy security has been defined as the “capacity [of the electric system] to cover adequately the demand for electricity of final consumers.” Under this Decree-Law, the security of supply, as well as regularity and quality of supply, are public service obligations.²⁹ In Council of Ministers Resolution 82/2022 regarding the current energy crisis, the concept of energy security is used to highlight the importance of ensuring a stable energy supply, focusing on preventive measures to safeguard this supply. Notably, it establishes a strategic water reserve in hydroelectric reservoirs to ensure energy security during times of crisis. In Decree-Law No. 114/2001, of 7 April, defining energy crisis, security of supply is linked to the fulfillment of the needs of vulnerable consumers and the functioning of the State, the Economy and Defense.³⁰ Security of supply has also been addressed through the protection of infrastructures or strategic assets in the energy sector in particular from foreign interference.³¹

In the EU, the measures for the achievement of the objective of energy security take into account, to some extent, Member States’ specific characteristics, as security of supply is attained in different ways in different Member States.

²⁶ Communication, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final.

²⁷ Communication, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final.

²⁸ Joint communication to the European Parliament, the European Council and the Council on European economic security strategy, JOIN(2023) 20 final, p. 5; State of the Energy Union Report 2024, COM(2024) 404 final, pp. 16–17.

²⁹ Decree-Law No. 15/2022, of 14 January, Article 9(3).

³⁰ Decree-Law No. 114/2001, of 7 April, which defines energy crisis and reactive measures. An energy crisis is characterized as “the occurrence of difficulties in the supply or distribution of energy which make it necessary to apply exceptional measures aimed at guaranteeing energy supplies essential to defense, the functioning of the State and priority sectors of the economy and the satisfaction of the fundamental needs of the population.”

³¹ Decree-Law No. 138/2014, of 15 September, with the regime for safeguard of strategic assets.

For instance, following the 2022 Energy Crisis, the Commission approved a measure applicable to the Iberian Electricity Market (MIBEL), which partially finances the fuel cost of electricity producers, in order to establish a gas price cap, under State Aid rules. The need to develop solutions suitable for certain national contexts is acknowledged in the Communication for the Security of supply and affordable energy prices of March 2022.³² Another example in the economic sector is the EU's Regulation on the screening of foreign direct investments,³³ which allows the Member States to have the last word regarding whether an investment threatens their security, including in the energy sector. The adoption of EU regimes that are not "one size fits all" and that leave margin for Member States' execution allows for the consideration of Member States' specificities. The Decree-Law No. 138/2014, of 15 September, which established a screening mechanism of foreign investments, is one such example. The Portuguese Government may oppose to a transaction resulting in control over a strategic asset, provided there is a real and sufficiently serious threat to national security or security of supply. Strategic assets include the main infrastructure and assets assigned to the provision of essential services in energy. The Gas Storage Regulation is another example of an instrument seeking security of supply while explicitly taking into account the specificities of Member States. These differences at the infrastructure and capacity levels are reflected on the filing targets, and ought to be considered by the Commission adopting measures to address deviations from these targets.³⁴

Energy security in the Portuguese framework encompasses risk preparedness, in particular concerning the electricity sector and the supply of gas, in line with EU policy. Following the EU Risk Preparedness Regulation³⁵ on the electricity sector, Portugal's Directorate for Energy and Geology has in 2022 presented a risk-preparedness plan, for the Portuguese Electricity Sector.³⁶ Likewise, under the Regulation to safeguard gas supply,³⁷ the Preventive

³² Communication from the Commission on Security of supply and affordable energy prices: options for immediate measures and preparing for next winter, COM(2022) 138 final.

³³ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79I, 21.03.2019).

³⁴ 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, pp. 17–33) Recitals 6 and 15.

³⁵ Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector (OJ L 158, 14.06.2019).

³⁶ Risk-preparedness Plan for the Portuguese Electricity Sector, pursuant to Article 10 of Regulation (EU) 2019/941, public version available at <pt_rpp-electricity_revison_19012023-public-version.pdf>

³⁷ 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 (OJ L 280, 28.10.2017).

Action Plan for the National Gas system 2023–2027³⁸ was submitted to the Commission. Both included a scenario of crisis related to cybersecurity issues. The protection against cybercrime and the promotion of the digitalization of the energy sector are among the objectives of the NECP2030.³⁹ Some of the developments are yet to be operationalized, in particular regarding the use of intelligent networks. Portugal already transposed Directive 2016/1148 on Security of Network and Information Systems (by means of Law No. 46/2018, of 13 August). This law led to the creation *inter alia* of the National CyberSecurity Center which also works with energy operators for the subsectors of gas, oil, and electricity. Energy is referred to as an essential service sector, whose players must adopt the appropriate and proportionate technical and organizational measures to manage the risks to the security of the network and/or the information systems used.⁴⁰

Many challenges to energy security, such as terrorism, climate change, geopolitical tensions *inter alia*, which brought new concerns and actors into play, have caused the concept of energy security to evolve far beyond the traditional principle of security of supply and therefore it is likely that further regulation comes to be enacted.⁴¹

Question 8

Energy solidarity can be understood to be a dimension of energy security and has gained increased prominence in EU energy policy and law since the Russian energy crisis.⁴² Recent acts of EU solidarity through its external competences may be identified in reaction to the Russian crisis, such as sanctions, expressly based on solidarity, and joint gas procurement.⁴³ Regulation 2022/2576⁴⁴ adopted under Article 122 TFEU was oriented by the principle of solidarity when setting up the grounds for joint gas procurement to be carried

³⁸ 'Plano Preventivo de Ação para o Sistema Nacional de Gás (2023–2027)', March 2023, Direção Heral de Energia e Geologia, <https://www.dgeg.gov.pt/media/sw2jfleh/pt-preventive-action-plan_march-2023_final.pdf>

³⁹ Portugal's Council of Ministers Resolution no. 53/2020, of 10 July.

⁴⁰ Law no. 46/2018 of 13 August, Article 16.

⁴¹ C. Patrício Fernandes, 'Segurança energética: para quem, por quem e de que ameaças?', *Nação e Defesa*, no. 153, August 2019, pp. 73–100, p. 76. Accessed at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjH8KOB272KAxWXUaQEHZbyPPgQFnoECBUQAQ&url=https%3A%2F%2Fprevistas.rcaap.pt%2Ffnacao%2Farticle%2Fdownload%2F30850%2F22060%2F131027&usq=AOvVaw2oNsLxqQYAYbHsbKQlPJsA&opi=89978449>

⁴² M. LaBelle, 'Breaking the era of energy interdependence in Europe: A multidimensional reframing of energy security, sovereignty, and solidarity', *Energy Strategy Reviews*, Vol. 52, March 2024, p. 2.

⁴³ M. LaBelle, 'Breaking the era of energy interdependence in Europe...', p. 4.

⁴⁴ 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.

through the EU Energy Platform.⁴⁵ These measures were aimed at reducing dependence from Russian energy sources, particularly by diversifying energy supply. The EU Energy Platform for instance facilitated the signature of agreements with gas exporting partner countries such as the US and Azerbaijan. Additionally, the TEN-E Regulation has been revised in 2020 to include Projects of Mutual Interest (infrastructure projects connecting Member States to countries outside of the EU) provided that the policy framework of such countries has a high level of convergence and ensure security of supply based *inter alia* in solidarity. Solidarity is among the positive externalities that may justify cost allocation and financial assistance to these projects. Similarly, projects with third countries that establish priority corridors should be eligible for the status of Projects of Common Interest (infrastructure projects connecting Member States). These projects are given priority status and rapid administrative treatment, and are eligible for EU Funds over the Connecting Europe Facility, among other benefits. The recent Proposal for a Regulation establishing a framework for screening of foreign investment into the EU,⁴⁶ which creates a screening competence of the Commission, in particular in regards to EU-funded projects, may lead to an EU competence creep in the energy field.⁴⁷

In essence, the principle of solidarity was often a legal justification for these EU-led responses.⁴⁸ The adoption of measures under Article 122 TFEU must be done “in a spirit of solidarity between member States.” The concept of solidarity in this provision is multi-dimensional and its use and objectives vary across the instruments.⁴⁹ The efforts to react to an external threat and to diversify external sources took place mainly through a coordinated system in lieu of national responses as it was the paradigm up until then,⁵⁰ reinforcing the EU’s role. In practice, the interpretation of this principle assisted the expansion of the EU’s external competences in the energy field.

Question 9

The current state of gas supply security within the European Union (EU) is shaped by a governance structure that allocates responsibilities between Mem-

⁴⁵ ‘EU Energy Platform’, *energy.ec.europa.eu*, European Commission, <EU Energy Platform>

⁴⁶ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union COM/2017/0487 final – 2017/0224 (COD)

⁴⁷ L. Reins, ‘The European Union’s framework for FDI screening: Towards an ever more growing competence over energy policy?’, *Energy Policy*, Volume 128, 2019, pp. 665–672, ISSN 0301-4215, <https://doi.org/10.1016/j.enpol.2019.01.029>

⁴⁸ M. LaBelle, ‘Breaking the era of energy interdependence in Europe...’, p. 10.

⁴⁹ K. Huhta and L. Reins, ‘Solidarity in European Union Law and its application...’, p. 790.

⁵⁰ M. LaBelle, ‘Breaking the era of energy interdependence in Europe...’, p. 4.

ber States and Union-level institutions – a *shared responsibility model*. The Energy Union strategy, launched in 2015, aimed to strengthen energy security through enhanced coordination and resilience-building.

However, this division of responsibility, particularly in the context of the gas market, presents both opportunities and challenges. From a governance perspective, a shared responsibility model enables Member States to tailor energy policies according to their specific needs, considering factors like their energy mix, economic conditions, and geopolitical context. This flexibility accommodates the diversity within the EU and respects national sovereignty.

Despite this positive aspect, the same model can also lead to fragmentation and inconsistencies across Member States, potentially weakening a collective action. The implementation of the Iberian Cap⁵¹ – a cap on the price of electricity generated using natural gas in the Iberian Peninsula – illustrates how national or regional measures can diverge from broader EU policies, creating potential disparities in energy pricing and security across the Union.⁵²

Another important aspect to consider is that a shared responsibility model impacts the security of gas supply across the EU by making the Union vulnerable as a whole to the policies and decisions of individual Member States. The decision of one Member State to enter into long-term contracts with a single supplier can increase the EU's overall vulnerability to geopolitical risks. For example, if one country becomes too reliant on Russian gas through bilateral agreements, this could weaken the EU's bargaining position as a whole and limit the effectiveness of collective actions, such as imposing sanctions or negotiating new supply routes. In this model, Member States retain significant control over their national energy policies, including how they respond to gas supply disruptions. If a country which is a major consumer and hub for gas distribution in Europe makes a unilateral decision to restrict or reroute gas supplies to prioritize its own needs during a crisis, it can reduce the availability of gas for neighboring countries. This was evident during the early stages of the Ukrainian crisis, where national interests led to uncoordinated and sometimes conflicting responses across the EU.

⁵¹ The Iberian Cap, officially known as the Iberian exception, refers to the temporary measure implemented by Spain and Portugal to cap the price of natural gas used in electricity generation. This policy was introduced in June 2022 in response to the energy crisis triggered by the sharp rise in gas prices following Russia's invasion of Ukraine. The Iberian Cap was designed to protect consumers from the extreme volatility in energy prices while ensuring the stability of the electricity market.

⁵² For example, in February 2023, the average residential electricity price in Spain was 24.1 euro cents per kilowatt-hour (c€/kWh), which was lower than the EU average of 28.3 c€/kWh. In contrast, countries like Germany and Ireland saw much higher electricity prices, reaching up to 49.9 c€/kWh (sources: euronews, S&P Global).

Nonetheless, the EU has established frameworks to enhance coordination, such as the Regulation on the Security of Gas Supply (2017),⁵³ which introduced the requirement for mandatory gas storage. This ensures that Member States maintain a minimum level of gas reserves to safeguard against supply disruptions and it had a significant impact on the stabilization of gas prices. Additionally, the EU has promoted joint purchases of gas to allow Member States to pool their demand, thereby strengthening their bargaining power with suppliers and reducing dependence on single sources. These initiatives have enhanced collective security, providing a buffer during supply disruptions, and enabling more favorable terms in gas procurement.

Undoubtedly, the energy crisis following Russia's invasion of Ukraine in 2022 provided critical insights into the strengths and weaknesses of the current governance model. Primarily, the crisis highlighted the limitations of the current decentralized approach, from lack of coordination to reduced solidarity and inefficiencies in energy infrastructure.

Additionally, the effectiveness of joint purchases of gas demonstrated that a more unified EU strategy could enhance energy security and reduce vulnerabilities, which means that there is a need for greater EU integration.

The second lesson we should retain from this crisis is the importance of mandatory storage. For a long time, the critical role of mandatory gas storage in ensuring energy security was underscored. While this measure provided a safety net during supply disruptions, the uneven implementation across Member States highlighted the need for stronger enforcement and more consistent standards.

The third lesson is that there are clear benefits of national/regional interventions in certain contexts (Iberian Cap), but these localized interventions could (potentially) conflict with broader EU energy objectives. A balance must be struck between national flexibility and Union-wide consistency. While the current governance model has allowed for flexibility, the recent crisis suggests that a more centralized approach at the EU level may be necessary. This could involve stronger coordination of policies (like mandatory gas storage and joint gas purchases), ensuring a more unified response to energy challenges.

To prevent disparities in the energy market, the EU should also consider harmonizing measures like the Iberian Cap with broader Union policies. This could involve setting guidelines that allow for national/regional interventions

⁵³ 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, aims to prevent, and respond to, potential gas supply disruptions.

while ensuring they align with EU-wide energy security goals. Furthermore, the EU should continue to strengthen mechanisms for coordination and solidarity, ensuring that all Member States are equally prepared for future crises.

In conclusion, while the shared responsibility model has provided flexibility, the experience of the recent energy crisis suggests that a shift towards a more integrated, Union-driven governance model may be *necessary*. Addressing challenges like the localized interventions and measures, enforcing mandatory gas storage, and expanding joint gas purchases are crucial steps to improve the EU's energy security and ensuring a more cohesive and resilient Union.

Section II: Energy solidarity, energy security and green transition

Question 1

Currently, the European Union is at a critical juncture in its energy and climate policies, as it seeks to transition to a climate-neutral economy by 2050. This ambition is enshrined in the European Green Deal, which sets the roadmap for achieving net-zero greenhouse gas emissions. However, as expected, this path to climate neutrality is complicated by the fact that there are significant economic and political differences among Member States, particularly in the energy sector. These disparities raise crucial questions about the role of energy solidarity and whether it can be relied upon to ensure coherence in the transition.

The EU is characterized by diverse energy landscapes and varying levels of dependency on fossil fuels. For instance, countries like Poland rely heavily on coal,⁵⁴ while others like France have invested significantly in nuclear energy.⁵⁵ These differences create varied economic and political stakes in the transition to a climate-neutral economy. Eastern European countries, with their dependence on coal and less developed renewable energy infrastructure, face higher costs and social challenges in the transition compared to wealthier Western European nations.⁵⁶ This diversity constitutes a challenge to energy solidarity, a principle that assumes a somewhat unified approach to energy security and

⁵⁴ S. Kardás, 'From coal to consensus: Poland's energy transition and its European future', Policy Brief, *ecfr.eu*, European Council on Foreign Relations, 27 September 2023 <From coal to consensus: Poland's energy transition and its European future | ECFR>

⁵⁵ 'Nuclear Power in France – World Nuclear Association', *world-nuclear.org*, updated Tuesday, 17 December 2024, <Nuclear Power in France - World Nuclear Association>

⁵⁶ D.-P. Gherasim, 'The Europeanisation of the Energy Transition in Central and Eastern EU Countries An Uphill Battle that Can Be Won', *ifri.org*, Center for Energy and Climate, available at: The Europeanisation of the Energy Transition in Central and Eastern EU Countries: An Uphill Battle that Can Be Won | Ifri

crisis management. While energy solidarity has been invoked in the past, such as during the natural gas disputes between Russia and Ukraine, its application in the context of long-term climate goals is more complex. The principle of energy solidarity is enshrined in EU law, but the question remains whether it is robust enough to navigate the economic and political realities of the energy transition.

Achieving carbon neutrality by 2050 involves significant costs for Member States, particularly those with a higher dependence on fossil fuels. Consumers also face financial impacts, as the shift to renewables may not always result in the lowest energy prices, especially during the initial phases of the transition. Energy solidarity must therefore be viewed from two perspectives: between Member States, who have diverse energy consumption profiles and levels of dependence on fossil fuels, and to consumers, where the focus should be on ensuring equitable access to energy, potentially through mechanisms like social tariffs to protect vulnerable populations. Energy solidarity is essential in maintaining coherence and security within the EU's energy system, ensuring that the transition is fair and inclusive for all stakeholders.

Nonetheless, implementing energy solidarity can be extremely challenging. First and foremost, because of the diverging national interests. Member States have different priorities based on their energy mix, economic structures, and social contexts. Countries heavily reliant on fossil fuels may resist rapid transitions that could jeopardize jobs and economic stability. In contrast, countries with advanced renewable energy sectors might push for faster and more stringent climate policies. Beyond that, there are differences in politics, culture, history and energy policy among Member States (where technical, industrial and technological conditions differ) that still lead to conflicting outlooks from governments on its meaning and the mechanisms for its implementation (e.g., perceiving energy solidarity as “a bond of charity”).⁵⁷

Without strong mechanisms to enforce solidarity, there is a risk of fragmentation, which means that Member States may be tempted to prioritize national interests over collective EU goals. This fragmented approach, where some countries advance towards climate neutrality while others lag behind, could undermine the overall coherence of the Union's energy and climate policies.

Regarding the second question, the 2050 climate neutrality objective is indeed a powerful concept that is gradually reshaping the meaning of energy solidarity and energy security in both EU and national law. This transformation is evident in several key developments, such as the integration of climate goals

⁵⁷ S. Andoura, ‘Energy solidarity in Europe: from independence to interdependence’, Jacques Delors Institute.

into energy policy. The European Green Deal has integrated climate objectives into the heart of EU energy policy – this has led to a redefinition of energy security, which now increasingly includes the need to ensure secure, sustainable, and affordable energy supplies that align with climate goals. For example, the shift towards renewable energy and the emphasis on energy efficiency are seen as essential components of energy security, reducing dependency on fossil fuel imports and mitigating exposure to volatile global energy markets.

With the same goal, the EU has introduced various legal frameworks to align national energy policies with the 2050 climate neutrality goal. Regulation (EU) 2021/1119 (“European Climate Law”) adopted in 2021, legally binds Member States to the net-zero target by 2050 and establishes a framework for achieving it. This Regulation also promotes solidarity by requiring Member States to update their national energy and climate plans (NECPs) regularly, ensuring that they contribute to the Union’s overall targets.

Another good example is the launch of (EU) initiatives such as the Just Transition Mechanism, which provides financial support to regions most affected by the transition away from fossil fuels. This mechanism embodies a new form of solidarity, aiming to ensure that no region or Member State is left behind in the transition.

The concept of energy solidarity is evolving beyond its traditional focus on crisis response to encompass a broader commitment to collective action towards climate neutrality. This new understanding emphasizes the shared responsibility of all Member States to contribute to the Union’s climate goals, recognizing that the benefits of a successful energy transition – such as reduced climate risks, energy independence, and economic opportunities – are collective. The ongoing transition to a climate-neutral economy by 2050 is not only reshaping the EU’s energy policies but also redefining the principles of energy solidarity and security. While the economic and political differences between Member States pose significant challenges to energy solidarity, the overarching goal of climate neutrality is driving the transformation on how these concepts are understood and applied. Furthermore, the evolving legal and policy frameworks at the EU level reflect a growing recognition that achieving climate neutrality requires a new form of solidarity – one that balances national interests with the collective good and ensures that all Member States can participate in and benefit from the transition.

In this context, energy solidarity can indeed be relied upon, but it will require continuous reinforcement through EU policies, financial mechanisms, and a commitment to shared goals. The 2050 climate neutrality objective is gradually becoming a unifying force, reshaping not only the EU’s energy landscape

but also the fundamental principles that govern cooperation and security within the Union.

Question 2

“Fit for 55” is a package by the European Union designed to reduce the European Union’s greenhouse gas emissions by 55% by 2030. The package has significantly influenced the development and application of EU and national energy law by prompting legal and regulatory changes aimed at improving grid integration, streamlining permitting processes, managing renewable intermittency, ensuring social equity, and enhancing regional cooperation.

The main legal instrument approved in the context of “Fit for 55” in Portugal is Decree-Law No. 30-A/2022, of 18 April, which sets measures to simplify the licensing procedure applicable to renewable energy generation projects. These measures were initially set as temporary (firstly for two years, and later extended until the end of 2024) and apply to: (i) renewable generation, storage facilities, self-consumption plants, and the respective grid connection lines, (ii) hydrogen facilities, and (iii) power transmission and distribution infrastructures. The relevant measures include: (i) simplification of the EIA procedure by eliminating mandatory opinions, (ii) mandatory incorporation of green hydrogen or biomethane for gas suppliers with a portfolio above 2000 GWh per year, and (iii) allowing wind farms to inject electricity into the grid above the limit of injection power that had been determined.

In the public transport sector, Decree-Law No. 86/2021, of 19 October, approved the legal regime for the promotion of clean road transport vehicles to support low-emission mobility.

Question 3

The principle of “do no significant harm” (hereafter ‘DNSH’) particularly through its application in sustainable finance and in economic measures involving public funding or state aid, has already been incorporated in EU legal instruments in several ways: as a technical screening criteria, as an eligibility requirement, as a horizontal principle “to be taken into account.”⁵⁸ We believe it may come to play an even more significant role in the EU energy law and policy.

⁵⁸ M. Beltran Miralles, T. Gourdon, I. Seigneur, M. Arranz Padilla, and N. Pickard Garcia, *The implementation of the ‘Do No Significant Harm’ principle in selected EU instruments*, Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/18850, JRC135691, p. 21.

This principle is already included in the Portuguese Recovery and Resilience Plan, because of the Regulation of the Recovery and Resilience Mechanism, observing a Commission Technical Guidance on this principle.⁵⁹

It is also already incorporated in measures indirectly affecting energy policy, such as a criterion for the attribution of funding under the EU Emission Trading System, or under the Just Transition Fund.

Some Portuguese constitutional provisions are in line with this principle by promoting environmental considerations in other areas of national policy. For instance, Article 66(2) of CRP stipulates in paragraph (f) that the State must promote the integration of environmental objectives into sectoral policies; and, more explicitly, paragraph (h) of the same provision mandates that fiscal policy must be compatible with environmental protection and quality of life. Nevertheless, there is no comparable national formulation of this principle as a criterion or element to consider when allocating funding, except as a result of the integration of EU legislation into the national legal order.

Question 4

The European Union's commitment to achieving climate neutrality by 2050 brings to the forefront the critical challenge of balancing environmental objectives with social equity. The concept of "energy poverty" has become central in this dialogue, as the green transition must ensure that all citizens have access to affordable energy while contributing to sustainable development.

The EU's integration of "energy poverty" into its legal framework reflects the recognition that access to affordable energy is a cornerstone of sustainable development. Energy poverty (which affects millions of Europeans) may be exacerbated by rising energy costs linked to the transition from fossil fuels to renewable energy. EU legislation, particularly through initiatives like the Clean Energy for all Europeans package,⁶⁰ aims to address this by ensuring that vulnerable populations are protected during the energy transition. These measures include promoting energy efficiency, supporting renewable energy adoption, and providing financial assistance to low-income households.

⁵⁹ Commission Notice Technical guidance on the application of DNSH under the Recovery and Resilience Facility Regulation, 2012/C 58/01 (OJ C 58, 18.2.2021, pp. 1–30), [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0218\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0218(01)&from=EN)

⁶⁰ 'Clean energy for all Europeans package', europa.eu, European Commission, <Clean energy for all Europeans package>

The European Green Deal and the Social Climate Fund further reinforce this by embedding energy poverty concerns into broader climate action strategies, ensuring that the transition to a low-carbon economy is equitable and inclusive.

In Portugal, the national framework has increasingly aligned with the EU's emphasis on the social dimension of energy policy. The concept of energy security in Portugal now includes social components, recognizing that ensuring affordable energy access is vital for the country's energy security and social stability. The Portuguese government has implemented various measures to address energy poverty, such as *social tariffs*⁶¹ for electricity and natural gas, which provide discounts to vulnerable consumers.⁶² These measures were significantly reinforced during the implementation of the Troika memorandum in Portugal.⁶³ The memorandum sought to address the electricity sector's tariff deficit by reviewing support schemes for production of energy under the special regime, and revising tariff policies and taxation. Additionally, Portugal's national energy and climate plans (NECPs) incorporate strategies to improve energy efficiency in low-income households, thus reducing energy costs and consumption. Portugal's NECP includes the implementation of targeted energy efficiency programs that provide financial support and subsidies to low-income households for energy efficiency improvements. These programs often include insulation and heating improvements,⁶⁴ as well as energy efficient appliances.⁶⁵ All these measures are crucial for ensuring that the green transition does not disproportionately affect the most vulnerable segments of the population.

The Just Transition Fund in Portugal⁶⁶ has played a crucial role in supporting the fair green transition, particularly in regions heavily dependent on fossil fuels or carbon-intensive industries. Particularly, the Fund has provided finan-

⁶¹ Implemented through the amendments to Decree-Law No. 138-A/2010, of 28 December, and Decree-Law No. 101/2011, of 30 September, made by Law No. 7-A/2016, of 30 March.

⁶² The energy social tariff is applied to households that meet specific criteria, which include income thresholds, social welfare benefits, and certain family situations. The social tariff provides a significant discount on electricity and natural gas bills.

One of the most important aspects of the social tariff is its automatic nature. Eligible households do not need to apply for the discount; instead, it is automatically applied by the energy supplier based on data provided by the tax authorities and social security. This system helps ensure that all eligible households benefit from the tariff without needing to navigate complex application processes.

⁶³ See: https://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf

⁶⁴ Grants or low-interest loans are provided to help low-income families improve insulation, replace inefficient windows, and upgrade heating systems. This reduces energy consumption, leading to lower energy bills.

⁶⁵ The NECP promotes the replacement of old, energy-intensive appliances with new, energy-efficient models, offering financial incentives to make these upgrades affordable for low-income households.

⁶⁶ 'EU Cohesion Policy: €223.8 million for a just climate transition in Portugal', Press Release, *europa.eu*, 15 December 2022, European Commission, <€223.8 million for a just climate transition in Portugal (*europa.eu*)>

cial support to address the social, economic, and environmental impacts of the energy transition, including the closure of the largest CO₂-emitting plants in the country.

Moreover, the JTF has facilitated the retraining of workers from traditional energy sectors, helping them transition to jobs in the renewable energy industry. This is particularly important in regions like Alentejo Litoral, following the closure of a coal-fired power plant in Sines, and Médio Tejo, following the closure of a coal-fired power plant in Pego,⁶⁷ where coal and other traditional energy sources have historically played a significant role in the local economy. Similarly, the JTF supported the closure of an oil refinery in Matosinhos by financing a new innovation hub with a particular focus on sustainable mobility, clean energy, advance manufacturing and marine economy, and helping local SMEs affected by the closure of the refinery to adapt their business model. The Fund has also supported community development projects that aim to diversify the local economy, reducing dependence on carbon-intensive industries and fostering sustainable economic growth.

The impact of the JTF in Portugal, therefore, has been positive, contributing to a more equitable transition by ensuring that vulnerable regions and populations are not left behind. However, the effectiveness of the Fund also depends on the continued alignment of national policies with EU objectives and the efficient allocation of resources to the areas most in need.

In conclusion, the EU's approach to the green transition, particularly through the lens of energy law, underscores the importance of social equity in achieving climate neutrality by 2050. The integration of the fight against energy poverty into EU and national policies highlights the need to protect vulnerable populations from the potential negative impacts of the transition, ensuring that the benefits of climate action are shared broadly. In Portugal, the concept of energy security has evolved to include social components, reflecting the country's commitment to an inclusive energy transition. The Just Transition Fund has played a positive role in supporting this process, helping to mitigate the socio-economic impacts of the green transition and ensuring that all regions and communities can participate in and benefit from the shift to a sustainable economy.

⁶⁷ JTF Territories, *europa.eu*, European Commission, <Inforegio – Just Transition Fund (europa.eu)>; S. Belo de Oliveira, Sara, 'Do the Portuguese Territorial Just Transition Plans comply with the Just Transition Regulation?', *unl.pt*, NOVA Green Lab, last updated 11 November 2023 <Do the Portuguese Territorial Just Transition Plans comply with the Just Transition Regulation? – NOVA Green Lab>

Question 5

In the *Hinkley Point* ruling, the Court determined that state aid granted for activities violating EU environmental law cannot be considered compatible with the internal market.⁶⁸ The Court followed the precedent in the 2008 *Nuova Agricast* ruling, which held that State Aid conflicting with EU law provisions or general principles cannot be deemed compatible with the internal market.⁶⁹ However, in the *Hinkley Point* ruling, the Court recalled the aims of ensuring security of supply in the Union, under Article 194(1)(a) and (b) TFEU, as well as Article 194(2) TFEU's safeguard of Member States' rights to determine the conditions for exploiting their energy resources and their general energy supply structure, among other matters.⁷⁰ The Court concluded that decisions regarding the choice of energy sources and their exploitation remain within the sovereign discretion of Member States. This led the Court to conclude that the environmental protection principles do not preclude, in all circumstances, the provision of State Aid to a nuclear power plant.⁷¹ In other words, the Member States' margin to choose their energy mix and the objective of energy security justified upholding the measure, despite the infringement of environmental law principles, which would render it incompatible with the internal market under State aid rules. This ruling can be interpreted as protecting Member States against a broad application of EU state aid rules in this sector.⁷²

In paragraphs 96–103, the Court evaluates the need for compliance with environmental law rules. The ruling has been interpreted to mean that the objective of the aid measure and the rules which are inseparable from it may not infringe other EU rules (in that case, the first condition under 107(3)(c) would not be met).⁷³ Therefore, if the adoption of a State Aid measure under EU energy policy is not preceded by the “solidarity assessment”⁷⁴ that may affect the assessment of compatibility under Article 107(3) TFEU.

Considering the Member States' right to determine their energy mix, the ambiguous scope of the principle of energy solidarity, and the lack of specific guidelines for conducting this assessment, it is unlikely that the Commission would find the aid incompatible based on a different result of the solidarity assessment.

⁶⁸ C-594/18 P, *Hinkley Point*, para. 45.

⁶⁹ *Ibid.*, para. 44.

⁷⁰ *Ibid.*, para. 48.

⁷¹ *Ibid.*

⁷² *Hinkley Point C*: ECJ Confirms Commission's Approval of Aid to Nuclear Energy Plant.

⁷³ The Common European Interest and the Environmental Impact of State Aid: The Case of Nuclear Power 27 October 2020 | State Aid Uncovered by Phedon Nicolaides <<https://www.lexxion.eu/en/stateaidpost/the-common-european-interest-and-the-environmental-impact-of-state-aid-the-case-of-nuclear-power/>>

⁷⁴ C-848/19 P, *Germany v Poland*, para. 44

Question 6

It is our understanding that these legal provisions are complementary. Articles 170–172 TFEU provide a general framework for trans-European networks and set the measures to execute (among others) the objective under Article 194(1) (d) to promote the interconnection of energy networks, which Article 194(1) clarifies it ought to be pursued in observance of the principle of solidarity. Article 170 provides for the EU's contribution and establishment of trans-European networks in several areas, including energy, whilst, as per Article 171 TFEU(1)(2), these objectives may be attained by, *inter alia*, projects of common interest and mutual interest. Under Article 172 TFEU, Regulation 2022/869 sets the Guidelines for Trans-European energy infrastructures, setting among others the selection criteria for projects of common interest. There are several references to the principle of solidarity. As already referred to in Question 8, Section I, the criteria for these projects to receive financial assistance under Article 18(2) of the aforementioned regulation takes into account the positive externalities, including solidarity. This instrument may therefore be understood as pursuing energy solidarity as it ensures the internal market's functioning and enabling the sharing of benefits and risks between Member States.⁷⁵ These enable the internal market, as Member States are pooling their resources to eliminate restrictions to trade⁷⁶ and strengthening their collective energy security.⁷⁷ Additionally, these are essential for the interconnection of energy networks, a pre-requisite to effective solidarity⁷⁸ and the interconnection of the networks, alongside with internal security of supply and supply diversification, which contribute to the progression of energy solidarity.⁷⁹

Question 7

Decarbonization involves reducing greenhouse gas emissions, primarily through decreasing the use of fossil fuels and increasing reliance on renewable energy sources. Energy security, on the other hand, involves ensuring a stable, reliable, and affordable supply of energy, preferably with EU independence.

At first glance, the relationship between the two seems potentially conflicting in several areas, particularly in terms of the intermittency and reliability of renewable energy sources compared to fossil fuels, which can provide a continuous and controllable supply of energy. However, the relationship between the concepts is one of true synergy when strategically settled, as decreasing

⁷⁵ K. Huhta and L. Reins, 'Solidarity in European Union Law and its application...', p. 785.

⁷⁶ *Ibid.*, p. 785.

⁷⁷ *Ibid.*, p. 782.

⁷⁸ S. Andoura, 'Energy solidarity in Europe...', p. 19.

⁷⁹ *Ibid.*

fossil fuel dependency, which often involves imports (in some cases, from politically unstable regions), enhances energy security. Renewable energy (unlike fossil fuels) can be generated within the Member States, further contributing to self-sustainment and security.

Thus, by reducing reliance on imported fossil fuels and increasing the production of renewable energy domestically, the EU can build a more resilient, stable, and sustainable energy system. This involves a strategic approach that includes investment in renewable energy, energy storage, grid modernization, and supportive policies, ensuring that the transition is both effective and equitable.

Question 8

Article 192 TFEU was one of the most used legal bases for secondary legislation in the energy sector before the introduction of Article 194 TFEU.⁸⁰ Article 192(2) TFEU lists the exceptional situations where, following a Commission proposal, the Council, acting unanimously, may adopt provisions that, *inter alia*, limit Member State's freedom to set their energy mix, for the prosecution of environmental objectives.

Article 191(2) provides a derogation for Article 194 TFEU which, in the context of the EU's energy policy, reserves certain areas for Member State action – including the freedom to choose their energy sources and energy mix. This safeguard is “without prejudice” to Article 192(2) TFEU. While a parallel has been drawn between Article 194 and 192 TFEU for restricting EU action in the energy sector, Article 192 TFEU, by imposing procedural obstacles,⁸¹ still provides for an erosion of state sovereignty preserved under Article 194(2) TFEU. Instead of the ordinary legislative procedure for adoption of measures in the energy sector, the EU can “significantly affect” the choice of sources and energy mix through a more demanding special legislative procedure detailed under Article 192(2) TFEU. While Council unanimity is required, the safeguards to State sovereignty are still eroded and there is less democratic legitimacy as the European Parliament is not involved.

Under Article 192(1), some measures have, in fact, been adopted that affect the Member States choice of energy mix, particularly concerning the promotion of renewable energy.⁸² Despite the reserve under Article 194(2) TFEU the EU has adopted measures limiting Member States' discretion in security

⁸⁰ K. Huhta, ‘The Scope of State Sovereignty...’, p. 996.

⁸¹ *Ibid.*, p. 998.

⁸² Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) OJ L 328, 21/12/2018.

of supply, such as Regulation 2017/1938 or the temporary 2022 emergency measures.⁸³

In practice, the EU has already created limitations by imposing climate goals, decarbonization targets and efficiency targets, to name a few, through the RePowerEU Strategy and “Fit for 55.” However, these have been adopted in dialogue with the Member States and still provide for some margin for action.

The principle of solidarity, already accepted by EU Member States in EU Treaties, under its current formulation, is too vague to serve as an effective legal basis to affect the Member States autonomy regarding their energy mix. It could lead to a competence creep of the EU that would (further) erode the Member States’ reserve under Article 194(2) TFEU.

The current approach of EU action in aspects of national energy mix is of gradual interference with a response to specific necessities – climate change objectives, geopolitical crisis, and it should remain strictly proportionate to these objectives or to the crisis it responds to, as well as limited in time.

Question 9

In Portugal, the impact of climate change on energy choices has driven the adoption of several legal instruments aimed at transitioning to a more sustainable energy mix.

These legal and governmental mechanisms include: (i) the NECP2030, (ii) the National Strategy for Hydrogen⁸⁴ (EN-H2), (iii) the Carbon Tax and Emissions Trading System (ETS), (iv) the legal framework for renewable energy, (v) the Energy Efficiency Law,⁸⁵ and (vi) the National Programme for Climate Change⁸⁶ (PNAC).

The NECP2030 outlines Portugal’s strategy to achieve its climate goals, focusing on reducing greenhouse gas emissions, increasing the share of renewable energy, and improving energy efficiency. The plan includes phasing out coal by 2023 and expanding investments in solar, wind, and other renewable energies, aiming for a significant reduction in carbon emissions by 2030.

⁸³ L. Hancher and A. De Haueclocque, ‘Strategic Autonomy, REPowerEU and the Internal Energy Market...’, p. 73.

⁸⁴ Ministerial Resolution No. 63/2020, of 14 August,

⁸⁵ Approved by Decree-Law No. 101-D/2020, of 7 December.

⁸⁶ Approved by Portugal’s Council of Ministers Resolution No. 56/2015, of 30 July.

The National Strategy for Hydrogen, adopted in 2020, promotes the development of green hydrogen as a key element of the energy transition. The EN-H2 focuses on producing hydrogen from renewable sources, which can be used in industries that are difficult to electrify, thereby reducing reliance on fossil fuels.

The Portugal's carbon tax was introduced in 2015 as part of a broader environmental taxation reform aimed at promoting sustainability and reducing carbon emissions (in order to meet EU targets for the reduction of greenhouse gas emissions). Today, Portugal applies a carbon tax to sectors not covered by the EU's ETS,⁸⁷ such as transport and waste. This tax is designed to encourage the reduction of carbon emissions by making it more expensive to emit greenhouse gases, thereby incentivizing cleaner alternatives.

Portugal has implemented various laws to promote the adoption of renewable energy. This includes several incentives in place for both industrial use⁸⁸ and the individual use of renewable energy, ranging from more favorable tax regime applicable to electric cars to incentives to micro-generation (e.g., a reduced VAT for renewable energy equipment, investment tax deductions, subsidies for homeowners to encourage the installation of solar panels, solar thermal systems, and energy-efficient equipment).⁸⁹

The Energy Efficiency Law sets standards for energy performance in buildings, industries, and public services. It mandates improvements in energy efficiency, which are crucial for reducing overall energy consumption and supporting the shift towards a more sustainable energy system.

The PNAC sets out long-term strategies for reducing greenhouse gas emissions across all sectors, aligning with both national and EU climate goals. It provides the framework for sector-specific plans, ensuring that climate considerations are integrated into all areas of energy policy.

⁸⁷ Law No. 82-D/2014, of 31 December: This law, passed in December 2014, established the framework for the carbon tax in Portugal as part of a broader fiscal reform aimed at environmental sustainability. The law specifically mentions the application of the carbon tax to sectors not covered by the EU ETS.

⁸⁸ Since 2022, electro-intensive consumers can install remote self-consumption power plants. If grid capacity rights are granted, self-consumption plants can inject excess power into the grid, which is sold at market prices. Decree-Law No. 80/2023, of 6 September, implemented an exceptional legal procedure for allocating connection capacity to electricity consumption facilities in high-demand areas, enhancing the grid access conditions required to implement industrial investments and addressing the existing grid-connection capacity constraints.

⁸⁹ Portugal has also invested in research and development (R&D) to promote innovation in renewable energy technologies. Programs funded by the government and the EU, such as *Horizon 2020*, provide grants and support for projects focusing on advanced renewable energy technologies, energy storage solutions, and smart grid applications.

These legal instruments collectively drive Portugal's transition towards a low-carbon economy, ensuring that the country's energy mix increasingly relies on sustainable and renewable sources.

Question 10

The EU-wide dependence on external supplies is well acknowledged.⁹⁰ This reliance on external sources poses significant risks to energy security. While the EU has shared competence in the energy sector and can act independently – as indicated by the Court's stance on facultative mixity in international agreements – this does not mean that Member States have lost their authority as decision-makers.

Firstly, Member States retain specific areas of competence under Article 194(2) TFEU, which allows them to determine their own energy mix. This right can be subject to interference under Article 192 TFEU(2)(c), which sets measures that might significantly affect Member States' choice of their energy mix, yet such action would require unanimity in the Council, as stipulated in Article 192(2) TFEU.

In the response to crises like Russia's war of aggression against Ukraine, as discussed earlier in response to question 8 in Section I, the EU has assumed a coordinating role in managing these challenges, rather than the traditional approach of each Member State acting individually.⁹¹ The EU has pursued this internal coordination mainly through its REPowerEU Plan⁹² and the REPowerEU Communication,⁹³ which aim to reduce dependency on imported fossil fuels, especially Russian gas. However, measures adopted under Article 122 TFEU are of an exceptional nature and not meant to be permanent,⁹⁴ thus these have a limited temporary scope. The external dimension of this strategy is found in the Joint Communication of May 2022, which sets three objectives⁹⁵: demand aggregation, most efficient use of existing infrastructure and

⁹⁰ Council of the European Union, How dependent are EU member states on energy imports? – Consilium (europa.eu), accessed 10 July 2024.

⁹¹ M.C. LaBelle, 'Breaking the era of energy interdependence in Europe: A multidimensional reframing of energy security, sovereignty, and solidarity', *Energy Strategy Reviews*, Vol. 52, 2024, p. 8.

⁹² European Commission, 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, REPowerEU Plan, 18 May 2022, COM(2022) 230 final (REPowerEU Plan)

⁹³ European Commission, 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, REPowerEU: Joint European Action for more affordable, secure and sustainable energy, 8 March 2022, COM(2022) 108 final

⁹⁴ Judgement of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756.

⁹⁵ Joint Communication of 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, 18.05.2022.

international outreach. This coordinating role of the EU has been one of concluding agreements with several third countries on behalf of the EU to diversify the sources of supply.⁹⁶ It also created the EU Energy Platform to pool demand and prepare for joint gas and hydrogen purchases. The joint gas procurement plan was considered to add limited value.⁹⁷ These do not substitute the role of Member States, who reserve the right to act in the external sphere and maintain their sovereignty in the long-term. Having in mind the current challenges of climate change and geopolitical tensions, it may, however, be the case that the EU chooses to pursue this kind of coordination more often.

Question 11

For Portugal, a country with a notable reliance on imported fossil fuels, especially natural gas and oil, the REPowerEU Plan represents a strategic opportunity to strengthen energy security, diversify energy sources, and further the green transition.

Portugal has applied for specific support under REPowerEU to finance reforms in the energy sector. These reforms include:

- (i) Review of the regulatory framework for renewable hydrogen to create conditions for the decarbonization of the natural gas grid and contribute to the development of the renewable hydrogen value chain.
- (ii) Promote and boost the production and consumption of sustainable biomethane. This includes, among other actions, launching the first auction for the centralized purchase of sustainable biomethane by the last resort wholesaler (launched by Dispatch No. 5971-A/2024, of 27 May, and currently in progress);
- (iii) Simplification of the legal and regulatory framework for renewable energy projects, particularly through the creation of the Mission Structure for Renewable Energy Project Licensing 2030 (already established by Council of Ministers Resolution No. 50/2024, dated of 26 March), the development of regulations for municipal licensing of energy projects, and the creation of “go-to” renewable areas.

Additionally, Portugal is relying on REPowerEU to finance public investments in energy security, including:

- (i) Industrial decarbonization (by promoting energy efficiency measures, renewable energy adoption, and energy storage);
- (ii) Energy efficiency in residential buildings and the services sector;

⁹⁶ Joint Communication JOIN 2022/23 final.

⁹⁷ A. Barnes, *EU Joint Purchasing of Gas – an assessment*, The Oxford Institute for Energy Studies, 2023.

- (iii) The developing of a green industry (through the promotion of technologies for the climate transition);
- (iv) Hydrogen and renewable gases (to boost production capacity);
- (v) The development of high-resolution geophysical, geotechnical, wind, wave, and current studies to promote offshore energy potential;
- (vi) Enhancing the flexibility of the public electricity grid and improving energy storage for transportation and distribution;
- (vii) Development of a single digital platform for licensing and monitoring of renewable energy projects;
- (viii) Systems to promote the acquisition and installation of renewable energy storage systems in the Portuguese autonomous regions of Madeira and Azores; and
- (ix) Decarbonizing public transportation.

After the presentation of the REPowerEU plan, Portugal implemented the Ministerial Resolution No. 82/2022, of 27 September, which defines preventive measures to deal with energy disruptions, focusing on guaranteeing the security of energy supply. This instrument complements REPowerEU and strengthens efforts to reduce Portugal's reliance on fossil fuels by increasing the share of domestically produced renewable energy.

Chapter III: The EU's crisis management in the field of energy and its limits

Question 1

The use of Article 194 TFEU for response to a crisis is not advantageous mainly due to the complex and time-consuming procedural steps. A measure is to be adopted under the ordinary legislative procedure, thus subject to European Parliament and Council approval, and after consultation with the Economic and Social Committee and the Committee of the Regions, as per Article 194(2) first paragraph. However, it can serve as an adequate basis for legislation for emergency prevention (i.e. setting a framework for when a crisis is triggered).⁹⁸

The recent adoption of energy sector measures under Article 122(1) has been the object of criticism.⁹⁹ The Council approves the measure by qualified majority and the European Parliament is not involved. The lack of discussion and approval by the European Parliament allows the Council and the Commission to bypass the element of democratic scrutiny and creates problems of lack of

⁹⁸ B. De Witte, 'Guest Editorial: EU emergency law and its impact on the EU legal order' *Common Market Law Review*, Vol. 59, no. 1, 2022, pp. 3–18, <https://doi.org/10.54648/cola2022002>, p. 11.

⁹⁹ L. Hancher and A. De Hauwclocque, 'Strategic Autonomy, REPowerEU and the Internal Energy Market...', p. 69.

transparency. While this was a choice of the legislator, the legislator presumably envisioned the legal provision for rare and limited actions.¹⁰⁰ However, a study carried for the European Parliament concluded that Article 112 has been adequately relied upon for the energy sector (albeit the Council overlooks the need of a justification for its use to the detriment of other legal bases).¹⁰¹ It is our understanding that Article 122 TFEU can be used as the main legal basis for temporary measures in face of exceptional situations in the energy sector. It is intended to be the crisis tool for the energy sector as it expressly refers to difficulties in the area of energy.

However, its recurrent and non-exceptional use and the adoption of measures exceeding its scope would upset institutional balance.¹⁰² Article 194 TFEU is a more suitable legal basis for reactive measures intended to have a long-term impact because (i) it does not pose the same risks to legitimacy and the balance of power between institutions, and (ii) the measures do not have to be temporary. It can prove especially adequate if the challenge the EU faces is prolonged in time.

Question 2

Article 122 TFEU provides two legal bases for EU measures. Article 122(1) TFEU allows the adoption of “measures appropriate to the economic situation *in particular* if several difficulties arise in energy supply.” There are doubts as to whether it configures an emergency clause due to its use *of in particular*.¹⁰³ Conversely, Article 122(2) provides for action only “where a Member State in difficulties or is seriously threatened with severe difficulties [...]” However, the recitals of the legal instruments adopted under Article 122(1) TFEU for the energy sector constantly seek to demonstrate the existence of an emergency or severe difficulties.

Both Articles 122(1) and 194 TFEU refer to the adoption of measures “in a spirit of solidarity between Member States” albeit it is understood that this concept has different scopes and application.¹⁰⁴ In our view the obligations to consider other interests, as defined by the CJEU in the *OPAL* ruling¹⁰⁵ under energy solidarity, do apply when enacting measures under Article 122 TFEU if these affect the energy sector. The instruments under Article 122 TFEU are

¹⁰⁰ B. De Witte, ‘Guest Editorial: EU emergency law...’, p. 10.

¹⁰¹ M. Chamon et al., ‘The use of Article 122 TFEU Institutional implications and impact on democratic accountability – Study requested by the AFCE committee’, September 2023.

¹⁰² *Ibid.*, p. 25.

¹⁰³ *Ibid.*, p. 19.

¹⁰⁴ K. Hutha and L. Reins, ‘Solidarity in European Union Law and its application...’, p. 777.

¹⁰⁵ Decision of the CJEU, Case C-848/19 P, 12.07.2021.

already grounded in the concept of solidarity, in different dimensions, as they seek to enhance economic coordination and protect more vulnerable Member States and individuals in a crisis.¹⁰⁶

From the Court's Judgement in *Pringle*,¹⁰⁷ it was concluded that measures adopted under Article 122 TFEU should be temporary.¹⁰⁸ This has been observed in the adopted measures affecting energy policy. These also established a procedure for prolongation, following a review. In practice, this prolongation takes place through subsequent Council Regulations, under the same legal basis (Article 122(1) TFEU) with recourse to the same justification of an "emergency situation" and "persistent severe difficulties in the supply of energy."¹⁰⁹

The instruments adopted under Article 122 TFEU were generally perceived to be an adequate response to the crisis, by providing for the coordination of economic policies, yet the efficiency of some was questioned.¹¹⁰ However, compared to other classic measures their temporary character allows for more flexibility, demanding Member States additional efforts for a short period of time. They complement the classic measures insofar as it is necessary to address a temporary crisis. These measures are not meant to impact the design of the energy sector in the long term.

The first of these instruments was Council Regulation 2022/1369 on coordination of demand-reduction measures for gas, setting an obligation to apply best efforts to reduce gas consumption by 15% and a threshold that triggers a mandatory demand reduction obligation.¹¹¹ It complemented Regulation 2022/1032, another measure seeking to ensure energy security but adopted under Article 194(2) TFEU with regards to gas storage, increasing the storage capacity objectives, whose target was achieved.

The second would be Council Regulation 2022/1854 on an emergency intervention to address high energy prices (including a solidarity contribution imposed upon companies that is exceptional and strictly temporary). Some measures were deemed not effective (electricity demand reduction, inframarginal rev-

¹⁰⁶ K. Hutha and L. Reins, 'Solidarity in European Union Law and its application...', p. 782.

¹⁰⁷ Judgement of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756.

¹⁰⁸ M. Chamon et al., 'The use of Article 122 TFEU Institutional implications', p. 23.

¹⁰⁹ Council Regulation 2023/2920 of 21 December 2023 amending Council Regulation 2022/2578 as regards the prolongation of its period of application, Recitals 8–10. For instance, Council Regulation (EU) 2024/223 of 22 December 2023 amending Council Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, Recital 25.

¹¹⁰ L. Hancher and A. De Haueclocque, 'Strategic Autonomy, RepowerEU and the Internal Energy Market...', p. 68.

¹¹¹ The measures therein were prolonged and amended by Council Regulation (EU) 2023/706 of 30 March 2023.

enue cap, etc.) or were adopted into the electricity market design proposal and thus its application was not prolonged.¹¹²

The success of Council Regulation 2022/2576 (which led to accompanying measures – the EU Energy Platform and mandatory use of AggregateEU)¹¹³ was also questioned.¹¹⁴ In particular, it is argued not to have been successful promoting a consortia approach to joint purchasing¹¹⁵ and that AggregateEU did not add much value to existing mechanisms.¹¹⁶ This Regulation complements Regulation 2017/1938 on safeguarding gas security of supply, which requires that Member States celebrate bilateral agreements detailing technical arrangements to operationalize solidarity. As of 2023, only 8 out of 40 these bilateral agreements were concluded, which the Commission deemed as “insufficient progress.”¹¹⁷

Regarding Regulation 2022/2577 on the deployment of renewable energy, introducing faster authorization procedures for renewable energy source, was deemed to have a positive impact.¹¹⁸ Selected measures were amended and prolonged due to its greater potential.¹¹⁹ Concerning Regulation 2022/2578 on the market correction mechanism protecting against high prices, in 2023 the European Securities and Markets Authority and European Union Agency for the Cooperation of Energy Regulators determined the mechanism has never been activated and there were no negative effects on the security of supply.¹²⁰ To our knowledge, these instruments did not raise particular issues in the Portuguese legal order.

¹¹² L. Hancher and A. De Haueclocque, ‘Strategic Autonomy, RepowerEU and the Internal Energy Market...’, p. 67.

¹¹³ Council Regulation 3022/2576 of 19 December 2022 enhancing solidarity through better co-ordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, OJ L 335 29.12.2022, p. 1.

¹¹⁴ Prolonged by Council Regulation 2023/2919 of 21 December 2023.

¹¹⁵ L. Hancher and A. De Haueclocque, ‘Strategic Autonomy, RepowerEU and the Internal Energy Market...’, p. 68.

¹¹⁶ A. Barnes, ‘EU Joint Purchasing of Gas – an assessment’, *oxfordenergy.org*, The Oxford Institute for Energy Studies <EU Joint Purchasing of Gas – an assessment - Oxford Institute for Energy Studies (oxfordenergy.org)>

¹¹⁷ Report from the Commission to the Council reviewing the application of Regulation 2017/1938, 5 October 2023, COM(2023) 572 final.

¹¹⁸ Report from the Commission to the Council reviewing Council Regulation (EU) 2022/2577 of 22 December 2022.

¹¹⁹ Prolonged by Council Regulation 2024/223 of 22 December 2023.

¹²⁰ Council Regulation 2023/2920 of 21 Dec. 2023 amending Regulation 2022/2578 as regards the prolongation of its period of application, Recitals 3–5.

Question 3

The existing instruments have proved useful, especially due to the celerity in the adoption of emergency measures. Article 122(1) TFEU was recently used regarding energy policy responses, and prior to that it was widely used for the response to the Covid-19 pandemic. While attaining the desired objective, there were significant issues signaled in literature, notably the lack of democratic accountability, transparency, and political accountability.¹²¹ Furthermore, since Article 122(1) TFEU can only be used in exceptional situations or situations of “severe difficulties” in energy supply¹²² there have been discussions on whether the measures truly consist of “emergency measures” exclusively or have a broader scope.¹²³

Regarding natural disasters, the toolbox also includes Article 222 TFEU (“the solidarity clause”) whose application is detailed on Council Decision 2014/415/EU.¹²⁴ It provides for the mobilization of all the instruments at the EU’s disposal (including military) following a request from the affected Member State. Article 222(2) also provides for the mobilization of Member States’ assistance. Albeit the requirements under Article 222(3) are similar to those of Article 122 TFEU, its application is more complex, entailing a previous exhaustion of national resources or a situation in which the State is “overwhelmed,” in accordance with Article 2(2) of Council Decision 2014/415/EU. These constitute a higher threshold than the one in Article 122 TFEU. Otherwise, both provide for the adoption of measures under Commission proposals, albeit Article 222 TFEU prioritizes the use of existing instruments. While Article 122 TFEU allows the adoption of coordinating measures in economic policy (which are in practice difficult to distinguish from non-economic policies),¹²⁵ Article 222 TFEU provides for coordination and for the mobilization of all instruments at its disposal, thus having a broader scope.

While it would be possible to adopt measures under Article 222 TFEU, it is our understanding that Article 122 TFEU has been an adequate response tool for the adoption of measures under the energy crisis as it provides for swift action and financial relief and can therefore continue to be useful *vis-à-vis* the current and future challenges and threats of climate change.

¹²¹ N. Ondarza, ‘The Crisis Governance of the European Union: More responsibility requires more democratic legitimacy’, SWP Research Paper 10, September 2023, Berlin <The Crisis Governance of the European Union. More responsibility requires more democratic legitimacy>

¹²² L. Hancher and A. De Hauwecloque, ‘Strategic Autonomy, RepowerEU and the Internal Energy Market...’, p. 63.

¹²³ P. Demine, ‘Op-Ed: Article 122 TFEU and the Future of the Union’s Emergency Powers’, 25 January 2024 <Op-Ed: “Article 122 TFEU and the Future of the Union’s Emergency Powers” by Paul Dermine – EU Law Live>

¹²⁴ Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause OJ L 192, 1.7.2014.

¹²⁵ M. Chamon et al., ‘The use of Article 122 TFEU Institutional implications’, p. 20.

ROMANIA

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

Romania, as a member state of the European Union, is part of the legal and institutional mechanisms, and the decisions of the Court are analyzed and implemented within the national legal order. Although Romania was not a party to the *OPAL* case¹ and did not act as an intervening party, there were no elements in Romania that raised questions regarding the existence of energy solidarity and energy security.

At the constitutional level, there is no principle explicitly regulating or addressing these concepts – Energy Security and Energy Solidarity. The Romanian Constitution, the fundamental legal act of the Romanian state, came into force in 1991, with the only revision occurring in 2003. The national constituent assembly could not have foreseen an approach to the principle of energy solidarity, as provided in Article 194 of the Treaty on the Functioning of the European Union (TFEU), six years before the entry into force of the Lisbon Treaty and twenty years before the interpretation given by the Court in the *OPAL* case. However, in principle, the constitutional revision carried out in 2003 included specific mechanisms for Euro-Atlantic integration, including in relation to the joint exercise of competences with other states as outlined in Union treaties.² It is worth noting that the provisions of the Constitution stipulate that, in matters of treaty revision, the citizens have delegated the power of ratification to Parliament, as the legislative authority of the state.

At the time of drafting this report, the Constitutional Court has not ruled on cases addressing energy solidarity or energy security.

At the institutional level, however, independent of the *OPAL* case, Romania is in the process of approving its Energy Strategy for 2025–2035, with a perspective extending to 2050.

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¹ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598.

² Ioan Muraru, Simina Elena Tănăsescu, *Drept constituțional și instituții politice*, 16th edn., vol. 1, CH Beck Publishing House, 2023, p. 135.

Additionally, as a result of recent international developments, particularly those caused by Russia's military aggression against Ukraine, Romania, like most EU member states, has had to face real, direct, and immediate challenges in ensuring energy supply for the economy and public consumption. An important factor was that the national market had to purchase energy at the highest European prices, with consequences for the economic stability of enterprises, their competitiveness, and the risk of population impoverishment.

Although there are no national case law elements invoking the effectiveness of the principle of energy solidarity, at the European Council meeting in October 2024, Romania, alongside other states, requested that the meeting's agenda include specific elements of this principle. The conclusion of the meeting was to ask the Commission for a stance and concrete measures, which will be further developed.

Question 2

Although there is no substantive debate regarding how the principle of solidarity should be approached in light of the direct effects arising from the Court's ruling in the *OPAL* case, it should be noted that, in general, Romania respects and applies the principles of the European Union, regardless of whether these principles belong to the classical values of Union law or are of more recent development due to recent Court rulings.

In our view, the principle of solidarity must be interpreted considering Article 194 TFEU as a fundamental principle of the Union, important for the balanced development of European regions and for ensuring social cohesion across all member states. Romania has been developing a strong energy production capacity, particularly by utilizing funds from the Union's budget and the Recovery and Resilience Facility. Romania's position has consistently been one of supporting solidarity across various sectors where it manifests, even though it has experienced inequitable treatment, especially in the areas of common border management and connection to European energy networks.

Given that the Union is focused on increasing energy production capacity, particularly from renewable sources, to ensure the competitive functioning of the economy and to supply energy to the population at moderate prices while limiting the need for imports, especially from states subject to sanctions, we believe that the principle of solidarity should emphasize shared goals, transcending the concept of energy sovereignty.

To achieve the concept of constitutional identity for the European Union, it is necessary for the Commission to first propose a comprehensive package of actions, measures, and objectives to ensure energy use aligns with the pressing issue of economic competitiveness, considering the market positions of major competitors. In our view, energy solidarity cannot be separated from ensuring competitiveness and implementing compensatory measures for states that produce inexpensive energy, which is then used in the economies of other member states. The principle of solidarity, particularly in its energy component, must be aligned with the Union's environmental policies. In our view, the medium-term consequence will be the inclusion of this principle within the Union's legal order as a fundamental principle, with an approach directed both internally – towards Union policies, competitiveness, and citizen welfare – and externally, in positioning the Union within international operations.

Question 3

Romania's energy market has developed steadily but faces challenges in integrating with the Union's market. The country's wholesale electricity and gas markets are heavily influenced by government interventions that go beyond the EU emergency framework. In this context, it should be noted that in April 2023, the European Commission initiated infringement proceedings against Romania for restricting electricity exports, citing violations of Union regulations that protect market freedoms and competition.³

In terms of social rights, it is evident that Romania's population is in a state of actual vulnerability, particularly regarding energy poverty. In 2023, 13.6% of the population faced difficulties in paying utility bills, and 12.5% were unable to adequately heat their homes during the winter, highlighting the need for accelerated building renovations and targeted social measures.⁴

To align the principle of solidarity and energy security with the need to ensure competitiveness and respect for citizens' social rights, particularly for those from vulnerable areas, Romania's Just Transition Plan focuses on phasing-out coal by 2032 and supporting the transition of carbon-intensive regions, including Dolj, Gorj, Hunedoara, Mureș, Galați, and Prahova. Supported by €2.1 billion from the Just Transition Fund, the plan aims to develop renewable energy sources, modernize industries, and retrain the workforce.⁵

³ See: <https://www.caleaeuropeana.ro/romania-se-confrunta-cu-obstacole-semnificative-legate-de-diversificarea-mix-ului-energetic-si-imbunatatirea-eficientei-energetice-raport/>

⁴ See: <https://www.caleaeuropeana.ro/wp-content/uploads/2024/09/Raportul-de-tara-privind-starea-uniunii-energetice-din-2024.pdf>

⁵ See: https://energy.ec.europa.eu/document/download/e1691f7a-c47e-4a3d-8b3c-238d2f10b335_en?filename=23_RO_SoEU%20Fiche_2024.pdf

Question 4

Romania, like other states, has felt the impact of the energy crisis triggered by the cessation of energy imports from Russia, following the latter state's military aggression against Ukraine. Although Romania's production capacity covered a significant portion of its internal consumption needs, the application of the principle of solidarity, combined with the consequences of a functional European energy market governed by competitive market rules, led to difficulties both in the economy and for household consumers. Domestically, Romania adopted a policy of capping energy prices, particularly for vulnerable consumers.

As a state, Romania acknowledged the Draghi report, and the approach to the energy sector within the context of competitiveness cannot be overlooked as a policy of the European Union. Like other states, Romania was affected by significant fluctuations in energy prices, being forced to purchase energy at prices far above those of countries with stronger economies, where the standard of living is well above the European average. In this context, considering that Ukraine, once a net exporter, now requires massive energy imports, Romania, together with Bulgaria and Greece, raised the issue of interconnectivity and solidarity at the Energy Council meeting in October 2024.⁶ The proposals were summarized in three actions⁷:

- strict monitoring by the European Commission of cross-border flow capacity in transit countries (where lines exist but are underutilized) and coordinating maintenance work to prevent the blockage of interconnections that could lead to price increases;
- accelerating investments in new interconnections and committing to a clear timetable from all member states. Romania specified that it is already interconnected with its neighbors through nine operational lines and is working on an additional nine. As of October 2024, Romania has a capacity of 3500MW, representing 20% of its total capacity and 38% of its maximum daily production, far exceeding the Union's minimum requirement of 15%. Romania pointed out that there is a lack of concern among all states for ensuring interconnectivity, which directly affects energy prices.

Exceptional short-term measures to protect European citizens and the economies of member states, ensuring fairness for both economies and citizens.

⁶ See: <https://www.consilium.europa.eu/ro/meetings/tte/2024/10/15/>

⁷ See: <https://www.caleaeuropeana.ro/romania-cere-raspicat-o-singura-europa-cu-aceleasi-drepturi-pentru-toti-pe-piata-de-energie-transmite-sebastian-burduja-in-intalnirea-cu-omologii-din-ue-e-o-chestiune-de-competitivitate-pe-termen-l/>

Question 5

The energy crisis has affected both household consumers and businesses during the 2022–2024 period, and Romania has taken steps to mitigate the negative effects on economic operators and citizens. Through GEO no. 118/2021⁸ a compensation scheme for electricity and gas was approved for the winter of 2021–2022, and through a joint order⁹ of the ministers of labor, energy, and finance, the application rules for compensations were approved. Successive legislative acts have extended and supplemented the measures aimed at protecting the population and non-household consumers.¹⁰

Question 6

To address the question, we start from the fact that Article 2(1) and (2) of the TFEU defines the concept of competences as the power *to legislate and adopt acts with binding legal force*. The delimitation of competences within the Union is regulated by Article 5 of the TEU, which enshrines the principle of conferral: “(2) Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.” Both Article 5(2) TEU and Declaration No. 18 on the delimitation of competences, annexed to the Treaties, *state that any competence not conferred upon the Union by the Treaties belongs to the Member States, and the fact that the European Union has legal personality does not authorize it to legislate or act outside the competences conferred upon it by*

⁸ Emergency Ordinance 118/2021 regarding the establishment of a compensation scheme for the consumption of electricity and natural gas for the cold season 2021–2022, as well as for completing Government Ordinance no. 27/1996 regarding the granting of facilities to people who live or work in some localities in the Apuseni Mountains and in the “Danube Delta” Biosphere Reserve Official Gazette of Romania, part I, no. 951 of 5.10.2021.

⁹ See: <https://energie.gov.ro/wp-content/uploads/2022/09/EXTRAS-ORDINUL-PROCEDURA.pdf>

¹⁰ Law 206/2022 for the approval of the Government’s Emergency Ordinance no. 27/2022 regarding the measures applicable to final customers in the electricity and natural gas market in the period April 1, 2022–March 31, 2023, as well as for the modification and completion of some normative acts in the field of energy:

Official Gazette of Romania 692, Law no. 206/2022 of July 8, 2022, Emergency Ordinance 27/2022 regarding the measures applicable to final customers in the electricity and natural gas market in the period April 1, 2022–March 31, 2023, as well as for the modification and completion of some normative acts in the field of energy;

Official Gazette of Romania 274, Emergency Ordinance no. 27/2022 of March 18, 2022, Emergency Ordinance 3/2022 for the amendment and completion of Government Emergency Ordinance no. 118/2021 regarding the establishment of a compensation scheme for the consumption of electricity and natural gas for the cold season 2021–2022, as well as for completing Government Ordinance no. 27/1996 regarding the granting of facilities to people who live or work in some localities in the Apuseni Mountains and in the “Danube Delta” Biosphere Reserve, Official Gazette of Romania 79, Emergency Ordinance no. 3/2022 of January 26, 2022.

*the Member States through the Treaties.*¹¹ In the field of Union competences, Article 5 TEU must be read in conjunction with Articles 2–6 of the TFEU, which regulate the scope of Union competences.¹²

Considering the provisions of Article 194 TFEU and considering the recent jurisprudential developments of the Court of Justice mentioned earlier, it is clear that solidarity is a fundamental principle of the Union, and legislative interventions by the Union are necessary to achieve legislative harmonization among the member states, with the aim of developing and implementing a unified energy security framework across the European Union.

Question 7

At the national level, there is ongoing concern to regulate the concept of energy security through the approval of a specific strategy. After the strategy was put up for public consultation, at the time of this report's issuance, the strategy is in the process of being approved by Government Decision.¹³ The strategy, which aligns with the European Union's strategy, envisions the growth of the energy sector under conditions of security, sustainability, economic growth, and affordability. The initiators state that the development of the energy sector is part of Romania's development process, ensuring economic efficiency and affordable prices for consumers.

Given the imperative of energy security in the context of significant challenges arising from market fluctuations and regional vulnerabilities caused by the war triggered by the invasion of Ukraine by the Russian Federation and, implicitly, Romania's geostrategic position at the eastern border of the European Union, it is necessary to build a resilient energy sector capable of responding promptly and efficiently to any type of crisis, ensuring continuous and secure energy supply.¹⁴

The strategy has the following horizontally developed principles¹⁵:

- prioritizing supply security and crisis response capacity;
- developing the energy sector based on the principle of efficiency and economic rationality;

¹¹ Declaration no. 24 regarding the legal personality of the European Union, annexed to the Treaties of the European Union.

¹² Gabriel Liviu Ispas, Daniela Panc, *Drept instituțional al Uniunii Europene*, 2nd ed., Hamangiu Publishing House, 2021, pp. 107–112.

¹³ See: https://energie.gov.ro/wp-content/uploads/2024/08/Strategia-Energetica-a-Romaniei-2025-2035-cu-perspectiva-anului-2050_23.08.2024.pdf

¹⁴ *Ibid.*, p. 4.

¹⁵ *Ibid.*, p. 3.

- economic and social equity for regions and individuals;
- achieving climate neutrality by 2050;
- creating a free, competitive, and entrepreneurial energy market;
- technological neutrality and the exploitation of all energy resources that can contribute to reducing emissions and strengthening the production chain;
- developing the electricity and thermal energy storage sector;
- strengthening the supply chain dedicated to the energy industry;
- developing the circular economy (e.g., using energy resulting from industrial processes in efficient centralized heating and cooling systems).

The objectives of the Energy Strategy are:

1. Energy security.
2. Low-carbon energy.
3. Energy efficiency.
4. Physical access to energy for all consumers and the financial affordability and economic competitiveness of energy.
5. Efficient energy markets.
6. Digitalization, development of smart grids, and cybersecurity.

Although the strategy encompasses the evolution of European regulations, especially those targeting the European Union's Energy Union Strategy, there are no references to energy solidarity or the *OPAL* case. Moreover, there are no mentions of the risks related to the security of transport networks, even though these are publicly known.

National regulations, not only those concerning energy, are up-to-date, and the capacity to respond to cybersecurity or security attacks is heightened. Both public governmental institutions and the intelligence services component continuously monitor systems to prevent cyberattacks or limit the effects of such acts of terrorism.

In our opinion, security needs to be regulated both at the European institutional level and nationally, in accordance with the principle of subsidiarity. Cooperation between responsible national institutions does not contradict the potential creation of a rapid response unit at the Union level, with the active participation of national authorities.

Question 8

In our view, energy solidarity and energy security are not opposed to a Union policy of establishing international partnerships with energy producers. Such a decision benefits the internal market and ensures accessibility for citizens, as long as past errors are not repeated in a different form. It is widely known

that Russia's military invasion of Ukraine and the sanctions imposed upon the aggression have affected energy imports. However, it is essential to emphasize that not all member states, particularly those with strong economies, displayed solidarity before the invasion. In relation to bilateral negotiations, it is regrettable that those who supported their economy through low-cost import agreements now invoke solidarity to protect their own economy. The need to develop all Union regions, along with the focus on competitiveness and economic growth, must be followed by immediate support measures for affected economies and for citizens unable to pay energy costs exceeding their income levels. The Union must also intervene to counter speculative practices that undermine confidence in decision-making capacity and adversely impact the economies of member states.

From a regional perspective, the national strategy reiterates the importance of ongoing interconnections in Central and Southeast Europe to ensure the development of energy markets and security mechanisms in accordance with Union regulations. Equally important is the development of interconnections with Moldova, Ukraine, Hungary, Bulgaria, Serbia, Azerbaijan, Georgia, Greece, and Turkey.

Question 9

At the national level, the 2023–2024 Government Program “Viziune pentru națiune” (Vision for the Nation) envisions a new national energy policy, with energy security being a key objective.¹⁶

At both the regional and national levels, energy independence is a strategic objective, as Romania aims to transpose and implement the European Green Deal, its strategies, plans, and the legislation related to key actions through the development and implementation of a Green Deal for Romania. This deal should tailor European objectives to national realities and capabilities, ensuring that the new framework for fair and sustainable development guarantees an economically efficient, socially manageable, and competitive and innovation-focused ecological transition. Renewable energy sources, while essential for the ecological transition, also have intermittent characteristics. In crisis situations, there may be periods when renewable energy production is insufficient to meet domestic consumption. Therefore, to ensure national energy security, baseload energy production sources, such as natural gas and nuclear energy, are necessary to maintain the flexibility and adequacy of the National Energy System (SEN).

¹⁶ See: https://gov.ro/fisiere/pagini_fisiere/23-06-16-12-32-52Programul_de_Guvernare_2023-2024.pdf

In this context, natural gas will be used as a transition fuel, playing a vital role due to its ability to quickly respond to demand fluctuations. Additionally, low-carbon sources, such as nuclear energy, will significantly contribute to increasing electricity production without greenhouse gas emissions.

In this context, we believe that current regulations are sufficient for the proper regulation of the energy market and gas supply. The existence of national responsibilities does not negatively impact the Union's overall policies, just as individual gas price negotiations before the energy crisis were not considered to affect the Union as a whole. Observing the principle of subsidiarity, as we have previously stated, it does not seem – at least from Romania's national experience – that centralized regulation at the European level would add value to the current situation, especially since gas exploitation is directly linked to the territorial dimension of the state. However, we believe that the Union can establish priorities to support member states in increasing gas production and transport capacity, so that by 2050, the Union as a whole can become an energy exporter.

Section II: Energy solidarity, energy security and green transition

Question 1

National government strategies are based on the decision to advance toward achieving climate neutrality by 2050. Romania has committed to reducing greenhouse gas (GHG) emissions by 89% in the energy sector by 2035 and by 99% by 2050, compared to the GHG emission levels recorded in 1990. Regarding the share of renewable energy sources (RES) in gross final energy consumption, Romania has set a target of 41.1% by 2035 and 86.1% by 2050. These targets will be achieved primarily by increasing installed capacity for energy production from wind, solar, hydro, and geothermal sources, using green gases (biomethane, hydrogen, synthetic methane, etc.), and through the partial electrification of heating and cooling systems.

To meet the objectives and targets set, the gradual phasing-out of solid fossil fuels from the energy mix is a necessary action. Romania has set 2032 as the deadline for decommissioning energy production capacities based on hard coal and lignite.¹⁷

Regarding the established targets, there is consensus on achieving the goal of climate neutrality, and the projected investments from Union funds, the

¹⁷ See: https://energie.gov.ro/wp-content/uploads/2024/08/Strategia-Energetica-a-Romaniei-2025-2035-cu-perspectiva-anului-2050_23.08.2024.pdf, pp. 87–92, 140–142.

recovery and resilience plan, and national funds are focused on innovation, research, and the development of green energy production capacities.

Question 2

- Romania has transposed the energy-related directives and continuously updates national regulations to ensure compliance with the principles and standards adopted at the Union level. The main national legislative acts influenced by the Union's environmental policies are: The Integrated National Energy and Climate Change Plan 2021–2030 (PNIESC), approved by Government Decision no. 1076/2021;
- Romania's Long-Term Strategy for Reducing Greenhouse Gas Emissions – Romania Neutral by 2050 (STL), developed in accordance with the provisions of Annex IV of Regulation (EU) 2018/1999 and approved by Government Decision no. 1.215/2023;
- Romania's National Recovery and Resilience Plan (PNRR), approved by the EU Council on October 28, 2021;
- The National Strategy for Sustainable Development of Romania 2030 (SNDDR 2030), which is Romania's response to the 2030 Agenda for Sustainable Development and establishes the national framework for implementing the 17 Sustainable Development Goals (SDGs).

Among the legally enforceable regulations are the following:

- Government Emergency Ordinance no. 64 of June 29, 2011, regarding the geological storage of carbon dioxide, which establishes the legal framework for the safe environmental storage of carbon dioxide to contribute to combating climate change;
- Law no. 123/2012 on electricity and natural gas, which establishes the regulatory framework for activities in the electricity and thermal energy sectors produced in cogeneration;
- Law no. 121/2014 on energy efficiency, which creates the legal framework for developing and implementing the national energy efficiency policy;
- Law no. 184/2018 regarding the establishment of a promotion system for energy from renewable energy sources, which establishes the legal framework for expanding the use of renewable energy sources;
- Law no. 362/2018, by which Romania transposed the NIS Directive, imposes specific measures to increase the level of cybersecurity in networks and IT systems used in critical sectors, including energy;
- Law no. 226/2021 on establishing social protection measures for vulnerable energy consumers, which aims to protect vulnerable consumers from rising energy prices by providing subsidies for heating, energy consumption, the purchase of products and services for improving the energy performance of buildings, or for connecting to the energy network;

- Government Emergency Ordinance no. 108/2022 regarding the decarbonization of the energy sector, approved by Law no. 334/2022, which established the general legal framework for the gradual elimination of coal from the energy mix;
- Law no. 237/2023 regarding the integration of hydrogen from renewable and low-carbon sources into the industrial and transport sectors (the Hydrogen Law), which sets obligations for fuel suppliers and industrial hydrogen consumers;
- Law no. 121/2024 on offshore wind energy, which provides for the operationalization of investments in offshore wind energy.

Therefore, we believe that in Romania there is an effective and updated legal framework in force that meets the specific requirements.

Question 3

In national legal doctrine and case law, there is no established position on this matter. It is a fact that aggressive coal extraction has caused environmental consequences, and the lack of ecological rehabilitation of mining areas has led to further negative impacts on the environment and the quality of life. However, even in this area, Romania initiated programs aimed at industrial balancing of these regions, professional reintegration, and support for investments before joining the Union. The entire body of legislation previously mentioned is based on the need for rational use of underground resources to protect the environment and citizens.

Question 4

Romania is one of the three states that requested effective intervention on energy policies in the European Council to protect vulnerable populations from market distortions, which have resulted in Romania purchasing the most expensive energy in Europe.¹⁸ Of course, energy management in the international context is part of Romania's diplomatic and strategic agenda, and the unlocking of major projects – nuclear or gas extraction in the Black Sea – is complemented by investments in wind, solar, and hydropower energy. Romania aims to produce sufficient energy by 2035 to meet domestic needs and contribute to the EU's energy independence through surplus production. To achieve these goals, resources from the Just Transition Fund¹⁹ are being appropriately managed.

¹⁸ See: <https://www.consilium.europa.eu/media/yzgoe2ng/20241017-euco-conclusions-ro.pdf>

¹⁹ Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund (OJ L 231, pp. 1–20).

Question 5

In our view, there can be no energy solidarity as long as citizens are vulnerable and unable to pay for expensive energy. In line with the conclusions of the Draghi report, we believe that energy should not be seen as an end in itself but should play a dual role: fostering and enhancing economic competitiveness in an unstable international context and protecting citizens from poverty. In this context, as we have highlighted, Romania has developed a mechanism to compensate energy prices for both household and non-household consumers. However, we consider that granting state aid, with the Commission's approval, is not incompatible with the principle of energy solidarity.

Question 6

The functional relationship between energy policy, conducted according to Article 194 of the TFEU in the spirit of solidarity among states, and the development of transport networks must emphasize the Union's fundamental principles, ensuring citizen access and competitiveness in the internal market. The development of transport networks is not an end but a multilateral tool within the Union and in relation to third countries, contributing to the organization of the energy sector to achieve the Union's objectives. In our view, the better developed the infrastructure and the stronger the interoperability, the more stable the market will be, and the more predictable economic flows will become.

Question 7

The decarbonization of the energy sector is an urgent and necessary action to meet Romania's energy and climate change commitments. It requires transforming the energy sector by increasing energy security, supporting economic development, fostering social inclusion, creating jobs, and ensuring fair and affordable energy prices for consumers. Romania has committed to reducing greenhouse gas emissions in the energy sector by 89% by 2035 and 99% by 2050, compared to 1990 levels. Given the context the energy crisis, and although Romania had planned to cease coal exploitation by 2032, it has been necessary to reopen certain mining operations to ensure sufficient energy supply. The decarbonization targets will be achieved in close correlation with economic, social, and security needs, ensuring the continuous availability of energy, even in times of stress in the energy sector, at accessible prices for both the population and businesses. Thus, reducing coal-based generation capacity will occur at a pace that does not compromise economic, social, or energy security imperatives.

To ensure decarbonization, the Union must support major projects for gas development or the expansion of nuclear, wind, solar, or hydropower capacities.

Question 8

We believe that, technically speaking, there may not be such limits. However, in the context of respecting the principle of solidarity, combined with environmental policies adopted at both the Union and national levels, states have committed to a roadmap to ensure that the Union becomes climate-neutral by 2050. As for Romania, the national report shows substantial progress compared to the commitments made, meaning that there are no applied debates in national institutions, the judiciary, or doctrine regarding the relationship between Article 192(2) TFEU and Article 194.

Question 9

As mentioned earlier, there are strategic levels approved by the Government, along with a draft Strategy that is currently awaiting approval by Government Decision. However, we believe that the most important measures adopted by the government aim to develop energy diversity and stimulate public and private investments in green energy, including the following actions:

At the beginning of 2023, an agreement was signed with an international bank to modernize the heating network. Based on this, two calls for projects were launched on 1.02.2024, under *Key Program 5: High-Efficiency Cogeneration and Heating Network Modernization* of the Modernization Fund, to “support investments for the modernization/rehabilitation of the intelligent heating network.” These include: (1) a call for projects with a total allocation of EUR 200,000,000, dedicated to administrative-territorial divisions producing thermal energy for transport and distribution networks or those holding distribution and transport systems to ensure public heating services or for their own consumption (*active until 30.06.2024*); and (2) a call for projects with a total allocation of EUR 390,000,000, dedicated to thermal energy transport and/or distribution operators defined under current legal frameworks (*active until 1.01.2027*).

Furthermore, under Key Program 5, the European Commission approved a state aid scheme aimed at supporting the development of flexible gas-based production capacities for high-efficiency combined heat and power (CHP) generation in the district heating sector. EUR 361,950,000 will be allocated for investments in high-efficiency cogeneration, by investing in electricity and thermal energy production units using natural gas, prepared for blending with renewable or low-emission gases, including green hydrogen.

Under the Recovery and Resilience Plan (PNRR), Investment 3 focuses on developing flexible, high-efficiency CHP gas-based combined heat and power generation in the district heating sector to achieve decarbonization. Following the project call under Investment 3, four financing contracts were signed, totaling EUR 709,207,237, of which EUR 388,050,000 is from the PNRR. The implementation process for these projects has already started, with a completion deadline of 30.06.2026.

Under the PNRR, funding for investments in new electricity production capacities from renewable sources is provided through Investment 1 – New Electricity Production Capacities from Renewable Sources, under Component 6 – Energy, with the following objectives:

- Launching a competitive tendering procedure for renewable energy production projects (wind and solar energy);
- Installing additional renewable energy capacity (wind and solar) of at least 950 MW.

Question 10

As of 2024, Romania has the capacity to meet its natural gas consumption needs from domestic resources, but overall, there remains a dependence on imports. Romania's position is to strengthen economic and diplomatic relations with energy-producing states to ensure consumption needs are met. However, as mentioned earlier, diversification could be a solution, and Romania prioritizes, in addition to the aforementioned strategies, the development of two additional nuclear energy production units at Cernavodă. Although the limits imposed by the decisions of the Court (CJEU) are clear and the Union can act only in cooperation with the member states, we believe there is consensus in identifying the best external partnerships to secure the necessary energy supply for the population and ensure energy provision for the economy to remain competitive.

Question 11

Among the previously mentioned examples are investments made under REPowerEU,²⁰ without these being limiting.²¹ This program has clear added

²⁰ Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC (OJ L 63, 28.2.2023, pp. 1–27).

²¹ See: <https://energie.gov.ro/lansarea-apelului-cef-2-energy-cross-border-renewable-energy-preparatory-studies/>

value, both in terms of diversifying energy resources, increasing production and transport capacity, and through cohesion and economic growth policies, including increasing employment opportunities for citizens.

Section III: The EU's crisis management in the field of energy and its limits

Question 1

Romania has not, until now, been involved in cases concerning how to intervene in crisis situations. Nevertheless, we believe that the Court's reasoning is clearly stated, making it possible to anticipate that the principle of solidarity includes not only a reactive component in response to an imminent, current, or potential danger but also a preventive role in ensuring good coordination between states. Although, in my opinion, the Court's decision extends the scope of solidarity, I consider this to be the only solution to ensure the harmonization of procedures among member states, while simultaneously laying the foundation for the functioning and development of a competitive economy within the internal market. I believe that the current regulation is sufficient and comprehensive for potential interventions, as long as national economies and citizens are protected.

Question 2

In crisis situations, measures must be appropriate and in compliance with the Union's primary law. Even when crisis measures are adopted, it must be considered that beyond the immediate measures issued by the Commission, Union legislative policies involve the intervention of the two legislative institutions. In this case, it cannot be said that citizens, represented in the European Parliament, or governments, through relevant ministers in the Council's working formations, are excluded from participation. I do not believe we can generalize the application over time of a measure adopted in a crisis situation. However, if the measure proves to be efficient and effective, its extension beyond the crisis, with the consultation of member states, could be considered. I do not believe that a separation should be made between the legislative mechanisms for energy policy and the mechanisms for ensuring necessary energy supply. Both types must be subsumed under the effort to ensure predictability, the functioning of the economy, and citizens' access to energy.

At the national level, I have not identified such legislative situations or cases before the courts.

Question 3

In our opinion, primary law contains sufficient mechanisms for crisis response, regardless of whether the crisis is energy-related or not. The realities of the last decade have shown that the Union has effective instruments to respond to deep crises: the migration crisis, the pandemic crisis, and the energy crisis. Even though these crises occurred in different domains, they were addressed through effective mechanisms of the Union and the member states. Just as, following the migration crisis, certain measures were extended as permanent measures under the new Migration Pact, adopted in 2024, so too in any domain where a crisis might arise, there could be measures maintained after the resolution of the crisis. However, we believe that the potential risk of a crisis is not a sufficient reason to extend competences beyond the limits of the attribution of powers as provided by the treaties, just as legislative inflation cannot be a solution to prevent future, uncertain, and unforeseeable events.

SLOVAKIA

Donald Wertlen*

Lucia Mokrá**

(rapporteurs)

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

Shaped by the development of the energy legislation on the EU level, the national energy legal order of the Slovak Republic consists primarily of the Law on energy,¹ Law on regulation of network industries,² Law on support of renewable energy sources,³ and Law on energy efficiency.⁴ Considering the Slovakia's post-communist legacy, resulting in long-term and almost exclusive import dependency on Russian natural gas, oil and nuclear fuel, the concept of the energy security has been high not only on legislative but also broader political agenda (e.g. mentioned many times in the *Programme Statements of the Government of the Slovak Republic* or *Security Strategies of the Slovak Republic*). Specifically, the security of supply, which is complemented by the Law on critical infrastructure⁵ (as Slovakia has enjoyed important position as a pipeline transit country) and affordability, oversight by the Regulatory Office for Network Industries with authority to issue executive (secondary) legal provisions in the form of Ordinances and Decrees, concerning mainly prices and tariffs regulation. As for the principle of energy solidarity in Slovak legal system, or better lack thereof, it was only introduced in post-OPAL case amendment of the law on energy in June 2022. However, majority of the provisions are limited to the gas supply and conduct of stakeholders (state, transmission system operators, distributors) in cases when Slovakia would be provider or alternatively recipient of the solidarity.

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¹ Act No. 251/2012 Coll. of laws on Energy and on Amendments and Additions to Certain Acts.

² Act No. 250/2012 Coll. of laws on regulation in network industries.

³ Act No. 309/2009 Coll. of laws on the promotion of renewable energy sources and high-efficiency combined production and on amending and supplementing certain acts.

⁴ Act No. 321/2014 Coll. of laws on Energy Efficiency and on Amendments and Additions to Certain Acts

⁵ Act No. 45/2011 Coll. of laws on Critical Infrastructure.

Question 2

The principle of energy solidarity shall be viewed as a “corrective tool,” yet given the existing Treaty-based framework designating energy as a shared competence, the diverging national interests (especially in time of crises) may undoubtedly undermine the EU-wide energy solidarity. The existing EU legislation gradually provide for more tangible application of the principle of energy solidarity, such as the solidarity agreements⁶ that aim to facilitate cross-border technical, legal and financial arrangements between Member States in cases of emergency. However, this measure is to-date underutilised, with Slovakia having none of such agreements in place. Moreover, the possibility of unilateral measures from Member States, for example in the form of the export restrictions that exposes the energy solidarity principle remains still viable within the legal framework. For example, Germany’s tariff on cross-border gas in 2022,⁷ or Hungarian ban on gas exports in the same year⁸ – both mainly triggered by the energy crisis. Hence, the major challenge is to reconcile the national interests and the principle of energy solidarity in context of the security of the energy supply.

As for the external dimension, we see it inherently linked to the internal one. More precisely, in a way that any external energy policy initiative shall be conducted through a prism of intra-EU solidarity. In this context, a launch of EU Energy Purchase Platform in 2022 was a step forward to strengthen the demand leverage of the EU and maximise the efficiency of the existing cross-border energy infrastructure. Nevertheless, there are still legal constraints when it comes to EU-wide joint purchases of gas. Specifically, the existing long-term contracts conducted by the individual member states (many of them with Russia) and the legal uncertainty on the implementation of the joint ventures on the consumer level.⁹

Question 3

The functioning of the energy market, security of energy supply in the EU, energy efficiency and energy saving and the development of new and renewable for Member State of energy and the interconnection of energy networks are complementary goals of the EU energy policy, therefore, there should not be tension between them.

⁶ Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply.

⁷ See: <https://www.euractiv.com/section/energy-environment/news/germanys-gas-tariff-puts-eu-energy-solidarity-at-risk-energy-commissioner-says/>

⁸ See: <https://www.euractiv.com/section/energy/news/eu-solidarity-tested-as-hungary-bans-gas-exports-in-emergency-move/>

⁹ See: <https://justclimate.fes.de/e/shaping-the-european-energy-solidarity.html>

The energy solidarity may invoke the legal effects in relation to green transition, if the Member State abuse the financial measures and/or the competition rules. There is no hierarchy between the objectives of green transition and their achievements is the commitment and obligation of each Member State.

The social and fundamental rights dimension of EU law is very relevant both for the EU Green Deal and just transition. The threat to EU energy market caused by Russian invasion to Ukraine, which has impact on energy supplies to Member States, contributed to the cost-of-living crisis. “The cost-of-living crisis has caused an increase in energy poverty, disproportionately affecting those already at risk of poverty and social exclusion. Disadvantaged groups – such as Roma, immigrants and descendants of immigrants, ethnic minorities, low-income and homeless people – and in particular women in those groups are more likely to encounter difficulties in relation to energy and transport than the general population. The EU is committed to addressing energy poverty and ensuring a fair and just transition in Europe, as part of the European Green Deal. Addressing energy poverty is prioritised in the revised energy efficiency directive (Directive (EU) 2023/1791), which sets out the energy policy requirements to achieve the EU climate targets on tackling and monitoring energy poverty.”¹⁰

As outlined in the Preliminary assessment of the EU Green Deal’s impact on equality,¹¹ “although the EU Green Deal primarily focuses on energy and the reduction of greenhouse gas emissions, its implementation will directly impact various areas of society such as land use, transport, buildings, housing, industry, and employment — in short, the way people live and do business. Despite the European policies regarding equality and non-discrimination already in place, the EU Green Deal risks further increasing existing inequalities in society by not consistently including an equality perspective in its ambition to reach carbon neutrality.” The European network of equality bodies enshrined that “the transition to a fair and socially inclusive society needs to consider potential impact of the EU Green Deal and its implementation into national legislation on vulnerable groups. They draw the attention to the situation of marginalised groups such as women, racialized people, migrant workers, older persons, people with disabilities, LGBTQIA+ people etc., which needed to be addressed by relevant authorities and ensure that Member States use the established Social Climate Fund to provide adequate compensation for those who need it most, i.e. those who(se rights) are most negatively impacted by the green transition.”

¹⁰ FRA (2024), *Fundamental Rights Report*, 15 June 2024.

¹¹ Equinet (2023), *Preliminary assessment of the EU Green Deal’s impact on equality*.

Question 4

As for the potential cross-border tensions with legal aftermath, especially in the context of the energy crises-triggered fallback to coal, as Slovakia shut down its last coal power plant in 2024.¹² Nevertheless, Slovakia's decision to commission 3rd and 4th bloc of the Mochovce nuclear power-plant (approximately 100km from Austrian border) has been criticised by the Austrian climate minister.¹³ In order not to escalate the tension, in June 2024 bilateral meeting between the Slovak Republic and the Republic of Austria on issues of common interest related to nuclear safety took place.¹⁴ Moreover, the uncertainty of the gas transit through Ukraine after 2024 (when the current contract expires) has urged Slovak government to explore prospects of coordinated action with neighbouring Member States, embedding both energy solidarity and energy security dimensions. Even though solidarity agreement between Slovakia and another Member State is yet to be signed, Slovakia has recently started dialogue with Austria and Hungary regarding the security of supply.¹⁵ Furthermore, the Memorandum of Understanding on Solidarity Ring was signed – joint initiative of Slovakia, Bulgaria, Romania, Hungary and Azerbaijan regarding a implementation of a new gas corridor from Azerbaijan to Central and Eastern Europe.¹⁶ Label “Solidarity” Ring, despite it being predominantly energy security initiative further suggests fundamental interconnection between these two concepts.

Question 5

The principles of proportionality and subsidiarity are undeniably cornerstones of the EU constitutional identity. Nevertheless, in the field of energy, which in the EU has been fragmented since 1950s, the principle of proportionality may be evoked when it comes to Member States' national energy interests (especially energy security), which are legally protected by Article 194(2) of TFEU. Therefore, we see room for the principle of energy solidarity, as recognised by the Court in *OPAL* case as legally binding, to take more central role in stipulation of new and implementation of existing laws and policies.

¹² See: <https://www.seas.sk/tlacove-spravy/vojany-ukoncenie-prevadzky-uhlie/>

¹³ See: <https://www.euractiv.com/section/energy-environment/news/austrian-climate-minister-slovakias-nuclear-power-plant-plans-incomprehensible/>

¹⁴ See: <https://www.ujd.gov.sk/bilateral-meeting-between-the-slovak-republic-and-the-republic-of-austria-in-voderady/?lang=en>

¹⁵ See: <https://www.economy.gov.sk/en/press/in-order-to-ensure-security-of-gas-supplies-to-slovakia-it-is-crucial-to-maintain-gas-transit-through-ukraine-even-after-2024>

¹⁶ See: <https://www.eustream.sk/en/about-us/press/news/medzinarodne-memorandum-projekte-solidarity-ring.html>

Question 6

The EU energy law has gradually taken more supernationalists turn, with European Commission being major driver of the political integration by utilizing various policy frames to make the legislation viable as well as bolster its authority. For example, energy security with regulations on risk-preparedness in the electricity sector¹⁷ or security of gas supply¹⁸ or green transition.¹⁹ In this sense, the principle of energy solidarity, backed by the Court's judgement shall be perceived as another potential policy frame towards *common* EU energy policy. In that way the energy solidary ought to be integral part in the denationalisation of the energy security (mainly security of supply as national interest) towards more comprehensive EU-wide approach.

Question 7

The energy crisis following the war in Ukraine put into question predominantly of security of supply. Nevertheless, the regulation on coordinated demand-reduction measures for gas²⁰ and its relative successful implementation by the member states highlights the moderation of demand and energy efficiency as crucial elements of concept of energy security. Moreover, in the context of gas-reduction regulation Slovakia also adopted Ministerial decree on the procedure for the application of restrictive measures in an emergency and on measures aimed at eliminating an emergency in the electricity sector and on the declaration of restrictive measures in the gas sector²¹ and government regulation on excess income from the sale of generated electricity.²² Another dimension of energy security, revealed by the energy crisis is the affordability and the impact of increasing energy prices on households. In this regard, Slovakia adopted law on solidarity contribution from activities in the oil, gas, coal and refining sectors.²³ Moreover, as the EU agreed on minimal 33% windfall tax on excess revenues of energy companies,²⁴ Slovakia introduced a steep 70% tax,²⁵ which has met strong opposition, especially by the largest energy company Slovnaft.

¹⁷ Regulation (EU) 2019/941.

¹⁸ Regulation (EU) 2017/1938.

¹⁹ Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action.

²⁰ Council Regulation (EU) 2022/1369, Council Regulation (EU) 2023/706.

²¹ Decree of the Ministry of Economy of the Slovak Republic No. 380/2022 Coll. of laws.

²² Regulation of the Government of the Slovak Republic No. 38/2023 Coll. of laws.

²³ Act No. 519/2022 Coll. of laws on the solidarity contribution from activities in the oil, gas, coal and refinery sectors and on the amendment of certain acts.

²⁴ Council Regulation (EU) 2022/1854.

²⁵ Government Regulation of the Slovak Republic No. 38/2023 Coll. of laws, which establishes the method of determining the amount of excess income from the sale of generated electricity.

Question 8

The principle of energy solidarity became even more visible after the Russian invasion to Ukraine in 2022. The EU's external policy in energy policy got under the scrutiny and with the objective to protect both the territory of the EU Member States and ensure the energy security of Member States, the EU had adopted EU external energy engagement strategy.²⁶ Among its main objectives immediately implemented came reduction of overall energy demand boosting energy savings, energy efficiency and the development of renewable sources of energy. The solidarity with Ukraine is at the centre of the strategy, including the Member States immediate response by actively replacing the energy resources and eliminating the energy dependency on Russian energy sources. This became visible mainly in the CEE countries, where the Russian gas supplies are the highest.

The share of Russia's pipeline gas in EU imports dropped from over 40% in 2021 to about 8% in 2023. For pipeline gas and LNG combined, Russia accounted for less than 15% of total EU gas imports. The drop was possible mainly thanks to a sharp increase in LNG import and an overall reduction of gas consumption in the EU.²⁷

The other EU Member States presented solidarity with CEE countries declaring the continuity of the energy supplies in case of cut from Russia. The projects of common interest presented the new opportunity to diversify the EU Member States energy suppliers' portfolio, and the tool for mitigating the dependency on the Russia sources. Although the Russian import of the gas sustain stable in 2024, the more emerging issues came with the US sanctions to Gazprombank, which collects payment from their contractors, including Hungary and Slovakia. This would mean, that from 1 January 2025, the contractual obligations cannot be fulfilled, or the sanctions will be broken. This raises the issue of energy solidarity between the EU Member States and energy security of the EU itself, if some of the Member States are either not able to ensure and pay for their energy supplies, or are negotiating on their own with Russia, contradictory to the EU goals and strategy.²⁸

²⁶ European Commission, 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*, SWD(2022)152 final, JOIN(2022)23 final, 18 May 2022.

²⁷ Council of the EU, *Where does the EU's gas come from?*, 21 March 2024.

²⁸ See more: Hnonline, *Slovakia has a problem, it does not know how to pay the Russians for gas. Time is running out, the key date will come in a few days*, 13 December 2024.

Question 9

The export of the Russian gas to the Europe through Ukraine remains stable, based on the information from the Eustream.²⁹ Although with the termination of the contract between Gazprom as the gas supplier from Russia to EU through Ukraine by the end of the year 2024, the situation will raise the overall concern on the Union level.

The security of supply remains Member States' responsibility, the individual Member States have different bilateral treaties on energy (gas included) supplies, including several EU Member States. The Slovak government has the valid contract on gas supplies with Gazprom by 2034. The contractual obligations and payments for gas supplies through Ukraine remains the lively interest of the government.

As of late 2024, the US Department of the Treasury's Office of Foreign Assets Control sanctions Gazprombank and take additional steps to curtail Russia's use of the international financial system.³⁰ As underlined in the related press release "Gazprombank is a conduit for Russia to purchase military materiel for its war effort against Ukraine. The Russian government also uses Gazprombank to pay its soldiers, including for combat bonuses, and to compensate the families of Russian soldiers killed fighting Putin's brutal war against Ukraine." These sanctions will have impact on the countries having gas supplies delivered by Gazprom and after the efficiency of the sanctions, as of 1st January 2025, there will be problem with the payment.

The current governance model will be again facing the challenges in relation to two main points: gas supplies, as the transit through Ukraine will not be the option from beginning 2025 and the payments if the supplies will be transferred through third countries, for instance, through Turkey and the TurkStream.

The individual efforts of the EU Member States are thus confronted with a lack of political strength or presentation of a common European interest in the supply of natural gas as one of the important sources of energy to the Central European countries. Strengthening the negotiating position would be helped by a "single voice" of the Union or the adoption of legal and political guarantees regarding energy supplies to those EU Member States affected by gas supplies via Ukraine and/or payments for these supplies in transit via third countries.

²⁹ TASR, *Russian gas exports via Ukraine to Europe remain stable*, 11 December 2024.

³⁰ US Department of the Treasury, *Treasury Sanctions Gazprombank and Takes Additional Steps to Curtail Russia's Use of the International Financial System*, 21 November 2024.

Section II: Energy solidarity, energy security and green transition

Question 1

The European Union as the concept (including its predecessor European Communities) was established on the principle of eliminating the internal borders and taking as the economic advantage the close cooperation between Member States. The Union's economy is known as the interdependent system of Member States' economies, which means that the Union's economy is only as strong as the weakest Member States economy. Additionally, both EU and all its Member States have committed themselves to the climate neutral goals by 2050 under the Paris Agreement and by 2030 under the Green Deal. Therefore, the common goals can be achieved more effectively by common approach and the rationality will underline the need to rely upon the coherence in the process of reshaping the climate neutral future of the European Union.

The 2050 climate neutrality objective is the legal obligation, but above it, it is strong political commitment, and therefore, it has impact on the meaning, codification and implementation of energy solidarity and energy security in EU and national law. The EU is also presented itself as the agenda-setter in the area of climate change, see its role in European security and competitiveness. In this challenging context, climate progressives will have to deploy compelling narratives, strategic resourcing, and diplomatic engagement to advance the best possible climate agenda during the EU's next institutional cycle.³¹

Question 2

The issue of climate change was regulated in Slovakia until 2023 through Act 414/2012 on emissions trading (which regulates only half of Slovakia's emissions that fall under the EU ETS). The remaining areas (so-called non-ETS emissions) were covered by directly applicable EU legislation or by legislation falling under other ministries. Reduction targets had not been set in legislation but were regulated by the 2030 Environmental Strategy entitled "A Greener Slovakia – Strategy of Environmental Policy of the Slovak Republic until 2030," the Integrated National Energy and Climate Plan for 2021–2030 or the Low Carbon Development Strategy of the Slovak Republic until 2030, with a view to 2050.

Since 2021 the Ministry of Environment run the consultations with different stakeholders, and the first draft of the Climate Law was prepared in

³¹ S. Dennison, M. Engstrom, C. Hobbs, *Winds of change: The EU's green agenda after the European Parliament election*, ECFR, 23 May 2024.

February 2022. Additional three months were given to public to provide comments and suggestions to amend the draft law. On 7 February 2023, the Ministry of Environment held a conference on climate change and low carbon transformation. The aim of the conference was the presentation of the draft law on climate change and expert discussion on the draft law. The conference was attended by experts in the field of climate change, air protection, representatives of the National Council of the Slovak Republic, the government cabinet, ministries, representatives of academia and civil society associations.³² The draft is pending in the legislative process.

Although the draft sees climate change as an urgent global problem with environmental, social and economic impacts and therefore the proposed law is intended to step up efforts to combat climate change through the rigorous implementation of the Paris Agreement. The draft law comprehensively regulates the mechanism for the implementation of the Slovak Republic's obligations arising from international agreements and European Union legislation in the field of tackling climate change and the mechanism for monitoring their implementation. It establishes the long-term binding objective and targets of the Slovak Republic in the field of addressing climate change and regulates the competence of state administration bodies, entities of territorial self-government, as well as the rights and obligations of legal entities and natural persons in protecting the climate system and meeting the long-term binding objective and climate targets set by the draft law.³³ Beyond this formal fulfilment of commitments, neither the draft law nor the consultations with the professional or lay public themselves have addressed the concept of energy solidarity or energy security.

Question 3

The principle of “do no significant harm” is present in the area of EU funds implementation and in the public procurement. The Ministry of investments, regional development and informatisation had issued the Methodological guidance on “not causing significant harm” for the programming period 2021–2027.³⁴ Additionally, the Public Procurement Office had issued the official explanation of the implementation of the “do no significant harm.” This document describes the application of the principle of “do no significant harm” in the case of the preparation of project documents relating to the

³² Ministry of Environment of the Slovakia, Act on Climate Change and Low-Carbon Transformation of Slovakia (Climate Change Act).

³³ Act on Climate Change and Low-Carbon Transformation of Slovakia (pending), *Explanatory memorandum*.

³⁴ MIRRI SK, *Methodological guidance on ‘not causing significant harm’ for the programming period 2021–2027*.

investment activities envisaged to be financed by the Slovakia Programme. As there is only one Slovakia programme, in general all investment actions that are to be financed from the Eurofunds as those for which these conditions need to be met.

Question 4

As the Act on Climate Change and Low-Carbon Transformation of Slovakia is pending, expecting to contain some of energy security dimensions, there is neither energy security nor the related social components defined. The Energy security strategy of the Slovak Republic³⁵ as the key political document highlights that the Slovak Republic perceives energy security as self-sufficiency in energy supply, which considers the optimal price policy, including the ability to export energy. In this context, it sees strengthening its position as part of the concept Slovakia as a transit state on the electricity, gas and oil markets. The aim of the Energy Security Strategy is to achieve a competitive energy sector, ensuring a secure, reliable and efficient supply of all forms of energy at affordable prices, considering consumer protection, environmental protection, sustainable development, security of supply and technical safety.

The social dimension is present more implicitly, referring to environmental and consumer protection, affordable prices (considering various socio-economic characteristics) and sustainability and security of supplies. The explicit reference to the social impact of green transition is neither in the strategy or the pending draft of the law. The reference provides is to social policies and the regional and cohesion policy.

The Territorial Just Transition Plans for Slovakia was approved in December 2022.³⁶ The implemented projects in three regions focused on phase out lignite mining and burning at the Nováky Power Plant by December 2023. The workers in the coal sector were provided with new job opportunities. The Just Transition Fund also supported energy efficiency measures for public buildings and innovative solutions for renewable energy in Upper Nitra. The emphasis in the Košice region is on re-skilling workers in the steel industry and creating new job opportunities in the renewable energy sector, energy storage and modernisation of district heating networks. In Banská Bystrica, the projects focused on increasing the energy efficiency in public buildings and using geothermal resources while providing education for workers in the sector. All implemented projects contribute to the green transition goals.

³⁵ Slovakia, *Energy Security Strategy of Slovakia*.

³⁶ Just Transition, *Territorial Just Transition Plans for Latvia, Poland and Slovakia approved*, 7 December 2022.

Question 5

Although the state aid is not prohibited under the rules of competition, its implementation is strictly regulated. The principle of energy solidarity is in the interest of the Union, but the balance to not affect the development of trade within and outside the European Union needs to be balanced. The broader interpretation of the *Hinckley Point* case will be relevant particularly regarding the diversification of the energy resources under the current global situation. Additionally, the energy solidarity would request the solidarity with EU Member States which had been for a long decade dependent on the Russian energy supplies. This can revoke the need for the state aid provided especially to those forms of (nuclear) energy, which is considered as part of the energy mix under the EU Green Deal and, therefore, such production of energy is applicable to be subject of the energy solidarity. The state aid provided to produce energy which will be shared with other Member States, however, cannot breach the principles of the competition law. The state aid measures can be applied addressing the energy solidarity, however, have to be balanced with principles of free, well-conducted, non-interfered and effective competition on common market.³⁷

Question 6

The relation between the Articles 170–172 TFEU and Article 194 TFEU is horizontal and complementary. Although the Article 194 TFEU identify the energy policy as shared policy between the EU and Member States, the content of the Article 170 TFEU provides the Union competence to “contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures,” understanding as the possibility to implement the energy infrastructure project. To ensure the principle of subsidiarity and proportionality is applied, any action or the project require the ordinary legislative procedure, consultation with the Economic and Social Committee and the committee of the Regions and the consent of the Member States concerned.

The revised TEN-E Regulation provides the legal safeguards and re-shape the system of priority corridors and areas, which are necessary for the implementation of the energy solidarity through the project of the common interest and project of mutual interest.

³⁷ O. Blažo, H. Kováčiková, *Legal Clinics of the Competition Law*, Bratislava, Comenius University, Faculty of Law, 2019, p. 5.

Question 7

Given the prominent role of the energy security discourse in the Member States it is only logical (especially for the European Commission) to integrate the decarbonisation objectives into the energy security (security of supply included) conception. There has been a long-standing cleavage in perception of the sustainability and energy security within the EU. While the western Member States have mostly perceived renewables as both economic and energy security opportunity, their eastern counterparts often prioritised the reliable and affordable fossil fuels. Nevertheless, to some degree, the European Commission as a driver of the integration has been able to “Europeanise” the energy security by penetrating it with the decarbonisation components, particularly renewable energy via the targets, anchored in the renewable energy directive.³⁸ The underlying idea is that in long term, compatible with the 2050 net-zero decarbonisation objective, energy security can be achieved by replacing imported fossil fuels with renewable energy. Moreover, the war in Ukraine has exposed Russia as unreliable energy partner, followed by the call for reduced role in the EU’s energy mix. In the ideal scenario, this a window of opportunity would accelerate the energy transition, replacing the energy imports from Russia, however, other fossil fuel “traps” opened; for instance, by diversification of the suppliers and routes, or increasing the LNG imports.

Question 8

The Article 192(2)(c) of TFEU basically upholds the sovereignty of the Member States over their energy mix and energy supply. The only viable tool limiting the national energy mixes rooted in the EU law are the renewable energy targets that are gradually increasing. It follows the zero-sum logic that increase of the renewables in the Member States’ energy mixes automatically decreases the share of other types of sources, preferably fossil fuels. Nevertheless, EU-wide legislation that would stipulate organised fossil fuels phase out has not been agreed upon, while the nuclear energy also remains in the grey zone of the EU energy policy. In this context, the energy solidarity plays an implicit role in a way that Member States shall ensure the functioning of the energy market and interconnection of energy networks. The more integration, specifically regarding EU and Member States’ energy mixes is plausibly a way forward for the enhancement of the energy solidarity per se within the EU.

³⁸ 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.

Question 9

Regarding the inclusion of the climate consideration in the energy policy, Slovakia has been predominantly in role of the “downloader” of the EU policies – complying with the minimum requirements, stemming from the EU legislation rather than being proactive in this matter. This is partially due to the important role of the nuclear energy in the national energy mix, as well as the Slovakia’s role as a natural gas transit country. Hence, the national legislation concerning the climate-energy nexus mostly rely on the transposition of the EU legislation in form of the law on renewable energy³⁹ or energy efficiency.⁴⁰

Question 10

The EU’s energy policy objectives include the functioning of the energy market and secure energy supplies within the EU, as well as promoting energy efficiency and savings, developing renewable energy sources and interconnecting energy networks. At the heart of the EU’s energy policy is a range of measures aimed at achieving a full Energy Union.

However, each Member State retains the right to determine the conditions for the use of its energy resources, its choice between different energy sources and the general structure of its energy supply (Article 194(2) TFEU).

In the external sphere, the EU’s ambitions focuses on the termination of dependency to external (mainly Russian) energy resources and the development in relation to REPowerEU adoption includes the rules for a minimum gas storage fill level of 90% before winter (Regulation (EU) 2022/1032), voluntary gas demand reduction targets for EU countries of 15% (Regulation (EU) 2022/1369, the period for voluntary demand reduction was extended to March 2025), voluntary aggregation of gas demand (Regulation (EU) 2022/2576, EU Energy Platform), 10% and 5% peak electricity demand reduction targets and time-limited emergency interventions to address high energy prices (Regulation (EU) 2022/1854).⁴¹

Although the EU adopted the above-mentioned regulation which are directly applicable and strengthen the EU’s coordinating role, the individual Member States complementary to that remain liable for ensuring their supplies. For that purpose, the individual Member States have bilateral agreements with

³⁹ Slovakia, Act No. 309/2009 Coll. on the promotion of renewable energy sources and high-efficiency combined production and on amending and supplementing certain acts.

⁴⁰ Slovakia, Act No. 321/2014 Coll. on Energy Efficiency and on Amendments and Additions to Certain Acts.

⁴¹ European Parliament, *Energy policy: general framework*.

suppliers, including criticised Gazprom (Russia) or Turkey (transferring the Russian gas supplies).

Question 11

The concept of the energy security and the Russian invasion of Ukraine had an impact on the Slovak Recovery and Resilience Plan. The chapter REPowerEU was introduced in the revised national plan in 2023,⁴² and includes six new reforms, four new investments and four expanded investments that were already included in the original plan. These measures will contribute to the REPowerEU plan's objective of making Europe independent from Russian fossil fuels by 2030 at the latest.

The revised plan focuses much more on the green transformation and allocates 46% (42% in the original plan) of the available funding to measures supporting climate objectives. The six reforms and eight investments included in the REPowerEU chapter contribute significantly to the green transformation. The reforms and investments will accelerate the deployment of renewables by defining areas suitable for wind energy development in Slovakia, streamlining the permitting framework, including for geothermal and heat pumps, and simplifying the procedures for connecting renewables to the grid. Significant investments are being made to expand the capacity of the electricity grid and to promote sustainable transport through zero-emission vehicles. The REPowerEU chapter also includes measures to increase energy efficiency, such as investment and support for families at risk of energy poverty, as well as measures to accelerate the uptake of green skills by workers.

Although there are no impact studies on the REPowerEU on the cohesion policy in Slovakia, the financial allocation makes it foreseeable that this will be one of the largest and most significant investments contributing to the energy security strengthening, by diversifying sources.

Section III: The EU's crisis management in the field of energy and its limits

Question 1

Article 194 TFEU provides the legal basis for the EU energy policy and the interpretation provided by the Court in the *OPAL* case underlines the extent of the energy solidarity as fundamental principle of EU law. It also outlined, that energy solidarity requires to be read in conjunction with the principle of

⁴² Slovakia, *Complete Recovery and Resilience Plan* (approved), 14 July 2023.

sincere cooperation, namely, close cooperation between the Union and Member State(s). The interpretation provided by the Court underlines, that “the solidarity obligation in fact has both a horizontal (between Member States) and a vertical (between Member States and the Union) dimension.”⁴³

The Court quite unequivocally states that, beyond the energy security context of the case at hand, energy solidarity applies to all objectives of EU energy policy enumerated in article 194(1), which include the functioning of the energy market, the promotion of energy efficiency and renewable energy, and the interconnection of energy networks. On this matter, the Court states that solidarity is “the thread that brings [these objectives] together and gives them coherence.”⁴⁴

This interpretation provides the legal framework for application without the time-limitation, per se it can be applicable to manage an energy crisis and to react before the crises evolved. The Article 122 TFEU provides the possibility of its application especially as the reaction to the crisis related to supply of energy products, and therefore, can be used in conjunction with Article 194 TFEU, as providing the clarity of the crisis management processes in area of energy. However, the sole application of Article 122 TFEU may evoke the legitimate challenge related to application of the principle of subsidiarity and proportionality, as the chapter regulates the economic policy. The legislative procedural clarity provided in Article 122 TFEU may in conjunction with the substantive regulation in energy policy stipulated in Article 194 TFEU be used as operationalised EU legal toolbox.

Question 2

Energy solidarity had been identified as one of the fundamental principles of EU law and energy policy. Therefore, this principle has to be observed in adoption of the decisions and measures in the times of crisis. The limits of the energy crisis measures are time-dependent, requiring the announcement of the emergency/crisis situation, and the principles of subsidiarity dependent. The division of competences and subsidiarity is the fundamental to the functioning of the EU and its relation to Member States. Even in the time of crisis, the common EU decision depends on ad-hoc pool of the competence in the respective area, which does not preclude the treaty implementation per se afterwards. The crisis instruments adopted in response to the gas supply crisis caused by Russia’s war of aggression against Ukraine and initiation of solidarity between Member States provides the effective temporary tool to

⁴³ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598, point 43.

⁴⁴ Ibidem

ensure security of energy supplies. However, the long-term perspective regulation in EU energy legislation, which assess the foreseen impact of the adopted legislation to economy, social dimension, the fundamental rights impact assessment and the international obligations of the EU and its Member States is more sustainable, more precious and provide the legal certainty based on the mentioned regulatory impact assessment.

Additionally, the lack of the legal basis for the continuity of the ad-hoc adopted measures to mitigate immediate effects related to energy supplies, can be challenged due the rule of law framework, related competition law or efficiency and transparency of spend financial resources (including the rules for the Eurofunds and linked REPowerEU rules⁴⁵). The potential legal challenge is linked also to the impact of adopted energy crisis measures to the public finances and the public deficit.

Question 3

The Union crisis management toolbox is not sufficiently prepared to respond different crisis, as visible during the COVID-19 pandemic crisis or the energy crisis. Therefore, the more robust crisis management toolbox applicable to different policy areas would be welcomed, providing the framework applicable also to other sectors. The existed instruments adopted based on the Article 222 TFEU could be adjusted based on the experience of the emergency measures (regulations and policy decisions) adopted and implemented as direct reaction to the lack of the energy supplies due Russian invasion to Ukraine. The work of the EU civil protection, the emergency response coordination centre may include the cooperation and adaptation of civil protection systems to work with the lack of energy supplies regionally and redistribution or cooperation in the sense of solidarity between the Member States and/or regions.

The Council conclusions on civil protection work in the EU in view of climate change⁴⁶ from March 2022 can be the example to work on similar tool also in area of energy supplies guarantee. The investments in research an innovation regarding alternative energy sources, preparedness of the population including the awareness raising, the energy efficiency measures, and the training of respective cooperating capacities can be a good example to start with.

⁴⁵ See e.g. MIRRI SK, *Methodological guidance on 'not causing significant harm' for the programming period 2021–2027*.

⁴⁶ Council for the EU, *Council Conclusion on civil protection work in view of climate change*, 3 March 2022.

SLOVENIA

Tamara Kosi (rapporteur)

Energy solidarity and energy security are fundamental pillars of the European Union's energy policy, as outlined in Article 194 of the Treaty on the Functioning of the European Union (hereafter 'TFEU').¹ These principles underpin cooperation among European Union's Member States (hereafter 'Member States'), ensuring secure energy supplies, promoting renewable energy, and addressing cybersecurity threats to enhance energy security.

Section I: Multidimensionality of energy solidarity and energy security in EU and national law

The Republic of Slovenia (hereafter 'Slovenia') as a Member State incorporates the principles energy solidarity and energy security into its legal framework and participates in their development within the European Union's energy policy context. There are multidimensional elements of these principles which have an impact on the European Union (hereafter 'EU') and Slovenian national legal framework. This report focuses on Slovenia as a Member State, examining how it integrates these principles into its national law. It also analyzes Slovenia's approach to the tensions between these principles and its responses to the EU's crisis management efforts.

Question 1

Slovenia, in alignment with EU law, emphasizes energy security (security of energy supply) as a priority in its national legal framework. According to the Ministry of the Environment, Climate and Energy of the Republic of Slovenia, as stated on its official 'Slovenian Energy Supply Online Portal',² a reliable energy supply is a cornerstone of a successful and sustainable energy policy. This includes ensuring a reliable energy supply and reliable related services.³

¹ Treaty on the Functioning of the European Union (hereafter 'TFEU'). Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4550. Retrieved on September 14, 2024.

² Slovenian Energy Supply Online Portal. Available at: <https://www.gov.si/teme/oskrba-z-energijo/>. Retrieved on September 14, 2024.

³ Ibid.

Key Slovenian laws with the aim of ensuring a competitive, safe, reliable and affordable energy supply include the Electricity Supply Act (ZOEE),⁴ the Gas Supply Act (ZOP),⁵ the Act on the Supply of Heat from Distribution Systems (ZOTDS),⁶ the Energy Acts (EZ-1 and EZ-2),⁷ and the Act on Measures to Manage Crisis Situations in the Field of Energy Supply (ZUOKPOE).⁸ The Electricity Supply Act aims to ensure a competitive, safe, reliable and affordable supply of electricity in Slovenia, considering sustainable development principles, and to establish comprehensive competitive, flexible, fair and transparent electricity markets, as determined in its Article 3. The purpose of the Gas Supply Act is to ensure a competitive, safe, reliable and accessible gas and hydrogen supply in Slovenia, considering sustainable development principles, and to establish comprehensive competitive, flexible, fair and transparent gas and hydrogen markets, taking into account the important role of natural gas as a transitional energy source in the transition to a carbon-free economy, as determined in its Article 1(2). The Act on the Supply of Heat from Distribution Systems aims to ensure a competitive, accessible, and sustainable supply of heat from distribution systems in Slovenia to enable the development of efficient and competitive district heating and cooling systems while providing effective mechanisms for heat price regulation and consumer protection, as determined in its Article 1(2). The Energy Acts determines in its Article 1 the principles and measures of Slovenian energy policy management, regulate the organization and operation of Slovenian state authorities in the energy sector, defines the energy infrastructure and its construction and maintenance, establish procedures for awarding financial incentives, and regulate other energy-related topics. The Act on Measures to Manage Crisis Situations in the Field of Energy Supply establishes temporary measures for managing increased energy supply risks, ensuring reliable energy supply, reducing import dependence, and mitigating the impact of volatile energy markets on prices, as determined in its Article 1(1).

While energy security is recognized in Slovenian energy laws, energy solidarity is less formalized but inherent in Slovenia's commitment to EU energy policies. Although not explicitly defined in Slovenian law, energy solidarity

⁴ Zakon o oskrbi z električno energijo (hereafter 'ZOEE') – Electricity Supply Act, Official Gazette of the Republic of Slovenia, No. 172/21.

⁵ Zakon o oskrbi s plini (hereafter 'ZOP') – Gas Supply Act, Official Gazette of the Republic of Slovenia, No. 204/21 *et seq.*

⁶ Zakon o oskrbi s toploto iz distribucijskih sistemov (hereafter 'ZOTDS') – Act on the Supply of Heat from Distribution Systems, Official Gazette of the Republic of Slovenia, No. 44/22.

⁷ Energetski zakon (hereafter 'EZ-1') – Energy Act, Official Gazette of the Republic of Slovenia, No. 60/19 *et seq.*, and Energetski zakon (hereafter 'EZ-2') – Energy Act, Official Gazette of the Republic of Slovenia, No. 38/24 (both acts hereafter 'EZ-1 and EZ-2').

⁸ Zakon o ukrepih za obvladovanje kriznih razmer na področju oskrbe z energijo (hereafter 'ZUOKPOE') – Act on Measures to Manage Crisis Situations in the Field of Energy Supply, Official Gazette of the Republic of Slovenia, No. 121/22 *et seq.*

is implemented through cooperation with neighbouring Member States and regional energy initiatives, including the Central and Southeastern Europe Energy Connectivity (hereafter 'CESEC'), international organisations, including the Energy Community, and other collaborative activities, including the North Adriatic Hydrogen Valley project between Croatia, Slovenia and the North Italian region of Friuli Venezia Giulia. This project aims to develop various segments of the hydrogen supply chain, including production, distribution, storage and end-use.

The search of the case law database did not identify any published cases decided by Slovenian Higher Courts or the Slovenian Supreme Court that directly address energy solidarity or energy security. The Slovenian Constitutional Court rulings have not yet directly invoked these principles. These principles are not explicitly mentioned in the Constitution of the Republic of Slovenia (URS).⁹ However, Slovenia as a Member State is obliged to follow precedents of the Court of Justice of the EU (hereafter 'the Court'), including the Judgment of the Court in case *Germany v Poland* No. C-848/19 P (hereafter 'OPAL case No. C-848/19 P'),¹⁰ which establishes energy solidarity as a legally binding principle. The Slovenian courts take the Court's case-law duly into regard.

Given that the principle of energy solidarity applies to all objectives of EU energy policy, including ensuring the functioning of the EU energy market, security of energy supply, energy efficiency and energy saving, and promoting renewable energy and energy network interconnection, Slovenia indirectly implements energy solidarity through its laws and initiatives related to these objectives. Examples of such laws include the Act on the Promotion of the Use of Renewable Energy Sources (ZSROVE),¹¹ the Act on the Efficient Use of Energy (ZURE),¹² the Act on the Introduction of Devices for the Production of Electricity from Renewable Energy Sources (ZUNPEOVE),¹³ and the Act on Infrastructure for Alternative Fuels and Promotion of Transition to Alternative Fuels in Transport (ZIAG).¹⁴ The Act on the Promotion of the Use

⁹ Ustava Republike Slovenije (hereafter 'URS') – Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I *et seq.*

¹⁰ Judgment of the Court in case *Germany v Poland*, No. C-848/19 P, EU:C:2021:598 (hereafter 'OPAL case No. C-848/19 P').

¹¹ Zakon o spodbujanju rabe obnovljivih virov energije (hereafter 'ZSROVE') – Act on the Promotion of the Use of Renewable Energy Sources, Official Gazette of the Republic of Slovenia, No. 121/21 *et seq.*

¹² Zakon o učinkoviti rabi energije (hereafter 'ZURE') – Act on the Efficient Use of Energy, Official Gazette of the Republic of Slovenia, No. 158/20.

¹³ Zakon o uvajanju naprav za proizvodnjo električne energije iz obnovljivih virov energije (hereafter 'ZUNPEOVE') – Act on the Introduction of Devices for the Production of Electricity from Renewable Energy Source, Official Gazette of the Republic of Slovenia, No. 78/2.

¹⁴ Zakon o infrastrukturi za alternativna goriva in spodbujanju prehoda na alternativna goriva v prometu (hereafter 'ZIAG') – Act on Infrastructure for Alternative Fuels and Promotion of Transition to Alternative Fuels in Transport, Official Gazette of the Republic of Slovenia, No. 62/23.

of Renewable Energy Sources determines in its Article 4(2) that the share of renewable energy in Slovenia's gross final energy consumption must be at least 25%. It further regulates state and municipal policies related to renewable energy, sets binding targets for renewable energy use, and outlines measures and financing methods to achieve these targets. It also regulates in its Article 1 the certificates of energy origin, self-sufficiency with renewable electricity, renewable energy use in the heating, cooling, the transport sector, and installer training. The Act on the Efficient Use of Energy specifies in its Article 1(1) the measures to promote energy efficiency, increase efficient energy use, and improve building energy efficiency. The Act on the Introduction of Devices for the Production of Electricity from Renewable Energy Sources regulates in its Article 1(1) the establishment of priority areas for renewable energy devices, specifics of spatial planning and permitting for solar and wind energy devices, regulatory sandboxes, geothermal concession research, accompanying energy activities, exemption from cultural conservation consent in certain cases, one-time compensation for municipalities to promote wind production devices, legal relationships related to installing photovoltaic devices on co-owned or condominium properties, and the establishment of free easements or building rights on publicly owned facilities. The Act on Infrastructure for Alternative Fuels and Promotion of Transition to Alternative Fuels in Transport aims to achieve a) reduction of greenhouse gases and air pollutant emissions from traffic, b) increase the share of renewable energy used in transport, c) transition towards low-carbon and zero-emission vehicles, d) utilization of low-carbon and emission-free technologies in the transport sector, e) optimization of material and cost efficiency in electrification and other alternative fuel transitions, prioritizing existing infrastructure like energy, road networks, parking lots and other complementary infrastructure, as determined in its Article 2(1).

Additionally, Slovenia is committed to its action-strategic document, the Slovenian Integrated National Energy and Climate Plan (hereafter 'NECP'),¹⁵ prepared and amended by the Ministry of Environment, Climate and Energy and adopted by the Government of the Republic of Slovenia on 28 February 2020, with proposed final amendments of 14 August 2024 in the proposed final version No. 5.0, which sets goals, policies and measures for the period up to 2030 (with a view to 2040) on five dimensions of the energy union, including decarbonisation (greenhouse gas emissions and renewable energy sources), energy efficiency, energy security, internal energy market, and research, innovation and competitiveness. The NECP does not have the force of law, but Slovenian Government is obliged to take measures to achieve the goals to

¹⁵ Celoviti nacionalni energetske in podnebni načrt ('NEPN') – National Energy and Climate Plan ('NECP') of the Government of the RS, No. 35400-18/2019/22 of 28 February 2020, with proposed final amendments of 14 August 2024 in the proposed final version No. 5.0. (hereafter 'NECP').

which Slovenia is committed with it.¹⁶ Furthermore, many Slovenian laws related to the energy sector, including Electricity Supply Act (ZOEE),¹⁷ the Gas Supply Act (ZOP),¹⁸ the Act on the Supply of Heat from Distribution Systems (ZOTDS),¹⁹ Energy Acts (EZ-1 and EZ-2),²⁰ the Act on the Promotion of the Use of Renewable Energy Sources (ZSROVE),²¹ the Act on the Introduction of Devices for the Production of Electricity from Renewable Energy Sources (ZUNPEOVE),²² and the Act on Infrastructure for Alternative Fuels and Promotion of Transition to Alternative Fuels in Transport (ZIAG),²³ reference the NECP and explicitly define the stakeholders obligated to fulfil the NECP's commitments. These Slovenian laws also specify which NECP's commitments are legally binding for these stakeholders, how they must comply, and the deadlines for fulfillment of commitments. The NECP covers also the measures that Slovenia must implement to achieve and maintain energy security and to contribute to energy solidarity.²⁴ The Slovenian Government adopted the NECP on 27 February 2020, in accordance with the Regulation (EU) 2018/1999 on the Governance of the EU and Climate Action (hereinafter 'Regulation (EU) 2018/1999').²⁵ The NECP was submitted to the EU Commission, its goal implementation is regularly monitored, results are reported to the EU Commission, and it was amended and finalized as necessary to comply with the Regulation (EU) 2018/1999.²⁶

These initiatives, as mentioned above, Slovenian laws, and measures, implemented by Slovenia as a Member State, together with cooperation with neighbouring Member States, contribute to ensuring the functioning of the EU energy market, security of energy supply, promotion of energy efficiency and renewable energy, and fostering interconnection of energy networks.²⁷

¹⁶ NECP.

¹⁷ ZOEE – Electricity Supply Act, Official Gazette of the Republic of Slovenia, No. 172/21.

¹⁸ ZOP – Gas Supply Act, Official Gazette of the Republic of Slovenia, No. 204/21 *et seq.*

¹⁹ ZOTDS – Act on the Supply of Heat from Distribution Systems, Official Gazette of the Republic of Slovenia, No. 44/22.

²⁰ EZ-1 and EZ-2.

²¹ ZSROVE – Act on the Promotion of the Use of Renewable Energy Sources, Official Gazette of the Republic of Slovenia, No. 121/21 *et seq.*

²² ZUNPEOVE – Act on the Introduction of Devices for the Production of Electricity from Renewable Energy Source, Official Gazette of the Republic of Slovenia, No. 78/2.

²³ ZIAG – Act on Infrastructure for Alternative Fuels and Promotion of Transition to Alternative Fuels in Transport, Official Gazette of the Republic of Slovenia, No. 62/23.

²⁴ NECP.

²⁵ Regulation (EU) 2018/1999 of the EU Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action (hereafter 'Regulation (EU) 2018/1999').

²⁶ Slovenian Energy Supply Online Portal. Available at: <https://www.gov.si/teme/oskrba-z-energijo/>. Retrieved on September 14, 2024.

²⁷ Ibid.

Question 2

The Court's interpretation of energy solidarity as a "specific expression" of the broader EU principle of solidarity, influences how Slovenia navigates its national sovereignty in the energy sector. In Slovenia, energy solidarity is generally seen more as a "corrective tool" that limits Slovenian national sovereignty for the sake of collective EU interests, particularly during energy crises. Slovenia acknowledges this in its participation in cross-border energy projects, where solidarity generally outweighs unilateral Slovenian national decisions. Energy solidarity is more likely to be considered as a fundamental component of the EU's constitutional framework, transcending national interests and forming part of the "EU's constitutional identity" as referred to in the Rule of law conditionality judgments of the Court in the *Poland v Parliament/Council* case No. C-157/21.²⁸

Energy solidarity as part of the EU's constitutional identity implies that Slovenia's energy policy decisions are made with a broader EU perspective, balancing Slovenian national autonomy with collective security and sustainability objectives. Slovenia follows this concept in the implementation of measures for which it has committed itself with the NECP.²⁹

Within the framework of the NECP, Slovenia has adopted and is implementing various action plans, strategies, strategic documents and other operational documents to more precisely define the ways to achieve the NECP's goals and commitments.³⁰ One of these action plans and strategies is the National Strategy for Exiting Coal and Restructuring Coal Regions (hereafter 'Slovenian Exiting Coal Strategy'), adopted by the Slovenian Government in January 2022 and published on the official 'Slovenian Exiting Coal Strategy Online Portal' of the Ministry of Environment, Climate and Energy of the Republic of Slovenia.³¹ This strategy sets 2033 as the latest year for Slovenia to stop using coal for electricity production and aligns with the principles of solidarity and a just transition. The Slovenian Exiting Coal Strategy, defined in the strategic document National Strategy for Exiting Coal and Restructuring Coal Regions (hereafter 'Exiting Coal Strategy Document'),³² adopted by the Slovenian Government on 13 January 2022, outlines a comprehensive

²⁸ *Poland v Parliament/Council* case No. C-157/21 of the EUCJ (hereafter '*Poland v Parliament/Council* case No. C-157/21').

²⁹ NECP, pp. 38–44.

³⁰ *Ibid.*, pp. 95–98.

³¹ Slovenian Exiting Coal Strategy Online Portal of the Ministry of Environment, Climate and Energy of the Republic of Slovenia (hereafter 'Slovenian Exiting Coal Strategy Online Portal'). Available at: <https://www.energetika-portal.si/dokumenti/strateski-razvojni-dokumenti/nacionalna-strategija-za-izstop-iz-premoga-in-prestrukturiranje-premogovnih-regij/>. Retrieved on September 14, 2024.

³² Exiting Coal Strategy Document as of December, 2021 (hereafter 'Exiting Coal Strategy Document'). Available at: https://www.energetika-portal.si/fileadmin/dokumenti/publikacije/premog_izhod/strategija_prem_vlada_jan2022.pdf. Retrieved on September 14, 2024.

social and economic restructuring process for the two Slovenian coal regions (i.e., Savinjsko-Saleska-Region and Zasavje-Region), identifies necessary financial resources at the national and EU levels, and determines the approach for the just green transition process.³³ Justice, just transition and solidarity were key guiding principles during the development of the Slovenian Coal Exit Strategy. Furthermore, Slovenia has committed to closing the Slovenian thermal power plant Sostanj minimizing the mining of lignite and abandoning the use of imported coal for electricity production by 2030 to reduce CO₂ emissions.³⁴ These and other NECP's commitments come at a cost, including job losses, potential energy poverty, risks to Slovenia's energy security (especially for energy-intensive industries), the loss of investment in a coal-fired heating plant, and further challenges. Therefore, for Slovenia, the EU Cohesion Policy program (hereafter 'ECP program') for 2021–2027 is crucial,³⁵ as Slovenia will receive EUR 3.2 billion in cohesion funds. The ECP program supports the transition to a highly productive, low-carbon, and circular economy, ultimately aiming to improve quality of life for all. Within the ECP program framework, approximately EUR 250 million will be allocated from the EU Just Transition Fund, detailed on the official 'Just Transition Fund Online Portal' (hereafter 'Just Transition Fund Online Portal'),³⁶ to support the restructuring and green transition of two Slovenian coal regions.³⁷

Further development of the Slovenian energy sector will require coordinated action on the technological, legislative, economic and social fields. This includes reducing energy demand, reducing import dependence, increasing diversification and storage, and effectively managing risks and emergency situations in the energy markets. Slovenia is committed to supply at least 85% of its electricity from domestic sources by 2030 and 100% by 2040 while ensuring an adequate level of reliability of electricity supply energy. To achieve this goal, Slovenia must ensure sufficient energy supply during different seasons, invest in storage solutions to store surplus electricity from renewable energy sources, maintain a high level (more than 80%) of electricity connectivity with neighboring countries, reduce import dependence in the field of fossil fuels, continue using nuclear energy, and have appropriate resources to always guarantee system services and operational reliability.³⁸

³³ Exiting Coal Strategy Document. Available at: https://www.energetika-portala.si/fileadmin/dokumenti/publikacije/premog_izhod/strategija_prem_vlada_jan202.pdf. Retrieved on September 14, 2024.

³⁴ NECP, pp. 282–286.

³⁵ EU Cohesion Policy Online Portal of the EU Commission (hereafter 'EU Cohesion Policy Online Portal'). Available at: https://ec.europa.eu/regional_policy/policy/what/investment-policy_en. Retrieved on September 14, 2024.

³⁶ Just Transition Fund Online Portal of the EU Commission (hereafter 'Just Transition Fund Online Portal'). Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

³⁷ NECP, pp. 311–312.

³⁸ *Ibid.*, pp. 18–20.

Given the interconnected nature of energy systems and the EU's global role, it is essential to consider energy solidarity in both the internal and external contexts. Internal solidarity is crucial for ensuring the stability and resilience of the EU energy market, while external solidarity is necessary for securing energy supplies from different suppliers, ensuring diversification, and promoting EU interests in global energy market. By adopting a comprehensive approach that considers both internal and external factors, the EU can effectively implement the principle of energy solidarity and achieve its objectives of a secure, affordable, and sustainable energy future.

Question 3

Slovenia faces the challenge of reconciling energy market stability, security of energy supply, energy efficiency, energy saving, and the transition to renewable energy, all of which are EU policy objectives under Article 194 of the TFEU. Energy solidarity plays a critical role in addressing these objectives, particularly in the context of green transition (the transition to renewable energy).³⁹

While the objectives of the EU policy under Article 194 of the TFEU are interconnected, they can also create tensions. Ensuring security of energy supply sometimes requires measures that restrict market competition, such as subsidies or price controls. Promoting energy efficiency often leads to increased costs for end-consumers, potentially impacting affordability. Integrating large amounts of renewable energy into the grid often poses challenges to system stability. Slovenia faces these challenges as well. To reconcile these tensions, the EU and its Member States must adopt a balanced approach by prioritizing objectives based on specific circumstances and strike a balance between competing interests, invest in infrastructure by modernizing energy infrastructure and invest into innovative storage solutions to accommodate renewable energy and ensure grid stability, promote innovation by supporting research and development of new technologies to address challenges and improve efficiency, foster cooperation by strengthening cooperation among Member States to share best practices and address common challenges.⁴⁰

By balancing Slovenian national interests with its EU obligations, Slovenia aims to effectively contribute to the EU's energy transition while ensuring a secure, affordable, and sustainable energy supply for its citizens. Therefore, Slovenia has implemented various measures to achieve the objectives of EU energy policy and to commit to the principle of energy solidarity, including investing

³⁹ Ibid., pp. 49–75.

⁴⁰ EU Energy Policy Online Portal. Available at EUR-LEX: <https://eur-lex.europa.eu/EN/legal-content/glossary/eu-energy-policy.html#:~:text=Article%20194%20of%20the%20Treaty,Member%20States%20and%20the%20EU>. Retrieved on September 14, 2024.

in renewable energy by expanding its renewable energy capacity, promoting energy efficiency by implementing energy efficiency programs and standards, strengthening grid infrastructure by upgrading the electricity grid to accommodate renewable energy and improve interconnectivity, reducing the use of domestic coal, ensuring the safe operation of nuclear facilities in Slovenia, and participating in regional energy initiatives by cooperating with neighbouring countries on energy projects. Slovenia's focus on hydropower and nuclear power, along with solar and wind energy development and the increase of the share of biogases and geothermal energy, highlights the Slovenia's commitment to renewable energy sources, while at the same time managing the complexities of ensuring energy security and solidarity. However, the further promotion of the use of renewable energy sources in Slovenia is significantly conditioned by environmental and spatial legislation. Approximately 22,000 animal and 3,500 plant species inhabit Slovenia, of which over 2,000 species are listed as endangered. Preserving biodiversity is a Slovenian obligation under EU legislation and is crucial for the entire EU. Protected areas cover 13% of Slovenia's land, while forests cover 70%. Therefore, the future increase of renewable energy projects, particularly wind and hydropower plants, is challenging due to rigorous environmental assessments, complex decision-making procedures, the need for careful spatial planning, and the obligation to preserve biodiversity. These factors can often hinder renewable energy projects implementation due to the legal obligation to protect the environment. Furthermore, Slovenia will continue to implement the mandatory energy savings scheme for final consumers through energy services and measures provided by energy suppliers and the ECO Fund in accordance with the Regulation on ensuring energy savings (Regulation on ensuring energy savings).⁴¹ This energy savings scheme will be updated in line with changes to the Directive (EU) 2023/1791 on Energy Efficiency⁴² (hereafter 'Energy Efficiency Directive').⁴³

Furthermore, to ensure energy security, energy sources diversification, energy import dependency reduction, and energy storage is becoming increasingly strategically important. In accordance with the Directive 2009/119/EC,⁴⁴ Slovenia will continue to ensure adequate reserves of oil and its derivatives in the future. Slovenia's long-term goal is to continue improving electricity connectivity in the region. Strategically, Slovenia supports continued use nu-

⁴¹ Uredba o zagotavljanju prihrankov energije (hereafter 'Uredba o zagotavljanju prihrankov energije') – Regulation on ensuring energy savings, Official Gazette of the Republic of Slovenia, No. 96/14 *et seq.*

⁴² Energy Efficiency Directive (EU) 2023/1791 of the EU Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (hereafter 'Energy Efficiency Directive').

⁴³ NECP, pp. 49–75.

⁴⁴ Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (hereafter 'Directive 2009/119/EC').

clear energy for electricity production, including the potential construction of a new nuclear power plant or small modular nuclear reactors, in accordance with the adopted Resolution on the long-term peaceful use of nuclear energy in Slovenia (hereafter 'ReDMRJE').⁴⁵ For the purposes of ensuring solidarity, Slovenia commits to ensuring a reliable gas supply by diversifying sources, energy products, and supply routes, cooperating with other Member States (particularly with Austria and Hungary) to promote regional and bilateral solidarity, and ensuring suppliers' obligation to end customers for gas supply under concluded contracts from at least two different supply sources. To achieve these solidarity goals, Slovenia commits to strengthening gas pipeline connections between neighbouring countries, including the construction of a hydrogen transmission system. This will guarantee the system's continuous operation and supply reliability, even in the event of a gas source failure.⁴⁶

The principle of energy solidarity, enshrined in Article 194 of the TFEU, requires Member States to cooperate and support each other in the energy sector and can trigger legal effects in relation to the green transition. Generally, each Member State has the right to decide the conditions for exploiting its own energy resources, choose between different energy sources and decide the general structure of its energy supply. However, Member States are obliged to take measures to ensure the functioning of the internal EU energy market, energy supply security, promotion of energy efficiency, development of renewable energy, and interconnection of energy networks. These obligations can have legal consequences, including the potential for legal challenges if Member States fail to comply with the EU laws.⁴⁷

Energy solidarity requires coordinated action and cooperation among Member States, which can lead to the development of joint initiatives that promote the green transition. In times of energy crises, the principle of energy solidarity can be invoked to justify emergency measures, such as load shedding or the redistribution of energy resources. These measures may have legal implications, such as temporary derogations from certain EU rules. Energy solidarity can also influence investment decisions and infrastructure development related to the green transition. Member States may be required to invest in shared energy infrastructure or support other Member States in their efforts to transition to renewable energy.⁴⁸

⁴⁵ Resolucija o dolgoročni miroljubni rabi jedrske energije v Sloveniji 'Jedrska energija za prihodnost Slovenije' (hereafter 'ReDMRJE') – Resolution on the long-term peaceful use of nuclear energy in Slovenia 'Nuclear energy for the future of Slovenia', Official Gazette of the Republic of Slovenia, No. 43/24.

⁴⁶ NECP, pp. 75–80.

⁴⁷ EU Energy Policy Online Portal. Available at EUR-LEX: <https://eur-lex.europa.eu/EN/legal-content/glossary/eu-energy-policy.html#:~:text=Article%20194%20of%20the%20Treaty,Member%20States%20and%20the%20EU>. Retrieved on September 14, 2024.

⁴⁸ Ibid.

The EU's goal of reducing emissions by 2030 aligns with Slovenia's goal of achieving climate neutrality by 2050 in accordance with Article 143 of the Environmental Protection Act (ZVO-2⁴⁹ and the Resolution on the Long-Term Climate Strategy of Slovenia until 2050 ('ReDPS50'),⁵⁰ adopted for the implementation of Article 15(1) of the Regulation (EU) 2018/1999.⁵¹ The right to a healthy living environment in accordance with Article 72 of the Slovenian Constitution (URS)⁵² can be used to justify measures to promote renewable energy and reduce pollution. The right to affordable housing in accordance with Article 78 of the Slovenian Constitution (URS)⁵³ can influence policies related to energy prices and energy efficiency. The right to social protection in accordance with Article 50 of the Slovenian Constitution (URS)⁵⁴ can be considered when implementing energy policies that may have social impacts, such as job losses or increased energy costs. Social and fundamental rights, including access and affordability, are integral to Slovenia's interpretation of energy security, especially as Slovenia transitions to cleaner energy sources.⁵⁵

Question 4

Slovenia has not experienced major cross-border energy tensions in the energy sector on a scale like Hinkley Point case No. C-594/18 P⁵⁶ or *Mine de Turów* case No. C-121/21⁵⁷ or ČEZ case No. C-343/04,⁵⁸ but it has faced challenges related to balancing environmental and economic objectives in its energy sector.

These tensions require cooperation in energy security and solidarity with its neighboring countries, especially during supply crises. Slovenia has responded to these challenges by prioritizing energy security, fostering cooperation with other Member States, and aligning Slovenian national policies with EU princi-

⁴⁹ Zakon o varstvu okolja (hereafter 'ZVO-2') – Environmental Protection Act, Official Gazette of the Republic of Slovenia, No. 44/22 *et seq.*

⁵⁰ Resolucija o Dolgoročni podnebni strategiji Slovenije do leta 2050 (hereafter 'ReDPS50') – Resolution on the Long-Term Climate Strategy of Slovenia until 2050, Official Gazette of the Republic of Slovenia, No. 119/21 *et seq.*

⁵¹ Regulation (EU) 2018/1999.

⁵² URS – Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I *et seq.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ NECP, pp. 38–45.

⁵⁶ Judgment of the Court in case *Austria v Commission*, No. C-594/18 P, EU:C:2020:742 (hereafter '*Hinkley Point* case No. C-594/18 P').

⁵⁷ Order of the Vice-President of the Court in case *Czech Republic v Poland*, No. C-121/21, EU:C:2021:420 (hereafter '*Mine de Turów* case No. C-121/21').

⁵⁸ Judgment of the Court in case *ČEZ* case No. C-343/04, EU:C:2006:330 (hereafter '*ČEZ* case No. C-343/04').

ples of energy solidarity. The CESEC⁵⁹ initiative has been pivotal in addressing the tensions, fostering coordinated action in electricity and gas supplies.⁶⁰

Question 5

The principle of proportionality requires that are EU measures appropriate, necessary, and not excessive in achieving their objectives. This principle can balance the demands of energy solidarity with the potential negative impacts on individual Member States. When applying EU energy measures, it is essential to consider the specific characteristics of each Member States, including their size, constitutional frameworks, industry and market characteristics, economic structures, geographical locations, and social conditions. These factors can influence the impact of EU energy policies on Member States. Therefore, it is essential to allow for flexibility in EU energy measures to accommodate the needs of different Member States. Any EU energy measure should be preceded by thorough impact assessments that consider the varying consequences for different Member States. This could help identify potential negative impacts and develop mitigating strategies.

Slovenia's energy policy reflects a balance between solidarity and proportionality, especially given its geographic and economic characteristics as a small and landlocked country. Its energy system is closely interconnected with its neighboring countries. Given the increasing volume of energy transmission, cross-border cooperation on renewable energy projects is crucial for Slovenia. As a transit country, Slovenia faces significant burdens from freight traffic passing through its territory to the port of Luka Koper and other EU countries. This heavy traffic strain hinders decarbonization efforts. Therefore, reducing road freight traffic is a key cross-border issue that Slovenia addresses at the inter-neighborhood, regional, and EU levels, aiming to achieve this through international cooperation. Slovenia's industrial sector is energy-intensive, and in addition to domestic financial resources, it will require EU financial support for decarbonization. EU financial incentives are essential for introducing green technologies, renewable sources, low-carbon gases (including hydrogen), and technologies for capturing, transporting, and using CO₂. These incentives are important aspects of solidarity and can contribute to Slovenia's decarbonization efforts.⁶¹

While energy solidarity guides Slovenia's participation in EU-wide initiatives, the principle of proportionality should ensure that Slovenia's specific needs

⁵⁹ CESEC – Central and South-Eastern Europe Energy Connectivity.

⁶⁰ NECP, pp. 14–37.

⁶¹ Ibid., pp. 38–40.

and limitations are considered. This is particularly relevant given its reliance on hydropower and limited fossil fuel resources. In 2021, Slovenia met 53% of its energy needs with domestic sources. The remaining 47% was supplied through imports, with petroleum products being fully imported. Large hydropower plants, thermal power plants and nuclear power plants, which are connected to the Slovenian electricity transmission system, mostly contribute to the domestic electricity production. The construction of cross-border gas infrastructure with Hungary remains incomplete.⁶²

Question 6

The notion of “spirit of solidarity between Member States” in Article 194 of the TFEU is crucial in understanding the relationship between Member States’ national energy policies and EU-level initiatives. While Member States retain some autonomy in their energy policies, they are also expected to cooperate and support each other in achieving common energy objectives.⁶³

The principle of shared competence enshrined in Article 4(2)(i) of the TFEU establishes that energy policy is a domain where both the EU and its Member States have the power to legislate and adopt acts. However, the intensity of this shared competence in the field of energy has been shifting towards the EU-level authority in recent years. The interconnected nature of EU energy systems and the urgent need to address climate change and energy security require greater EU-level coordination and action. The concept of energy solidarity plays a crucial role in promoting cooperation and ensuring a unified approach to EU energy policy. The spirit of solidarity requires mechanisms for collaboration, including joint projects, shared infrastructure, and harmonized regulations.

The Court has emphasized energy solidarity, interpreting it as a principle that obliges Member States to consider the effects of their national policies on their neighbors. This legal interpretation supports a trend toward greater EU oversight and action in energy matters, especially in ensuring that individual Member States do not act in ways that compromise collective security or market stability.

As the energy landscape evolves with hydrogen and other emerging technologies, the interdependence between Member States will likely deepen. The interconnected grid in electricity and gas markets illustrate the limitations of purely national energy policies. The operation of these markets requires cross-border

⁶² Ibid., pp. 271–280.

⁶³ EU Energy Policy Online Portal. Available at EUR-LEX: <https://eur-lex.europa.eu/EN/legal-content/glossary/eu-energy-policy.html#:~:text=Article%20194%20of%20the%20Treaty,Member%20States%20and%20the%20EU>. Retrieved on September 14, 2024.

cooperation and policies aligned with EU objectives to ensure stability and security of supply. The interconnected nature of European energy networks makes it increasingly difficult for individual Member States to pursue purely national energy policies. The gas sourcing and consumption are solely national matters, as gas flows across borders and is traded in the EU market.

Energy solidarity has become increasingly vital as crises demonstrate that energy security cannot be achieved in isolation. Measures, including the Council Regulation (EU) 2022/2576,⁶⁴ reflect a commitment to joint purchasing, price stabilization, and coordinated responses to supply emergencies. These initiatives illustrate how solidarity translates into practical, legal frameworks that promote cooperation.

Given Slovenia's integration into the EU energy market, Slovenian national energy policy is shaped by EU directives. Solidarity principles guide cooperative efforts in renewable energy projects, allowing Slovenia to benefit from shared technologies and best practices. Energy solidarity in Slovenia reflects the interconnected nature of the grid, making it essential for Slovenia to adhere to EU-wide energy security policies. Active participation in EU energy initiatives, including the Clean Energy for All Europeans package published on the official Clean Energy for All European Package online portal,⁶⁵ allows Slovenia to influence and benefit from collective efforts while ensuring that its specific interests and challenges are addressed. Slovenia's geographic position as a transit country in Central Europe emphasizes its role in regional energy security. Its energy policy must navigate its own needs while considering the interconnectedness with neighboring countries, including Austria, Italy, and Hungary. Slovenia relies significantly on energy imports, particularly for fossil fuels. This dependency requires alignment with EU policies to enhance energy security and supply sources diversification. Solidarity principles thus become crucial in ensuring that Slovenia's energy needs are met without compromising the security of neighboring Member States.⁶⁶

Question 7

Defining “security of energy supply” within the EU and its Member States, including Slovenia, requires considering various dimensions, including legal,

⁶⁴ 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 (hereafter ‘Council Regulation (EU) 2022/2576’) (not in force anymore).

⁶⁵ Clean energy for all Europeans package Online Portal of the EU Commission. Available at: https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en. Retrieved on September 14, 2024.

⁶⁶ NECP, pp. 49–75.

economic, geographical, and political aspects. Besides reliability and affordability, energy security should focus on environmental sustainability, social equity, and economic resilience. This comprehensive approach ensures that energy security benefits all stakeholders while protecting the environment and promoting economic well-being.⁶⁷

Slovenia's constitution (URS)⁶⁸ emphasizes in its Article 72 the right to a healthy living environment, influencing its energy policy. The Environmental Protection Act (ZVO-2)⁶⁹ regulates the protection of the environment with a purpose to ensure sustainable development and it defines the fundamental principles of environmental protection.

Security of energy supply remains a foundational aspect of energy security, ensuring that Member States have reliable energy sources, including diversification of supply routes and sources to mitigate risks associated with dependence on single suppliers. Critical energy infrastructure must be designed to withstand and adapt to physical and cyber threats. This includes continuous monitoring, real-time assessments, and technology upgrades to ensure that energy systems can respond to disruptions, whether due to geopolitical tensions, technical failures or natural disasters. Effective crisis management strategies include developing emergency plans and ensuring cooperation among Member States to share resources and support during supply disruptions. Modern energy security must also consider environmental sustainability by integrating renewable energy sources and minimizing the reliance on fossil fuels, which can be subject to geopolitical risks. Economic conditions, such as reliance on specific industries (e.g., manufacturing or agriculture), influence energy needs and the capacity to invest in resilience measures. Wealthier nations may have more resources to develop robust infrastructures compared to smaller or less economically stable countries.⁷⁰

At the EU level, recent measures, such as the REPowerEU plan, detailed on the official REPowerEU Online Portal (hereafter 'REPowerEU plan'),⁷¹ promote energy supply diversification, increase renewable energy production, and

⁶⁷ EU Energy Policy Online Portal. Available at EUR-LEX: <https://eur-lex.europa.eu/EN/legal-content/glossary/eu-energy-policy.html#:~:text=Article%20194%20of%20the%20Treaty,Member%20States%20and%20the%20EU>. Retrieved on September 14, 2024.

⁶⁸ URS – Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I *et seq.*

⁶⁹ ZVO-2 – Environmental Protection Act, Official Gazette of the Republic of Slovenia, No. 44/22 *et seq.*

⁷⁰ NECP, pp. 14–37.

⁷¹ REPowerEU Online Portal of the EU Commission (hereafter 'REPowerEU Online Portal'). Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en. Retrieved on September 14, 2024.

improve interconnectivity between Member States. However, implementation varies across countries due to differing capacities and commitments.⁷²

Recent incidents, such as those involving the Nord Stream and Balticconnector pipelines, highlight the need for a broader view of energy security. This includes considering infrastructure protection, resilience against cyberattacks, and geopolitical tensions. A holistic approach should encompass energy supply, infrastructure, cybersecurity, environmental impacts, and social dimensions. This broader perspective is essential for developing effective strategies to address both immediate risks and long-term sustainability. Interconnected energy systems mean disruptions in one area can have cascading effects. A comprehensive approach to energy security must consider these interdependencies to address potential impacts effectively.⁷³

While the EU has made progress in addressing energy security and cybersecurity, Slovenia must align its Slovenian national policies with these objectives while addressing its specific vulnerabilities. Slovenia's energy security encompasses continuous energy supply and energy infrastructure, especially considering potential cybersecurity threats. Following incidents like the Nord Stream pipeline sabotage, Slovenia has strengthened its focus on protecting critical infrastructure and preparing for potential crises. Slovenia promotes digitization in climate action and increases cyber security in all strategic systems.⁷⁴ Due to its small energy market, Slovenia depends on cooperation with other Member States. Its economy is relatively small and energy-dependent, making it vulnerable to external shocks. Slovenia's location in Central Europe as a transit country requires collaboration with neighboring Member States.⁷⁵

The new energy connections with neighboring Member States will enable more dynamic energy exchanges in the region. This is crucial for ensuring the stable operation of energy systems that rely on unpredictable renewable energy sources. Cooperation in system services, energy storage, research, and innovation will help reduce the operating costs of energy systems.⁷⁶

⁷² REPowerEU Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en. Retrieved on September 14, 2024.

⁷³ NECP, pp. 14–37.

⁷⁴ *Ibid.*, pp. 18–21.

⁷⁵ *Ibid.*, pp. 14–37.

⁷⁶ *Ibid.*, p. 350.

Question 8

The principle of energy solidarity plays a crucial role in shaping the EU's external energy policy, influencing how the EU engages with third countries and manages its energy resources. This interplay between energy solidarity and energy security is significant in the context of diversifying supply routes and reducing dependence on single suppliers.

Energy solidarity establishes a framework of rights and obligations that bind both the EU and its Member States, which is essential when negotiating with external partners. This principle encourages Member States to align their external energy policies to present a cohesive front, enhancing the EU's negotiating power. The inclusion of projects in the EU list of Projects of Common Interest (hereafter Project of Common Interest 'PCI', and Projects of Common Interest 'PCIs') reflects the commitment to enhance interconnectivity and security of energy supply across Member States.⁷⁷ The PCI framework facilitates investments in infrastructure that promote solidarity, including interconnectors and gas pipelines that diversify energy sources. The EU Commission Delegated Regulation (EU) 2022/564⁷⁸ underscores this approach by identifying projects vital for achieving EU energy policy objectives. Cooperation agreements like the Memorandum of Understanding (hereafter 'MoU') on a strategic partnership in energy, concluded on 18 July 2022 in Baku between EU Commission's President von der Leyen, representing the EU, and Azerbaijan's President Aliyev, representing Azerbaijan (hereafter 'MoU on EU and Azerbaijan Energy Cooperation'),⁷⁹ highlight the EU's focus on forging external partnerships that align with the principle of solidarity. These partnerships aim to secure alternative energy supplies, contributing to a more diversified energy mix and enhancing overall energy security.

Energy solidarity is crucial for diversifying supply routes and reducing dependence on single suppliers. This helps mitigate risks associated with geopolitical tensions. The PCI framework exemplifies this commitment to fostering connectivity and ensuring energy security. By promoting solidarity, the EU can better manage risks associated with external energy dependencies. A coordinated approach enables the EU to respond collectively to crises, strengthening its bargaining position with energy suppliers and ensuring

⁷⁷ PCI Online Portal of the EU Commission (hereafter 'PCI Online Portal'). Available at: https://energy.ec.europa.eu/topics/infrastructure/projects-common-interest-and-projects-mutual-interest/pci-examples-and-their-benefits_en. Retrieved on September 14, 2024.

⁷⁸ Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 amending Regulation (EU) No. (hereafter 'Commission Delegated Regulation (EU) 2022/564').

⁷⁹ Cooperation Agreement in the form of Memorandum of Understanding (hereafter 'MoU') on a strategic partnership in energy, concluded on 18 July 2022 in Baku between EU Commission's President von der Leyen, representing the EU, and Azerbaijan's President Aliyev, representing Azerbaijan (hereafter 'MoU on EU and Azerbaijan Energy Cooperation').

a more secure energy landscape. By supporting each other, Member States enhance their collective resilience against external shocks, including supply disruptions from single-source suppliers. The EU's external energy policy must reflect the collective interests of its Member States, enabling joint strategies aligned with the principle of solidarity.⁸⁰

Slovenia supports the EU's external energy policy, particularly in securing diverse supply routes and reducing dependence on single suppliers, such as Russia. Article 5 of the Gas Supply Act (ZOP),⁸¹ Article 7 of the Electricity Supply Act (ZOEE),⁸² and Article 13 of the Act on the supply of heat from distribution systems (ZOTDS)⁸³ determine that energy suppliers of gas, electricity and heat are obligated to carry out long-term planning to meet energy system demand and ensure a reliable energy supply to end consumers. Energy solidarity is evident in Slovenia's involvement in regional energy cooperation and efforts to diversify its energy sources, especially in response to recent geopolitical crises. Article 6 of the Act on the Promotion of the Use of Renewable Energy Sources (ZSROVE)⁸⁴ determines the right to financial incentives for the use of renewable energy sources.

Question 9

The governance of the EU energy policy, particularly gas supply security, involves a complex balance between EU-wide coordination and Member State responsibility. The EU Energy Strategy, detailed on the official EU Energy Strategy Online Portal⁸⁵ and the associated legislation, including Regulation (EU) 2018/1999 on the Governance of the EU and Climate Action (hereafter 'Regulation (EU) 2018/1999')⁸⁶ and Regulation (EU) 2017/1938 on measures to safeguard the security of gas supply (hereafter 'Regulation (EU) 2017/1938'),⁸⁷ aim to address this balance by enhancing cooperation among Member States while recognizing their national authority over energy security. Regulation

⁸⁰ PCI Online Portal. Available at: https://energy.ec.europa.eu/topics/infrastructure/projects-common-interest-and-projects-mutual-interest/pci-examples-and-their-benefits_en. Retrieved on September 14, 2024.

⁸¹ ZOP – Gas Supply Act, Official Gazette of the Republic of Slovenia, No. 204/21 *et seq.*

⁸² ZOEE – Electricity Supply Act, Official Gazette of the Republic of Slovenia, No. 172/21.

⁸³ ZOTDS – Act on the Supply of Heat from Distribution Systems, Official Gazette of the Republic of Slovenia, No. 44/22.

⁸⁴ ZSROVE – Act on the Promotion of the Use of Renewable Energy Sources, Official Gazette of the Republic of Slovenia, No. 121/21 *et seq.*

⁸⁵ EU Energy Strategy Online Portal of the EU Commission. Available at: https://energy.ec.europa.eu/topics/energy-strategy_en. Retrieved on September 14, 2024.

⁸⁶ Regulation (EU) 2018/1999.

⁸⁷ Regulation (EU) 2017/1938 of the EU Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) 994/2010 (hereafter 'Regulation (EU) 2017/1938').

(EU) 2017/1938 establishes a framework for securing gas supplies within the EU, defining roles for Member States and EU. Articles 3 of the Regulation (EU) 2017/1938 defines the roles of Member States in ensuring national energy security, including risk assessments and contingency plans, while also cooperating with neighboring countries and the EU in crisis situations. Articles 4 of the Regulation (EU) 2017/1938 determines the role of regional cooperation and EU-level institutions, highlighting that the coordination across borders and shared assessments of risks and energy demand are essential for the EU's overall energy security. This dual-level governance in the gas market, involving both national governments and the EU, provides flexibility to Member States while securing cross-border energy flows during disruptions. This approach emphasizes the importance of both national responsibility and regional cooperation in safeguarding gas supply security within the EU.⁸⁸

While the shared responsibility approach has served the EU well, the recent energy crisis highlights the need for stronger EU-level governance. While maintaining some Member State autonomy, a more centralized EU-driven model could benefit energy security, especially in crisis management, supply diversification, and renewable energy integration. Lessons from recent events suggest the EU should strengthen its regulatory and strategic role in securing energy supplies, while allowing for flexibility at the Member State level. Greater EU-level coordination in strategic planning, joint procurement, and crisis response can strengthen solidarity mechanisms and ensure no Member State is disproportionately vulnerable. The EU could oversee strategic reserves and manage joint energy procurement more efficiently than a fragmented national system. Prioritizing diversification of gas supply sources, including renewables, is crucial. Stronger EU governance can ensure that energy security aligns with the EU's broader goals of transitioning to renewable energy sources and reducing carbon emissions. Increased investment in strategic infrastructure is essential for enhancing the EU's resilience.⁸⁹

The crisis revealed how interconnected energy markets are across the EU. A disruption in one Member State can ripple across the entire EU, reinforcing the need for robust cross-border infrastructure and shared strategic reserves. The EU's reliance on Russian gas was a key vulnerability. Moving forward, the diversification of supply sources, including increased imports of liquefied natural gas (hereafter 'LNG') from the US, Azerbaijan, Egypt, or Norway, and the promotion of renewable energy should be top priorities in the EU

⁸⁸ Regulation (EU) 2017/1938.

⁸⁹ REPowerEU Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en. Retrieved on September 14, 2024.

energy policy. Joint gas purchasing agreements and AggregateEU mechanism, detailed on the official AggregateEU Online Portal,⁹⁰ which were initiated in the crisis, could serve as a model for future EU-wide energy security initiatives, moving towards a more centralized governance structure in emergency situations. AggregateEU mechanism, detailed on the official AggregateEU Online Portal⁹¹ is a great example of response to energy crisis representing a demand aggregation and joint purchasing mechanism under the official EU Energy Platform⁹² in accordance with Council Regulation 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (hereafter ‘Council Regulation (EU) 2022/257’).⁹³ AggregateEU mechanism, launched in 2023 to contribute to sufficient and diversified gas supplies and to reduce price volatility and increase predictability, is part of the REPowerEU plan aimed at reducing EU’s dependence on fossil-fuel and accelerating the transition to green energy.⁹⁴ While shared responsibility has its merits in terms of flexibility and competition, the recent energy crisis has exposed the limitations of the current governance model.⁹⁵

Slovenia’s gas supply security is closely linked to the shared responsibility model between the EU and Member States. The Act on measures to manage crisis situations in the field of energy supply (ZUOKPOE)⁹⁶ determined in its Article 22 that costs of purchasing energy to replace losses in the event of a crisis are covered by the Slovenian state system. During the recent energy crisis, Slovenia benefited from EU mechanisms that ensured gas availability. However, the governance model could evolve to give the EU a more central role in managing supply crises, particularly as Slovenia continues to rely on gas imports from regional partners.⁹⁷

⁹⁰ AggregateEU Online Portal of the EU Commission (hereafter ‘AggregateEU Online Portal’). Available at: https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform/aggregateeu-questions-and-answers_en. Retrieved on September 14, 2024.

⁹¹ AggregateEU Online Portal. Available at: https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform/aggregateeu-questions-and-answers_en. Retrieved on September 14, 2024.

⁹² EU Energy Platform of the EU Commission (hereafter ‘EU Energy Platform’). Available at: https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en. Retrieved on September 14, 2024.

⁹³ Council Regulation (EU) 2022/2576 (not in force anymore).

⁹⁴ AggregateEU Online Portal. Available at: https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform/aggregateeu-questions-and-answers_en. Retrieved on September 14, 2024.

⁹⁵ EU Energy Platform. Available at: https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en. Retrieved on September 14, 2024.

⁹⁶ ZUOKPOE – Act on Measures to Manage Crisis Situations in the Field of Energy Supply, Official Gazette of the Republic of Slovenia, No. 121/22 *et seq.*

⁹⁷ NECP, pp. 80–87.

Section II: Energy solidarity, energy security and green transition

The European Green Deal, detailed on the official EU Green Deal Online Portal,⁹⁸ and the “Fit for 55” initiative, detailed on the official Fit for 55 Online Portal,⁹⁹ represent ambitious EU plan to achieve a climate-neutral economy by 2050, with 55% greenhouse gas (hereafter ‘GHG’) emissions reduction target by 2030. This clean energy transition aims to reduce emissions and improve the quality of life for EU citizens through a sustainable and resilient economy. To succeed, these initiatives must prioritize fairness and solidarity to ensure no one is left behind.¹⁰⁰

Slovenia is actively contributing to the EU’s goal of achieving climate neutrality by 2050, as outlined in the EU Green Deal.¹⁰¹ Slovenia’s energy transition focuses on reducing coal reliance and increasing renewable energy sources, particularly hydropower and solar energy.¹⁰² Energy solidarity plays a significant role in Slovenia’s green transition. Slovenia’s participation in the EU Green Deal, “Fit for 55” package, and the principles of fairness and solidarity demonstrates how these EU-wide policies are implemented at the national level. As a small, relatively carbon-intensive economy, Slovenia faces unique challenges and opportunities in the clean energy transition.¹⁰³

Slovenia’s long-term climate policy prioritizes achieving climate neutrality by 2050, as mandated by the Environmental Protection Act (ZVO-2).¹⁰⁴ This aligns with the NEPN and the Resolution on the Long-term Climate Strategy of Slovenia until 2050 (‘ReDPS50’).¹⁰⁵ ReDPS50 in its Article 4.1 stipulates that Slovenia must reduce GHG emissions by 80%–90% by 2050 compared to 2005 level.¹⁰⁶ Article 4.1 of the ReDPS50 also emphasizes climate change adaptation and ensuring climate safety for Slovenia’s residents.¹⁰⁷ By 2030, Slovenia must

⁹⁸ The EU Green Deal Online Portal of the EU Commission (hereafter ‘EU Green Deal Online Portal’). Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. Retrieved on September 14, 2024. Retrieved on September 14, 2024.

⁹⁹ Fit for 55 Online Portal of the EU Commission (‘Fit for 55 Online Portal’). Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals_en. Retrieved on September 14, 2024.

¹⁰⁰ EU Green Deal Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. Retrieved on September 14, 2024.

¹⁰¹ Ibid.

¹⁰² NECP, pp. 61–62.

¹⁰³ Ibid., pp. 14–16.

¹⁰⁴ ZVO-2 – Environmental Protection Act, Official Gazette of the Republic of Slovenia, No. 44/22 *et seq.*

¹⁰⁵ ReDPS50 – Resolution on the Long-Term Climate Strategy of Slovenia until 2050, Official Gazette of the Republic of Slovenia, No. 119/21 *et seq.*

¹⁰⁶ ReDPS50 – Resolution on the Long-Term Climate Strategy of Slovenia until 2050, Official Gazette of the Republic of Slovenia, No. 119/21 *et seq.*

¹⁰⁷ ReDPS50 – Resolution on the Long-Term Climate Strategy of Slovenia until 2050, Official Gazette of the Republic of Slovenia, No. 119/21 *et seq.*

eliminate tax incentives for fossil fuel use, which conflicts with GHG emission reduction goals. The increasing CO₂ levy will make fossil fuel less economical. To decarbonize the economy, Slovenia will provide financial incentives to energy-intensive industries from domestic and EU sources, including from Climate Change Fund, detailed on the official LIFE Climate Change Mitigation and Adaptation Online Portal (hereafter ‘LIFE Climate Change Mitigation and Adaptation Online Portal’),¹⁰⁸ Innovation Fund, detailed on the official Innovation Fund Online Portal (hereafter ‘Innovation Fund Online Portal’),¹⁰⁹ Modernization Fund, detailed on the official Modernisation Fund Online Portal (hereafter ‘Modernisation Fund Online Portal’),¹¹⁰ etc. These incentives support restructuring production processes through green technologies, renewable and low-carbon gases, including hydrogen, and technologies for capturing, transporting, and using CO₂. However, CO₂ storage is not planned in Slovenia.¹¹¹

Fairness, solidarity, and leaving no one behind are crucial for Slovenia’s successful and just transition to a low-carbon economy. Given its reliance on coal, energy security concerns, and socio-economic challenges, Slovenia relies on EU solidarity mechanisms like the Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹¹² and Social Climate Fund, detailed on the official Social Climate Fund Online Portal (hereafter ‘Social Climate Fund Online Portal’),¹¹³ to achieve EU climate objectives. The EU’s emphasis on fairness and solidarity ensures that Slovenia receives support, both financially and technically, while protecting its most vulnerable citizens and regions during the transition. As Slovenia aligns with the EU Green Deal and “Fit for 55” initiatives, it contributes to and benefits from the EU’s collective ambition for climate neutrality by 2050. Climate neutrality, energy solidarity, and energy security are interconnected. Achieving climate neutrality through renewable energy can enhance energy security by reducing reliance on fossil fuel imports. However, ensuring a just transition requires solidarity to support

¹⁰⁸ LIFE Climate Change Mitigation and Adaptation Online Portal of the EU Commission (hereafter ‘LIFE Climate Change Mitigation and Adaptation Online Portal’). Available at: https://climate.ec.europa.eu/eu-action/eu-funding-climate-action/life-climate-change-mitigation-and-adaptation_en. Retrieved on September 14, 2024.

¹⁰⁹ Innovation Fund Online Portal of the EU Commission (hereafter ‘Innovation Fund Online Portal’). Available at: https://climate.ec.europa.eu/eu-action/eu-funding-climate-action/innovation-fund_en. Retrieved on September 14, 2024.

¹¹⁰ Modernisation Fund Online Portal of the EU Commission (hereafter ‘Modernisation Fund Online Portal’). Available at: https://climate.ec.europa.eu/eu-action/eu-funding-climate-action/modernisation-fund_en. Retrieved on September 14, 2024.

¹¹¹ NECP, pp. 38–45.

¹¹² Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹¹³ Social Climate Fund Online Portal of the EU Commission (hereafter ‘Social Climate Fund Online Portal’). Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/social-climate-fund_en. Retrieved on September 14, 2024.

those affected by decarbonization. Energy solidarity is essential for a unified approach to achieving climate neutrality. It ensures that all Member States can adapt their energy systems without undue hardship. While energy solidarity is crucial, it must be complemented by other measures to address the specific challenges faced by individual Member States.¹¹⁴

Question 1

Energy solidarity, a principle enshrined in Article 194 of the TFEU, traditionally seen as a crisis response mechanism, has evolved into a fundamental aspect of EU energy policy. Given the economic and political disparities among Member States, energy solidarity is crucial for achieving a unified climate-neutral future. The EU's 2050 climate neutrality goal reshapes the understanding of energy solidarity and energy security. As the EU transitions to renewable energy, energy solidarity becomes essential for managing economic and political differences among Member States. It ensures a just transition, preventing undue hardship for vulnerable Member States. Energy solidarity must be applied beyond crises, as a tool for fairness and inclusivity. It drives the integration of energy systems and infrastructure, fosters cooperation, and ensures that all Member States benefit from the transition to a climate-neutral future. Climate neutrality, energy solidarity, and energy security are interconnected. Achieving climate neutrality through renewable energy enhances energy security by reducing fossil fuel dependence. However, this transition requires energy solidarity to ensure all Member States can adapt without undue hardship. A unified approach is essential for achieving climate neutrality. Energy solidarity is a key tool in this endeavour, ensuring a resilient and sustainable energy framework for all Member States. The 2050 climate neutrality goal is driving significant changes in EU and national law. The European Climate Law, detailed on the official EU Climate Law Online Portal (hereafter 'EU Climate Law Online Portal'),¹¹⁵ and the legislative acts under the "Fit for 55" package are embedding the climate neutrality objective into EU legislation, reshaping energy security and solidarity. Carbon pricing expanded Emissions Trading System (hereafter 'ETS') coverage, detailed on the official EU ETS Online Portal (hereafter 'EU ETS Online Portal'),¹¹⁶ and the Carbon Border Adjustment Mechanism (hereafter 'CBAM')¹¹⁷ are

¹¹⁴ NECP, pp. 38–45.

¹¹⁵ EU Climate Law Online Portal of the EU Commission (hereafter 'EU Climate Law Online Portal'). Available at: https://climate.ec.europa.eu/eu-action/european-climate-law_en. Retrieved on September 14, 2024.

¹¹⁶ EU ETS Online Portal of the EU Commission (hereafter 'EU ETS Online Portal'). Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en. Retrieved on September 14, 2024.

¹¹⁷ CBAM Online Portal of the EU Commission. Available at: https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en. Retrieved on September 14, 2024.

directly tied to the EU's decarbonization goals. These measures influence how Member States manage their energy systems and cooperate with each other.¹¹⁸

Previously, solidarity was seen as a compensation for inequalities. Today, solidarity is evolving into a shared effort to achieve decarbonization, where Member States with greater renewable potential or technological capacity (e.g., offshore wind in the North Sea) work together with those that face more significant challenges (e.g., coal-dependent regions in Central and Eastern Europe). Solidarity mechanisms, such as the Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹¹⁹ cross-border projects, and shared investments in renewables and grid infrastructure, will continue to be necessary to bridge the economic and political differences that exist between Member States. Solidarity is long-term cooperation for a shared climate-neutral future.¹²⁰

Question 2

The “Fit for 55” package is reshaping EU and national energy law, focusing on reducing GHG emissions by 55% by 2030 and achieving climate neutrality by 2050. This impacts energy solidarity and security, which are evolving to align with the EU's decarbonization goals. The “Fit for 55” package includes various measures, including ETS expansion to new sectors (e.g., transport, buildings), making carbon pricing central to EU energy law, detailed on the official ETS2 Online Portal (hereafter ‘ETS2 Online Portal’),¹²¹ increasing the renewables target to 42% by 2030 with the Renewable Energy Directive (RED II),¹²² forcing national laws to promote wind, solar, and other clean energy sources under the Renewable Energy Directive (RED II),¹²³ and pushing for a 11.7% energy reduction consumption by 2030, requiring stronger national policies on energy efficiency, as required by the Energy Efficiency Directive.¹²⁴ Energy security is shifting from ensuring fossil fuel supply to renewable energy reliability. The

¹¹⁸ EU Climate Law Online Portal. Available at: https://climate.ec.europa.eu/eu-action/european-climate-law_en. Retrieved on September 14, 2024.

¹¹⁹ Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹²⁰ EU Green Deal Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. Retrieved on September 14, 2024.

¹²¹ ETS2 Online Portal of the EU Commission (hereafter ‘ETS2 Online Portal’). Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/ets2-buildings-road-transport-and-additional-sectors_en. Retrieved on September 14, 2024.

¹²² Renewable Energy Directive (EU) 2023/2413 of the EU 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 (hereafter ‘Renewable Energy Directive (RED II)’).

¹²³ Renewable Energy Directive (RED II).

¹²⁴ Energy Efficiency Directive.

Social Climate Fund, detailed on the official Social Climate Fund Online Portal,¹²⁵ and Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹²⁶ are crucial for balancing costs and supporting vulnerable regions during the transition. The “Fit for 55” initiative, part of the EU Green Deal, has significantly influenced Slovenia’s energy policy. Slovenia is increasing renewable energy use and improving energy efficiency, aligning with EU goals. Its legal framework is evolving to accommodate these changes, while maintaining a focus on energy solidarity and security.¹²⁷

Slovenia’s energy policy balances reliance on nuclear energy from the Krško Nuclear Power Plant, which it co-owns with Croatia, with the transition to renewable energy. Slovenia faces challenges in decarbonizing its energy-intensive regions (i.e., Savinjsko-Saleska-Region and Zasavje-Region). Slovenia has a relatively high rate of energy poverty. Energy solidarity is crucial for achieving a just transition, addressing energy poverty, and ensuring energy security. The Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹²⁸ is essential for mitigating job losses, especially in the Savinjsko-Saleska-Region and Zasavje-Region. Slovenia’s location at the crossroads of several Central and Eastern European energy markets means that cross-border energy cooperation is crucial for both energy solidarity and security, particularly for renewable energy integration. Legal frameworks that govern energy trading with Austria, Hungary, and Croatia are being adjusted to account for greater interconnectivity and shared renewable energy projects under the “Fit for 55” agenda. The “Fit for 55” package is transforming Slovenia’s energy laws. It drives the transition from coal and fossil fuels to renewables while ensuring energy security through nuclear energy and cross-border cooperation. Energy solidarity is evolving to support immediate crises and long-term decarbonization with the Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹²⁹ and Social Climate Fund, detailed on the official Social Climate Fund Online Portal,¹³⁰ that are crucial for ensuring a fair and equitable transition in Slovenia.¹³¹

¹²⁵ Social Climate Fund Online Portal. Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/social-climate-fund_en. Retrieved on September 14, 2024.

¹²⁶ Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹²⁷ EU Green Deal Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. Retrieved on September 14, 2024.

¹²⁸ Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹²⁹ Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹³⁰ Social Climate Fund Online Portal. Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/social-climate-fund_en. Retrieved on September 14, 2024.

¹³¹ NECP, pp. 14–26, 38–69.

Question 3

The “do no significant harm” principle, established in Regulation (EU) 2020/852 (hereafter ‘Taxonomy Regulation’),¹³² is a key aspect of EU energy law. It ensures that economic activities, including post-COVID recovery measures, do not harm environmental objectives. This aligns with Article 11 and Article 194 of the TFEU, emphasizing environmental protection across all EU policies. The Taxonomy Regulation¹³³ and Recovery and Resilience Facility (hereafter ‘RRF’) instrument, representing EU’s plan to emerge stronger and more resilient from the current crisis, detailed on the official Recovery and Resilience Facility Online Portal (hereafter ‘Recovery and Resilience Facility Online Portal’),¹³⁴ require energy projects to respect the “do no significant harm” principle. This ensures that renewable energy development or energy efficiency improvements do not negatively impact climate adaptation, biodiversity, or pollution prevention goals. Slovenia, while not explicitly referencing the “do no significant harm” principle, reflects it in its laws. Slovenia does not explicitly refer to the “do no significant harm” principle, but several legal principles resonate with it, particularly in the Environmental Protection Act (ZVO-2)¹³⁵ and Nature Conservation Act (ZON),¹³⁶ which enforce the precautionary principle, ensuring that economic activities do not harm the environment. NECP integrates sustainability objectives, including “do no significant harm” principle, prioritizing renewable energy while safeguarding natural resources and biodiversity. Legal challenges arise in balancing renewable energy expansion with environmental protection, particularly given Slovenia’s rich biodiversity and the need for thorough environmental assessments. Slovenia’s transition away from coal, particularly in the Šoštanj coal region, must comply with the “do no significant harm” principle, balancing economic recovery with environmental sustainability. The post-COVID recovery plan must also align with this principle to ensure that energy investments do not harm ecosystems or communities. Integrating the “do no significant harm” principle into Slovenian law can promote sustainable energy projects and ensure environmental protection remains central to the energy transition.¹³⁷

¹³² Taxonomy Regulation – Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (hereafter ‘Taxonomy Regulation’).

¹³³ Taxonomy Regulation.

¹³⁴ The Recovery and Resilience Facility Online Portal of the EU Commission (hereafter ‘Recovery and Resilience Facility Online Portal’). Available at: https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en. Retrieved on September 14, 2024.

¹³⁵ ZVO-2 – Environmental Protection Act, Official Gazette of the Republic of Slovenia, No. 44/22 *et seq.*

¹³⁶ Zakon o ohranjanju narave (hereafter ‘ZON’) – Nature Conservation Act, Official Gazette of the Republic of Slovenia, No. 96/04 *et seq.*

¹³⁷ NECP, pp. 37–57.

Question 4

The social dimension of the EU's green transition, particularly through instruments like the Social Climate Fund, detailed on the official Social Climate Fund Online Portal,¹³⁸ and Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹³⁹ is crucial for ensuring a fair and inclusive shift to climate neutrality. The concept of energy poverty, addressed in Regulation (EU) 2023/955,¹⁴⁰ establishing a Social Climate Fund, and in Energy Efficiency Directive,¹⁴¹ ensures that vulnerable populations are protected from the rising energy costs associated with carbon pricing and the broader decarbonization process. Various EU instruments, including the Social Climate Fund, detailed on the official Social Climate Fund Online Portal,¹⁴² and Just Transition Fund, detailed on the Just Transition Fund Online Portal,¹⁴³ help protect vulnerable populations from rising energy costs associated with decarbonization.¹⁴⁴

Energy poverty is addressed in EU regulations and is a key consideration for Slovenia. Slovenian national policies are aligned with EU directives to support vulnerable households during the green transition. The Just Transition Fund, detailed on the official 'Just Transition Fund Online Portal'¹⁴⁵, has been instrumental in facilitating a fair green transition in Slovenia, particularly in coal-dependent regions (i.e., Savinjsko-Saleska-Region and Zasavje-Region). While Slovenia faces challenges in implementing the Just Transition Fund, detailed on the official 'Just Transition Fund Online Portal'¹⁴⁶, it remains essential support for reskilling workers, diversifying the economy, and promoting new industries to replace coal, although the speed of implementation remains a challenge. The fund's effectiveness will depend on its timely and efficient implementation.¹⁴⁷

¹³⁸ Social Climate Fund Online Portal. Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/social-climate-fund_en. Retrieved on September 14, 2024

¹³⁹ EU Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹⁴⁰ Regulation (EU) 2023/955 of the EU Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 (hereafter 'Regulation (EU) 2023/955').

¹⁴¹ Energy Efficiency Directive.

¹⁴² Social Climate Fund Online Portal. Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/social-climate-fund_en. Retrieved on September 14, 2024.

¹⁴³ Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹⁴⁴ EU Cohesion Policy Online Portal. Available at: https://ec.europa.eu/regional_policy/policy/what/investment-policy_en. Retrieved on September 14, 2024.

¹⁴⁵ EU Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹⁴⁶ EU Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹⁴⁷ Slovenian Exiting Coal Strategy Online Portal. Available at: <https://www.energetika-port.si/dokumenti/strateski-razvojni-dokumenti/nacionalna-strategija-za-izstop-iz-premoga-in-prestrukturiranje-premogovnih-regij/>. Retrieved on September 14, 2024.

Question 5

State aid control is essential for ensuring fair competition within the EU's internal market. In the energy sector, where Member States often provide subsidies, the state aid framework intersects with EU objectives like climate neutrality, energy security, and energy solidarity. Energy solidarity, while potentially conflicting with national interests, can be integrated into state aid assessments. The *Hinckley Point* case No. C-594/18 P¹⁴⁸ suggests that environmental objectives can justify state aid, and energy solidarity may also be considered, especially when national subsidies impact cross-border cooperation or market stability. State aid measures must be scrutinized to ensure they do not undermine energy security across Member States. They should support EU-wide goals, including climate neutrality and integrated energy markets. State aid that supports interconnectors, joint renewable ventures, or shared gas storage infrastructure aligns with energy solidarity by enhancing collective energy resilience. Aid measures supporting renewables or energy efficiency can be justified as contributing to EU-wide decarbonization and energy security, thus aligning with solidarity principles, as suggested in the *Hinckley Point* case No. C-594/18 P.¹⁴⁹

In Slovenia, state aid in the energy sector must align with EU energy solidarity principles, which means supporting both domestic energy security and cross-border cooperation. Given Slovenia's reliance on nuclear energy and coal phase-out, targeted state aid for renewables and regional projects is crucial. Promoting interconnectors and joint renewable projects can help Slovenia align its state aid measures with EU-wide solidarity, avoiding market fragmentation and supporting the EU's collective climate and energy security objectives.¹⁵⁰

Question 6

Articles 170–172 of the TFEU (regarding trans-European networks) and Article 194 of the TFEU (regarding energy policy) are interconnected in shaping EU energy infrastructure. Articles 170–172 of the TFEU provide the legal foundation for cross-border energy networks, while Article 194 of the TFEU focuses on energy security, market integration, and environmental objectives. The revised TEN-E Regulation (EU 2022/869) (hereafter ‘TEN-E Regulation’)¹⁵¹ links these frameworks through PCIs.¹⁵²

¹⁴⁸ *Hinkley Point* case No. C-594/18 P.

¹⁴⁹ *Hinkley Point* case No. C-594/18 P.

¹⁵⁰ NECP, pp. 75–80.

¹⁵¹ Regulation (EU) 2022/869 of the EU Parliament and of the Council of 30 May 2022 on guidelines for trans-EU energy infrastructure, amending Regulations (EC) No. 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/94 and further (hereafter ‘TEN-E Regulation’).

¹⁵² TEN-E Energy Online Portal of the EU Commission. Available at: https://energy.ec.europa.eu/topics/infrastructure/trans-european-networks-energy_en. Retrieved on September 14, 2024.

PCIs are critical cross-border energy infrastructure projects that enhance energy security, market integration, and support the EU's decarbonization goals. They are essential for operationalizing energy solidarity, ensuring all Member States benefit from secure energy supply and interconnected markets. Energy solidarity, rooted in Article 194 of the TFEU, ensures Member States cooperate to guarantee reliable and affordable energy for all, particularly in times of crisis or supply shortages. The TEN-E Regulation¹⁵³ links energy solidarity with PCIs, ensuring that infrastructure investments support EU-wide energy resilience and align with climate neutrality and energy security goals. By fostering cooperation through PCIs, the TEN-E Regulation¹⁵⁴ makes energy solidarity a reality. This regulation provides financing mechanisms and regulatory support to ensure efficient PCI implementation. The Connecting Europe Facility (hereafter 'CEF') instrument, which represents key EU funding instrument to promote growth, jobs and competitiveness through infrastructure investment, helps ensure even less economically developed Member States can contribute to and benefit from these projects, reinforcing energy solidarity across the EU, detailed on the official Connecting Europe Facility Online Portal¹⁵⁵ (hereafter 'Connecting Europe Facility Online Portal').¹⁵⁶

Slovenia's participation in PCIs demonstrates the relationship between energy solidarity and infrastructure projects. These projects, including cross-border gas pipelines and electricity grids, enhance Slovenia's energy security and contribute to the EU's decarbonization efforts. This ensures Slovenia plays a vital role in the EU's integrated energy market, benefiting from shared resources and contributing to regional energy resilience.¹⁵⁷

Question 7

Decarbonization and energy security are closely linked in the EU energy policy. Moving away from fossil fuels to renewables addresses climate change and strengthens energy security by reducing reliance on energy imports, stabilizing prices, and diversifying the energy mix. By investing in renewable energy, smart grids, and energy storage, the EU can improve both energy resilience and long-term security. Reducing energy demand through efficiency measures improves both decarbonization and security. Cross-border energy projects

¹⁵³ TEN-E Regulation.

¹⁵⁴ Ibid.

¹⁵⁵ Connecting Europe Facility Online Portal of the EU Commission (hereafter 'Connecting Europe Facility Online Portal'). Available at: https://cinea.ec.europa.eu/programmes/connecting-europe-facility_en. Retrieved on September 14, 2024.

¹⁵⁶ Connecting Europe Facility Online Portal. Available at: https://cinea.ec.europa.eu/programmes/connecting-europe-facility_en. Retrieved on September 14, 2024.

¹⁵⁷ NECP, pp. 14–37.

under the TEN-E Regulation¹⁵⁸ ensure energy security for all Member States, especially during supply disruptions. Scaling up renewable energy projects across the EU reduces fossil fuel dependency. During the transition, careful management, such as using natural gas as a bridge fuel and enhancing cross-border energy cooperation, is needed to maintain stable energy supplies. The EU's green transition thus reinforces energy security by promoting a sustainable and resilient energy system.¹⁵⁹

Slovenia's efforts to decarbonize its energy sector are driven by both environmental and security concerns. Reducing reliance on fossil fuels contributes to energy security, as Slovenia seeks to diversify its energy sources and reduce its vulnerability to external supply disruptions.¹⁶⁰

Question 8

The relationship between Article 192(2)(c) of the TFEU and Article 194 of the TFEU balances Member State autonomy in setting energy policy with EU-wide climate and energy objectives. While Article 194(2) of the TFEU allows Member States to determine their energy mix, limits exist, including EU climate goals, including emission reduction and renewables expansion, internal market rules, preventing competition distortion and maintaining cross-border energy flows, and the principle of energy solidarity, which requires Member States to consider the impact of their energy choices on EU energy security and cooperation. The intensity of shared competence between the EU and Member States in the field of energy has evolved over time. Energy solidarity, as interpreted by the Court, contributes to this shift. It requires Member States to cooperate and support each other in achieving common energy objectives. While Member States still have some margin to determine their energy sources and supply structures, the EU's role has become more prominent.¹⁶¹

Slovenia must respect the EU's principle of energy solidarity to ensure a secure and stable energy supply across the region. Projects like cross-border gas interconnectors and electricity grids highlight Slovenia's participation in the shared energy market. The recent *OPAL* case No. C-848/19 P¹⁶² reinforces that

¹⁵⁸ TEN-E Regulation.

¹⁵⁹ EU Green Deal Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. Retrieved on September 14, 2024.

¹⁶⁰ NECP, pp. 38–70.

¹⁶¹ REPowerEU Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en. Retrieved on September 14, 2024.

¹⁶² *OPAL* case No. C-848/19 P.

national energy decisions must not harm the energy security of other Member States.¹⁶³ Slovenia's role as a transit country for energy supplies between Italy, Austria, and Croatia means that its energy policies must facilitate regional energy interconnectivity. Slovenia has flexibility in shaping its energy policy, particularly in decisions concerning nuclear energy and the exploitation of hydropower resources. However, it must balance this autonomy with compliance to EU emissions targets, pushing the country towards more renewable investments and away from coal.¹⁶⁴

Question 9

In Slovenia, climate change is a key driver of the country's energy mix choices, with the legal framework aligned with EU climate goals. Several legal tools have been adopted to integrate climate considerations into Slovenian energy policy, including NECP, Energy Acts (EZ-1 and EZ-2),¹⁶⁵ Environmental Protection Act (ZVO-2),¹⁶⁶ Regulation on renewable energy sources in transport,¹⁶⁷ National Strategy for Exiting Coal and Restructuring Coal Regions, detailed in the official Exiting Coal Strategy Document,¹⁶⁸ ETS, detailed on the official ETS2 Online Portal,¹⁶⁹ and others. The NECP sets Slovenian targets for reducing emissions, increasing renewables, and improving energy efficiency by 2030, including phasing out coal, expanding solar, hydropower, and biomass, and promoting energy efficiency in buildings, industry and transport. National Strategy for Exiting Coal and Restructuring Coal Regions, detailed in the official Exiting Coal Strategy Document,¹⁷⁰ ensures a fair energy transition, particularly for coal-dependent regions (i.e., Savinjsko-Saleska-Region and Zasavje-Region). It promotes economic diversification, reskilling programs, and investment in renewable energy to mitigate the impacts of coal phase-out. Slovenia participates in the EU Emissions Trading System (hereafter 'EU ETS'), which imposes carbon pricing on high-emission sectors, encouraging the shift

¹⁶³ Ibid.

¹⁶⁴ NECP, pp. 38–93.

¹⁶⁵ EZ-1 and EZ-2.

¹⁶⁶ ZVO-2 – Environmental Protection Act, Official Gazette of the Republic of Slovenia, No. 44/22 *et seq.*

¹⁶⁷ Uredba o obnovljivih virih energije v prometu – Regulation on renewable energy sources in transport, Official Gazette of the republic of Slovenia, No. 208/21 *et seq.* (hereafter 'Regulation on Renewable Energy').

¹⁶⁸ Exiting Coal Strategy Document. Available at: https://www.energetika-portal.si/fileadmin/dokumenti/publikacije/premog_izhod/strategija_prem_vlada_jan202.pdf. Retrieved on September 14, 2024.

¹⁶⁹ ETS2 Online Portal. Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/ets2-buildings-road-transport-and-additional-sectors_en. Retrieved on September 14, 2024.

¹⁷⁰ Exiting Coal Strategy Document. Available at: https://www.energetika-portal.si/fileadmin/dokumenti/publikacije/premog_izhod/strategija_prem_vlada_jan202.pdf. Retrieved on September 14, 2024.

from fossil fuels to clean energy. Slovenia's energy mix is increasingly shaped by legal tools focused on decarbonization, renewables, and energy efficiency.¹⁷¹

Question 10

Slovenia faces challenges in energy security due to its reliance on imported fossil fuels. Slovenia's energy mix includes nuclear power, hydropower, and growing renewable energy sources like solar and biomass, but the country remains dependent on natural gas and oil imports. Slovenia has applied for EU support to finance reforms in the energy sector, with key programs, including Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹⁷² EU Structural and Investment Funds for regional and urban development projects, detailed on the official EU Structural and Investment Funds Online Portal,¹⁷³ and National Recovery and Resilience Plan, detailed on the official Recovery and Resilience Plans Online Portal.¹⁷⁴ Targeted at Slovenian coal-dependent regions (i.e., Savinjsko-Saleska-Region and Zasavje-Region), the Just Transition Fund, detailed on the official Just Transition Fund Online Portal,¹⁷⁵ helps diversify energy sources, support retraining programs, and promote renewable energy projects. EU Structural and Investment Funds, detailed on the official EU Structural and Investment Funds Online Portal,¹⁷⁶ support renewable energy projects like solar, wind, and biomass to reduce dependence on fossil fuels. Under the NextGenerationEU framework, detailed on the official NextGenerationEU Online Portal,¹⁷⁷ representing a recovery plan, Slovenia's National Recovery and Resilience Plan, detailed on the official Recovery and Resilience Plans Online Portal,¹⁷⁸ finances clean energy tech-

¹⁷¹ Slovenian Exiting Coal Strategy Online Portal. Available at: <https://www.energetika-portalsi.si/dokumenti/strateski-razvojni-dokumenti/nacionalna-strategija-za-izstop-iz-premoga-in-prestrukturiranje-premogovnih-regij/>. Retrieved on September 14, 2024.

¹⁷² Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹⁷³ EU Structural and Investment Funds Online Portal of the EU Commission (hereafter 'EU Structural and Investment Funds Online Portal'). Available at: https://commission.europa.eu/eu-regional-and-urban-development/financial-support-projects/structural-and-investment-funds_en. Retrieved on September 14, 2024.

¹⁷⁴ Recovery and Resilience Plans Online Portal of the EU Commission (hereafter 'Recovery and Resilience Plans Online Portal'). Available at: https://reform-support.ec.europa.eu/what-we-do/recovery-and-resilience-plans_en. Retrieved on September 14, 2024.

¹⁷⁵ Just Transition Fund Online Portal. Available at: https://ec.europa.eu/regional_policy/funding/just-transition-fund_en. Retrieved on September 14, 2024.

¹⁷⁶ EU Structural and Investment Funds Online Portal. Available at: https://commission.europa.eu/eu-regional-and-urban-development/financial-support-projects/structural-and-investment-funds_en. Retrieved on September 14, 2024.

¹⁷⁷ NextGenerationEU Online Portal of the EU (hereafter 'NextGenerationEU Online Portal'). Available at: https://next-generation-eu.europa.eu/index_en. Retrieved on September 14, 2024.

¹⁷⁸ Recovery and Resilience Plans Online Portal. Available at: https://reform-support.ec.europa.eu/what-we-do/recovery-and-resilience-plans_en. Retrieved on September 14, 2024.

nologies, energy efficiency projects, and the electrification of transport. The REPowerEU plan supports Slovenian coal-dependent regions (i.e., Savinjsko-Saleska-Region and Zasavje-Region), by fostering renewable energy projects and ensuring a just transition. Slovenia's energy security is bolstered by REPowerEU plan through investments in renewables, infrastructure, and energy diversification.¹⁷⁹

Despite efforts to diversify energy sources and strengthen trade relationships, the EU's reliance on imports, particularly for natural gas, exposes it to geopolitical risks. While the EU has shared external competence in the field of energy, the Court has recognized that the EU can act alone in this area when necessary. This is particularly evident in cases where EU-wide action is required to address common challenges, such as energy security or the transition to a low-carbon economy.¹⁸⁰

Question 11

REPowerEU plan has played a crucial role in enhancing energy security in Slovenia. The REPowerEU plan has provided financial support for diversifying energy supplies, reducing dependence on Russian gas, and accelerating the deployment of renewable energy. Slovenia has applied for support under REPowerEU plan to finance reforms in its energy sector, including diversifying energy supplies and investing in renewable energy projects. REPowerEU plan has also contributed to strengthening energy solidarity among Member States and promoting regional cooperation.¹⁸¹

Section III: The EU's crisis management in the field of energy and its limits

Article 122(1) of the TFEU has been a valuable tool for the EU in responding to energy crises, providing a legal basis for emergency measures to ensure energy supply security. However, the use of Article 122(1) of the TFEU should be balanced with other relevant EU legislation, including Article 194 of the TFEU. The recent energy crisis has highlighted the importance of energy solidarity and security. Slovenia, like other Member States, has had to adapt to the evolving crisis management measures implemented by the EU, including the use of Article 122(1) TFEU. Implementation of energy solidarity is con-

¹⁷⁹ NECP, pp. 14-37.

¹⁸⁰ EU Green Deal Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. Retrieved on September 14, 2024.

¹⁸¹ REPowerEU Online Portal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en. Retrieved on September 14, 2024.

strained by infrastructure gaps and national interests of Member States. More investment in renewables and energy interconnectors would improve the EU's resilience.

Question 1

The *OPAL* case No. C-848/19 P¹⁸² confirmed that energy solidarity under Article 194 of the TFEU is central to EU energy policy, extending beyond crisis situations covered by Article 222 of the TFEU.¹⁸³ This raises the question of whether Article 194 of the TFEU or Article 122 of the TFEU is more appropriate for managing energy crises. Article 194 of the TFEU serves as the primary legal basis for the EU energy policy. It has preventive focus, as it supports measures to prevent energy crises by promoting diversification, efficiency, and interconnection. The *OPAL* case No. C-848/19 P¹⁸⁴ highlights that energy solidarity must inform actions under Article 194 of the TFEU, ensuring Member States cooperate to secure energy supply.¹⁸⁵

Measures like Directive 2009/119/EC¹⁸⁶ demonstrate the proactive role Article 194 of the TFEU can play. Article 194 of the TFEU is less suitable for rapid intervention during crises, as it generally follows the ordinary legislative process, which can be slow. Article 122 of the TFEU is designed for emergency measures, allowing quick responses to energy supply disruptions. It was used in the crisis for joint gas procurement, price caps, and gas storage regulations. Its scope is limited to reactive measures during crises and does not address long-term energy system reforms. Article 194 of the TFEU should be used for long-term energy planning, building resilience through renewable energy, energy efficiency, and infrastructure investments.¹⁸⁷

A combined approach that uses Article 194 of the TFEU for preventive measures and Article 122 of the TFEU for rapid crisis responses ensures a comprehensive and flexible energy crisis management strategy. Energy solidarity remains central to both, ensuring cooperation and security across the EU.

Slovenia supports the use of Article 194 of the TFEU as a primary tool for managing energy crises, combined with the swift procedures outlined in

¹⁸² *OPAL* case No. C-848/19 P.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Directive 2009/119/EC.

¹⁸⁷ EU Energy Policy Online Portal. Available at EUR-LEX: <https://eur-lex.europa.eu/EN/legal-content/glossary/eu-energy-policy.html#:~:text=Article%20194%20of%20the%20Treaty,Member%20States%20and%20the%20EU>. Retrieved on September 14, 2024.

Article 122 of the TFEU. Slovenia's experience during the recent gas crisis has shown that rapid response mechanisms are essential, particularly for smaller, import-dependent countries like Slovenia.

Question 2

The energy crisis measures revealed the importance of energy solidarity and energy security within the EU. These measures, including Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices (hereafter 'Council Regulation (EU) 2022/1854')¹⁸⁸ and Council Regulation (EU) 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (hereafter 'Council Regulation (EU) 2022/2576'),¹⁸⁹ both of which are no longer in force, were adopted under Article 122 of the TFEU to manage the energy crisis, however, they come with certain limits. Article 122 of the TFEU is suited for short-term interventions and does not offer a legal framework for long-term energy reforms or structural changes. Member States have different energy security levels. Some may prioritize national energy needs over collective EU efforts. The lack of sufficient interconnectors limits the practical application of energy solidarity, making it difficult for Member States to share resources effectively. While the 2022 crisis measures were effective in ensuring energy security, the temporary nature of Article 122 of the TFEU and limits of energy solidarity raise questions about their long-term applicability. In Slovenia, these measures revealed challenges in integrating EU interventions with national energy laws, emphasizing the need to balance national control with EU-coordinated solutions. While energy solidarity has been critical during the crisis, there are limits to its application. Slovenia acknowledges the need for proportionality, ensuring that solidarity measures do not disproportionately burden smaller Member States. The effectiveness of crisis management measures depends on a balance between collective security and individual Member State capacities. Legal issues in Slovenia concern market structure, infrastructure, and regulatory autonomy. Measures like price caps clashed with Slovenia's market liberalization, raising concerns about market distortion. Limited cross-border energy infrastructure in Slovenia restricted the full implementation of gas-sharing agreements.¹⁹⁰

¹⁸⁸ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (hereafter 'Council Regulation (EU) 2022/1854') (not in force anymore).

¹⁸⁹ Council Regulation (EU) 2022/2576 (not in force anymore).

¹⁹⁰ NECP, pp. 38–93.

Question 3

The EU's energy crisis management toolbox, primarily built around Article 122 of the TFEU and Article 194 of the TFEU, has been effective in addressing recent crises like the 2022 energy price surge. However, these articles have limitations, especially in the context of long-term climate-related threats and natural disasters. Article 122 of the TFEU is ideal for short-term emergency interventions, such as addressing market disruptions or supply shortages, but it is not suited for long-term energy reforms. Article 194 of the TFEU focuses on the long-term energy strategy, including market regulation and energy security, but lacks the speed for rapid crisis response.

To address natural disasters and climate-related threats, Article 222 of the TFEU ('Solidarity Clause') could be revitalized. This article could support energy supply protection during natural disasters by enabling coordinated infrastructure recovery. Article 222 of the TFEU would allow Member States to pool resources and assist each other in securing critical infrastructure. Revitalizing Article 222 of the TFEU would enhance the EU's ability to handle climate-related threats and protect its energy infrastructure, complementing the short-term tools provided by Article 122 of the TFEU. Together, these measures would strengthen the EU's crisis response capacity and ensure long-term energy resilience. The EU's current crisis management tools are robust but could benefit from further development. The integration of EU energy and climate policies could be strengthened to better address the challenges posed by natural disasters and climate-related threats to energy security.

Conclusions

Energy solidarity and energy security are core elements of the EU energy policy, ensuring cooperation among Member States to secure reliable energy supplies while supporting the green transition. Slovenia has integrated these principles into its national framework, playing an active role in the EU's efforts to achieve climate neutrality by 2050 through EU initiatives, including the European Green Deal and "Fit for 55". Slovenia's transition focuses on reducing reliance on coal and increasing renewable energy, supported by EU mechanisms. Slovenia's approach to energy solidarity and security is deeply integrated with EU law.

The recent energy crisis highlighted the effectiveness of Article 122 of the TFEU for emergency response, but also revealed challenges, including Member State autonomy over energy mixes and infrastructure limitations. Moving forward, further coordination and investment in renewables are essential to ensure long-term resilience and that energy solidarity continues to support both the energy transition and future crisis management across the EU.

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