

# DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

## RECOVER AND REPOWER? *REPOWEREU*, BETWEEN CRISIS MANAGEMENT, STRATEGIC AUTONOMY, AND CONSTITUTIONAL CONSTRAINTS

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### **1. *REPowerEU* and the management of the energy crisis by the EU**

This blogpost engages with the implications of the legal measures that have been proposed or adopted by the European Union (EU) as part of its *REPowerEU* Plan. This plan is significant in that it seeks to rapidly reduce, and eventually end, the EU's dependence on Russian fossil fuel imports, particularly natural gas. Consequently, *REPowerEU* could be seen as a step in the direction of strengthening the [strategic autonomy](#) of the EU, which has been defined in the July 2022 [Strategic Autonomy Monitor](#) produced by the European Parliament's in-house think tank, as "the capacity of the EU to act autonomously – that is, without being dependent on other countries – in strategically important policy areas". However, as the *Monitor* also notes, strategic autonomy is subject not just to external, international constraints, but is also conditional upon Member States' support of a common European agenda. In the context of this latter, internal constraint to EU strategic autonomy, we focus on two legal steps taken in pursuit of the realisation of *REPowerEU*, that is [Council Regulation 2022/2576](#), through which the Union aims to coordinate its diversification

of gas imports; and the Commission [proposal](#) to amend the Recovery and Resilience Facility (RRF) Regulation in order to integrate it with *REPowerEU*, on which Council and Parliament reached [political agreement](#) in late 2022. *REPowerEU* is the heading under which the European Union groups its actions aimed at rapidly decreasing its dependence on Russian fossil fuel imports in light of the February 2022 invasion of Ukraine. Given the EU's historic heavy reliance on these resources, the diversification or substitution of energy imports poses an enormous challenge. The Union's historic dependence on Russian fossil fuel imports, particularly gas, had previously led to tensions between Member States and between Member States and the European Commission, for both environmental and security-of-supply reasons. The most high-profile example of such disagreement prior to the start of the war in Ukraine is the controversy surrounding the [Nord Stream 2 Pipeline](#). Despite open and often [vociferous opposition](#) by the Commission and several Member States, and long-running efforts by the Commission to gain more legal and political control over the pipeline, Germany and other advocates of the project, such as Austria, [supported it](#) until shortly before Russia launched its invasion of Ukraine.

The external shock of war in Europe and Russia's overt use of gas exports as an instrument of geopolitical pressure provided the necessary momentum for the EU to tackle this import dependence head-on. *REPowerEU* is the strategic masterplan for how this watershed moment in the EU's internal and external energy relations should unfold in policy and law. The initial [REPowerEU Communication](#) was published by the Commission on 8 March 2022, less than two weeks after Russia launched its invasion of Ukraine. Spurred on by the European Council's 11 March [Versailles Declaration](#), the Commission developed *REPowerEU* into a comprehensive [plan for action](#) by 18 May 2022. The Plan has the four interrelated main objectives of saving energy; diversifying supplies; compensating for reduced fossil fuel imports by scaling up the deployment of renewable energy; and "smartly investments and reforms". Adding more detail to how these ambitious goals will be accomplished, the Plan was accompanied by a set of documents focusing on particular

aspects of this shift in energy policy. These concern the estimated [investment needs and additional costs](#), means for [reducing energy consumption](#), [emergency measures for the electricity market](#), a [strategy](#) for the swift deployment of solar energy, and a [Joint Communication](#) on the EU's external energy relations.

In the legislative sphere, too, *REPowerEU* actions have been remarkable in both scope and speed as discussed in an [earlier contribution](#) to this blog. To recapitulate briefly, the legal realisation of the *REPowerEU* Plan so far has consisted of an amendment to the Gas Security Regulation establishing a minimum gas storage filling obligation, which was [passed into law](#) by the end of June 2022; [Council Regulation 2022/1369](#) of 5 August 2022, which established a 15% gas demand reduction target for all Member States for the period between August 2022 and March 2023; [Council Regulation 2022/1854](#) of 6 October 2022, which notably introduced measures such as a “revenue cap” for generators of electricity from inframarginal technologies, and a so-called “solidarity contribution” on excess profits for companies active in the fossil fuel sector; [Council Regulation 2022/2577](#) of 22 December 2022, which aims to simplify the procedural requirement for the deployment of renewable energy; [Council Regulation 2022/2578](#) of 22 December 2022, aiming to prevent [excessive gas price spikes](#); and, significantly, [Council Regulation 2022/2576](#) of 19 December 2022, which seeks to encourage greater solidarity among Member States in their gas import decisions by encouraging joint purchasing of gas. It is this latter act and its operation that we focus on below.

## **2. Joint Gas Purchasing under *REPowerEU*: Towards Greater EU Strategic Autonomy in the Energy Sphere?**

The legislation on coordination of gas purchases builds on and further defines the so-called [EU Energy Platform](#), a forum that was established on 7 April 2022 to facilitate communication on and coordination of strategic and secure gas supplies among Member States. [Council Regulation 2022/2576](#) establishes (in Article 8) an *ad hoc Steering Board* for the Platform, composed of representatives from the Commission, all Member

States, and, upon invitation from the Commission, also from the members of the [Energy Community](#), an international organisation seeking to foster energy market integration between the European Union and its neighbours. According to the Commission, the Platform has already been instrumental in realising the abovementioned external energy relations strategy by facilitating the conclusion of recent Memoranda of Understanding on gas imports from [Israel and Egypt](#), and [Azerbaijan](#). Regulation 2022/2576 seeks to give further momentum to the Platform as an instrument of a coordinated EU gas import policy by making it mandatory for Member States to participate in the aggregation of gas demand equal to 15% of their 2023 gas storage filling target (per Article 10). Once this demand is aggregated, a service provider appointed by the European Commission will seek offers to match this demand (Article 7). These measures adopted in pursuit of better coordination of EU gas imports certainly are remarkable steps taken to enhance EU strategic autonomy in the Union's external energy relations, and indeed would have been unthinkable before the onset of the war in Ukraine. Yet, it is important to specify that, from a legal viewpoint, such autonomy remains largely dependent on the political support by Member States of the EU's crisis response agenda.

As with [other measures](#) contained in the legislation adopted as part of the *REPowerEU* Plan, provisions that touch on the very core of the right of each Member State "to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply", enshrined in article 194(2) TFEU, remain largely unenforceable through the Court of Justice. For example, the 15% gas demand reduction target is voluntary and becomes binding only if the Council agrees that there is an acute gas supply emergency (as per articles 4 and 5 of [Regulation 2022/1369](#)). Even where the target itself is binding, such as with the gas storage filling target introduced by [Regulation \(EU\) 2022/1032](#), complex procedural stipulations, such as introduced by Article 6a(11) of that instrument, render formal infringement proceedings an unlikely and impractical solution in case of a Member State falling short of its filling obligations. As for the demand aggregation mechanism

introduced by Regulation 2022/2576, a [recent commentary](#) is rather critical of the measure, stating that Member States only being obliged to aggregate a small percentage of their demand, coupled with the fact that joint *purchasing*, as opposed to *demand aggregation*, is voluntary, render the chances of its successful deployment slim. Despite the rapid and impressive pivot in the Union's energy policy towards the reduction of fossil fuel imports from Russia, the Union is thus likely to remain, to a certain degree, an "[engaged but constrained](#)" actor.

### **3. *REPowerEU* and its funding: healing the fractures of Europe's metabolic constitution or creeping supranational competences in the economic sphere?**

Another element worth reflecting on is the funding of the new instrument, to be assessed in the perspective of the EU's responsiveness to crises. Indeed, the [funding of the \*REPowerEU\* Plan](#) is axed on the [Recovery and Resilience Facility \(RRF\) instrument](#), one of the pillars of the [Next Generation EU](#). To this purpose, 225 billion euros in loans are already available under this line of funding. Additional RRF grants will be funded by the [auctioning of the Emission Trading System \(ETS\) allowances](#), currently held in the Market Stability Reserve, worth 20 billion euros. The ETS is a key tool for reducing greenhouse gas emissions and is a cornerstone of the EU policy to combat climate change.

Next to it, other sources feed the financing of *REPowerEU*. Unspent resources from a line of subsidy under the Cohesion policy, the [SAFE \(Supporting Affordable Energy\) funding](#), will be used to provide direct support to vulnerable families and small and medium-sized businesses (SMEs) to support climate equity objectives, one of the pillars of the [energy trilemma](#).

An additional 5.4 billion euros of funds will come from the Brexit Adjustments Reserve that MSs will be able to voluntarily transfer to the RRF to finance *REPowerEU* measures, as reported in the [Commission Factsheet](#) on the funding of the *REPowerEU* plan.

As one can understand from this overview, the biggest share of the funding comes from the [RRF instrument](#), which is one of the pillars of the

Next Generation EU, an effective yet [not unproblematic instrument](#) adopted as a reaction to the COVID-19 pandemic. This means that *REPowerEU* is attracted under the umbrella of the governance innovations of Next Generation EU and what they represent for the EU as a polity.

The RRF is part of a [complex legal construction](#), which has been devised as a solution for the creation of an [innovative](#) plan to support states in their effort to get out of the asymmetric crises caused by the pandemic. In this perspective, the fact that a core part of the funding of the Plan is coming through the RRF means that the energy transition in the EU is somehow coupled with the economic coordination policy of the EU, which appears to become a super-competence of the EU, developing beyond the black-letter of the Treaties, as argued recently by [Chamon](#). Indirectly, this witnessed the growing bubble of the integration-through-funding approach pursued by the EU with the last crises, which deserves scrutiny for its implications on the constitutional setting of the EU.

To better understand this claim, one should look back at the RRF development. From this perspective, there is a growing role for Article 122 TFEU as a legal basis employed to expand the economic coordination competence of the EU beyond its actual legal basis. Some steps backward are needed to unpack the core of the question.

First, the RRF is the instrument that governs operationally the new scheme devised for the recovery of the EU from the pandemic. Though adopted on Article 175(3) TFEU, which provides the legal basis for the coordination of economic policies, yet the RRF is the operating branch of the [Recovery Instrument Regulation](#), adopted on Art. 122(1) TFEU and referred to as the 'control room' of the RRF.

As suggested [earlier](#), Article 122(1) TFEU, which is, therefore, the basis of a significant part of the funding used for the *REPowerEU* Plan, has been used as the *passe-partout* legal basis for emergency regulation, for any situation requiring urgent action at EU level, from [supporting Greece during the refugee crisis](#) to the [SURE](#) during the pandemic, and now to fund the *REPowerEU* Plan.

Secondly, the 'method' designed with the Next Generation EU implies a new system of close coordination between national and European

institutions. As aptly framed by [Nicola Lupo](#), the system designed with the EU RRF and the domestic Recovery and Resilience plans can be called a maxi 'euro-national proceeding', carving the governmental function of steering the domestic political agendas to the targets defined in recommendations of the European Semester and of the Stability and Growth Pact, "giving further teeth to those recommendations", as rightly observed by [Chamon](#).

Overall, this contributes to the growth of the 'integration-through-funding bubble', which questions the respect of the current constitutional setting, certainly one "[of bits and pieces](#)" but still one that is based on the principle of conferred competences.

From another perspective, it has also been questioned if this reliance on this line of funding, which are administered by MSs, can jeopardize the effective attainment of the strategic objectives of the *REPowerEU* Plan, also in relation to the different timeframes of the Plan and of the RRF, as it has been put forward by the [European Court of Auditors](#).

To conclude, with the *REPowerEU* Plan the EU has engaged in a clean energy transition while it secures its energy supplies with more reliable international partners. However, this does seem to be going to heal the fractures of the [European metabolic constitution](#), as explained by Fasone and Lindseth, since *REPowerEU* insists -for a good deal- on temporary solidarity measures like the RRF. From another perspective, the EU's energy constitution constrains its strategic autonomy to respect the prerogatives of the MSs.

#### **4. Conclusions: "Never let a good crisis go to waste"**

*REPowerEU* represents a watershed moment in the management of the energy crisis. If 'Never let a good crisis go to waste' seems to be a lesson learned in the governance of past crises, some reflections are in place as to the implications of the measures, beyond the surface of political successes. If *REPowerEU* is certainly a step in the direction of breaking the energy dependence from Russia and moving forward in the direction of reaching the targets of the Green Deal, one must stress that the measures decided at the legislative level are not so intrusive to be developing a fully-

fledged strategic autonomy for the EU, also viz-a-viz the Member States. Yet, demand aggregation, as many other measures of the *REPowerEU*, still need to respect competence division as per Article 194 TFEU, so that legally, the internal constraint on the strategic autonomy in energy is not lessened or 'neutralised': its actual achievement will depend on the Member States' political will to realize it. Certainly, the solution of the knot concerning the funding of the Plan is also a success, and it consolidates the development of the 'integration-through-funding' approach. This must however take place in a way that does respect the constitutional setting of the EU and grants the power-legitimacy nexus, which requires the participation of the European and national parliaments.