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THE PRINCIPLE OF ENERGY SOLIDARITY AT ITS FIRST STRESS TEST: THE MITIGATION OF THE ENERGY CRISIS BETWEEN NATIONAL SOVEREIGNTY AND SUPRANATIONAL INTEGRATION

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“Ending our dependency on Russian fossil fuels is only the first step. The skyrocketing electricity prices are now exposing, for different reasons, the limitations of our current electricity market design. It was developed under completely different circumstances and for completely different purposes. It is no longer fit for purpose. That is why we, the Commission, are now working on an emergency intervention and a structural reform of the electricity market. We need a new market model for electricity that really functions and brings us back into balance.”

Ursula Von Der Leyen, Bled Strategic Forum, 29.9.2022

Introduction

The aim of this blogpost is to give a first analysis and assessment of the measures designed by the EU to react to the energy crisis, a crisis that is [unfolding partly due to the pandemic](#) (crisis), and later on also as a consequence of the [weaponization of gas supply by Russia](#), as a

counterreaction to the EU's sanctions.

Starting from the famous [OPAL case](#), which enshrined the principle of solidarity as a cornerstone of European energy law, this post will focus on the measures that have been adopted by the EU to mitigate the crisis, and will analyze them through the lens of the principle of solidarity.

The salience of this topic is multiple: on the one side, the energy crisis is one of the several crises the EU is tackling, right after the covid-19 crisis, the refugee and financial crises. This situation of 'polycrisis' – as framed by [Zeitlin, Nicoli and Laffan](#) – fractures the European political space across multiple and new cleavages. From a legal perspective, it is interesting to observe how the EU is reacting and forging solutions to these crises with the toolkit available to it, and if and how the reactions to these crises affect European governance in a more structural manner.

A second interesting element is the relation between the energy and climate crises, which concern two pillars of the so-called energy trilemma, consisting of energy sustainability, security, and competitiveness. Energy sustainability is one of the priorities of the European Commission and is embedded in the European [Green Deal](#). These priorities, furthermore, touch on various different competences of the EU, in particular environment and energy, which have developed along different historical paths. In this context, the search for emergency solutions is intertwined with the pursuit of policies, e.g., on renewable energies, which have a more structural nature. It is therefore interesting to analyze if challenges can be raised against the legal basis adopted for these first reactions to the crisis by the EU.

The OPAL case and the principle of solidarity: a politically 'sustainable' legacy in EU energy law?

The competence of the EU in energy policy was introduced by the Treaty of Lisbon, albeit European integration, from the beginning, has been concerned with the creation of a progressively integrated market of production factors. When a specific energy competence was negotiated, it was [Poland that lobbied](#) for the inclusion of the principle of solidarity in Article 194 TFEU, considering its vulnerable position in relation to energy

security: interestingly, it was the first country to rely on this principle in litigation.

The OPAL case represents a [constitutional turning point in energy law](#): indeed, the CJEU affirmed that the principle of solidarity is a cornerstone of EU energy law.

In its judgment of the 15th of July 2021, the CJEU stated that the principle of solidarity of Article 194 TFEU is one of the specific expressions, in the field of energy, of the general principle of solidarity (para. 38), which is itself one of the fundamental principles of EU law. In doing so, the Court supports the idea that the principle of solidarity has a [polymorphic nature](#), in the sense that, besides a core common to the whole EU system, the principle can be declined with several nuances across the different sectors where it is supposed to apply.

In asserting the binding nature of the principle, the Court relied on the [case law](#) on the principle of solidarity in the context of relocation decisions, where Poland and other Visegrad countries were defendants in the infringement proceedings brought against them by the Commission. This could be seen as a subtle message to Poland, hinting that the respect of the European legality can have both bitter and sweet fruits (para 42).

Another important element specified by the CJEU concerns the scope of the principle, which goes beyond security of energy supply. This means that it applies and intersects all four different objectives set out in Article 194 TFEU. These are: to (a) ensure the functioning of the energy market; to (b) ensure security of energy supply in the Union; to (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and to (d) promote the interconnection of energy networks (para 37). Therefore, solidarity permeates all the different aspects of energy law and policies, as highlighted by Münchmeyer in [his analysis](#) of the case.

A fourth element stressed by the Court is the systemic nature of the principle, in the sense that solidarity entails rights and obligations both for the EU and for the Member States. The dimensions of solidarity are vertical, i.e., from the EU to States and vice versa, but also horizontal, between Member States. This is extremely important since it stresses an

inescapable horizontal dimension of the principle, which might impact or even conflict upon national prerogatives in energy law.

The implications of the case are important. The principle of solidarity -as framed by the CJEU- goes beyond emergencies and entails a preventive dimension, in the sense that the EU can resort to it to avoid the occurrence of crises (para 69). Furthermore, solidarity requires that the Commission verifies if there is a danger for gas supply on the markets of the MS. It entails a duty “to conduct an analysis of the interests involved (...), taking into account the interests both of the Member State and of the EU as a whole (para 53). This has been stressed by the Court, with special comparison with Article 222 TFEU. In contrast, the Court did not address the relation between Article 122(1) and 194 TFEU. Interestingly, most of the measures adopted in the aftermath of the crisis, are based on Article 122(1) TFEU.

One of the questions left by the OPAL case is whether the integrated approach in the definition of solidarity by the CJEU has left its seeds, and which fruits it will bear, against the background of the energy crisis that unfolded in 2021 and 2022?

The reaction to the energy crisis in light of the principle of solidarity

Right after the Russian invasion of Ukraine, the EU has been active in finding solutions to the energy crisis, with several measures. The situation is dynamic, and several proposals are in the process of negotiation. From the outset, it should be observed that the word solidarity has been used in the legislative proposal, often in the meaning of solidarity between Member States but also in relation to social components, e.g., household and companies.

With [REPowerEU](#) – outlined on the [8th March](#), and adopted in [May 2022](#) (Plan), the Commission has clearly formulated the targets of ending dependence from Russian fossil fuels, accelerating the shift toward clean energy transition, setting the foundation of a Union of Clean Energy.

Subsequently, the EU adopted binding measures, such as [Regulation No. 2022/1032](#) on gas storage, that provided for gas storage minimums and provisions on storage infrastructures, with Article 194(2) TFEU as legal

basis.

Furthermore, [Council Regulation No. 2022/1369](#) of 5 August 2022 on coordinated demand-reduction measures for gas had the aim to reduce gas consumption by 15%, and had Art. 122(1) TFEU as legal basis. This Regulation aims at creating a mechanism for demand-reduction measures and a Union alert, triggering a mandatory demand-reduction obligation, to safeguard the security of gas supply, in a spirit of solidarity.

A third measure is [Council Regulation No. 2022/1854](#) focused on an Emergency Intervention to address high energy prices in the EU, and has Art. 122(1) TFEU as legal basis. It has the aim of 'moderating' the market, for example by capping the revenues for electricity generators using infra-marginal technologies, targeting renewable, nuclear, lignite, for example, with a duty of reinvestment to the benefit of the final consumers.

This Regulation provides for measures organizing forms of solidarity to mitigate the effects of the crisis, including a solidarity contribution on the profits of companies active in the crude petroleum, natural gas, coal, and refinery sectors. The solidarity contribution, additional to regular taxes, is calculated on taxable profits more than 20 per cent higher than the average yearly taxable profits since 2018 (Art. 14-18). This will be to the benefit of households and companies, mitigating the effects of high retail prices for electricity. In this respect, the use of the proceeds from the temporary solidarity contribution, provides that, among other destinations, "in a spirit of solidarity between Member States, Member States *may assign a share of the proceeds to the common financing of measures* to reduce the harmful effects of the energy crisis, including support for protecting employment", and to promote investments in energy efficiency, including cross-border projects, and in the Union renewable energy financing mechanism ex Article 33 of Reg 2018/1999.

Additional solidarity measures include solidarity agreements between Member States. Since at domestic level states have different energy mixes, not all states can support their final customers in a symmetric manner. Therefore, Member States with net import of electricity above 100% shall conclude agreements to share the surplus revenues with the main exporting Member State in a spirit of solidarity (Art. 11 Reg 1854).

Such solidarity agreements are also encouraged, in particular, to reflect unbalanced trading relationships.

More initiatives include proposals for a Council Regulation on a [new framework to accelerate the deployment of renewable energy](#), and a [proposal for a Council Regulation on the coordination of gas purchases](#).

All these initiatives have the legal basis in Article 122(1) TFEU.

This last measure provides for solidarity through a better coordination of gas purchases, with a joint purchase system, providing for demand aggregation and a duty for Member States to join for at least 15% of their respective storage filling targets. As one can perceive, 15% is not a great share of the filling targets, so this joint purchase mechanism could have - in the best case- a corrective effect only. Also, the proposal provides for joint purchases on a voluntary basis, in the effort to help smaller states and companies to access markets at better conditions.

Furthermore, another instrument, the Market Correction Mechanism, can be activated in case of spikes in gas prices, measured on the TTF, used as a price reference for gas contracts. This dynamic price cap will apply as long as the prices remain high. The ACER will monitor the market, and the Commission will propose the activation of the cap to the Council, that will decide. This price cap is meant to be a mechanism of last resort to prevent episodes of excessively high prices, and not a regulatory intervention by the Commission on prices.

The mitigation of the energy crisis between national sovereignty and supranational integration

All in all, the EU is addressing the crisis, partially coordinating the responses of the Member states and avoiding that free riding could compromise energy security for some states: this seems to be the minimum legacy of the OPAL case. Next to a coordinated effort, [some states remain active](#) in securing their domestic markets, and this feeds the [frustration of others](#), that possess less economic resources to address this crisis and invoke a stronger supranational intervention.

The energy crisis creates a situation where an asymmetrical shock will create exponentially more asymmetrical consequences, because of the

[fragmented nature of European energy market](#). It is therefore important that emergency measures can address these imbalances, to grant energy security and to correct distortive effects created by the crisis.

If the measures are certainly inspired by solidarity, some observations can be made precisely on this principle.

First, solidarity is -once again- linked to emergency, and the use of Article 122(1) TFEU as legal basis confirms it. Article 122(1) TFEU deals with economic solidarity in case of “difficulties (..) in the supply of certain products, notably in the area of energy”. This procedure does not involve the European Parliament, and it allows the Council to decide alone. This entails by-passing the rules and guarantees typical of the OLP, also including an impact assessment. Though motivated by the sense of urgency implied by the emergency and by their temporary nature, it would be legitimate to question some of the long-term effects of those measures. Additionally, Article 122(1) TFEU has been used for many disparate measures, from [supporting Greece during the refugee crisis](#), to the [SURE](#) during the pandemic: is this legal basis becoming the general *passe-partout* legal basis for emergency regulation, for any situation requiring urgent action at EU level?

Second, in several horizontal inter-state solidarity measures there is an important voluntaristic dimension, in the sense that states are left free to decide to activate forms of solidarity, in contrast to mandatory solidarity initiatives, perhaps because of the urgency and legitimacy issues explained above. These measures do not seem to be inspired by a vision of further Europeanization of the markets, but rather by the preservation of domestic competences, where the EU intervenes to correct the most dangerous effects of the crisis. Along these lines, though there is a strong redistributive component in these emergency measures, aimed at protecting households and companies, the redistributive effects of solidarity are to be measured within states; their horizontal (inter-state) effects seem inspired by a [corrective logic](#), mainly to address the asymmetric consequences of the crisis.

Though unprecedented and unthinkable before the war, a final question mark remains on the long-term effect of the crisis on the fragmentation

of the European energy market. In similar terms, the evolution of the scope of the principle of solidarity in energy law after the OPAL case is yet to be seen. As to the current energy crisis, solidarity is certainly the buzz word, but it has been implemented in a way to preserve national competences. Instead, a more structural reform of the energy market, inspired by a more robust supranational rationale is yet to be seen. It might be in that context that we could appreciate the full potential of the solidarity principle as envisaged by the CJEU in the OPAL case, also to support more ambitious European decarbonization policies.

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