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**Solidarity between Member States in the
field of energy**

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Introduction

The Russian attack on Ukraine in 2022 and the consequent gas crisis in Europe has brought questions of energy security and energy solidarity between the Member States of the European Union (EU) to the forefront once again. The consistent dependence of certain Member States on Russian gas, from the far past even still to the present, two years after the begin of the war, is a reliable constant for driving on the development of European energy law and policy. The direct effects of the war in the EU resulted in the REPowerEU package, a bundle of new legislation in the form of secondary law. It is intended to lessen the impact of the volatile energy markets and to ensure the energy security of the EU and was explicitly adopted in a spirit of solidarity.

One year before the war, OPAL, a pipeline for Russian gas connecting Nord Stream 1 with the border of Germany and Czechia, was the object of a judgement¹ of the Court of Justice of the European Union (CJEU) that lead to an almost revolutionary development in the application of the principle of solidarity as it is laid down in primary law. The Court ruled that the principle of solidarity, at least in the field of energy, is judicially enforceable. The consequences of the justiciability of the principle of solidarity and its effects have since been widely discussed. While the Commission has apparently already applied the principle of solidarity according to its new interpretation², the consequences of the judgement are still not entirely clear. It is possible for the principle of solidarity to become either an asset for the achievement of the energy objectives of the Union or a tool for Member States to ensure their own national energy interests. This is the result of solidarity being a principle that does not dictate concrete legal consequences, but rather requires the balancing of interests.

To get a better understanding of what this means, it is necessary to have a look at what solidarity as a general principle is, what its specific characteristics are in EU law and how it is applied in areas other than energy law (I.A). After that, the OPAL judgement and its implications will be discussed in more detail (I.B).

Since the REPowerEU legislation so heavily relies on solidarity in its language, it can be insightful to analyze the different dimensions under which the EU legislator gives solidarity a more concrete form in secondary law and how that shapes the relationship between Member States (II.B). It will become apparent that the legal basis, which the Council chose to base the REPowerEU package on, makes a considerable difference. The Council used Art. 122 TFEU³, the legal basis for measures in crisis, instead of Art. 194 TFEU, the regular legal basis for measures in energy law. Therefore, before coming to the REPowerEU measures themselves, it is crucial to delimit the two legal basis that could potentially be used for their adoption (II.A).

¹ Case C-848/19 P *Germany v Poland* [2021] ECLI:EU:C:2021:598.

² Opinion of AG Campos Sánchez-Bordona, Case C-848/19 P *Germany v Poland* [2021], ECLI:EU:C:2021:218, 106.

³ Consolidated version of the Treaty on the Functioning of the European Union, OJ C326/47, 26.10.2012.

Part I: The principle of solidarity as enshrined in EU primary law

It was the idea of solidarity that sparked a united Europe. Robert Schuman, the French Foreign Minister at the time, proposed the idea of a European Coal and Steel Community in his declaration of 9 May 1950. He stated: „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“⁴.

From the word solidarity alone, one can conclude that solidarity implies mutual assistance between Member States in times of need and the maintaining of the Union’s integrity⁵. In recent years, achieving and maintaining solidarity has been repeatedly tested by crises⁶. These developments started with the Euro crisis⁷ and have continued with the rise of populist movements in Member States, and increasingly at the European level⁸.

A major shock in this regard came in 2016 when the UK voted for „Brexit“ and consequently left the EU. The challenges continued with the COVID pandemic, where the Member States first reaction was not one of mutual support, but of isolation and the closing of borders to restrict the export of scarce medical equipment⁹. Therefore, one might conclude that solidarity is not an instinctive reaction of Member States. In a crisis, they initially retreat to their national sovereignty. Only after the initial shock subsides and rational thinking sets in, they recognize the value of the larger whole and act accordingly. The latest challenge to solidarity was caused by Russia’s war of aggression in Ukraine, which led to volatile energy prices and a threat to European energy security. Surprisingly, in response to this crisis, the Member States have stood largely united, with only occasional exceptions¹⁰.

Solidarity as a concept and term appears multiple times in the European Treaties, serving as a founding value¹¹. References to solidarity can be found in the preamble, Art. 2, 3 TEU¹² and Art.

⁴ Fondation Robert Schuman, „Declaration of 9 May“ < <https://www.robert-schuman.eu/en/declaration-of-9-may-1950> > accessed 28 September 2024.

⁵ Matúš Mišík, Andrej Nosko, „Each one for themselves: Exploring the energy security paradox of the European Union“ (2023) 99 ERSS 1.

⁶ Dagmar Schiek, „Solidarity in the Case Law of the European Court of Justice – Opportunities Missed?“, in: Helle Krunke, Hanne Petersen, Ian Manners, „Transnational Solidarity. Concept, Challenges and Opportunities“ (2020) Cambridge University Press, Chapter 12, 2.

⁷ Irina Domurath, „The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach“ (2013) 35 J. Eur. Integr. 459.

⁸ Jennifer Rankin, Lisa O’Carroll, Lili Bayer, „EU elections: populist right makes gains but pro-European centre holds“ (The Guardian, June 10, 2024), < <https://www.theguardian.com/world/article/2024/jun/09/eu-elections-populist-right-makes-gains-but-pro-european-centre-holds> > accessed 28 September 2024.

⁹ Aline Bartenstein, „European energy solidarity: strengthening the EU’s resilience to crises“ (Fondation Robert Schuman, February 6, 2023), < <https://www.robert-schuman.eu/en/european-issues/655-european-energy-solidarity-strengthening-the-eu-s-resilience-to-crises> > accessed 28 September 2024.

¹⁰ *Id.*

¹¹ Domurath, *supra* note 7.

¹² Consolidated version of the Treaty on European Union, OJ C 326/13, 26.10.2012.

21, 24, 31, 32 TEU in the area of External Action. In the TFEU, solidarity is explicitly stated in the areas of asylum and immigration policy (Art. 67, 80), economic policy (Art. 122), energy (Art. 194), and the Solidarity Clause (Art. 222). The term appears in various forms, often as „mutual solidarity“ or „political solidarity“ and is closely linked to the concept of loyalty (Art. 24 III TEU)¹³.

While the Treaties provide no definition of what solidarity is or how it should be applied, many contributions have tried to characterize it¹⁴. Solidarity has been described as „a principle, an obligation, a ‘constitutional value’, an ‘idea’ and ‘political rhetoric’“¹⁵. Sölter insightfully characterized „the concept of solidarity [...] - perhaps only comparable to that of freedom - [as] a projection surface for questions of distribution and balancing“¹⁶.

A. Different dimensions of the principle of solidarity

Solidarity as a concept outside of legal discussion has existed for a long time and is closely linked to the development of human communities¹⁷. „If law is a reflection of social concepts of order, then the question of solidarity must also be addressed“¹⁸. It is therefore no surprise that the principle of solidarity is not only found in the European Treaties but in the national constitutions of the Member States as well¹⁹.

In sociology, Durkheim described a dualistic concept of solidarity²⁰. „[H]e distinguished between mechanic solidarity, which is based on ties developed in small, closed groups“²¹ and therefore „derives from the likeness of people in homogeneous societies“²² „and organic solidarity, which emerges in industrial [heterogeneous] societies dependant on exchange between their individual members. Mechanic solidarity appears as a condition experienced as natural obligation, perhaps experienced as inescapable fate. Organic solidarity requires effort by a developed society“²³.

¹³ Campos Sánchez-Bordona, *supra* note 2, 64.

¹⁴ Kaisa Huhta, Leonie Reins, „SOLIDARITY IN EUROPEAN UNION LAW AND ITS APPLICATION IN THE ENERGY SECTOR“ (2023) 72 ICLQ 771,771 f.

¹⁵ *Id.* 772.

¹⁶ Nicolas Sölter, „Abwägung ohne Maßstab – zum Grundsatz der Energiesolidarität Anmerkung zum Urteil des EuGH v. 15.7.2021, Rs. C-848/19 P (OPAL)“ (2022) 57 EuR 130, 138.

¹⁷ Peter Hilpold, „Solidarität als Rechtsprinzip – völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen“ (2007) 55 JöR 195.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Schiek, *supra* note 6, 6.

²¹ *Id.*

²² Domurath, *supra* note 7, 461.

²³ Schiek, *supra* note 6, 6.

Durkheim also contends that mechanic solidarity prevails over organic solidarity²⁴. This could explain why the initial reflex of Member States in times of crisis is often national, prioritizing the protection of their own citizens instead of cooperating with other Member States, which might be more advantageous in the long term.

Since solidarity is a sociological concept, the transfer of the principle to a political system is not a natural process. If the foundation for solidarity is seen in a „specific commonality, such as personal affection, physical proximity, common interests and belonging to a group“²⁵, then solidarity requires „a certain social consensus based on the affiliation of ‘like’ or ‘same’ individuals to a group and the equality of group members“²⁶. Consequently, as a social system becomes more abstract, as is the case in a state system, the idea of solidarity is likely to play a less important role²⁷. While in a nation-state, the sense of belonging could be established by a shared national identity, it becomes increasingly difficult to create this bond in a supranational, „sociologically heterogeneous construction“²⁸ like the EU with nearly 450 million citizens. By acknowledging and embracing this diversity, some even suggest that solidarity in the EU is based on the acceptance of differences²⁹.

As honorable as solidarity is as a value as such and as effective as it may be as an „appeal to groupness“³⁰ it has a practical purpose too. Solidarity has a reciprocal element³¹ and functions as a form of insurance, in that it requires mutual support. This has been described as „solidarity counts on solidarity“³². In a more poetic form, it has been said „to create a minimum of security against the veil of uncertainty,, „in a contractualist overall relationship“³³.

Solidarity has been categorized as charity, mutual obligation, and risk mitigation³⁴. Other functions of the principle include: „embedding individual rights, embedding the Internal Market, [and] rejecting limiting effects of national solidarity“³⁵. Schiek sees five different types of

²⁴ Domurath, *supra* note 7, 461.

²⁵ J. Isensee, Solidarität – sozialethische Substanz eines Blankettbegriffs, in: J. Isensee (Hrsg.), Solidarität in Knappheit, Berlin 1998, S.97–141 (113) (as cited in Hilpold, *supra* note 17, 196).

²⁶ Domurath, *supra* note 7, 460.

²⁷ Hilpold, *supra* note 17, 196.

²⁸ Domurath, *supra* note 7, 460.

²⁹ Malcolm Ross, „Solidarity—A New Constitutional Paradigm for the EU?“, in: Malcolm Ross, Yuri Borgmann-Prebil, „Promoting Solidarity in the European Union“ (2010) OUP, 31.

³⁰ Bartenstein, *supra* note 9.

³¹ Domurath, *supra* note 7, 460.

³² Hilpold, *supra* note 17, 204.

³³ *Id.* 205.

³⁴ Schiek, *supra* note 6, 1.

³⁵ *Id.*

solidarity in the case law of the CJEU³⁶. Furthermore, solidarity has been described „as a requirement for mutual cooperation in producing common goods by the Member States; as a constitutional paradigm for social justice-led purposes; [and] as a corrective mechanism to market failures“³⁷.

Besides the foregoing, it is also important to have a closer look at what a principle is. A principle can describe both the „essential characteristics of legal institutions (descriptive principles)“ and „designate fundamental legal norms (basic principles)“³⁸. „It can fill gaps in positive law by assigning a constitutional or legal value to rules which are not yet formally set forth in written sources of law although they are considered essential (general principles of law)“³⁹. The origin of principles can differ significantly⁴⁰. They can be explicitly written in the foundational texts of a political order or developed through judicial construction⁴¹.

As already noted, the existence of the principle of solidarity is described explicitly in the Treaties. However, it is more important how a principle is applied than how it is derived. This is where principles differ fundamentally from legal rules. If the conditions of a legal rule are fulfilled, it dictates a binding legal consequence⁴². Principles on the other hand don't prescribe a legal consequence⁴³. Instead, they provide a general orientation for positive law and decision-making⁴⁴, which aims to help the principle to its greatest possible realization. It is inherent to principles that their application requires a balancing decision, especially when multiple principles have to be weighed against each other. These principles must then be balanced unless one principle carries greater weight⁴⁵. This balancing act is central to the application of the principle of solidarity in the field of energy, where, as will be seen, it involves the weighing of interests of the Member States. As a result, solidarity becomes not only a tool to preserve the integrity of the Union but also „a federal principle ensuring that the constituent units do not harm each other“⁴⁶.

³⁶ *Id.* 11.

³⁷ Mykola Iakovenko, „A need for clarification of the energy solidarity principle: what can be learned from the General Court's judgment in the OPAL case?“ (2021) 14 JWELB 38, 41; Kim Talus, „EU Energy Law and Policy: A Critical Account (2013), OUP 281; Ross, *supra* note 29, 42.

³⁸ Nicolas de Sadeleer, „Environmental Principles: From Political Slogans to Legal Rules“ (2002) OUP 306.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* 307.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Bartenstein, *supra* note 9.

There is seemingly no end to the ways in which the principle of solidarity can be used, which is why it is so difficult to get an abstract understanding of it and highlights its inconsistency⁴⁷. In the end, the principle of solidarity has different meanings depending on the context in which it is used. A better understanding requires the examination of the principle in the context of its legal system and the application in specific fields of law.

1. The general principle of solidarity in EU law

The European Treaties, in line with the Schuman Declaration, establish solidarity as the foundation of the EU and its values⁴⁸. The Member States have given themselves the task in Art. 1 TEU of „creating an ever closer union among the peoples of Europe“. In the preamble of the TEU, the desire has been written down to deepen the solidarity between the peoples of the Member States. Furthermore, solidarity, in its many dimension, serves the creation of this ever closer Union by linking the societies of the Member States⁴⁹. To reference Durkheim once more, solidarity in a way has the task of creating the conditions for its own existence within the European Union.

In Art. 2 TEU, solidarity is described as a value that is common to the Member States of the European Union. Solidarity is not part of the founding values in the first sentence of the article, it appears only in the second sentence. This is why some speculate that the principle was met with skepticism⁵⁰. Maybe the skepticism originates from the Durkheimian description of solidarity and doubts whether solidarity is transferable to the EU. However, in the current version of the Treaties, Art. 2 TEU establishes a link between the Member States and the EU⁵¹, because the values of the EU are common to the Member States. Additionally, Art. 2 TEU speaks of a society in singular, which implies that it develops outside the confinements of the Member States into a shared, common European society⁵².

It is only logical that the internal market, a core function of the EU, serves the promotion of „economic, social and territorial cohesion, and solidarity among Member States“ according to Art. 3 III TEU. The realization of solidarity is therefore its objective⁵³.

Lastly solidarity serves as a counter weight to the principle of subsidiarity in the EU. While the principle of subsidiarity aims to protect the smallest entity and a bottom up approach, the principle of solidarity ensures cohesion and the consideration of the larger public interest⁵⁴.

⁴⁷ Schiek, *supra* note 6, 18.

⁴⁸ Huhta, Reins, *supra* note 14.

⁴⁹ Schiek, *supra* note 6, 2, 8.

⁵⁰ Schiek, *supra* note 6, 7.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Campos Sánchez-Bordona, *supra* note 2, 61.

⁵⁴ Hilpold, *supra* note 17, 208.

In the EU, the principle of solidarity appears mainly in three dimensions: between the Union and Member States, between Member States and between Member States and individuals⁵⁵. However, it is not limited to these and also applies to the relations between institutions, between Member States and third countries, as well as between generations⁵⁶. The most well-developed form of solidarity is with regard to individuals. This is a result of the jurisprudence of the CJEU, which has expanded access to national security systems through its rulings in „the socio-economic law of the internal market⁵⁷.

The Charter of Fundamental Rights played a supportive role here. Chapter IV of the Charter is dedicated to solidarity and serves the economic and social protection of workers and their families. By doing so, it extends the internal market in its social dimension⁵⁸. However, the focus of this thesis is laid on the relationship between Member States, which is why the developments in the relationship between Member States and individuals are not that insightful.

The CJEU nevertheless established some guidelines for the application of the principle of solidarity between Member States. In this dimension, Member States have the obligation to potentially endure substantial losses in order to maintain the common efforts of the Union⁵⁹. Because solidarity is a mutual obligation, this means that if a Member State endures heavy sacrifices from this obligation, they have „to be distributed equally“ among them. Solidarity in these relations therefore amounts „to the fair sharing of responsibility in pursuit of the common goal of solving a crisis that might particularly affect certain Member States“⁶⁰. As will become apparent later, it is not always obvious what constitutes a common goal and what the fair sharing of responsibilities entails, resulting in friction between Member States.

2. The principle of solidarity in specific legal fields

As solidarity is a founding value and foundation of the EU, it does not only appear explicitly in the Treaties, it shapes many policy fields implicitly as well. One example for this is the collective defense mechanism under Art. 42 VII TEU⁶¹. Other provisions that are similarly shaped by the principle include the financial assistance mechanism for countries outside the euro zone in Art. 143 TFEU and the Art. 174-178 TFEU under TITLE XVIII of the TFEU which are concerned with economic, social and territorial cohesion⁶². It is only logical that the use of solidarity

⁵⁵ Domurath, *supra* note 7

⁵⁶ Campos Sánchez-Bordona, *supra* note 2, 60, Art. 3 III TEU.

⁵⁷ Domurath, *supra* note 7, 461.

⁵⁸ *Id.* 460.

⁵⁹ Iakovenko, *supra* note 37, 41.

⁶⁰ Case 263/82 *Klöckner-Werke AG v Commission of the European Communities* [1983] ECLI:EU:C:1983:373, 19.

⁶¹ „Versailles Declaration“ (11 March 2022) < <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf> > accessed 28 September 2024, 3.

⁶² Campos Sánchez-Bordona, *supra* note 2, 59.

increased considerably over time, especially so in cases before the CJEU after the Treaty of Amsterdam entered into force⁶³. Since then, solidarity was invoked in the areas of staff regulations, the value added tax as well as in agriculture, fisheries and transport⁶⁴. Art. 21 I TEU states that the Union's action on the international scene shall be guided by, inter alia, the principle of solidarity and according to Art. 24 II TEU, the common foreign and security policy shall be based on the development of mutual political solidarity among Member States.

AG Campos Sánchez-Bordona argues, that the concrete reference to the political dimension of the principle excludes its judicial application⁶⁵. This is to be endorsed, as the nature of the Common Foreign and Security Policy (CFSP) is one of intergovernmental character. The appeal of an EU principle can therefore only be addressed to those politically responsible to align their actions with the principles aims, but not as legal obligation.

Solidarity also played an interesting role in the combatting of the European debt crisis. There is arguably no other field of law, whose functioning is shaped so fundamentally by the principle of non-solidarity than the Economic and Monetary Union. Interestingly, this is where Member States provided significant assistance to struggling Member States. The legal basis for such assistance is found in Art. 122 TFEU. Art. 122 I TFEU provides that MS have to act in spirit of solidarity between Member States when adopting measures to resolve economic difficulties. The correct legal basis for measures which allow the Union to provide financial assistance is Art. 122 II TFEU. However, such financial assistance is prohibited, at least if provided in a direct way, because of the no-bail-out clause of Art. 125 TFEU.

The policy field in which the Court so far made most notable use of the principle of solidarity is the common policy on asylum, immigration and external border control⁶⁶. The Geneva Convention Relating to the Status of Refugees, on which the European asylum system is built, already affirms in the fourth sentence of its preamble „that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation“⁶⁷. While solidarity is not mentioned by name „there is little doubt that the preceding statements are motivated by the principle of solidarity“⁶⁸.

Art. 67 II TFEU links the common policy on asylum, immigration and external border control with solidarity between Member States. Art. 80 TFEU is even more clear and states that the

⁶³ Schiek, *supra* note 6, 9 f.

⁶⁴ *Id.* 10; Barnard, C. 2010. “Solidarity and the Commission's ‘renewed social agenda’”. In *Promoting solidarity in the European Union*, Edited by: Ross, M. and Borgmann-Prebil, Y. 73 – 105. Oxford: Oxford University Press (as cited in Domurath, *supra* note 7, 464).

⁶⁵ Campos Sánchez-Bordona, *supra* note 2, 97.

⁶⁶ Campos Sánchez-Bordona, *supra* note 2, 68.

⁶⁷ Convention relating to the Status of Refugees (189 U.N.T.S. 150, entered into force April 22, 1954). United Nations. 1951.

⁶⁸ Marco Balboni, „Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy“ (E-International Relations, March 29, 2021), < [https://www.e-ir.info/2021/03/29/subsidiarity-versus-solidarity-eu-asylum-and-immigration-policy/#:~:text=In EU policy on asylum,commitments by the member states.](https://www.e-ir.info/2021/03/29/subsidiarity-versus-solidarity-eu-asylum-and-immigration-policy/#:~:text=In%20EU%20policy%20on%20asylum,commitments%20by%20the%20member%20states.>) > accessed 28 September 2024.

policy in this field "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States". Nowhere else in the Treaties is there such an explicit reference to the financial dimension of solidarity, except for the Economic and Monetary Union, although in a negative dimension. The fact that asylum law is the natural subject of solidarity has been confirmed again by the mass displacement of many Ukrainians after the Russian invasion. At an informal meeting, the Heads of State or Government of the European Member States announced their intention to offer Ukrainian refugees temporary protection. They adopted the „Versailles Declaration“ and stated: „We commend European countries, notably at the borders with Ukraine, for showing immense solidarity in hosting Ukrainian war refugees. The EU and its Member States will continue to show solidarity and provide humanitarian, medical and financial support to all refugees and the countries hosting them“⁶⁹.

The huge importance of the principle of solidarity in this field was also apparent in recent judgements regarding "the admissibility of legally enforceable quotas for admitting refugees"⁷⁰, in the dimension of solidarity as a mutual obligation between Member States⁷¹. In 2015, exceptional migratory flows in the Mediterranean pushed frontline Member States, particularly Italy and Greece, to their limits⁷². One reason for this was the Dublin system, where typically the Member State of first entry is responsible for the examination of an asylum application. Because of the geographic reality, this risk of responsibility is unevenly distributed⁷³ and impacts Italy and Greece in particular. The result was, contrary to the aim of Art. 80 TFEU, that the Dublin system has become more of a burden-shifting mechanism than a burden-sharing one⁷⁴. Consequently, a crisis relocation mechanism was established.

The Slovak Republic and Hungary challenged this relocation mechanism and requested its annulment before the CJEU⁷⁵. The Court ruled that „the Council, when adopting the contested decision, was in fact required, to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States“⁷⁶. It further stated: „When one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between

⁶⁹ Versailles Declaration, *supra* note 61, 2.

⁷⁰ Schiek, *supra* note 6, 11.

⁷¹ Schiek, *supra* note 6, 11.

⁷² Joined Cases C-643/15 *Slovakia v Council*, C-647/15 *Hungary v Council* [2017] ECLI:EU:C:2017:631, 2.

⁷³ Schiek, *supra* note 6, 15.

⁷⁴ Balboni, *supra* note 68; European Commission, „Proposal for a Regulation of the European Parliament and of the Council establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-country National or a Stateless Person (Recast)“ COM/2016/0270 final/2.

⁷⁵ Joined Cases C-643/15 *Slovakia v Council*, C-647/15 *Hungary v Council*, *supra* note 72, 1.

⁷⁶ *Id.* 252.

all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy⁷⁷.

The Court has therefore used solidarity as a judicially enforceable principle to ensure the fair sharing of responsibilities between the Member States. The same could apply in the field of energy. From the analysis of the principle in its application in specific areas of EU law emerges, for its application in the relationship between Member States, that it amounts to the fair sharing of responsibility in pursuit of the common goal of solving a crisis even if that might particularly affect certain Member States.

However, it should be clear by now that even if certain characteristics of solidarity are established, a correct analysis of the principle is only possible in the context in which it is used. A uniform interpretation of the principle that makes it universally applicable does not exist. Therefore, the next Chapter examines the principle of solidarity in the field of energy.

B. The principle of solidarity in the field of energy

It was only with the Treaty of Lisbon in 2009, when Art. 194 TFEU was inserted into the TFEU, that the EU got its own express legal basis in primary law for its own energy policy⁷⁸. Herein lies the basis for the principle of solidarity in the field of energy or rather the „spirit of solidarity between Member States" as the wording of the article reads. The same expression can be found in Art. 122 TFEU, the legal basis for measures „if severe difficulties arise in the supply of certain products, notably in the area of energy". So far, it is „the first and only legally binding principle of EU energy law that can clearly and explicitly be identified from EU legal sources"⁷⁹.

It is striking, that like many other advancements in the field of energy, the inclusion of this principle is the prominent result of the efforts of Poland and other Baltic States, who used their influence in the European Council to anchor the principle in the Treaty⁸⁰, even going so far as to threaten to make use of their veto right⁸¹.

The timing of its introduction is no coincidence and seems to play out in a dance with Russia's flow of energy supply, Russia being the other major player shaping the European energy policy from the outside. Russia had several disputes with Belarus and Ukraine over oil and gas prices as well as transit fees and restricted its supply of oil and gas towards the EU several times in the 2000s⁸². The energy supply through a transit pipeline in Ukraine was stopped in the winter of

⁷⁷ *Id.* 291.

⁷⁸ Case C-490/10 *Parliament v Council* [2012] ECLI:EU:C:2012:525, 66.

⁷⁹ Huhta, Reins, *supra* note 14, 772.

⁸⁰ Thomas Lübbig, „Solidarität energisch vertreten" [2021] *EuZW* 737, 738.

⁸¹ Kim Talus, „The interpretation of the principle of energy solidarity - A critical comment on the Opinion of the Advocate General in OPAL" (2021) *OIES*, 1f.

⁸² Charlotte Kreuter-Kirchhof, „Europäische Energiesolidarität – Wege zur Vorbeugung und Bewältigung schwerer Energieversorgungskrisen in der EU" [2022] *NVwZ* 993, 994.

2005/2006⁸³, as well as in 2009 and restricted in 2006⁸⁴, while the supply through Belarus' Druschba pipeline was stopped in 2007⁸⁵. In comparison, central Europe was not as harshly affected by those interruptions as the eastern European Member States, which is the reason why they used their weight to ensure the codification of the principle of solidarity⁸⁶. The principle therefore emerged from a „strong political background“⁸⁷.

Poland, through its then prime minister Donald Tusk, used the next confrontation with Russia to advance its goals for the European energy policy in 2014, when the confrontation between Russia and Ukraine escalated and Russia annexed Ukraines' peninsula Crimea. Tusk called for an „Energy Union“, again „motivated by concern for the security of Europe's energy supplies“⁸⁸. It is this Energy Union in conjunction with a broad interpretation of the principle of solidarity that could become an important driver for the further development of the European energy policy, as will be shown later. At the time, the idea of the Energy Union was picked up by Jean-Claude Juncker who referenced it at his inaugural speech as one of the ten policy priorities for his Commission⁸⁹.

Since then, the concept has prevailed and was recently reinforced by a Council Conclusion that called for the achievement of „a genuine energy union, by securing the supply of abundant, affordable and clean energy, that serves the dual objective of pursuing European energy sovereignty and climate neutrality“⁹⁰. The Council Conclusion describes the development of the concept, which reaches beyond just energy security. Energy policy is also relevant in the context of climate policy and it is the principle of solidarity that has the potential to interconnect energy policy with other policy areas.

The basis for this interconnection is found in Art. 194 I TFEU which describes the objectives of the European energy policy: ensuring the functioning of the energy market, ensuring security of energy supply in the Union, promoting energy efficiency and energy saving and the development of new and renewable forms of energy, and promoting the interconnection of energy networks.

These broad objectives stand in stark contrast to the right established by Art. 194 II TFEU, which gives the Member States the right to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of their energy

⁸³ Jörg Gundel Bayreuth, „Der Grundsatz der Energiesolidarität als justiziable Vorgabe des europäischen Energierechts“ [2021] EuZW 758, 760.

⁸⁴ Kreuter-Kirchhof, *supra* note 82.

⁸⁵ FAZ Nr. 8 v. 10.1.2007, 1-3, 13 (as cited in Gundel Bayreuth, *supra* note 83.)

⁸⁶ Kreuter-Kirchhof, *supra* note 82.

⁸⁷ Talus, *supra* note 81, 1.

⁸⁸ Georg Zachmann, „The European Energy Union: Slogan or an important step towards integration?“ (bruegel, September 17, 2015), < <https://www.bruegel.org/blog-post/european-energy-union-slogan-or-important-step-towards-integration> > accessed 28 September 2024.

⁸⁹ Marie Vandendriessche, „The Road to the Energy Union“ (FSR, December 11, 2017), < <https://fsr.eui.eu/road-energy-union/> > accessed 28 September 2024.

⁹⁰ European Council, „Conclusions – 17 and 18 April 2024“ (2024) EUCO 12/24.

supply. The goals of the Energy Union and the sovereign energy rights of the Member States form the two opposing poles of energy policy and are in constant conflict. Others have already explained that the Member States reluctance to centralize the competence of energy security at the EU level is in fact weakening energy security in times of crisis⁹¹, because it is more difficult to achieve a concerted response.

The principle of solidarity, which builds the foundation for the European energy policy, was largely characterized not as a legal principle, but as „policy guidance“⁹² or a „programmatic statement“⁹³ with only „limited judicial impact“⁹⁴ lacking „a concrete definition“⁹⁵. Kotzur saw it as a „declaratory emphasis on the mutual assistance clause of Art. 222 TFEU“⁹⁶, while Callies attested the principle slightly more merit as a „procedural solidarity obligation in the form of mutual information, consultation and coordination“⁹⁷.

The General Court and subsequently the CJEU unexpectedly gave the principle of solidarity a powerful new direction in their OPAL judgements by finding the principle judicially enforceable, completely shaking up the former understanding of the principle. Among the relevant actors that make up the background of the case are the European Commission, Germany and again Poland and Russia, the two important forces in EU energy policy.

Starting point for the OPAL judgement of the CJEU was the Ostseepipeline-Anbindungsleitung (OPAL), which is part of the onshore extension of the Nord Stream 1 pipeline, and started operations in 2011⁹⁸. The pipeline, operated by the Gazprom group, brings Russian gas from the Baltic Sea to the German grid, at the shore close to Greifswald⁹⁹. The OPAL pipeline then transports the gas southwards to the Czech Republic¹⁰⁰.

Gazprom was initially only allowed to use 50 % of the pipeline capacity while the other 50 % remained unused, as Gazprom did not implement the gas release program pursuant to the first Commission decision¹⁰¹. In 2013, Gazprom applied for an amendment of the first decision in order to get the rights to use the whole pipeline capacity under Article 36 of Directive 2009/73,

⁹¹ Mišík, Nosko *supra* note 5, 1.

⁹² Katja Yafimava, „The OPAL Exemption Decision: a comment on the Advocate General’s Opinion on its annulment and its implications for the Court of Justice judgement and OPAL regulatory treatment“ (2021) OIES, 2.

⁹³ Ruven Fleming, „A legal perspective on gas solidarity“ (2019) 124 Energy J. 107.

⁹⁴ Talus, *supra* note 37, 280.

⁹⁵ Fleming, *supra* note 93, 107.

⁹⁶ S. M. Kotzur, in: Geiger/Khan/Kotzur (Hrsg.), 6. Aufl. 2017, Art. 194 AEUV, Rn. 2 (as cited in Sölter, *supra* note 16, 135 f.)

⁹⁷ Calliess in Calliess/Ruffert/Calliess, 6. Aufl. 2022, AEUV Art. 194 Rn. 6.

⁹⁸ Campos Sánchez-Bordona, *supra* note 2, 15.

⁹⁹ *Id.* 17.

¹⁰⁰ Talus, *supra* note 81, 2.

¹⁰¹ Campos Sánchez-Bordona, *supra* note 2, 17.

which governs the internal market for natural gas¹⁰². The Bundesnetzagentur, the competent national authority, after getting approval by the Commission, approved the application in 2016. This allowed Gazprom to use the whole capacity of the OPAL pipeline if no third-party demand was registered¹⁰³.

However, OPAL as well Nord Stream 1, were politically opposed since their announcement in 2005¹⁰⁴. Poland, the Baltic States and Sweden were concerned that the pipeline could alter the energy supply landscape. The pipelines made it possible to circumvent existing transit routes, leading to lower transit volumes and therefore transit fees¹⁰⁵.

Poland, joined by Latvia and Lithuania, opposed the exemption decision before the General Court, arguing that it could weaken the energy security of the country and undermine the diversification of sources of supply of gas¹⁰⁶.

It raised six arguments in its case, the first being that Article 36 I a) of Directive 2009/73/EC and Article 194 I b) TFEU, in conjunction with the principle of energy solidarity were infringed¹⁰⁷. The General Court considered only the first plea, upholding it and annulling the Commission's decision. It found that the Commission didn't examine the impact of the decision on Poland, violating the principle of solidarity¹⁰⁸.

Germany then appealed the judgement without support from the European Commission, making it the first time Germany and Poland faced each other directly as parties in the proceedings before the CJEU¹⁰⁹. Germany argued on five grounds of appeal, the first of which, that the principle of energy solidarity is a political, not legal principle. Therefore, it cannot create rights and obligations for the European Union and for the Member States¹¹⁰. In any case, the principle would be binding on the EU legislature alone, not the Member States¹¹¹. Another ground of appeal was that the principle of solidarity does not entail a general obligation, it constitutes merely a duty to assist in the event of a disaster or crisis according to Art. 3 III TEU in conjunction with Art. 222 TFEU¹¹².

The Court did not follow the arguments made by the appellant. It understands the principle of solidarity as the „basis of all of the objectives of the European Union's energy policy, serving as

¹⁰² Case C-848/19 P, *supra* note 1, 11.

¹⁰³ *Id.* 15; Talus, *supra* note 81, 2.

¹⁰⁴ Sölter, *supra* note 16, 131.

¹⁰⁵ Mišík, Nosko *supra* note 5, 2.

¹⁰⁶ Case T-883/16 *Poland v Commission* [2019] ECLI:EU:T:2019:567, 51.

¹⁰⁷ Campos Sánchez-Bordona, *supra* note 2, 28.

¹⁰⁸ *Id.* 30.

¹⁰⁹ Gundel Bayreuth, *supra* note 83, 759.

¹¹⁰ Campos Sánchez-Bordona, *supra* note 2, 3, 87.

¹¹¹ *Id.* 90.

¹¹² Case C-848/19 P, *supra* note 1, 55, 57.

the thread that brings them together and gives them coherence¹¹³, confirming the view of the Advocate General. It agrees with the General Court and upholds „that 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 common interest of the European Union and the policies pursued by it¹¹⁴.

The neglected assessment by the Commission would first need to carry out an examination of the impact on the security of supply in Poland. Second, it must examine what the medium-term consequences, inter alia for the energy policy of the Republic of Poland, might be of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported via the Yamal and Braterstwo pipelines¹¹⁵. Lastly, it must balance those effects against the increased security of supply that it had observed at EU level.¹¹⁶

However, „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 field¹¹⁷.

The judgements makes the case that the principle of solidarity „can be relied on in matters of EU energy policy in the context of the establishment and functioning of the internal market in natural gas“, even if secondary law refers to the principle. The Court seems to agree with the Advocate General that „the principle of energy solidarity is justiciable (...) 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 established¹¹⁸.

This could have implications for the application of the principle of solidarity in more policy fields than just energy policy, where solidarity could become justiciable as a general principle.¹¹⁹ This possibility has resulted in controversy in the literature. Sölter writes that, while „solidarity may be anchored or emphasized many times in the European Treaties“, "not every political topos, not every structural feature and not every sector specific principle is at the same time a general legal principle¹²⁰. This new interpretation of the principle of solidarity collides with the general duty of competent authorities, applying the relevant secondary law. Now, they might also

¹¹³ *Id.* 43.

¹¹⁴ *Id.* 49.

¹¹⁵ *Id.* 21.

¹¹⁶ *Id.*

¹¹⁷ *Id.* 73.

¹¹⁸ *Id.* 46; Campos Sánchez-Bordona, *supra* note 2, 99.

¹¹⁹ Sölter, *supra* note 16, 131; Max Münchmeyer, „The principle of energy solidarity: Germany v. Poland“ (2022) 59 *Common Mark. Law Rev.* 915, 931.

¹²⁰ Sölter, *supra* note 16, 136.

have to consider „general legal principles, values and policy objectives of the EU“, such as „the social or sustainability objectives of primary law“¹²¹.

The Court also hints in this direction in a recent judgement concerning state aid for Hinkley Point C, a British nuclear power station. In this judgment, the Court ruled that „the requirement to preserve and improve the environment, expressed in both the Charter and the TFEU“, as well as principles which flow from it, apply in the nuclear energy sector¹²². The Court accepted that 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“¹²³.

Although the OPAL decision refers only to the field of energy policy, the characterization of the principle of solidarity as a general principle in combination with the judgment regarding Hinkley Point C indicate, that the principle of solidarity will play a more important role in future cases.

It is no surprise that the Advocate General also defends the broad interpretation of the principle of solidarity and argues that the Treaties have constitutional status with normative value¹²⁴. Even the critical voices agree with his opinion, stating that „[w]ithout the judicial development of general legal principles, the Union as a legal community would hardly be conceivable“¹²⁵. However, this would require a level of legal certainty, making the application of those principles predictable, which the principle of solidarity is lacking¹²⁶. The Member States authorities are not equipped to apply a relatively unconfined principle¹²⁷. The issues this raises will be discussed in more detail later.

Solidarity, according to the judgement of the CJEU, has several dimensions. The first dimension concerns the obligations between the EU and Member States, which is the „vertical axis of solidarity“¹²⁸. This axis will be discussed only briefly, as the main focus of this contribution lies on the effects of solidarity between Member States.

The European Commission argued that the principle of solidarity applies only to the EU legislator when adopting secondary legislation. The Commission as an executive body should only be bound by secondary law¹²⁹, using the principle of solidarity in the interpretation of that law¹³⁰.

¹²¹ Lübbig, *supra* note 80, 738.

¹²² Case C-594/18 P *Republic of Austria v European Commission* [2020] ECLI:EU:C:2020:742, 42.

¹²³ *Id.*46.

¹²⁴ Campos Sánchez-Bordona, *supra* note 2, 71.

¹²⁵ Sölter, *supra* note 16, 135; Lübbig, *supra* note 80, 738.

¹²⁶ Sölter, *supra* note 16, 135.

¹²⁷ Lübbig, *supra* note 80, 738.

¹²⁸ Münchmeyer, *supra* note 119, 927.

¹²⁹ Sölter, *supra* note 16, 137; Case T-883/16 *supra* note 106, 65.

¹³⁰ Sölter, *supra* note 16, 137; Case T-883/16 *supra* note 106, 65.

This argument was rejected by both the GC and the CJEU. They emphasized „that acts adopted by the EU institutions, including by the Commission under that policy, must be interpreted, and their legality assessed, in the light of the principle of energy solidarity“¹³¹. This is plausible, as it is only natural that the provisions and principles of the Treaties bind the EU legislature as well as the Commission, and that the Commission „should also be bound by principles to which the Union itself is bound“¹³².

While this is clear in principle, the broad interpretation of the principle becomes an issue for its application by the Commission. As the CJEU noted, the Commission had failed to examine what the medium-term consequences might be, *inter alia*, for the energy policy of the Republic of Poland. The use of the term „*inter alia*“ suggests that such an assessment is mandatory at least for Member States „making a complaint i.e. Poland, Latvia and Lithuania in the OPAL case“¹³³, and means the Member States directly impacted by the decision. Another interpretation could be that an assessment for each of the 27 Member States and the Union as a whole is necessary, although this would be an enormous task¹³⁴. However, the Court’s judgement implies such an expansive assessment when it states that „Member States, in the exercise of their respective competences in respect of EU energy policy, [have] to take into account the interests of all stakeholders liable to be affected“¹³⁵. Since EU policy and law has become such an „interconnected system in which no Member State can decide on its energy policy completely unencumbered by Union energy legislation[, a]lmost any such decision has some effect on other Member States“¹³⁶, which would therefore be impacted. It is obvious that such a wide obligation would entail a conflict with the Member States’ rights under Art. 194 II TFEU. While the Commission is certainly required to integrate solidarity into its assessments more rigorously now, the Court should clarify the criteria for the assessment following from the application of the principle of energy solidarity¹³⁷.

The second and in this case more important axis is the „horizontal axis of energy solidarity“, which means the application of the principle between Member States¹³⁸. While the application between the EU and Member States finds its origin in the nature of solidarity being an EU principle, the basis for the horizontal axis is rooted in the wording of Art. 194 I TFEU. According to this provision, the Union policy on energy shall have regard to a spirit of solidarity between Member States.

¹³¹ Case C-848/19 P, *supra* note 1, 44.

¹³² Johannes Nohl, Nick Paprotny, „Grundsatz der Solidarität im Energiesektor – Eine neue Prüfungspflicht im Rahmen von Kommissionsentscheidungen“ [2020] IR 84, 86.

¹³³ Yafimava, *supra* note 92, 4.

¹³⁴ *Id.*

¹³⁵ Case C-848/19 P, *supra* note 1, 71.

¹³⁶ Münchmeyer, *supra* note 119, 915.

¹³⁷ Yafimava, *supra* note 92, 4.

¹³⁸ Münchmeyer, *supra* note 119, 927.

Interestingly, this dimension has gone through several changes through the course of the judgements and the Opinion of the Advocate General. The General Court noted that the principle must be taken into account by Member States and consequently the national authorities, in so far as a decision is rooted in European law¹³⁹. On the other hand, the Advocate General refused to elaborate on the horizontal axis, stating that „the present dispute is confined to the judicial review of a Commission decision, it is not necessary, in order to settle it, to analyse the implications of that principle in relation to the (unilateral or mutual) actions of the Member States but only in relation to its binding force on the Commission“¹⁴⁰. This coincides with the headline of the German press release of the CJEU, which reads „Die Rechtmäßigkeit aller Handlungen der Unionsorgane im Bereich der Energiepolitik der Union ist anhand des Grundsatzes der Energiesolidarität zu beurteilen“¹⁴¹ and means that the legality of acts in the field of energy policy adopted by the EU institutions must be assessed in the light of the principle of energy solidarity. What this headline neglects, is that the Court indeed agrees with the view of the General Court and extended the scope of the principle of energy solidarity to the Member States. Member States are therefore „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“¹⁴².

As explained before, the principle is not confined to the legislature, but also applies to national authorities. Sölter aptly expresses concern for the broad wording of the Court, explaining that there is no connection to specific energy law regulation necessary from the wording of the decision, which is why „a regional authority must deal with the judgment when issuing a planning decision if the decision may have an impact on the cross-border energy market“¹⁴³.

If read carefully, the scope of the principle of solidarity is even wider, as the Court does not contain its obligations to energy policy, rather binding Member States in all Union policies¹⁴⁴. This is remarkable and gives authorities a new task for which they are not well equipped¹⁴⁵. The principle of solidarity now requires far more from national authorities than just the interpretation of secondary law in the light of a primary law.

National authorities have to carry out an examination of primary law on their own, without clear criteria they can apply¹⁴⁶. This new area of application of a principle deriving from primary law

¹³⁹ Nohl, Paprotny, *supra* note 132, 918; Case T-883/16 *supra* note 106, 77, 72.

¹⁴⁰ Campos Sánchez-Bordona, *supra* note 2, 102.

¹⁴¹ Gerichtshof der Europäischen Union „PRESSEMITTEILUNG Nr. 129/21“ (July 15 2021) < <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210129de.pdf> > accessed 28 September 2024.

¹⁴² Case C-848/19 P, *supra* note 1, 49.

¹⁴³ Sölter, *supra* note 16, 137.

¹⁴⁴ Case C-848/19 P, *supra* note 1, 49.

¹⁴⁵ Lübbig, *supra* note 80, 738.

¹⁴⁶ *Id.*

without further concretization leads to many open questions and issues. The first of which is a conflict with the principle of legal certainty¹⁴⁷.

The principle of legal certainty is a general principle of EU law of its own and „requires that rules applicable to individuals must be clear and precise and that their application must be foreseeable by those subject to them“¹⁴⁸. The Advocate General recognized the issue and mentioned the difficulty to apply the principle of solidarity¹⁴⁹. However, this has not prevented the CJEU from leaving the authorities alone with the question of which material standards are used for the required solidarity test¹⁵⁰. The conflict with the principle of legal certainty arises in all dimensions of the solidarity principle¹⁵¹, but especially so with regard to the Member States.

Some authors, as well as the Advocate General, argue for a limited judicial review of the application of the principle of solidarity, which fits into the established framework of discretion and balancing applied by competent authorities¹⁵². Both, EU institutions and Member States maintain considerable discretion in how they apply the principle within their respective competences¹⁵³. In this case, the decision of a national authority would be subject to a review of potential errors in judgement by the courts, which is not a high threshold for the authorities to pass¹⁵⁴. If they did not fail to take the principle into account and a balancing of interests took place, the courts can't render the authority's decision invalid on the grounds that it breached primary EU law¹⁵⁵. Kreuter-Kirchhof categorizes the obligation in the same way¹⁵⁶.

This has been criticized, because it would „largely exclude meaningful judicial control“ in the absence of clear criteria for the application of the principle and therefore violate the right to effective judicial protection¹⁵⁷. It is argued that the limited judicial control bears resemblance to the principle of subsidiarity. However, there lies a difference in the respective addressee of the principles. The principle of subsidiarity is intended to guide the legislature, while the principle of solidarity has direct consequences for private persons, which is the reason why a „limited review approach appears entirely unsatisfactory“¹⁵⁸. On the other hand, while clear criteria for the

¹⁴⁷ Sölter, *supra* note 16, 137; Lübbig, *supra* note 80, 738.

¹⁴⁸ Talus, *supra* note 81, 8.

¹⁴⁹ Campos Sánchez-Bordona, *supra* note 2, 111.

¹⁵⁰ Sölter, *supra* note 16.

¹⁵¹ Talus, *supra* note 81, 7.

¹⁵² Nohl, Paprotny, *supra* note 132, 86.

¹⁵³ Gundel Bayreuth, *supra* note 83, 763.

¹⁵⁴ Nohl, Paprotny, *supra* note 132, 86.

¹⁵⁵ Nohl, Paprotny, *supra* note 132, 86.

¹⁵⁶ Kreuter-Kirchhof, *supra* note 82, 996.

¹⁵⁷ Talus, *supra* note 81, 8.

¹⁵⁸ *Id.* 9.

proper application of energy security are necessary, and the inability of the Court to outline them more clearly is regarded as a failure¹⁵⁹, it is not uncommon that decisions by authorities with more profound technical knowledge is not subject to a complete judicial review. Those affected by the decision don't lose their rights and can still challenge the plausibility of the decision before a court. The integration of the solidarity test into the framework of discretion is sensible and takes weight off the criticism, that the interpretation of the principle of solidarity is too broad and imprecise for its application. The Court has not yet taken a clear stance on the issue. In any case, the judgement has the „potential to open up a Pandora's box of situations where the principle of energy solidarity may suddenly come into play and require new interpretations of existing rules and practices“¹⁶⁰, which can go in two directions. In a specific case, the application of the principle can either result in a Member State enforcing its own energy interests over those of the EU, using the principle and the wide margin of discretion to assert its own energy interests. On the other hand, the broad interpretation of the principle could strengthen the aims of the EU Energy Union in line with Art. 194 I TFEU.

1. Solidarity as a tool to enforce national energy interests

The potential of the principle of solidarity to enforce national energy interests depends on the way national authorities apply the principle. The principle of solidarity now establishes a form of judicial review for the executive¹⁶¹, which enables national authorities to override a decision otherwise mandated by secondary law through the application of the solidarity test and by leveraging the balancing of interests in their favor. This raises the question how the authorities should act if „they are in doubt as to whether the result of their examination is in accordance with general legal principles, values and objectives of primary law“¹⁶². They could of course tread on safe ground and come to the conclusion that if secondary law allows or forbids a project or activity, it is automatically allowed by primary law as well. This would however hollow out the solidarity test¹⁶³ and result in „meaningless prose“¹⁶⁴. The other option would be a substantive examination of the principle, which leads to the shifting of fundamental political decisions into the administrative sphere¹⁶⁵, whose original task it is to implement those decisions,

¹⁵⁹ Yafimava, *supra* note 92, 6

¹⁶⁰ Talus, *supra* note 81, 5.

¹⁶¹ Sölter, *supra* note 16, 139 f.

¹⁶² Lübbig, *supra* note 80, 738.

¹⁶³ *Id.*

¹⁶⁴ Sölter, *supra* note 16, 130.

¹⁶⁵ *Id.*

not make them. Energy projects and the operation of gas pipelines in particular are inherently political, as demonstrated by the pervasive criticism of Nord Stream 2 by German allies¹⁶⁶.

The first possibility of misuse of the principle could be as a means to weaken „the extent to which the EU can influence national energy policies“¹⁶⁷. Just as Member States are bound by solidarity, the EU is too and Member States could invoke the principle „to prioritize national interests over common EU goals and policies“¹⁶⁸. One possible way to use the solidarity test in this way is by claiming that energy and climate targets mandated by the EU are too much of a burden on the Member State and disproportionately affect its energy security or that they could lead to energy poverty¹⁶⁹. Member States could use this argument to justify national energy projects that are contrary to Union targets and underpin it by invoking their energy sovereignty according to Art. 194 II TFEU.

In relation to other Member States, there are two levers available to national authorities to impose their will. First, the Court has recognized „that 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“¹⁷⁰. This means that negative impacts on one Member State could be overcome with sufficiently serious counter-interests of the obliged Member State in the balancing of those interests¹⁷¹.

The second opportunity for misuse lies in the very reason that authorities have to balance their own interests with those of other Member States. The interests involved are extremely broad and undefined. The Court ruled, that „Member States, in the exercise of their respective competences in respect of EU energy policy, [have] 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“¹⁷².

At first, the balancing of interests looks familiar and is reminiscent of a proportionality test¹⁷³. The important difference between the two is that the proportionality test usually weighs objectively determinable rights, while the solidarity test aims to balance interests¹⁷⁴. Interests are

¹⁶⁶ Tina Dolbaia, „Geopolitical Weapon or Commercial Venture? Politics and Economics of Nord Stream 2“ (SFS, November 29, 2021), < <https://ceres.georgetown.edu/research/student-projects/geopolitical-weapon-or-commercial-venture-politics-and-economics-of-nord-stream-2/> > accessed 28 September 2024.

¹⁶⁷ Münchmeyer, *supra* note 119, 929.

¹⁶⁸ Iakovenko, *supra* note 37, 45.

¹⁶⁹ Münchmeyer, *supra* note 119, 929.

¹⁷⁰ Case C-848/19 P, *supra* note 1, 73.

¹⁷¹ Sölter, *supra* note 16, 139.

¹⁷² Case C-848/19 P, *supra* note 1, 71.

¹⁷³ Sölter, *supra* note 16, 139.

¹⁷⁴ *Id.*

subjective and not objectively determinable¹⁷⁵. Combining this with the fact that the principle of solidarity is now judicially enforceable, the CJEU becomes an „arena for political disputes“ beyond what is inherent in its capacity as the highest court¹⁷⁶.

The procedural aspects of the case demonstrate this political dimension¹⁷⁷. It was Germany and not the Commission that appealed the General Court’s ruling. The case therefore leads to a direct confrontation of Member States before the Court¹⁷⁸. Direct disputes between Member States are rare and happen usually in the infringement proceedings of Art. 259 TFEU¹⁷⁹. In this case, the conflict is centered around the diverging national interests of Germany and Poland concerning the European gas market. Yafimava has argued that Poland, while defending national gas security, might disregard broader European energy security goals¹⁸⁰. Poland’s opposition to Nord Stream 2 and its efforts to limit the use of the OPAL pipeline could be seen as motivated by a desire to maintain its own position as a transit country, instead of serving European energy security¹⁸¹. The application of the principle of solidarity has led to potentially higher gas prices for European buyers, undermining the original aim of preserving and enhancing competition¹⁸². If the case is examined in this light, Poland has already used the principle in the OPAL case to further its national energy interests. The principle of solidarity has become instrumentalized to stop a politically opposed pipeline, despite possible improvements in security of supply and energy prices for the Union as a whole.

It is established by now that the Member States have to take into account the interests of all stakeholders liable to be affected by a decision¹⁸³ that is both the Member States and the European Union¹⁸⁴. The Member States are apparently obliged to consider more than the arguments a potentially impacted Member State submitted. This is supported by the fact that Poland participated in the proceedings and submitted written arguments, making it unlikely that the Commission disregarded its input¹⁸⁵. Authorities are consequently required not only to consider submitted information about potential threats to supply security as well as other interests, but must actively gather relevant information themselves as part of their official

¹⁷⁵ *Id.*

¹⁷⁶ Sölter, *supra* note 16, 138 f.

¹⁷⁷ Gundel Bayreuth, *supra* note 83, 759.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Katja Yafimava, „The OPAL Exemption Decision: past, present, and future“ (2017) OIES 28.

¹⁸¹ *Id.*

¹⁸² Yafimava, *supra* note 180, 28.

¹⁸³ Case C-848/19 P, *supra* note 1, 71.

¹⁸⁴ Campos Sánchez-Bordona, *supra* note 2, 102.

¹⁸⁵ Sölter, *supra* note 16, 138.

investigation¹⁸⁶. In practice this would entail that the authorities of one Member State will be tasked with objectively determining another Member States energy policy interests¹⁸⁷. The selectivity of authorities in the identification and prioritization of interests can significantly influence the outcome of a decision.

Another issue is that interests are inherently broad, subjective, and prone to change. This raises the question whether the decision should only concern the potentially undisclosed interests of, in this case, the Polish government. The government's interests may not necessarily align with the broader energy policy goals of the European Union, for example regarding the expansion of renewable energy. In this case, should the national authority exclusively consider the national interests of another Member State or should the assessment be based on its interests in line with the obligations deriving from European law and other general policy aims? Several authors have argued in favor of the second possibility, although not directly addressing this issue¹⁸⁸. Iakovenko writes „the key aspect of the solidarity test" should be „the consideration of broader EU goals [as they] can be a more reliable ‚benchmark’“¹⁸⁹. Sölter warns the authorities from determining the interests of another Member State themselves, recommending them to assess the solidarity test „pro forma“. He further hopes that the CJEU denies the existence of such an obligation¹⁹⁰. Nohl and Paprotny note that, in the future, longer decision-making processes are to be expected and that there may be an increase in consultations, at least with neighboring states.¹⁹¹ In order to make their interests heard, it may indeed lead to improved communication between the Member States. A tension between the obligation to properly apply the energy test and a potential assertion of national energy interests remains however.

2. Solidarity as a tool to strengthen EU energy aims

While there is a risk that Member States use the principle of solidarity to further their national energy interests, the principle of solidarity also has the potential to strengthen the energy objectives of the Union. Which one will be more consequential depends in part on who can first make effective use of the principle.

Solidarity in the field of energy is necessary to balance the national energy sovereignty of the Member States and to give the fractured energy landscape a level of coherence, benefitting everyone. The Court recognized this and said that energy solidarity is the thread that brings the Unions energy policies together¹⁹², therefore making up the bedrock of EU energy policy.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* 139.

¹⁸⁸ Yafimava, *supra* note 92, 3; Iakovenko, *supra* note 37, 40.

¹⁸⁹ Iakovenko, *supra* note 37, 40.

¹⁹⁰ E Sölter, *supra* note 16, 139.

¹⁹¹ Nohl, Paprotny, *supra* note 132, 86.

¹⁹² Case C-848/19 P, *supra* note 1, 43.

According to the court, the „principle can be relied on in matters of EU energy policy in the context of the establishment and functioning of the internal market in natural gas“¹⁹³. Initially, even though energy solidarity was understood as a political concept, it was mostly relevant for energy security and „does not feature at all in landmark energy sector decarbonisation legislation such as the Renewable Energy or Energy Efficiency Directives“¹⁹⁴. At first, it appears as if it is no different in the OPAL case. Iakovenko argues that Poland’s pleas in the OPAL case concern several different dimensions of security of supply¹⁹⁵. Especially regarding "the functioning of the Yamal and Braterstwo pipelines, Poland referred to the risk posed to the physical availability of supply and capacity, economic difficulties resulting from decrease in the transportation of natural gas, and threats associated with the lack of diversification of sources of gas supply“¹⁹⁶. All of these concerns are expressions of security of supply¹⁹⁷. Energy solidarity in connection with security of supply is „a very open-ended concept“ and „can be taken to mean anything and everything depending on the context and on the viewpoint of the person evoking it“¹⁹⁸. A broad interpretation is in part necessary, because no Member State „can achieve sustainable energy supply and security alone and a common market on which only some members have energy cannot work“¹⁹⁹. To ensure the effective operation of the internal market, it is essential to consider supply conditions beyond individual Member States, especially as the integration of energy networks advances²⁰⁰. The broad interpretation of the principle of solidarity, supported by the Advocate General that energy solidarity goes beyond mere security of supply²⁰¹, opens the door „for a much more muscular solidarity jurisprudence“²⁰². The Court established solidarity not just within the four pillars of Art. 194 I TFEU, but also in a „cross-sectoral axis“ between the objectives of Art. 194 I TFEU²⁰³. Through this interconnection, energy policy now plays a much larger role in many different policy areas, from security and economic policy to climate policy, depending on the angle from which you approach it²⁰⁴.

¹⁹³ Case C-848/19 P, *supra* note 1, 46.

¹⁹⁴ Münchmeyer, *supra* note 193.

¹⁹⁵ Iakovenko, *supra* note 37, 43.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Talus, *supra* note 81, 8

¹⁹⁹ Mišik, Nosko, *supra* note 5, 4.

²⁰⁰ *Id.*

²⁰¹ Campos Sánchez-Bordona, *supra* note 2, 129.

²⁰² Münchmeyer, *supra* note 119, 916; Münchmeyer, *supra* note 193.

²⁰³ Münchmeyer, *supra* note 119, 927, 930.

²⁰⁴ Bartenstein, *supra* note 9.

The most promising potential for interconnections with energy policy have environmental protection and climate policy²⁰⁵. The Energy Union is a cornerstone of the European Green Deal that is a priority of von der Leyen's Commission²⁰⁶. This Energy Union builds on the concept and the interconnection of different dimensions: energy security, sustainability and competitiveness²⁰⁷. This „interrelated, holistic approach“ is „an attempt to push past the silo mentality that has traditionally characterized the EU's energy policy“²⁰⁸. Solidarity could now establish a „binding obligation with Union-level targets for renewable energy or energy efficiency“²⁰⁹.

It could be used to ensure that every Member State carries its burden and does not free ride on the back of other Member States to reach decarbonization goals and „achieve pan-European targets for greenhouse gas reduction, renewable energy, and energy efficiency“²¹⁰. In this case, the Commission or another Member State could utilize the newly judicial principle of solidarity to take legal action and bring the Member State before the Court to ensure it provides its fair contribution²¹¹. The Union would gain a tool to better assert its energy objectives through the Commission. However, tensions with Art. 194 II TFEU arise here as well²¹².

Part II: The principle of solidarity shaping secondary law in the field of energy

The idea of the Schuman Declaration that Europe will be built through concrete achievements that first create a de facto solidarity, which in turn creates a unified Europe²¹³, applies to the field of energy too. However, energy policy has its own logic, which is why the concept applies here in a peculiar way. In the field of energy, de facto solidarity is the premise and not the result of concrete achievements and the original meaning of the declaration therefore turned on its head. The original meaning is aimed at the fact that the Member States become factually dependent on each other through a legally created bond. Because of Art. 194 II TFEU, according to which the Member States are in principle responsible for their own energy mix and supply, this bond does not exist in the field of energy. In times of crisis, as exemplified by the recent gas crisis, this factual independence of the Member States is disadvantageous and cannot be upheld. As a result, solidarity is necessary by requiring a mutual reaction to deal with the consequences of that crisis.

²⁰⁵ Campos Sánchez-Bordona, *supra* note 2, 82.

²⁰⁶ Münchmeyer, *supra* note 193; Münchmeyer, *supra* note 119, 926.

²⁰⁷ Vandendriessche, *supra* note 89.

²⁰⁸ *Id.*

²⁰⁹ Münchmeyer, *supra* note 193

²¹⁰ Münchmeyer, *supra* note 119, 928.

²¹¹ Münchmeyer, *supra* note 193; Athir Nouicer, Anne-Marie Kehoe, Jana Nysten, Dörte Fouquet, Leigh Hatcher, Leonardo Meeus, „THE EU CLEAN ENERGY PACKAGE (2020 ed.)“ (2020) European University Institute, 24.

²¹² Talus, *supra* note 81, 5; Nouicer, Kehoe, Nysten, Fouquet, Hatcher, Meeus, *supra* note 218, 24.

²¹³ Fondation Robert Schuman, *supra* note 4.

In the field of energy, de facto solidarity is therefore the bedrock of the creation of concrete achievements, that is tools to deal with the crisis.

On the other hand, the original meaning of the Schuman Declaration is still partly true, as this de facto solidarity is enabled by an interconnected energy grid and pipelines that reach beyond the borders of a single Member State. This infrastructure enables them to assist each other, through, for example, a transfer of gas from one Member State to another. This also highlights that the reaction to a crisis requires precautions to be taken in normal times. Union law establishes this infrastructure and provides for solidarity even in normal times, which will be examined in II.B.1. However, it will become apparent that solidarity, even if provided for in the general energy framework, only becomes relevant in times of crisis, serving as the last resort in case all other measures have failed. However, efficient action is only possible once the required infrastructure is in place. How exactly action in crisis operates and how it is shaped by solidarity will be analyzed in II.B.2. Art. 122 I TFEU served as the legal basis for the crisis response in 2022, which sparked lots of criticism²¹⁴. Legislation in energy law is usually based on Art. 194 I TFEU, which could have served as a legal basis too. Therefore, it is important to delimit the scope of application of these two legal bases first (II.A)

A. Delimitation of Art. 194 and Art. 122 TFEU: Solidarity in regular times and in crisis

The EU responded swiftly to the energy crisis triggered by Russia's war of aggression. The response package was called „REPowerEU“ and introduced five regulations to address energy shortages and high prices, complementing the „Fit for 55“ package²¹⁵. The REPowerEU package consists of:

- Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas²¹⁶,
- Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices²¹⁷,
- 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 borders²¹⁸,

²¹⁴ Markus Ludwigs, „Unionsrechtliche Rahmensetzungen zur Bewältigung der Energiekrise Die EU-Notfallkompetenz auf dem Prüfstand“ [2024] EuZW-Sonderausgabe 16.

²¹⁵ *Id.*

²¹⁶ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L 206, 1.

²¹⁷ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L 261I, 1.

²¹⁸ 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 L 335, 1.

- Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy²¹⁹ and
- Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices²²⁰.

Those efforts are supported by Regulation (EU) 2022/1032²²¹ with regard to gas storage. These six measures address the energy crisis in various ways. Interestingly, the general response to energy crises has remained largely similar over time. The oil price crisis of the 1970s has provoked very similar reactions compared to today²²². Four measures were taken at the time: spatial reorganization of the energy supply by stockpiling and strengthening so-called domestic resources, internal energy savings, strengthening international cooperation and diversification of energy supply externally²²³. In the current gas crisis, the legislator has resorted to the repertoire of the oil price crisis: stockpiling (Regulation 2022/1032), energy savings (Council Regulation 2022/1369), diversification of energy sources (Council Regulation 2022/2576) and strengthening domestic energy sources (Council Regulation 2022/2577). However, the current gas crisis also introduced new measures to the repertoire: direct interventions in price-setting mechanisms (Council Regulation 2022/1854) and the imposition of taxes on extraordinary profits due to the crisis (Council Regulation 2022/2578) as well as a preference for renewable energies over coal and nuclear energy²²⁴. Little has changed in terms of the strategy for managing an energy crisis, however there is a stronger emphasis on solidarity and the aspect of burden-sharing today.

The reason for this is „that the increasing cross-border dependency resulting from the advancing internal energy market requires mutual trust, solidarity and faith in the functioning of the markets“²²⁵. Shortages in energy supply are no longer contained to one Member State and can impact other Member States²²⁶. Consequently, all these emergency regulations refer to solidarity, addressing concerns that „unilateral, uncoordinated measures could jeopardize the internal market and lead to significant distortions“²²⁷.

²¹⁹ Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L 335, 36.

²²⁰ 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 L 335, 45.

²²¹ 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 (Text with EEA relevance) [2022] OJ L 173, 17.

²²² Rike Sinder, Thilo Wiertz, „Energieversorgungssicherheit“ (2023) 42 NVwZ 552, 553.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Eva Neumann, Dominik Römling, „Die Notstandskompetenz des Art. 122 Abs. 1 AEUV und ihre Bedeutung in der Energieversorgungskrise“ (2024) 59 EuR 93, 127.

²²⁶ *Id.*

²²⁷ *Id.*

The REPowerEU package is based on two political initiatives that were adopted by the Commission. „The REPowerEU Communication and the REPowerEU Plan, which call for ‘Joint European Action for more affordable, secure and sustainable energy’“²²⁸. While the notion of solidarity appears in the REPowerEU Communication only once, the REPowerEU Plan „relies heavily on solidarity- related language“, both as a political and legal concept²²⁹.

All of the REPowerEU measures were based on Art. 122 I TFEU. However, both Art. 194 TFEU and Art. 122 TFEU could potentially serve as the legal basis. Art. 122 is predominantly used in crisis situations. As stated before, both provisions refer to the spirit of solidarity between Member States and it could therefore be irrelevant, which provision was actually used. However, five actions for annulment have been brought before the Court by different companies. They all have in common that they contend Art. 122 TFEU as the legal basis for the emergency measures²³⁰. Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices is especially controversial, as it allows Member States to impose a temporary solidarity contribution to collect surplus profits generated by Union companies and permanent establishments with activities in fossil fuels (Art. 14, 15, 16). Four actions for annulment were brought against this Regulation²³¹. Their argument is that the regulation reaches beyond the scope of Art. 122 TFEU, which allows for the intervention in the event of severe difficulties in the supply of certain products, but not fiscal measures that should be adopted unanimously on the basis of a special legislative procedure²³².

However, the admissibility of the cases is questionable²³³. The Regulation is a regulatory act, because it was not adopted through a legislative procedure in Art. 289 III TFEU. Acts like this can be challenged by legal persons without being individually concerned, as it is sufficient if it is of direct concern to them and does not entail implementing measures (Art. 263 IV Var. 3 TFEU). However, Regulation 2022/1854 requires exactly that²³⁴. While the aforementioned cases were brought by companies, Poland brought an action for annulment against Council Regulation (EU) 2022/1369 on coordinated demand-reduction measures for gas²³⁵. Poland also raises the point that Art. 122 I TFEU was not the correct legal basis and that the Council should have acted

²²⁸ Huhta, Reins, *supra* note 14, 783.

²²⁹ *Id.*

²³⁰ Ludwigs, *supra* note 214, 18.

²³¹ Case T-802/22: Action brought on 28 December 2022 — *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council* [2023] OJ C 54; Case T-759/22: Action brought on 2 December 2022 — *Electrawinds Shabla South EAD v Council* [2023] OJ C 71; Case T-775/22: Action brought on 12 December 2022 — *TJ and Others v Council* [2023] OJ C 54; Case T-803/22: Action brought on 30 December 2022 — *TZ v Council* [2023] OJ C 63; Case C-675/22: Action brought on 2 November 2022 — *Republic of Poland v Council of the European Union* [2023] OJ C 7

²³² Case T-759/22, Case T-775/22 Case T-803/22, *supra* note 231.

²³³ Ludwigs, *supra* note 214, 18.

²³⁴ Ludwigs, *supra* note 214, 18.

²³⁵ Case C-675/22, *supra* note 226.

unanimously²³⁶. Poland submits that the mandatory gas demand reduction of 15 % in the event of a Union alert²³⁷ infringes its rights under Art. 194 II TFEU. Therefore, the Regulation should have been adopted on the basis of Art. 192 II c TFEU, as referred by Art. 194 II TFEU. Interestingly, Poland also raises the issue of a breach of the principle of energy solidarity²³⁸. The case by Poland is admissible²³⁹.

These cases highlight the importance of a clear delimitation of the two legal bases. Furthermore, the legislative procedure and the manifestation of the principle of solidarity differ, which makes their delimitation all the more necessary.

1. Art. 194 TFEU

The Court has provided a good overview of Art. 194 TFEU in its judgement C-490/10 *Parliament v Council*. It stated „Article 194 TFEU, which is in Part Three of the TFEU, entitled ‘Union policies and internal actions’, and which alone constitutes Title XXI, headed ‘Energy’, provides in paragraph 1, that, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, European Union policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market, ensure security of energy supply in the European Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy and promote the interconnection of energy networks. Under the first subparagraph of Article 194(2) TFEU ‘[w]ithout prejudice to the application of other provisions of the treaties’, the Parliament and the Council are to establish the measures necessary to achieve those objectives by acting in accordance with the ordinary legislative procedure provided for in Article 294 TFEU, in the context of which the Parliament participates fully in the procedure“.²⁴⁰ „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“²⁴¹.

Pursuant to Art. 194 II TFEU „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)©“. The EU supports the Member States outside their domain of energy sovereignty, where the internal

²³⁶ *Id.*

²³⁷ Council Regulation (EU) 2022/1369, Art. 5 II.

²³⁸ Case C-675/22, *supra* note 226.

²³⁹ Ludwigs, *supra* note 214, 18.

²⁴⁰ Case C-490/10 *supra* note 78, 65.

²⁴¹ *Id.* 66.

energy market, by expanding energy supply across borders, leads to shared risks²⁴². This happens when cross border dependencies result in shared import dependencies and supply disruptions²⁴³. Art. 194 is the legal basis for all acts intended to allow the implementation of its objectives and that are typically preventive and permanent in nature²⁴⁴. However, this is subject to the beginning of Art. 194 II TFEU: „[w]ithout prejudice to the application of other provisions of the treaties“²⁴⁵. Those other provisions of the treaties encompass, inter alia, Art. 122 and Art. 170 TFEU. Art. 170 TFEU concerns the establishment and development of trans-European networks where the Union does not have the power to act independently, it has only the mandate to contribute. This complementary power should not be underestimated and „plays a central role in the context of Europe's digital future and within the framework of the Green New Deal proposed by the Commission, including the creation of an integrated energy system“²⁴⁶. Here too arise new delimitation issues with Art. 194 TFEU, that states that Union policy shall aim to „promote the interconnection of energy networks“²⁴⁷. However, this delimitation issue is outside the scope of this thesis.

Lastly, the Union can adopt measures under the other competencies it has under other provisions of the treaties, even if they affect energy and pursue one of the objectives of Art. 194 I TFEU²⁴⁸.

2. Art. 122 TFEU

Unlike Art. 194 TFEU, the predecessor of today's Art. 122 TFEU has been part of the European treaties since the beginning of the European Economic Community. Art. 122 TFEU allows the EU to take „measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy“. The predecessor, Art. 103 II of the Treaty of Rome, referred to „measures appropriate to the situation.“ What is new in Art. 122 TFEU, is the specific reference to products in the area of energy, which goes back to the oil crisis of the 1970s²⁴⁹ and demonstrates that the provision has historically been linked to combat energy crises. As the Treaties, unlike many national constitutions, do not provide for a general emergency framework, Art. 122 TFEU functions as a type of emergency clause²⁵⁰.

²⁴² Johannes Nohl, Patrick Demus, „AggregateEU – Rechtsrahmen und Plattform für die gemeinsame Gasbeschaffung in Europa“ (2024) 21 IR 8, 8 f.

²⁴³ *Id.*

²⁴⁴ Ludwigs, *supra* note 214, 19.

²⁴⁵ Case C-490/10 *supra* note 78, 67.

²⁴⁶ Calliess/Ruffert/Calliess, 6. Aufl. 2022, AEUV Art. 170, 2.

²⁴⁷ *Id.* 4.

²⁴⁸ Case C-490/10 *supra* note 78, 67.

²⁴⁹ Leo Flynn, „Article 122 TFEU“, in: Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin, „The EU Treaties and the Charter of Fundamental Rights: A Commentary“ (2019) OUP 2.

²⁵⁰ Neumann, Römling, *supra* note 225, 93.

Art. 122 TFEU is situated between provisions Art. 120 to 126 TFEU, which constitute the chapter for economic policy and is an atypical provision in this context. The other provisions in this chapter leave economic policy in principle to the responsibility of the Member States, only mandating monitoring and coordination mechanisms. Art. 120 TFEU on the other hand gives the EU the power to adopt binding economic policy measures²⁵¹. So far, the legal discussion of Art. 122 TFEU has been limited, which makes a more thorough examination necessary. „Before 2022, Article 122 had served as the legal basis for only two directives on minimum oil stocks in 2006 and 2009 and for one directive on the security of the gas supply in 2004. All three instruments refer to solidarity but do not define it“²⁵². More recently, it was used as legal basis to combat the economic effects of the COVID-19 pandemic, when parts of the „Next Generation EU“ refinancing program were adopted²⁵³. Although the used paragraph of the Article was not specified²⁵⁴.

A delimitation with Art. 194 TFEU is particularly relevant, as contrary to that provision, Art. 122 I TFEU does not require the EU to apply the ordinary legislative procedure in order to adopt measures. The Council can act on a proposal from the Commission without the need to involve the European Parliament. This highlights the nature of Art. 122 TFEU as an emergency clause, which requires a swift capacity to act. Adopted measures on the basis of Art. 122 I TFEU can take the form of regulations, directives and decisions²⁵⁵. It leaves the Council and the European Commission a wide discretion when they are implementing measures²⁵⁶. However, Art. 122 I TFEU does not allow for the adoption of financial assistance for a Member State, in so far Art. 122 II TFEU is the exhaustive legal basis. When multiple legal bases are applicable, it must first be established which provision takes methodological precedence²⁵⁷, which is why the fundamental hierarchical relationship between the two provisions will be analyzed first, before having a look at the recitals of the REPowerEU measures to determine the objectives of the legislature.

The scope of Art. 122 is general, allowing the adoption of „the measures appropriate to the economic situation“, even beyond the usual scope of Art. 120-126 TFEU²⁵⁸. However, the provision remains vague regarding the concrete economic situation that allows for its use²⁵⁹.

²⁵¹ Neumann, Römling, *supra* note 225, 96.

²⁵² Kaisa Huhta, Leonie Reins, „What is energy solidarity? A view from the EU and the energy crisis“ (GreenDeal-NET, October 8, 2023), < <https://www.greendealnet.eu/blog-What-is-energy-solidarity> > accessed 28 September 2024.

²⁵³ Neumann, Römling, *supra* note 225, 95.

²⁵⁴ *Id.*

²⁵⁵ *Id.* 100.

²⁵⁶ Ludwigs, *supra* note 214, 21.

²⁵⁷ *Id.* 19.

²⁵⁸ Neumann, Römling, *supra* note 225, 96 f.

²⁵⁹ *Id.* 97 f.

What is clear, is that „in terms of energy, it is a *lex specialis* provision that only applies where severe difficulties arise in respect of supply, whereas Article 194 of the TFEU is the general legal basis for all energy policy measures“²⁶⁰. This precedence even applies in situations when the realization of one of the objectives of Art. 194 TFEU is at the core of a measure²⁶¹. Additionally, the given example in Art. 122 I TFEU, supply difficulties in the area of energy, is not exhaustive for the required economic situation, which allows for legislation on the basis of Art. 122 TFEU²⁶². Since Art. 122 I TFEU is an independent legal basis and *lex specialist* to Art. 194 TFEU, there is a concern, that it could serve to undermine the national energy sovereignty established by Art. 194 II TFEU. From the *lex specialist* character of Art. 122 I TFEU follows, that the limitations outlined in Art. 194 II TFEU do not apply for measures adopted on the basis of Art. 122 I TFEU²⁶³. Broad agreement exists in the literature that in order to avoid the circumvention of this sovereignty safeguard (to prevent a „competence creep“²⁶⁴), and in line with the existing regulatory framework, Art. 122 I TFEU must be applied restrictively²⁶⁵. Its use should be confined to the occurrence or imminent threat of „exceptional situations that stand out from the normal situation on the domestic market due to extraordinary circumstances“²⁶⁶. However, an examination of the example provided in Art. 122 I TFEU shows that a general economic crisis is not required, it is sufficient if the economic difficulties are contained to specific economic sectors²⁶⁷. While some say the scope of the measures may be short-, medium-, or long-term²⁶⁸, the majority of authors only allow for the „[a]doption of temporary ad hoc measures to deal with acute crisis situations“²⁶⁹. Consensus exists that „[n]ormative, permanent emergency regimes to be activated in the event of a crisis, [...] should be based on Art. 194 TFEU“²⁷⁰. Although some argue for distinctions as well and allow for the adoption of preventive measures on the basis Art. 122 I TFEU, if there are concrete reasons to believe that a crisis will occur. This argument is rooted in the principle of energy solidarity, which has a preventive dimension as well²⁷¹. As long as there is a causal connection between a crisis and the emergency measures intended to combat it, there is no need to worry, that Art. 122 I TFEU is used beyond

²⁶⁰ Huhta, Reins, *supra* note 14, 775; Case C-490/10 *supra* note 78, 67.

²⁶¹ Case C-490/10 *supra* note 78, 67.

²⁶² Neumann, Römling, *supra* note 225, 97 f.

²⁶³ *Id.* 97; Nohl, Demus, *supra* note 242, 9.

²⁶⁴ Huhta, Reins, *supra* note 14, 791.

²⁶⁵ Ludwigs, *supra* note 214, 19; Neumann, Römling, *supra* note 225, 96; Nohl, Demus, *supra* note 242, 8 f.

²⁶⁶ Neumann, Römling, *supra* note 225, 98.

²⁶⁷ *Id.* 125.

²⁶⁸ Streinz/Kempen, 3. Aufl. 2018, AEUV Art. 122, 6.

²⁶⁹ Ludwigs, *supra* note 214, 19; also Neumann, Römling, *supra* note 225, 97; Nohl, Demus, *supra* note 242, 9.

²⁷⁰ Neumann, Römling, *supra* note 225, 97; Nohl, Demus, *supra* note 242, 9.

²⁷¹ Neumann, Römling, *supra* note 225, 100.

its limits and transforms into a general clause²⁷². However, general preventive measures established within the general energy framework should be based on Art. 194 TFEU²⁷³, just like Regulation 2017/1938, which will be analyzed in part II.B.

Upon closer examination such a distinction is sensible. If a crisis is foreseeable, it would be difficult to justify why one should wait for its initial effects before taking action to combat it. Moreover, it is often easier to implement preventive measures than it is to combat the consequences of a crisis after it has occurred, especially so in energy supply shortages caused by disruptions on the international field. Therefore, Art. 122 TFEU is *lex specialis* for measures when an energy crisis occurs and allows to a limited extent the adoption of preventive measures. Once the general hierarchy between two provisions is established, the choice of the legal basis must be founded on "objective factors which are amenable to judicial review" and which "include in particular the aim and content of the measure"²⁷⁴.

Insight into which of the two legal bases is appropriate for the adoption of the REPowerEU measures can be gained by examining the recitals of the „REPowerEU“ regulations.

First, it is notable that all regulations, except for Regulation 2022/2578, state a reason in their recitals justifying the use of Art. 122 TFEU as the legal basis²⁷⁵. They all align in their argumentation that the conflict with Russia leads to security of supply issues, which cause volatile energy prices, that must be addressed. Additionally, the situation is very unpredictable and a complete halt of Russian gas supply an imminent risk, which could have severe consequences for all Member States during the winter of 2022/2023. Regulation 2022/1369 also addresses this, stating: "The Union should therefore anticipate such a risk and prepare, in a spirit of solidarity, for the possibility of a full disruption of gas supply from Russia at any moment"²⁷⁶. The Council sees the general framework insufficient for preventive measures which could lead „to a risk of uncoordinated action by Member States“ and could in turn place „an additional burden on the Union’s industry and consumers“²⁷⁷. Therefore, immediate and proactive action is necessary, coordinated by the Union. Regulation 2022/2577 also refers to the high risk of a complete halt of Russian gas supplies, “which poses a significant threat to energy supply stability and further escalates energy prices“²⁷⁸, making urgent action necessary. Strengthening renewable energy has „the highest potential for quick deployment and immediate effect on the objectives of reducing price volatility and reducing the demand for natural gas without constraining the overall

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Case C-300/89 *Commission of the European Communities v Council of the European Communities* [1991] ECLI:EU:C:1991:244, 1.

²⁷⁵ Regulation (EU) 2022/1369, 8; Regulation (EU) 2022/2577, 22; Regulation (EU) 2022/2576, 3; Regulation (EU) 2022/1854, 7.

²⁷⁶ Regulation (EU) 2022/1369, 5.

²⁷⁷ *Id.* 6.

²⁷⁸ Regulation (EU) 2022/2577, 22.

energy demand²⁷⁹. Regulations 2022/2578 and 2022/2576²⁸⁰ align with the previous argumentation²⁸¹. Regulation 2022/2576 highlights the need for „a strong and coordinated response from the Union“ to manage both security of supply and energy prices²⁸². Lastly, Regulation 2022/1854, relies on the principle of solidarity again with the possibility of an emergency intervention in energy prices, citing the risk for „uncoordinated national measures, which could endanger security of supply at Union level and put an additional burden on the Union’s industry and consumers“²⁸³. Again, a „united and well-coordinated Union-wide response is needed“²⁸⁴. It is evident from the justifications in the recitals of the emergency measures, that the Council is very concerned with unilateral national action by the Member States, which could exacerbate the crisis and highlights the deficits of the existing energy crisis framework. One could argue that the Council remembers the lacking unity in past crisis responses and tries to create this unity by referencing solidarity, relying in part on the power of its expression, while backing it up with practical measures.

Justifying the choice of the legal basis, the Council explicitly mentions, that the volatile energy prices „constitute a severe difficulty in the supply of gas and electricity energy products“ within the meaning of Art. 122 I TFEU²⁸⁵. Supply issues with electricity and gas constitute the typical reason for the application of Art. 122 I TFEU, falling under the example provided for in the provision²⁸⁶. The frequent recourse to high energy prices also falls under the notion of energy security, which is defined as „the uninterrupted availability of required energy sources to meet current and anticipated energy demand at affordable prices“²⁸⁷. Thus, the existence of an economic situation with severe difficulties with the supply of energy products cannot be denied²⁸⁸. Notably, the justification is in part preventive and especially provides for a complete halt of Russian gas supply. However, the measures are specifically related to the current energy crisis and serve its combating and therefore constitute temporary ad-hoc measures, which are permissible under Art. 122 I TFEU. This is supported by the fact that, contrary to Regulation 2022/1032 with regard to gas storage that was adopted on the basis of Art. 194 II TFEU, all five Regulations were initially limited in their application to two years²⁸⁹. Although the duration of

²⁷⁹ *Id.* 5.

²⁸⁰ Regulation (EU) 2022/2578, 1; Regulation (EU) 2022/2576 1, 3.

²⁸¹ Regulation (EU) 2022/2578, 1; Regulation (EU) 2022/2576 1, 3.

²⁸² Regulation (EU) 2022/2576 2,3.

²⁸³ Regulation (EU) 2022/1854, 6.

²⁸⁴ *Id.* 9.

²⁸⁵ *Id.* 7.

²⁸⁶ Neumann, Römling, *supra* note 225, 124.

²⁸⁷ Patrick Sikora, „Grundstrukturen der Energieversorgungssicherheit“ (2023) 76 NJW 2989.

²⁸⁸ Ludwigs, *supra* note 214, 20; Neumann, Römling, *supra* note 225, 125; Nohl, Demus, *supra* note 242, 9.

²⁸⁹ Ludwigs, *supra* note 214, 18; Neumann, Römling, *supra* note 225, 131.

four of the regulations was prolonged, such a prolongation is not an automatic process. The Commission recommended not to extend Regulation 2022/1854. It is reminiscent of the oil crisis, that the initial aim of the legislature is to revert to the regular state of affairs after the crisis is endured²⁹⁰.

While it should be clear by now that Art. 194 TFEU and Art. 122 I TFEU address different situations, that does not mean that they exist completely independent from another. The saying that nothing is as permanent as a temporary solution is true in this case. Secondary law adopted in times of crisis on the basis of Art. 122 TFEU can, if it proves itself useful, be integrated into the wider energy policy framework of the EU on the basis of Art. 194 TFEU. The integration of some temporary measures into the regular energy framework is already being discussed²⁹¹. One example is the amendment of the RED III Regulation on the promotion of the use of energy from renewable sources²⁹² by Directive 2024/1711 that incorporates parts of the REPowerEU package in the regular energy market toolbox. Similarly, the Commission has spoken out in favor of integrating parts of Regulation 2022/2576 in Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation²⁹³. Additionally, a similar mechanism for hydrogen has been agreed on by the Council and the European Parliament²⁹⁴.

The REPowerEU measures provide insight, how the manifestations of the principle of solidarity differ between Art. 122 I TFEU and Art. 194 TFEU, as „it seems that solidarity should be perceived differently depending on the legal source from which it emerges“²⁹⁵. Since the OPAL judgement, the principle of solidarity is central to the application of Art. 194 TFEU, as it is now established that it is judicially enforceable and directly applicable in all of the Union’s energy policies objectives. In the context of Art. 122 TFEU, it is less independent in nature, "fundamentally security and crisis-oriented, and therefore narrower in scope“²⁹⁶. In combating the crisis, the central objective of the principle of solidarity is to ensure security of supply²⁹⁷, which includes the affordability of energy. When adopting crisis measure, the principle guides

²⁹⁰ Sinder, Wiertz, *supra* note 222, 557.

²⁹¹ Matteo Ciucci, „Energiebinnenmarkt“ (Europäisches Parlament, April, 2024), < <https://www.europarl.europa.eu/factsheets/de/sheet/45/energiebinnenmarkt> > accessed 28 September 2024.

²⁹² 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 L 328, 82.

²⁹³ Council of the European Union, „REPORT FROM THE COMMISSION TO THE COUNCIL on the main findings of the review of Council Regulation (EU) 2022/2576 of 19 December 2022, in view of the general situation of the gas supply to the Union.“ (2023) COM(2023) 547 final.

²⁹⁴ Rat der Europäischen Union, „Gaspaket: Rat und Parlament erzielen Einigung zum Wasserstoff- und Gasmarkt der Zukunft“ (Europäischer Rat Rat der Europäischen Union, December 8, 2023), < <https://www.consilium.europa.eu/de/press/press-releases/2023/12/08/gas-package-council-and-parliament-reach-deal-on-future-hydrogen-and-gas-market/> > accessed 28 September 2024.

²⁹⁵ Huhta, Reins, *supra* note 14, 777 f.

²⁹⁶ *Id.* 790.

²⁹⁷ Neumann, Römling, *supra* note 225, 129.

the legislator, who gives solidarity form through their actions. Solidarity can be subject to judicial review in this regard too, although it serves primarily as a tool to assess whether the legislator has sufficiently considered the interests between Member States and the EU in its measures. However, the legislature enjoys wide discretion in his decision how to act²⁹⁸. In any case, the OPAL judgement has made the legislature much more sensitive to the principle of solidarity, shown by the fact that it addresses solidarity in the recitals of all crisis regulations.

B. Manifestations of solidarity in secondary law

Now that the characteristics of the principle of solidarity in the different legal bases are clarified, the next step is to analyze its specific manifestation in legal acts. Interestingly, the reaction of the regular energy framework and the crisis measures differ not that significantly. This results from the fact that solidarity applied in the context of energy security is only relevant in times of crisis, as there is per definition enough energy supply available during normal operations. Applied solidarity is therefore not necessary under normal operations. However, being in the position to effectively react to an energy crisis requires an interconnected and well developed energy grid between Member States. Here, in the creation and utilization of the fundamental energy infrastructure, solidarity plays a crucial role in balancing the interests of Member States, as exemplified by the OPAL judgement.

This also applies in the other direction, as „[u]ltimately, all EU secondary legal acts related to network expansion, particularly the Regulation on Trans-European Energy Networks (TEN-E Regulation²⁹⁹), serve, at least in part, to enable energy solidarity in times of crisis“³⁰⁰.

In this context, it makes sense to take another look at the Energy Union, which recognized the importance of the cross-sectional axis of solidarity in its origin and embodies the spirit of the new principle of solidarity, in that every action of the Union in the field of energy is guided by it. As shown, this principle 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“³⁰¹.

The goal of the Energy Union is, „with an ambitious climate policy at its core“, „to give EU consumers - households and businesses - secure, sustainable, competitive and affordable energy“³⁰². The vision of the Energy Union is one „where Member States see that they depend

²⁹⁸ Ludwigs, *supra* note 214, 20; Neumann, Römling, *supra* note 225, 126.

²⁹⁹ 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 [2022] OJ L 152, 45.

³⁰⁰ Gundel Bayreuth, *supra* note 83, 760.

³⁰¹ Case C-848/19 P, *supra* note 1, 43.

³⁰² European Commission, „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“ [2015] COM(2015) 80 final, 2.

on each other to deliver secure energy to their citizens, based on true solidarity and trust³⁰³. This vision also includes an Energy Union that establishes „an integrated continent-wide energy system where energy flows freely across borders, based on competition and the best possible use of resources, and with effective regulation of energy markets at EU level where necessary“³⁰⁴. The Union has recognized that the existence of, at the time, 28 national energy frameworks led to a fragmentation of the intended integrated European internal energy market³⁰⁵. A major challenge to this shared market is the existence of „energy islands“, indicating Member States who are poorly connected to other energy networks³⁰⁶. Although the Union is aware of these problems, they persist and complicated the reaction to the gas crisis in 2022 and beyond. Consequently, the Heads of State and Government of the Member States committed to „completing and improving the interconnection of European gas and electricity networks and fully synchronising“ the power grids throughout the EU in the Versailles Declaration responding to the war. The overarching goal of these efforts is to reduce the Union’s energy dependency on Russia³⁰⁷.

Subsequently, the Commission proposed a list of 166 energy projects that support the goal of achieving cross-border connections³⁰⁸. These lists are adopted every two years, ensuring that energy areas lacking behind are identified, following consultations with stakeholders that are part of regional groups established by the TEN-E Regulation³⁰⁹. These projects are not contained to the EU territory, but can also encompass energy infrastructure that connects the EU with third countries³¹⁰. It is striking that there is not a single reference to the term „solidarity“ in this document, it formally refers only to the European Green Deal. The Advocate General however establishes exactly this link in his OPAL Opinion, stating that the promotion of gas infrastructure at transnational level and the connection to third countries promoted by the Union, thus the list adopted under the TEN-E Regulation, is essential for practiced energy solidarity between the Member States³¹¹.

The ambitions underlying the Commission’s document are wider than just ensuring energy security by interconnecting Member States’ energy grids. In addition to 85 electricity, offshore,

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* 3.

³⁰⁶ *Id.* 3, 8.

³⁰⁷ *Id.*

³⁰⁸ European Commission, „Commission proposes 166 cross-border energy projects for EU support to help deliver the European Green Deal“ (European Commission, November 28, 2023), < https://ec.europa.eu/commission/presscorner/detail/en/IP_23_6047 > accessed 28 September 2024.

³⁰⁹ Directorate-General for Energy, „166 key cross-border energy projects published“ (European Commission, April 8, 2024), < https://energy.ec.europa.eu/news/166-key-cross-border-energy-projects-published-2024-04-08_en > accessed 28 September 2024.

³¹⁰ European Commission, *supra* note 308.

³¹¹ Campos Sánchez-Bordona, *supra* note 2, 83.

and smart grid projects, it also contains 65 hydrogen and electrolyser projects³¹². This shows that even if solidarity is not explicitly mentioned, it enables the Union to achieve its energy objectives, assisting the Member States in becoming more sustainable and climate friendly, which supports energy security at the same time.

Another recent report highlights the importance of an interconnected European energy network from the view of the European Single Market³¹³. It comes to the conclusion that, first, interconnected energy grids are a central tool for the future development of the Single Market in order to ensure a fast shift towards renewable energy³¹⁴. Second, the Single Energy Market is seen as „Europe’s best asset to ensure its success in a novel global order“, contrary to what some Member States considered in response to the gas crisis, introducing temporary export restrictions to gas³¹⁵. As the internal energy market led to a liberalization of gas supply, resulting in shared risks between the Member States, the principle of solidarity in the field of energy has become a fundamental pillar of said market³¹⁶ and therefore shapes its rules.

1. On the basis of Art. 194 TFEU

The foundation for the crisis reaction in 2022 was already established with the Energy Union, although not sufficiently. Back in 2015, it had already recognized the potential of liquefied natural gas (LNG) as a back-up in a crisis situation should the gas supply through pipelines be disrupted³¹⁷. This assessment was again confirmed by a study in 2021³¹⁸. Even the issue of uncoordinated, unilateral responses to a crisis by the Member States was recognized, which was a central justification for the REPowerEU measures³¹⁹. The Commission had even assessed the option for a voluntary demand aggregation mechanism to enable Member States to collectively purchase gas during a crisis³²⁰, which was eventually implemented in 2022.

The instrument to tackle problems in the supply of gas was the Security of Supply Regulation 2017/1938 (SoS Regulation), which references solidarity in varying dimensions and aims to protect vulnerable consumers, which aligns with the objectives of the Energy Union³²¹. Another instrument to safeguard energy security in the EU in the spirit of solidarity is Regulation

³¹² European Commission, *supra* note 308.

³¹³ Enrico Letta, „MUCH MORE THAN A MARKET“ (April 2024), < <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf> > accessed 28 September 2024.

³¹⁴ *Id.* 9.

³¹⁵ *Id.* 61.

³¹⁶ Sikora, *supra* note 287.

³¹⁷ European Commission, *supra* note 302, 5.

³¹⁸ Kreuter-Kirchhof, *supra* note 82, 994.

³¹⁹ European Commission, *supra* note 302, 5.

³²⁰ *Id.* 6.

³²¹ *Id.* 6, 12.

2019/941 on risk-preparedness in the electricity sector³²². It is significantly less detailed than the SoS Regulation which has comparable objectives in the gas sector³²³. The reason for this lies in the fact that in electricity, the development of the energy grid is imperative, while security of supply is less the result of foreseeable supply disruptions and more a consequence of issues in grid management, therefore solidarity is less important in daily operations³²⁴. Despite plans of the Commission to expand the interconnection of electricity grids to at least 15 % in the context of the Energy Union³²⁵, it becomes apparent how much more potential exists in this field. The minor role of solidarity in the electricity sector is exemplified again by the Council conclusions “Advancing Sustainable Electricity Grid Infrastructure”, where solidarity is not mentioned by name³²⁶.

Consequently, the principle of solidarity between Member States plays a larger role in response to crisis in the gas sector. More relevant to understanding how solidarity is expressed in secondary law is Regulation 2017/1938, the SoS Regulation. It replaced its predecessor Regulation (EU) 994/2010 and is based on Art. 194 II TFEU, the regular legal basis in the field of energy. Despite this, it establishes a framework to help secure energy security for the Member States when energy supply is running low, which is necessary because „[m]any EU countries import nearly all their supplies and some are, or have been, also heavily reliant on a single source, meaning that disruptions along a single transport route can threaten the certainty of their gas supply“³²⁷. Although the gas crisis of 2022, the most recent example of the consequences resulting from the over-reliance of the EU on „a single, unreliable supplier for almost half of its gas imports“³²⁸, has produced lots of crisis action, the framework of the SoS Regulation has not been employed yet³²⁹.

The idea of the Regulation is to enable regional solidarity by making connected member States support each other in the event of supply disruptions, doing so in the most cost-effective way³³⁰.

³²² Kreuter-Kirchhof, *supra* note 82, 996.

³²³ Gundel Bayreuth, *supra* note 83, 761.

³²⁴ *Id.*

³²⁵ 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 (Text with EEA relevance.) [2018] OJ L 328 1, 6.

³²⁶ Council of the European Union, „Council conclusions on “Advancing Sustainable Electricity Grid Infrastructure”“ [2024] 10459/24.

³²⁷ European Commission, „Security of gas supply“ (European Commission), < https://energy.ec.europa.eu/topics/energy-security/security-gas-supply_en#solidarity-arrangements > accessed 28 September 2024.

³²⁸ *Id.*

³²⁹ Mišák, Nosko *supra* note 5,2.

³³⁰ 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 (Text with EEA relevance.) [2017] OJ L 280, 1, 10.

Solidarity in this case is an obligation that is achieved in two ways: „first, directly connected Member States are being clustered into so called risk groups and second, the new article 13 of Regulation (EU) 2017/1938, spelling out concrete solidarity measures that Member States have to take in case of an emergency“³³¹.

Art. 3 of the regulation shares the responsibility for the security of gas supply between natural gas undertakings, the Member States and the Commission, so Member States are no longer solely responsible. This three-level approach is inherited from the predecessor regulation³³² and establishes a hierarchy where the market is still primarily responsible for gas supply³³³. This means that gas undertakings are expected to ensure supply initially, with the Member States and the Commission acting only if the market cannot fulfill its role³³⁴. The major innovation of the SoS Regulation is Art. 13, which makes solidarity operational in risk groups who have to implement solidarity measures. These risk groups „should be defined based on the major transnational risks to the security of gas supply in the Union“ and should be composed according to the main gas supply sources and routes³³⁵. This framework aims to ensure that Member States can effectively support each other during crises, based on shared vulnerabilities and interdependencies in the gas supply network and „[a]s a consequence, only directly interconnected Member States have been clustered into gas supply risk groups“³³⁶.

If a Member State is unable to provide gas supply for all its solidarity protected consumers, such as households and hospitals, it may invoke Art. 13 and activate the solidarity mechanism as a last resort. In that case, a Member State that is directly or indirectly connected via a third country is obligated to, „as far as possible without creating unsafe situations, take the necessary measures to ensure that the gas supply to customers other than solidarity protected customers in its territory is reduced or does not continue to the extent necessary and for as long as the gas supply to solidarity protected customers in the requesting Member State is not satisfied“ (Art. 13 I 1). If multiple Member States are able to provide solidarity to the requesting Member State, it should „seek the most advantageous offer on the basis of cost, speed of delivery, reliability and diversification of supplies of gas“ (Art. 13 IV). Once an agreement is reached, the requesting Member State has to ensure that the gas is effectively delivered to the solidarity protected customers in its territory (Art. 13 I 2).

Such assistance requires bi-directional pipelines that enable „permanent physical capacity to transport gas in both directions“ and is mandated for all interconnections between Member States

³³¹ Fleming, *supra* note 93, 103.

³³² *Id.* 104.

³³³ Kreuter-Kirchhof, *supra* note 82, 998.

³³⁴ *Id.*

³³⁵ Regulation (EU) 2017/1938, 12.

³³⁶ Fleming, *supra* note 93, 105.

(Art. 5 IV). Significant improvements in this regard have been made in recent years³³⁷. Solidarity on the basis of Art. 13 operates on the basis of compensation. Gas companies become liable for compensation claims when they reduce or cut the supply of gas to enterprises they have contracts with, in order to support solidarity protected customers in another Member State³³⁸. These claims can then be passed on to the assisting Member State, which in turn can seek compensation from the requesting Member State³³⁹. Thus, requesting help can become a costly strategy³⁴⁰. This mechanism is the perfect example for the idea of solidarity as a form of insurance³⁴¹.

However, this form of solidarity causes a conflict with the sovereignty of Member States over their energy mix as provided for in Art. 194 II TFEU, because „the promise of solidarity applies regardless of the risks that a Member State has taken in choosing its energy sources“³⁴². One can recognize the basis that is shared with the Economic and Monetary Union and the reason why it is characterized by the principle of non-solidarity. According to Art. 125 TFEU, Member States are prohibited from providing assistance to a struggling Member State in the form of a direct bail-out. The rationale for this is that each Member State should have a balanced budget and not rely on the assistance provided by other Member States, trusting that they try to mitigate the impact on the common currency. There is a fundamental difference between the two areas. If a Member State relies on the mechanism of the SoS Regulation, it is obliged to compensate an assisting Member State, which can be very costly and ensures that the other Member State does not suffer from the costs of assistance, unlike in the case of a bail-out. This ban on free-riding through reciprocity and self-responsibility (Art. 6) of Member States was essential for the establishment of the solidarity mechanism³⁴³. However, one could find a general legal principle in the functioning of the Economic and Monetary Union. The implementation of solidarity should not lead to irresponsibility in the actions of a Member State. A similar dynamic could develop in the field of energy due to the interconnection of Member States. To mitigate this risk, there is the potential for an obligation on Member States to diversify their energy mix or at least the countries from which they get their gas supply. Such an obligation is reinforced by the preventive aspect of energy solidarity, which entails, as stressed by the Court, „not only dealing with emergencies when they arise, but also to adopting measures to prevent crisis situations“³⁴⁴.

³³⁷ European Commission, „COMMISSION STAFF WORKING DOCUMENT Commission assessment of the Gas Security of Supply Regulation“ [2023] SWD(2023) 323 final, 9 f.

³³⁸ Fleming, *supra* note 93, 109.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ Bartenstein, *supra* note 9.

³⁴² Gundel Bayreuth, *supra* note 83, 760.

³⁴³ Bartenstein, *supra* note 9.

³⁴⁴ Case C-848/19 P, *supra* note 1, 69.

Measures can be broadly interpreted as a duty of precaution, not to put other Member States in a situation where they have to reduce their own consumption in order to provide assistance. If thought through, this would mean that after Russia's invasion in Ukraine and the subsequent gas crisis in Europe, energy dependence from Russia is no longer permitted. More abstractly, the preventive dimension of energy solidarity must be understood as a requirement to diversify energy supplies and reduce the risk of supply disruptions in case one source defaults. Such dependence could be seen as a breach of energy solidarity. However, this again runs into the issue of national energy sovereignty according to Art. 194 II TFEU. A conflict with Art. 194 II arises regardless of the perspective one assumes.

Lastly, it is important to note that Member States need to conclude bilateral agreements on the technical, legal, and financial arrangements to make the SoS Regulation work (Art. 13 X). Although the Regulation set a deadline of 1 December 2018 for the conclusion of such agreements, only nine agreements have reached this stage, the most recent one signed on 19 March 2024 between Germany, Italy, and Switzerland³⁴⁵. Other agreements have been concluded by the following Member States: Slovenia, Croatia, Denmark, Sweden, Finland, Estonia, Lithuania, Latvia and Austria³⁴⁶. To guarantee assistance in emergencies, Regulation (EU) 2024/1789 amended the SoS Regulation and adds new paragraphs (8a and 8b), setting default conditions in case no agreement has been reached. They include modalities for compensation and set formal requirements for requesting solidarity.

The first concrete measure responding to the gas crisis in 2022 was Regulation (EU) 2022/1032 of 29 June 2022 with regard to gas storage. Contrary to the REPowerEU measures it is based on Art. 194 TFEU, although the justification for its adoption is similar. It aims to „reinforce the security of gas supply at Union level, in particular gas supplies to protected customers“³⁴⁷, dealing with energy security and volatile prices, and amends Regulations (EU) 2017/1938 and (EC) No 715/2009. The amendments to the SoS Regulation are particularly relevant under the aspect of solidarity, because they introduce solidarity under the principle of burden-sharing instead of the insurance approach of Art. 13 SoS Regulation. It responds to the risk of gas supply disruptions, which could occur at any time and sets filling targets for underground gas storage facilities to safeguard energy security during the winter of 2022/2023³⁴⁸. All Member States are in principle required to reach a storage level of at least 90 % in facilities located in their territory³⁴⁹. However, some Member States have significantly more storage capacity than others, surpassing their own consumption needs, and would therefore be disproportionately affected by the obligation³⁵⁰. This impact is reduced by the obligation to fill storage facilities only up to 35%

³⁴⁵ European Commission, *supra* note 327.

³⁴⁶ *Id.*

³⁴⁷ Regulation (EU) 2022/1032, 2.

³⁴⁸ *Id.* 3.

³⁴⁹ *Id.* 6.

³⁵⁰ *Id.*

of their average annual gas consumption over the preceding five years. However, since all Member States benefit from high storage levels, especially those without their own underground storage facilities, a burden-sharing mechanism exists to equalize the effects (Art. 6c II). Member States without storage facilities can provide financial compensation for gas storage in other Member States, equivalent to 15% of their average annual gas consumption over the preceding five years. This requires that cross-border transmission is technically possible. In this case, solidarity acts as an instrument for risk sharing and ensures that no Member State is disproportionately affected³⁵¹.

2. On the basis of Art. 122 TFEU

When examining how solidarity is shaped in secondary law on the basis of Art. 122 I TFEU, one has to look at the REPowerEU package again. Solidarity has probably never played such a prominent role in the language of the EU as it has with these measures³⁵². Solidarity is not just a tool to achieve the energy objectives of the Union, it acts as the key justification for the adoption of the necessary measures³⁵³. It is invoked as an argument, that the EU is better suited to address the crisis and is thus not prevented from acting by the subsidiary principle³⁵⁴, because Member States responses would be counterproductive, as the EU highlighted several times in the recitals. The unity Member States have achieved has been remarkable³⁵⁵, especially compared to the challenges in the Common European Asylum System. As a reason for this unity was stated that the war has challenged the EU's identity, bringing Member States closer together against Russia as a common foe³⁵⁶. The EU is reliant on gas imports from third countries for 90 % of its consumption and 45 % of those imports are coming from Russia³⁵⁷. Without undermining the continued support for Ukraine, the EU could no longer rely on Russia's gas supply. It managed to demonstrate extraordinary efforts and reduced fossil fuel imports from Russia from 90 billion € in 2019 to 7 billion € in 2023³⁵⁸.

This was made possible by shifting gas imports to LNG from countries such as the USA and Qatar³⁵⁹. However, the transition to LNG also led to a rise in Russian LNG entering Europe, now

³⁵¹ European Commission, „Gas storage“ (European Commission), < https://energy.ec.europa.eu/topics/energy-security/gas-storage_en > accessed 28 September 2024.

³⁵² Huhta, Reins, *supra* note 14, 783.

³⁵³ Huhta, Reins, *supra* note 14, 788; European Commission, *supra* note 327.

³⁵⁴ Huhta, Reins, *supra* note 14, 788.

³⁵⁵ Bartenstein, *supra* note 9.

³⁵⁶ Bartenstein, *supra* note 9.

³⁵⁷ Nohl, Demus, *supra* note 242, 9.

³⁵⁸ European Commission, *supra* note 327.

³⁵⁹ Arthur Sullivan, „Ukraine-Krieg: Warum kauft die EU weiter russisches Gas?“ (DW, April 30, 2024), < <https://www.dw.com/de/ukraine-krieg-warum-kauft-die-eu-weiter-russisches-gas/a-68958552> > accessed 28 September 2024.

accounting for approximately 20% of LNG imports, making Russia the second-largest LNG supplier³⁶⁰. It is important to note that 22% of these imports are not consumed within the EU but are re-exported to global markets, primarily in Asia³⁶¹. Nonetheless, it can be argued that the dependency on Russia has partially shifted from pipeline gas to LNG.

This was made possible by the emergency measures, which incorporate solidarity and shape it in three dimensions: „(1) solidarity as an expression of the internal market approach; (2) solidarity as a description of risk-sharing between Member States; and (3) solidarity as a means of protecting those most affected by the energy crisis“³⁶². The internal market dimension aims to achieve the energy objectives of Art. 194 TFEU, including energy security³⁶³. According to Huhta and Reins, „the internal market approach in the energy sector is based on the idea of pooling all Member States’ energy resources by creating an area without trade restrictions, so that these resources can be utilized in the most cost-efficient way“³⁶⁴. One could argue that the internal market dimension encompasses and partially overlaps with the other two, being the key for solidarity.³⁶⁵ The risk-sharing dimension is about Member States pledging mutual support to ensure the energy security of all. A clear distinction from the internal market dimension is difficult to make³⁶⁶, although the risk-sharing dimension emphasizes the importance of the energy security objective over mere functioning of the market³⁶⁷. As described above, the gas storage regulation represents the risk-sharing dimension. The SoS regulation on the other hand is an example for the implementation of solidarity in the third dimension, aiming to protect the most vulnerable households and groups, the solidarity-protected customers.

How solidarity manifests in the emergency measures will be analyzed, beginning with Regulation (EU) 2022/1369 of 9 September 2022 on coordinated demand-reduction measures for gas. This regulation was extended by Regulation (EU) 2023/706 until 31 March 2024 and is therefore no longer in force. It was the first regulation in the measure adopted and responds to a potential gas supply halt from Russia³⁶⁸. It follows a two stage approach, where Member States shall initially use their best efforts to voluntarily reduce gas demand by 15% from 1 August 2022 to 31 March 2023 and then extended to 31 March 2024 compared to their average gas consumption in the preceding five years (Art. 3). Member States are free to choose the

³⁶⁰ *Id.*; Edgar Meza, „EU increasing Russian gas imports despite efforts to reduce dependence“ (CLEW, July 16, 2024), <<https://www.cleanenergywire.org/news/eu-increasing-russian-gas-imports-despite-efforts-reduce-dependence>> accessed 28 September 2024.

³⁶¹ Arthur Sullivan, *supra* note 359.

³⁶² Huhta, Reins, *supra* note 14, 785.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Huhta, Reins, *supra* note 252.

³⁶⁶ Neumann, Römling, *supra* note 225, 128.

³⁶⁷ Huhta, Reins, *supra* note 14, 787.

³⁶⁸ Regulation (EU) 2022/1369, 5.

appropriate measures to achieve this target (Art. 6 I). They are expected to cooperate within their risk groups, taking recourse to the SoS Regulation, and report their achievements to the Commission (Art. 7, 8). The SoS regulation therefore serves as the backbone for crisis response and new measures integrate into this framework. If the Council declares a Union alert, in case there is a substantial risk of a severe gas supply shortage or where an exceptionally high demand for gas occurs, the 15% reduction target becomes mandatory (Art. 4 II). Member States can still choose the appropriate measures (Art. 6 I).

The recitals emphasize the internal market dimension of solidarity. One reason for the coordinated reduction of gas demand in a spirit of solidarity is to prevent significant distortions of the internal market, which are likely to occur if Member States react in an uncoordinated manner to a potential or actual further disruption of Russian gas supply³⁶⁹. The second dimension of solidarity, risk sharing, is also an important part of the Regulation³⁷⁰ and ensures that, „despite the varying impact of disruptions in Russian gas supplies, all Member States contribute to minimizing economic damage“³⁷¹. The idea of risk sharing becomes even more apparent, because Member States are exempted from applying the mandatory gas reduction, as long as they are not directly connected to the gas infrastructure of another Member State (Art. 5 IV). The rationale for the gas demand reduction is to prevent other Member States from being put under pressure to assist and to ensure the ability to provide help in times of crisis.

The second regulation is Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices. It includes three instruments: reducing electricity consumption, introducing a cap on market revenues and the redistribution of surplus profits (Art. 1). Except for the obligation to review the measures related to the temporary solidarity contribution, the regulation is no longer in force (Art. 22). The observations from the first regulation apply here as well. Just as it aimed to reduce gas demand, this regulation aims for the reduction of electricity demand. The Member States shall endeavor to implement measures to reduce their total monthly gross electricity consumption by 10% compared to the average gross electricity consumption in the corresponding months of the five preceding years (Art. 3 I).

The second measure caps market revenues for producers generating electricity from the sources referred to in Art. 7 I at a maximum of 180 EUR per MWh of electricity produced (Art. 6 I). Lastly, surplus revenues generated by Union companies and permanent establishments with activities in fossil fuels, defined as a 20% increase of the average of the taxable profits in the four previous fiscal years, shall be subject to a mandatory temporary solidarity contribution (Art. 14, 15). These funds should be used to support the objectives outlined in Art. 17 I, particularly by

³⁶⁹ Neumann, Römling, *supra* note 225, 102.

³⁷⁰ Huhta, Reins, *supra* note 252.

³⁷¹ Ludwigs, *supra* note 214, 20.

providing financial support to vulnerable households, small and medium-sized enterprises (SMEs), and energy-intensive industries³⁷².

Although the recitals state the functioning of the internal market as justification for the measure³⁷³, solidarity mainly serves market interventions to protect vulnerable groups. The protection of these groups is achieved by burdening other private actors, that benefit significantly from the crisis³⁷⁴.

Nevertheless, this also serves the functioning of the internal market, as unilateral interventions in the internal market by Member States would adversely affect the situation of these groups, by endangering security of supply and potentially further price increases³⁷⁵.

Regulation 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks, and cross-border gas exchanges, has been extended until the end of 2024, except for Art. 14. No other regulation mentions solidarity so frequently and even includes it in its title. It provides for several measures, but the central one is a demand aggregation mechanism, which intends to ensure lower gas prices by enabling the joint purchasing of gas³⁷⁶. While it also aims to cover energy supply for the Member States, the central aspect of the regulation is the protection of citizens and the economy against excessively high prices (Art. 1 II). To better coordinate gas purchasing, Art. 3 I states that natural gas undertakings or undertakings consuming gas established in the Union shall inform the Commission or their Member State of establishment if they intend to purchase gas volumes exceeding 5 TWh/year. However, this gas demand level is not intended as a restriction and all natural gas undertakings and undertakings consuming gas established in the Union regardless of the volume requested can participate in the demand aggregation and joint purchasing of gas (Art. 8 I). This allows „gas suppliers to make offers on the basis of large aggregated volumes, instead of many smaller offers to purchasers approaching them individually“³⁷⁷. There is no obligation to purchase gas that has been matched through the mechanism³⁷⁸ and the contract will be finalized outside the platform after individual negotiations³⁷⁹. There was one exception, in the original version of the regulation, that mandated the use to reach filling targets mandated by Article 6a and 20 of Regulation (EU) 2017/1938, that amounted to 15 % of storage capacity. This mandatory use has been deleted with the amendment by the extending regulation.

³⁷² Regulation (EU) 2022/1854, 11.

³⁷³ *Id.* 9.

³⁷⁴ Neumann, Römling, *supra* note 225, 129.

³⁷⁵ Regulation (EU) 2022/1854, 6, 9.

³⁷⁶ Regulation (EU) 2022/2576, 6.

³⁷⁷ Regulation (EU) 2022/2576, 8.

³⁷⁸ Regulation (EU) 2022/2576, 13.

³⁷⁹ Nohl, Demus, *supra* note 242, 10.

The EU considers the Aggregate platform a success, informing that it has so far matched more than 43 bcm of gas of European demand in short term tenders³⁸⁰. In 2024, the platform has been extended to include mid-term tenders, which cover the demand for seasonal 6-month periods³⁸¹. So far, 34 bcm of total gas demand has been submitted³⁸².

Whether the Aggregate platform is indeed a success has been contended. It was established within the regular regulatory and market framework³⁸³, not exempt from competition law and matches are non-binding³⁸⁴. It is therefore not entirely clear what added benefits the platform provides³⁸⁵. In this view, solidarity in the form of joint purchasing of gas is nothing more than the application of existing market mechanisms.

The second-to last Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy is also the one with the least connection to the principle of solidarity. It has been extended in part until 30 June 2025. Like the other measures it combats volatility in the market, aims to reduce energy prices and to ensure energy security, in this case by accelerating the deployment of renewable energy sources³⁸⁶. It serves primarily the third dimension of solidarity, the protection of vulnerable groups, although this is more inherent to the crisis response itself than a dedicated aim of the measure.

It does so by accelerating the permit-granting process applicable to the production of energy from renewable energy sources (Art. 1 I). First, the planning, construction, and operation of renewable energy projects are to „be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case“ (Art. 3). Second, the regulation aims to accelerate the permit granting process for the installation of solar energy equipment, repowering of renewable energy projects, the installation of renewable energy projects and heat pumps (Art. 4, 5, 6, 7).

The last regulation, Regulation (EU) 2022/2578 of 22 December 2022, establishes a market correction mechanism to protect Union citizens and the economy against excessively high prices. It also aims to protect people, households, and communities that are most affected by the energy supply shock through emergency instruments that allow price formulation on grounds of solidarity and equity, representing market interventions. This regulation is therefore closely related to Regulation (EU) 2022/1854 and driven by similar considerations.

³⁸⁰ Directorate-General for Energy, „EU Energy Platform“ (European Commission), < https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en > accessed 28 September 2024.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ Alex Barnes, „EU Joint Purchasing of Gas – an assessment“ (2023) OIES, iii, iv.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ Regulation (EU) 2022/2577, 1, 3.

It establishes a temporary market correction mechanism (MCM) to limit episodes of excessively high gas prices in the Union which do not reflect world market prices (Art. 1). The MCM is triggered when the front-month TTF derivative settlement price exceeds EUR 180/MWh for three working days and is at least EUR 35 higher than the reference price at the same time (Art. 4 I). When activated, a dynamic bidding limit is imposed, preventing market operators from accepting, and TTF derivatives market participants from submitting, orders for TTF derivatives priced at more than EUR 35 above the reference price (Art. 4 V). To avoid unintended market disturbances or manifest risks of disturbances that negatively affect security of supply, intra-Union flows of gas or financial stability, the Commission shall suspend the MCM at any time (Art. 6 II).

By analyzing the REPowerEU package, one can see how intertwined the different dimensions of solidarity are and how central the functioning of the internal energy market is to achieve its aims. At the beginning of the crisis, it was the risk sharing between Member States in order to secure sufficient energy supply for all that was especially important. The EU also introduced robust instruments which enable it to intervene directly in the energy price setting mechanisms of the market to ensure the protection of vulnerable groups.

Conclusion

It is certain that the principle of solidarity will not become irrelevant any time soon. The principle is so adaptable and plays an important role in many fields of law that it will almost certainly become a more important tool for the EU in the future. The Court has accelerated this development when it gave the principle a powerful new direction in the OPAL judgement. The principle of solidarity in the field of energy has the potential to bring the European energy landscape closer together and act as a catalyst to form an unofficially unified energy policy. On the other hand, it also has the potential to jeopardize exactly that, by providing the Member States a tool to impose their own energy interests, rejecting the objectives of the Union. Three years after the OPAL judgement, it is still not clear which possibility is more likely to manifest. Maybe there is no need to worry, as the Member States have shown great unity in the face of the gas crisis following the Russian invasion in Ukraine. By the swift response with the REPowerEU package, they managed to effectively mitigate the effects of the crisis and maintained unity, using language heavily influenced by the notion of solidarity.

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