

EU RULEMAKING IN RESPONSE TO CRISIS: THE EMERGENCE OF THE PRINCIPLE OF ENERGY SOLIDARITY AND ITS USE

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This article presents an overview of the legal development in the energy market, within the general EU internal market, and focuses on the emergence of the principle of energy solidarity. The process has been premised on the inclusion of Article 194 TFEU in 2009 and the resulting shift of legal basis, from Article 114 TFEU. But the significant stages are more recent. The analysis takes its starting point in the ruling by the EU Court of Justice (Grand Chamber) in Case C-848/19 P, where the Court declared the existence of a principle of energy solidarity that both EU institutions and Member States must take into account in the normal operation of the internal market. Then, the article proceeds with an empirical assessment how that ruling has been exploited by the EU Commission and Legislature. The overall conclusion is that the principle defined by the Court in the context of Article 194 TFEU has enabled the EU Legislature to push the confines of its competences and, in that way, to respond to the energy crisis.

1 RESEARCH CONTEXT

The present text builds on some of the results of an interdisciplinary project that has studied rulemaking in the EU internal market after the global financial crisis 2008. It was called *A Centralisation of Rulemaking in Europe? The Legal and Political Governance of the Financial Market*; the results of which are published in several books, articles and reports.¹ The text takes a starting point in my own research within this project and some of the ideas that I have continued to explore. They relate to the fact that the reform of the financial market departed from traditional rulemaking in the internal market. To some extent, this must be explained by the context that the changes were introduced in response to crisis. But irrespective of that, they were also the results of a critique of traditional rulemaking and enforcement of EU legal acts, and designed to come to terms with a perceived lack of cohesiveness.²

Against this background, I suggest that the reform of the financial market constitutes a structural shift: from a reactive model based on enforcement of EU legal acts that give Member States responsibility for transposition (and room for interpretation) to a proactive

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¹ See in particular Carl Fredrik Bergström and Magnus Strand (eds), *Legal Accountability in EU Markets for Financial Instruments: The Dual Role of Investment Firms* (Oxford University Press 2021); Adrienne Heritiér and Johannes Karremans (eds), *Regulating Finance in Europe: Policy Effects and Political Accountability* (Edward Elgar Publishing 2021); and Adrienne Heritiér and Magnus Schoeller (eds) *Governing Finance in Europe: A Centralisation of Rulemaking?* (Edward Elgar Publishing 2020).

² See Report of the High-Level Group on Financial Supervision in the EU (2009) (De Larosière Report), 27 <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf> accessed 01 August 2023.

model based on coordination of national authorities and uniform application of EU legal acts across all Member States. The new model is not easy to reconcile with the institutional framework in the EU Treaties or, indeed, the provisions relating to rulemaking, legal acts and enforcement. Therefore, it affects the balance of powers in the EU legal and political system. At the same time, the changes contribute to a dynamic development with new forms of interaction, interest representation and legal acts. To understand this better, I now ask myself whether a similar shift can be observed in other areas of the EU internal market.

The legal concept of the internal market was inserted through amendments of the EC Treaties in 1987 and is said to comprise ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’ (Article 26 TFEU). None of all competences that relate to the internal market has been more important than Article 114 TFEU (originally Article 100a TEEC). It enables the EU Legislature to adopt ‘measures for approximation’ of national law which have as their object ‘the establishment and functioning of the internal market’. The inclusion of Article 114 TFEU created more generous preconditions for rulemaking relating to the free movement of goods, persons, services and capital. Put into historical context, the introduction of the internal market represents a watershed in the integration process. Before, there had been limited political progress with respect to the free movement of goods, persons, services and capital. But after 1987, the situation changed. The most visible step was taken by the EU Commission through the launch of its internal market programme.³

The original internal market model was based on the existing institutional framework and supported by changes to the Treaties: the new competence in Article 114 TFEU and better preconditions for delegation of rulemaking powers to the EU Commission. The significance of the Treaties was clearly manifested in the internal market programme, which included a package of proposals for legal acts to be adopted by the EU Legislature over an intense period expiring 1993. Most of these legal acts were to have the form of directives, addressed to the ‘Member States’ and required to leave them the ‘choice of form and methods’ (Article 288 TFEU). The realisation of the directives – their transposition into national law – was to be safeguarded by the Commission itself, through enforcement actions against Member States, represented by their Governments (Article 258 TFEU).

The internal market programme became a political success and cemented the notion of ‘harmonisation’ based on the use of directives. This in turn influenced the nature of EU law; typically focusing on legal principles and procedures that should ensure directives’ effectiveness in Member States. Since then, the original internal market model has been reinforced by several subsequent reforms of the Treaties. Most important are improvements relating to enforcement actions; introducing fines for Member States (1993) and simplifying the procedure before the EU Court of Justice (1997 and 2009). But there have also been changes relating to rulemaking: encouraging the EU Legislature to delegate more powers to the EU Commission and reminding all Member States of their duty to adopt the measures necessary to implement EU legal acts (2009).

³ See *Completing the Internal Market: White Paper from the Commission to the European Council* (Milan, 28–29 June 1985), COM (1985) 310 final.

For a long time, the process for integration of the financial market was consistent with that of the internal market in general. But after the financial crisis the development in the financial market took a different direction. Most significantly, the use of directives was shifted to a use of ‘directly applicable’ regulations that are binding in their entirety (Article 288 TFEU).⁴ This in turn made it possible for the EU Legislature to establish new EU agencies, most notably the European Securities Market Authority (ESMA) in Paris, and empower them to operate inside the Member States, in interaction with national financial authorities but also firms and other stakeholders. The basic idea was that the EU agencies and their counterparts in the Member States ‘must be independent from possible political and industry influences, at both EU and national level’.⁵

Now there are several signs of a similar development in the energy market. Also this time in the context of a major crisis. In this text, I will briefly present an overview of the legal development in the energy market. Then, I will focus my assessment on the emergence of the principle of energy solidarity and seek to identify how that principle is being used. The assessment will combine a legal dogmatic method with a legal historical method and a legal empirical method.

The integration of the financial market was one of the objectives encompassed by the original EEC Treaty and one of the priority areas of the internal market programme. But for the energy market, there was no visible ambition until 1993, when a reference to ‘measures in the sphere of energy’ was inserted into the EC Treaty’s general list of activities.⁶ Before that, the European Council had ‘urgently appealed’ to the EU Legislature to step up its efforts for completion of the internal market in all areas where progress had not been so rapid and expressly included energy.⁷ This had resulted in two directives intended to open up for cross-border trade between transmission grids for electricity and natural gas (Directive (EEC) 1990/547 and Directive (EEC) 1991/296).⁸

The more ambitious development was initiated in 1996, with the adoption by the EU Legislature of the First Energy Package. This added two new directives that required the Member States to open up their monopolies to competition (Directive (EC) 1996/92 and Directive (EC) 1998/30).⁹ Like the initial directives, these had a legal basis in Article 114 TFEU (then Article 100a TEEC). In 2000, the European Council called – again

⁴ See Carl Fredrik Bergström, ‘EU Rulemaking in the Internal Market after the Financial Crisis’ in Carl Fredrik Bergström and Magnus Strand (eds), *Legal Accountability in EU Markets for Financial Instruments: The Dual Role of Investment Firms* (Oxford University Press 2021).

⁵ See Carl Fredrik Bergström, ‘EU Resilience within the Internal Market after the Financial Crisis: Political Resolution and Legal Responsiveness’ in Antonia Bakardjieva Engelbrekt et al (eds), *Routes to a Resilient European Union* (Palgrave MacMillan 2022). Quotation from the De Larosière Report (n 2), 47.

⁶ See Article 3 TEC as amended by Article G(3) TEU and also the inclusion of the new competence on energy in Article 130s TEC, with a reference to ‘measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply’ (point 2).

⁷ See Conclusions of the European Council Presidency in Rhodes 2-3 December 1988 <https://www.europarl.europa.eu/summits/rhodes/rh1_en.pdf> accessed 01 August 2023.

⁸ See Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids [1990] OJ L313/30, and Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids [1991] OJ L147/37.

⁹ See Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20, and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1. The legal basis was Article 114 TFEU (then Articles 95 TEEC) in combination with Articles 53 and 62 TFEU (then Articles 47 and 55 TEEC).

– for rapid work to speed up the process. This led to the adoption of the Second Energy Package. The central acts were two directives with common rules for electricity and natural gas (Directive (EC) 2003/54 and Directive (EC) 2003/55).¹⁰ They replaced all previous directives. A central feature was the introduction of a legal separation of transmission systems operators (TSOs), ensuring a long-term ability of the system, and distribution system operators (DSOs), managing energy to the final consumers. Following the implementation, consumers in Europe were entitled to choose their energy suppliers and all Member States compelled to designate national authorities responsible for monitoring of the energy market.¹¹

But it was soon concluded that the changes were insufficient and the European Council called for a true Energy Policy for Europe. This should enhance the functioning of the internal market and also enable ‘an external policy conducted in a spirit of solidarity and intended to ensure reliable, affordable and sustainable energy flows into the Union’.¹² In response to the European Council, the EU Commission presented a set of proposals that included a reform of the rulemaking architecture. First, the Member States’ monitoring authorities should be empowered and turned into National Energy Regulators (NRAs), which were ‘legally distinct and functionally independent from any other public or private entity’.¹³ Then, a preexisting advisory group composed of representatives from the same NRAs should be transformed into an EU agency that should coordinate their rulemaking and complete it.¹⁴ Finally a permanent network should be established for cross-border cooperation between the TSOs.

The proposals led to the adoption by the EU Legislature of the Third Energy Package. Also this time the acts included were based on Article 114 TFEU (then Article 95 TEC) and they entered into force in 2009, two months before the Lisbon Treaty. The central acts were two directives with rules for the generation, transmission, distribution, supply and storage of electricity and natural gas (Directive (EC) 2009/72 and Directive (EC) 2009/73). Linked to them was a regulation (Regulation (EC) 2009/713) establishing the Agency for the Cooperation of Energy Regulators (ACER) in Ljubljana.¹⁵ Essentially,

¹⁰ See Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37 (Directive 2003/54/EC) and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57. See also Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L176/1, and Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks [2005] OJ L289/1.

¹¹ Quote from Directive 2003/54/EC, Article 23.

¹² See Conclusions of the Brussels European Council (15 and 16 June 2006), point 22
<https://www.cvce.eu/en/unit-content/-/unit/b9fe3d6d-e79c-495e-856d-9729144d2cbd/9548f704-90e6-4432-8882-d36341449556#a9c3ae4a-5b2c-4bb9-a59e-34252456e799_en&overlay> accessed 01 August 2023.

¹³ Quote from Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55 (Directive 2009/72/EC), Article 35.4.a.

¹⁴ See 2003/796/EC: Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas [2003] OJ L296/34.

¹⁵ Directive 2009/72/EC; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94; and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1. The legal basis was Article 114 TFEU in combination with Articles 53 and 62 TFEU (then Articles 47 and 55 TEEC).

the regulation authorised ACER to coordinate the NRAs and to monitor the performance of the new European Network of Transmission System Operators (ENTSO).¹⁶ The legal acts that ACER could make use of were non-binding opinions, recommendations and guidelines, but also binding decisions (that were subject to control by an internal board of appeal whose assessments could be reviewed by the EU Court of Justice).

There are striking similarities between this rulemaking architecture and that which was introduced, more or less simultaneously, in the financial market.¹⁷ At the root was a wish to secure market confidence and, therefore, to ensure that national authorities did ‘not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks’.¹⁸

Parallel to the above development, the Lisbon Treaty entered into force. This was obviously relevant for several reasons. But most importantly, now, a new competence on energy was established in Article 194 TFEU and, at the same time, an explicit reference to energy was added to the existing competence on economic policy in Article 122 TFEU (see below).

After it was inserted, Article 194 TFEU came to replace Article 114 TFEU as the principal legal basis for the energy market.¹⁹ This far Article 194 TFEU has been used by the EU Legislature for the adoption of 9 directives and 19 regulations, which in turn has given rise to numerous implementing and delegated acts from the EU Commission. In 2019 a Fourth Energy Package was presented. Like before the central acts were two directives updating the common rules for electricity and natural gas (Directive (EU) 2019/944 and Directive (EU) 2019/692)²⁰ and an adjusted regulation (Regulation (EU) 2019/942) for ACER, intended to increase clarity after amendments and pave the way for changes ahead.²¹

The competence in Article 194 TFEU has often been perceived as a mere formality; an adjustment to the text reflecting the progress in the energy market that started more

¹⁶ See also Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15, and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36.

¹⁷ See Carl Fredrik Bergström, ‘EU Rulemaking in the Internal Market after the Financial Crisis’ (n 4).

¹⁸ See e.g., Articles 35 and 36 of Directive 2009/72/EC with its *travaux préparatoires* and Case C-718/18 *Commission v Germany* EU:C:2021:662, para 108. Cf now Articles 57 and 58 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/25 (Directive (EU) 2019/944).

¹⁹ See e.g., Kaisa Huhta, ‘The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector’ (2021) 70(4) *International and Comparative Law Quarterly* 991.

²⁰ See Directive (EU) 2019/944, and Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas [2019] OJ L117/1. See also Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) [2019] OJ L158/54, replacing Regulation (EC) 2007/14 (supra note 15).

²¹ See Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) [2019] OJ L158/22 and the Preamble, recitals 1-3: ‘It is anticipated that the need for coordination of national regulatory actions will increase further in the coming years. The Union’s energy system is in the middle of its most profound change in decades. More market integration and the change towards more variable electricity production require increased efforts to coordinate national energy policies with neighbours and increased efforts to use the opportunities of cross-border electricity trade’.

than ten years before Article 194 TFEU was introduced, through use of Article 114 TFEU.²² To some extent this is true. The wording of Article 194 TFEU resembles that of Article 114 TFEU: it connects to ‘the establishment and functioning of the internal market’ and it enables the EU Legislature to adopt unspecified ‘measures’ using the ordinary legislative procedure. Another important similarity with Article 114 TFEU is the explicit exemption for fiscal measures. In Article 194 TFEU, this can be seen in paragraph 3, which permits the EU Legislature to adopt measures that are ‘primarily of a fiscal nature’ but only if using a special legislative procedure; giving each Government a veto in the Council and restricting the formal influence of the European Parliament (cf Article 114(2) TFEU that excludes fiscal measures altogether).

But in contrast to Article 114 TFEU, the measures that the EU Legislature adopts under Article 194 TFEU have to be ‘necessary to achieve’ objectives that are more specific than those of the internal market (Article 26 TFEU):

- a) to ensure the functioning of the energy market;
- b) to ensure security of energy supply;
- c) to promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- d) to promote the interconnection of energy networks.

It is in this context the principle of energy solidarity presents itself. According to Article 194 TFEU, the objectives of the EU energy policy should be sought to achieve in a ‘spirit of solidarity’ between Member States. The same expressions appear in Article 122 TFEU, which enables the EU Legislature – here the Council alone – to take measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products and ‘notably in the area of energy’ (point 1). The provision in itself was inserted by the Maastricht Treaty (1993) but the reference to ‘energy’ and ‘the spirit of solidarity’ was added by the Lisbon Treaty, together with Article 194 TFEU.

How can this focus on energy in the Lisbon Treaty and the references to a ‘spirit of solidarity’ in the context of energy be explained?

There was no mention of ‘solidarity’ in treaty provisions until the Maastricht Treaty, which inserted a few general references (Article 1 TEU and 3 TEC) and some specific ones relating to the new common foreign and security policy (Articles 11 and 23 TEU). But after the Lisbon Treaty there were many more and in more areas. Most notably, solidarity was mentioned in Article 2 TEU that established, for the first time, the common values and the societal characteristics of the EU and its Member States. This and other references to solidarity had been envisaged already in the Constitutional Treaty (2004). But this was not so with the references to solidarity in Articles 194 TFEU and 122 TFEU. These were instead ‘modifications’ introduced after consultations held with the Member States just before the start of the intergovernmental conference that led to the Lisbon Treaty (2007).²³

²² See for example the Swedish Government [proposition 2007/08:168](#), pp 29, 51-52 and 199-200.

²³ See Council of the European Union, IGC 2007 Mandate, Brussels 26 June 2007 (11218/07), points 4 and 19 <https://www.cvce.eu/en/unit-content/-/unit/b9fe3d6d-e79c-495e-856d-9729144d2cbd/c940ecf0-f040-4644-b190-e0e4000e6116#f373c9eb-5bcf-4773-a2fc-62122bf88394_en&overlay> accessed 01 August 2023. The new competence on energy was envisaged already in the Constitutional Treaty (Article III-256 CT)

The reason for this was an emerging security crisis. Since 2006 Russia had begun to cut off gas to its largest pipeline to Europe, the Bratstvo pipeline running through Ukraine. The crisis did not only expose the vulnerability of Central and Eastern Europe but also the inability of the EU to provide a coordinated response. For these reasons, Poland threatened to veto the Lisbon Treaty, if that treaty would not enhance energy solidarity.²⁴

2 JUDICIAL RECOGNITION OF THE PRINCIPLE OF ENERGY SOLIDARITY

In the EU official database EUR-Lex, the ‘principle of energy solidarity’ is first mentioned in an opinion of the European Economic and Social Committee from 2009 and then again in 2016, in a resolution of the European Parliament.²⁵

The principle makes its entry into the EU Court in 2017, in an action brought by the Polish state gas company Polskie Górnictwo Naftowe i Gazownictwo (PGNiG) against the EU Commission (Case T-130/17).²⁶ PGNiG claimed that the General Court should annul a decision by the Commission that gave the German Energy Regulator permission to grant the Russian state gas company Gazprom full access to the new OPAL pipeline – connecting to the Nord Stream in the Baltic Sea – and, as a result, reduce transport through the Bratstvo pipeline (and also the Yamal pipeline). The decision was taken within the framework of Directive (EC) 2009/73. According to PGNiG, the decision meant that gas users in Central and Eastern Europe had become exposed to the risk of a lack of supply and that the decision, therefore, constituted an infringement of ‘the principle of energy solidarity’ (eleventh plea in law).

The action was dismissed by the General Court as inadmissible (for lack of standing) and nothing was said about the principle. But the case provides a vital background to the subsequent recognition by the EU Court of Justice of the principle of energy solidarity in 2021.

After the failure of PGNiG to challenge the decision favouring Gazprom, a more or less identical action was brought against the EU Commission by the Polish Government, supported by the Latvian Government and the Lithuanian (Case T-883/16). The applicant relied on several pleas in law, the first – and decisive – being infringement of ‘the principle of energy solidarity’ in Article 194 TFEU. In response to this, the Commission submitted that energy solidarity was merely ‘a political notion that appears in its communications and documents’ whereas the decision was adopted in compliance with the legal criteria of

but the words ‘notably in the area of energy’ in Article 122 TFEU (and the fourth objective in Article 194 TFEU) were also among the modifications.

²⁴ See Sami Andoura, ‘Energy Solidarity in Europe: From Independence to Interdependence’ (2013) Studies & Reports No 70 - Notre Europe, 30 and 34 <<https://institutdelors.eu/wp-content/uploads/2020/08/energysolidarity-andoura-ne-ijd-july13-1.pdf>> accessed 01 August 2023.

²⁵ See Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation concerning the notification to the Commission of investment projects in energy infrastructure within the European Community and repealing Regulation (EC) 1996/736, COM(2009) 361 final, point 1.6 European Parliament resolution of 25 October 2016 on EU strategy for liquefied natural gas and gas storage [2018] OJ C215/133.

²⁶ See the application in Case T-130/17 *PGNiG v Commission* [2017] OJ C121/4. Cf also Case T-616/18, *PGNiG v Commission* [2022] OJ C128/15.

Directive (EC) 2009/73 (and consistent with the EU priority project of the Nord Stream).²⁷ The Commission did not contest the existence of a principle of solidarity in Article 194 TFEU but argued that it was only addressed to the EU Legislature – not to the executive – to be used in a situation of crisis.

The General Court found that the decision was, indeed, adopted in breach of the principle of energy solidarity in Article 194 TFEU. Reaching its conclusion, the General Court stated that the ‘spirit of solidarity’ referred to in Article 194 TFEU was a specific expression of the general principle mentioned in several treaty provisions and that this principle entails a general obligation for the EU and the Member States ‘to take into account the interests of the other stakeholders and to balance those interests where there is a conflict’.²⁸ Since the Commission had failed to do this, the decision was annulled.²⁹

This led the German Government to make an appeal, seeking to have set aside the judgment of the General Court on grounds related to the nature of the principle of energy solidarity. Most importantly, it was submitted that the principle of energy solidarity in Article 194 TFEU was ‘an abstract, purely political notion and not a legal criterion for the assessment of the validity of an act of an EU institution’ and it was ‘only by the adoption of more specific rules in secondary legislation that such a principle could become a legal criterion to be implemented and applied by the executive’.³⁰

The case was tried by the EU Court of Justice in Grand Chamber (Case C-848/19 P).³¹ In its judgment of 15 July 2021, the Court rejected all grounds and consequently dismissed the appeal in its entirety. For anyone interested in the EU principle of solidarity, this is a case that should be studied carefully.³² Not only the findings of the Court, the arguments of the parties, and the Opinion of Advocate General Campos Sánchez-Bordona, but also the political context: the contested decision was taken two years *after* the Russian invasion of the Crimean Peninsula in 2014 and the German Government, supported by the Commission, was still fighting to make Europe more dependent on Russian gas.

The final judgment was passed a few months before the start of the war against Ukraine. The current account will only highlight those aspects of the judgment that concern the recognition of the principle of energy solidarity.

First, the Court confirmed that the spirit of solidarity mentioned in Article 194(1) TFEU constituted ‘a specific expression’ of the fundamental principle of solidarity, which was also referred to in other provisions (such as Article 122(1) TFEU).³³ This principle, the Court said, ‘underpins the entire legal system of the European Union’ and is closely linked to the principle of sincere cooperation in Article 4(3) TEU.³⁴

Then, it concluded that the General Court had been right to hold that

²⁷ See para 65.

²⁸ See in particular paras 69, 70 and 77; and cf Case C-848/19 P *Germany v Commission* EU:C:2021:598, para 20.

²⁹ See the excellent contribution by Federico Casolari in this Issue.

³⁰ See para 27.

³¹ See Case C-848/19 P (n 28).

³² See in particular the parallel rulings in Case C-156/21 *Hungary v European Parliament and Council* EU:C:2022:97, and in Case C-157/21 *Poland v European Parliament and Council* EU:C:2022:98.

³³ See paras 38-40.

³⁴ See para 41 with references to Case 39/72 *Commission v Italy* EU:C:1973:13, para 25, and Case 128/78 *Commission v United Kingdom* EU:C:1979:32, para 12.

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 it.³⁵

For this reason, the Court said, acts adopted by the EU institutions under the energy policy, ‘must be interpreted, and their legality assessed, in the light of the principle of energy solidarity’.³⁶ This meant that the EU institutions must conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole.³⁷

Finally, it shall be observed that the German Government (like the EU Commission) complained that the principle of energy solidarity was supposed to be an emergency mechanism and therefore to be used only in a situation of crisis. But once again the Court reverted to the wording of Article 194 TFEU and concluded that the EU institutions and the Member States must take the principle of energy solidarity into account in the normal operation of the internal market, by ensuring security of energy supply, ‘which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations’.³⁸

The implications of the judgment are far reaching yet far from clear. To what extent does the principle of energy solidarity extend to other areas and how does it influence the understanding of solidarity in EU law? There is already an important example of the EU Court of Justice – in plenary – making reference to the judgment ‘by analogy’ in a situation that had nothing to do with energy or indeed the internal market; to sustain the existence of a ‘fundamental principle’ of solidarity (with a horizontal basis in Article 2 TEU).³⁹ To what extent are the obligations that the principle of energy solidarity confers on the EU institutions and the Member States reflected by rights for private actors? None of these questions will be sought to answer here. In the following, focus will be set, instead, on a brief empirical assessment of the way in which the judgment has been used by the EU Legislature in the context of the energy crisis caused by the Russian war against Ukraine.

3 POLITICAL EXPLOITATION OF THE PRINCIPLE OF ENERGY SOLIDARITY

It was noted above that the EU Commission did not contest the existence of the principle of solidarity in Article 194 TFEU but argued that it was only addressed to the EU Legislature, to be used in a situation of crisis. This was later repeated by the German Government. Even if the Court took the principle far beyond that point, the reality has been such that the EU Legislature has been given no room for not acting in response to crisis.

³⁵ See para 49.

³⁶ See paras 43-44.

³⁷ See paras 51-53.

³⁸ See paras 67 and 69.

³⁹ See the parallel rulings of 16 February 2022, in Case C-156/21 and in Case C-157/21 (n 32) paras 129 and 147 respectively.

Little more than six months after the judgment that acknowledged the legal principle of energy solidarity, on 24 February 2022, Russia started its full-scale war against Ukraine. This, in turn, exposed Europe's over-dependence on gas and other fossil fuels, and drove energy prices to extreme levels. But the situation was significantly better than it would have been without the persistence of Poland and the perceptiveness of the EU Court(s).

In its response to the aggression, the European Council called upon the EU Commission to rapidly put forward a plan how to free all Member States from Russian energy.⁴⁰ The result was presented by the Commission in its REPowerEU plan.⁴¹ The basic idea was to fast forward the existing package of proposals for EU transition to renewable energy sources (Fit for 55) and support this with specific action. Parallel to the REPowerEU Plan, a new strategy was formulated for the EU external energy policy.⁴²

Since the launch of the REPowerEU Plan, several regulations have been adopted by the EU Legislature (and some decisions, but no directives). But only one of them has had a legal basis in Article 194 TFEU.⁴³ The remaining five have had a legal basis in Article 122 TFEU and, interestingly, each of them explicitly purports to implement the fundamental principle of energy solidarity 'stated by the EU Court of Justice' in Case C-848/19 P. The reference to the ruling can be found in the explanatory memorandum of each underlying proposal and sometimes also in the preamble of the final act.⁴⁴

In terms of substance, the principle of energy solidarity has been used to introduce a number of temporary measures intended to increase security of EU energy supply: a common platform for purchase of gas; a correction mechanism for transactions; an emergency intervention to mitigate consumers' cost for electricity; and a targeted support for new technologies with high potential for quick deployment.⁴⁵

In terms of procedure, the principle of energy solidarity has, typically, been used in the assessment by the EU Commission of subsidiarity, to explain the need for a

⁴⁰ See Conclusions of the European Council in Brussels 24 and 25 March 2022, points 15-19 <<https://data.consilium.europa.eu/doc/document/ST-1-2022-INIT/en/pdf>> accessed 01 August 2023.

⁴¹ See Communication of the Commission of 18 May 2022: REPowerEU Plan, COM/2022/230 final <https://eur-lex.europa.eu/resource.html?uri=cellar:fc930f14-d7ae-11ec-a95f-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 01 August 2023.

⁴² See Joint Communication of the Commission and the High Representative of the EU for Foreign Affairs and Security Policy of 18 May 2022: EU External Energy Engagement in a Changing World, JOIN/2022/23 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022JC0023&from=EN>> accessed 01 August 2023.

⁴³ See Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) 2009/715 with regard to gas storage [2022] OJ L173/17.

⁴⁴ See e.g. the preamble of Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36 (Council Regulation 2022/2577), recital 22: 'The principle of energy solidarity is a general principle under Union law as stated by the European Court of Justice in its judgment of 15 July 2021, in Case C-848/19 P, Germany v Poland and it applies to all Member States. In implementing the principle of energy solidarity, this Regulation allows for cross-border distribution of the effects of faster deployment of renewable energy projects'.

⁴⁵ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L206/1; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L2611/1; Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders [2022] OJ L335/1; Council Regulation 2022/2577; 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 prices [2022] OJ L335/45.

coordinated approach and sustain its conclusion that the objectives of a specific proposal for a legal act ‘cannot be sufficiently achieved by the Member States’ (Article 5.3 TEU). Also, this can be found in the explanatory memorandum of the proposal, under the regular sub-title on ‘subsidiarity’ or, most recently, a new sub-title on ‘solidarity’ (appearing before the regular sub-title on subsidiarity).⁴⁶

In addition to the above, two more observations should be made. First, the choice of instrument – regulations over directives – has invariably been motivated by ‘the dimension of the energy crisis’ and the corresponding need for ‘a swift, uniform and Union-wide cooperation mechanism’. Second, two of the regulations include a number of provisions that entrust ACER with more power and, that way, enhance its position in the rulemaking architecture (without formal amendments of Regulation (EU) 2019/942).⁴⁷

4 CONCLUSIONS

Looking at its historical and political context, it seems clear that the principle of energy solidarity is an offspring of foreign and security policy. The judgment that launched the principle was given in the context of an approaching crisis and its subsequent use by the EU Legislature was crucial for the response to this crisis.

The principle of energy solidarity framed by the EU Court was used by it to annul the validity of a decision from the EU Commission – addressed only to one of the Member States – since it had not taken into account the interests of the other Member States and of the European Union as a whole. In more general terms, the Court introduced a requirement that all legal acts adopted by the EU institutions under the energy policy ‘must be interpreted, and their legality assessed, in the light of the principle of energy solidarity’.⁴⁸

Since it was framed by the EU Court, the principle of energy solidarity has been used by the EU Legislature to exploit its competence to adopt legal acts and push the confines. Most obviously, the principle of energy solidarity has been invoked to counterbalance the principle of subsidiarity. To some extent, this has made it possible to build further on the new rulemaking architecture and, in particular, entrust ACER with more power. This conclusion gives some support for the idea that the EU Legislature has instrumentalised the principle of energy solidarity, to support an ongoing structural shift in the energy market, similar to the shift in the financial market. But this will need more study.

Two additional observations.

The principle of energy solidarity is more than likely to spill over into other areas. It has been noted that there is already an important example of the EU Court making reference to its judgment ‘by analogy’ in a situation that had nothing to do with energy or indeed the internal market.⁴⁹ But a closer consideration of the way in which the principle has been used by the EU Legislature reveals that there has also been an important spillover in the context of energy policy: a legal principle recognised within Article 194 TFEU has been used to adopt legal acts within Article 122 TFEU. Even if there are similarities between them, the competence in Article 122 TFEU has a much broader scope and its

⁴⁶ See, for the latter, the Proposal for Council Regulation (EU) 2022/2578 (*ibid*), COM/2022/668 final.

⁴⁷ See Council Regulation (EU) 2022/2576 and Council Regulation (EU) 2022/2578 (n 45).

⁴⁸ See n 36.

⁴⁹ See n 39.

‘spirit of solidarity’ is not confined to energy. Therefore, the principle from Article 194 TFEU, as interpreted by the EU Court in Case C-848/19 P, has already been imported in other areas.

The most controversial act adopted by the EU Legislature this far, is Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices.⁵⁰ The significance of this regulation in the context of the energy crisis has been enormous. Still, several Member States have expressed concerns with respect to its legal basis. The main reasons for this are found in the fact that the regulation is, clearly, a fiscal measure and, therefore, such that its adoption would normally require unanimity in the Council (cf Article 194(3) TFEU). Under Article 122 TFEU, the Council was able to force it through with qualified majority voting (cf Article 16(3) TEU). At least one of the Member States, Hungary, would have been likely to use its veto to block the measure, had it been given the chance.⁵¹ Since then, the same kind of protests are being voiced by ExxonMobil and other companies ‘with activities in the crude petroleum, natural gas, coal and refinery sectors’ whose profits are targeted by the ‘solidarity contribution’ in Council Regulation (EU) 2022/1854.⁵² There are currently five actions for annulment pending before the EU General Court.⁵³ They will teach us all more about the principle of energy solidarity.

⁵⁰ See n 45.

⁵¹ See Council General Secretariat Communication on the written procedure opened by CM 4714/22 of 6 October 2022, 2022/0289(NLE) <<https://data.consilium.europa.eu/doc/document/CM-4715-2022-INIT/en/pdf>> accessed 01 August 2023.

⁵² See in particular Articles 14-18.

⁵³ See Case T-802/22: Action brought on 28 December 2022, *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council* [2023] OJ C54/23; and Case T-759/22: Action brought on 2 December 2022, *Electravinds Shabla South EAD v Council* [2023] OJ C71/32; Case T-775/22: Action brought on 12 December 2022, *TJ and Others v Council* [2023] OJ C54/19; Case T-795/22: Action brought on 20 December 2022, *TV and TW v Council* [2023] OJ C54/20; and Case T-803/22: Action brought on 30 December 2022, *TZ v Council* [2023] OJ C63/64.

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