

**Giuseppe Morgese (a cura di)**

# **LA SOLIDARIETÀ EUROPEA: A CHE PUNTO SIAMO?**

**EUSTiC Jean Monnet Chair Working Papers 2023**



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Il presente volume rientra tra le attività di divulgazione dei risultati delle attività della Cattedra Jean Monnet 2022-2025 dal titolo "EU Solidarity in (Times of) Crisis?" (EUSTIC) (Project No. 101083292), cofinanziata dal Programma Erasmus+ dell'Unione europea nell'ambito dell'Azione Jean Monnet (ERASMUS-JMO-2022-HEI-TCH-RSCH - ERASMUS-JMO-2022-CHAIR), di cui è titolare il Prof. Giuseppe Morgese. I contenuti riflettono le opinioni espresse degli autori. La Commissione e l'Agenzia EACEA non sono responsabili in alcun modo dei contenuti e delle opinioni espresse.

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# **Unus Pro Omnibus, Omnes Pro Uno? The Energy Crisis, REPowerEU and the Principle of Solidarity**

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## **1. Introduction: the energy crisis as a laboratory for energy solidarity.**

This contribution deals with the principle of solidarity as it has been implemented to counter the effects of the energy crisis. It will do so focusing on REPowerEU, and in particular on (some of) the legislative measures adopted within the context of this package<sup>1</sup>. Its aim is to reflect upon the complex and multi-faceted meaning(s) of solidarity in energy law, as expression and manifestation of the general principle of solidarity<sup>2</sup>. Solidarity, together with fairness and loyal cooperation, is one of the cornerstones of European integration<sup>3</sup>.

In this perspective, we will follow the thread of the concept of inter-state

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<sup>1</sup> Communication from the Commission, 18 May 2022, REPowerEU Plan, COM(2022)230 final. This Plan has been preceded by a Joint European Action for more affordable, secure and sustainable energy, presented on 8 March 2022, COM(2022)108 final.

<sup>2</sup> The scientific debate on this principle is rich. For references, see F. Maiani, R. Bieber, *Sans solidarité point d'Union européenne: regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile*, in *Revue trimestrielle de droit européen*, 2012, p. 295; A. Sangiovanni, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, p. 213; P. Hilpold, *Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union*, in *Yearbook of European Law*, 2015, p. 257; A. Biondi, E. Dagilytė, E. Küçük (eds.), *Solidarity in EU Law. Legal Principle in the Making*, Cheltenham-Northampton, 2018; G. Morgese, *La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018. For a recent analysis on energy solidarity, see S. Villani, *Considerazioni sul principio di solidarietà energetica nel quadro giuridico dell'UE*, in *federalismi.it*, 5/2023, p. 118.

<sup>3</sup> G. Morgese, *Solidarietà di fatto ... e di diritto? L'Unione europea allo specchio della crisi pandemica*, in *Eurojus.it*, numero speciale "L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive", 2020, p. 77; Pi. Mengozzi, *L'idea di solidarietà nel diritto dell'Unione europea*, Bologna, 2022.

solidarity<sup>4</sup>, i.e. solidarity in inter-state relations, which is especially important since one of the main pillars of the EU's energy policy is the security of supply (Article 194(1)(b) TFEU). In addition to this traditional dimension, we will pay attention to other forms of solidarity. For example, there is also a corrective idea of solidarity and even a redistributive idea of solidarity that will be revealed<sup>5</sup>.

In the aftermath of the invasion of Ukraine by Russia, and of the breakdown of the relations between EU and Russia, the Commission adopted the *REPowerEU* Plan<sup>6</sup>. With this Plan, the Commission has clearly formulated the targets of ending dependence from Russian fossil fuels, accelerating the clean energy transition, and reducing energy consumption. Even if both the pandemic and energy crises have created important stress situations for the energy market, representing critical events for the energy security paradigm, the effort of the Commission has been to develop and consolidate, in the long-term, the targets of the Green Deal<sup>7</sup>. This is expression of the intertwinement between energy and climate crises, which touch upon two pillars of the so-called energy trilemma, i.e., energy sustainability and energy security. Energy sustainability is one of the priorities of the European Commission and is embedded in the European Green Deal<sup>8</sup>.

In this context, the search for emergency solutions to secure supplies is intertwined with the pursuit of policies, e.g. on renewable energies, which have a more structural nature. Furthermore, these priorities touch on various competences of the EU, in particular environment and energy, which have developed along different historical paths<sup>9</sup>. Against this premise, EU institutions have proposed several measures to react to the shocks created by the crisis. These will be analysed through the prism of the principle of solidarity.

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<sup>4</sup> F. Croci, *Solidarietà tra Stati membri dell'Unione europea e governance economica europea*, Torino, 2020.

<sup>5</sup> For analyses on these different declinations of the same principle, see A. Sangiovanni, *supra* n. 2; P. Eleftheriadis, *Corrective Justice Among States*, in *Jus Cogens*, 2020, p. 7; S. Giubboni, *Solidarietà. Un itinerario di ricerca*, Napoli, 2022.

<sup>6</sup> *Supra* n. 1; for a comment, see D. Sheppard, *Russia weaponisation of gas spurs clean energy push to secure supply*, *Financial Times*, 20 September 2022.

<sup>7</sup> Communication from the Commission, 11 December 2019, The European Green Deal, Communication from the Commission, 11 December 2019, The European Green Deal, [COM\(2019\)640 final](#). See A. Gili, A. Rizzi, *From the Green Deal to REPowerEU: The Green Transition in Europe and Beyond*, ISPIonline, 28 July 2022.

<sup>8</sup> See also [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).

<sup>9</sup> K. Talus, *Introduction to EU Energy Law*, Oxford, 2016. For an early account on the intertwinement between energy and environment, see L. Hancher, *Energy and the Environment: Striking a Balance?*, in *Common Market Law Review*, 1989, p. 475.



## 2. The *OPAL* case and the constitutionalisation of solidarity as a legal principle of energy law.

The last decades of European integration have been described by former European Commission President Jean-Claude Juncker as expression of a “polycrisis” of the EU: this refers to the juncture of multiple crises, hitting both the governance (euro-crisis and refugee crisis) and the very identity (rule of law backsliding) and composition (Brexit) of the EU. In these contexts of crises, solidarity is invoked regularly in political speeches and policy documents as the unifying element, that unique feature that should enable the finding of innovative solutions healing governance structures<sup>10</sup>. Yet, several questions remain as to its scope and content, and if there is a uniform meaning of solidarity as a legal principle, across the different policy domains.

This paper will precisely tackle solidarity in the context of the measures adopted in the energy crisis, to distill the features of this legal principle, with the aim to contribute to the scholarly debate on the principles of EU law.

This principle has a special relevance in energy law since the Treaty of Lisbon. Back then, when a specific energy competence was negotiated, Poland lobbied for the inclusion of the principle of solidarity in Article 194(1) TFEU, considering its vulnerable position in relation to energy security: interestingly, it was the first country to rely on this principle in litigation<sup>11</sup>.

An additional legal basis for solidarity measures in the context of energy law is given by Article 122(1) TFEU, which is the general legal basis for emergency measures in the context of the coordination of economic policies. This provision states that the Council can adopt, “in a spirit of solidarity between Member States (...) the measures appropriate to the economic situation, in particular, if severe difficulties arise in the supply of certain products, notably in the area of energy”. In the context of economic integration too, energy is recognized as a crucial production factor.

After the Lisbon reform, the CJEU has had the chance to rely on the energy-specific legal basis for solidarity in the context of a highly significant controversy between Germany and Poland on the *OPAL* pipeline, connecting Germany to the NordStream II pipeline - the “*OPAL* case” - which represents a constitutional turning point in energy law<sup>12</sup>.

“In a spirit of solidarity between Member States” seems to be a style for-

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<sup>10</sup> See, e.g., the State of the Union speeches of 2015 and 2017 by then President Jean-Claude Juncker and the one of 2022 by President Ursula von der Leyen.

<sup>11</sup> D. Buschle, *Energy Solidarity: Approaching a New Constitutional Principle*, in *European Energy & Climate Journal*, 2021, p. 66.

<sup>12</sup> Buschle, *supra* n. 11.

mula of Article 194(1) TFEU. Yet, in *OPAL* the CJEU affirmed that the principle of solidarity is a cornerstone of EU energy law and is legally binding<sup>13</sup>. Furthermore, it interpreted the principle of solidarity as having a broad scope, beyond the traditional interpretation of energy security, and covering all four different policy aspects of the EU energy policy: beyond energy security, these include energy sustainability, the functioning of the energy market, and the promotion of the interconnection of energy networks<sup>14</sup>. As highlighted by Münchmeyer in his analysis of the case, solidarity permeates all four strands of EU energy law<sup>15</sup>.

Furthermore, the judgment stated that the principle of solidarity of Article 194(1) TFEU is one of the specific expressions, in the field of energy, of the general principle of solidarity<sup>16</sup>, as already argued in a prominent case on the decision on migrants' relocations, against, among others, the same Poland<sup>17</sup>. In doing so, the Court supports the idea that the principle of solidarity has a polymorphic nature: as I have argued elsewhere, besides a core common to the whole EU system, the principle can be declined with several nuances across the different sectors where it is supposed to apply<sup>18</sup>.

At the same time, solidarity entails rights and obligations both for the EU and for the Member States, in their relations (vertical dimension), but also among the same Member States (horizontal dimension). This is extremely important since it stresses an inescapable horizontal dimension of the principle, which might impact or even conflict upon national prerogatives in energy law. It should be recalled that Article 194(2) TFEU provides that the objectives of the EU energy policy "shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply".

While the significance of this case is high, yet not all its implications are clear. As highlighted, the principle permeates all four dimensions of the energy policy, also in their relations between States. Among the most significant and sensitive developments, we have its possible consequences on the inter-

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<sup>13</sup> Case C-848/19 P, *Germany v. Poland*, Judgment of 15 July 2021, para 37 ff.

<sup>14</sup> Ibid.

<sup>15</sup> M. Münchmeyer, *The principle of energy solidarity: Germany v. Poland*, in *Common Market Law Review*, 2022, p. 915.

<sup>16</sup> Case C-848/19 P, *Germany v. Poland*, *supra* n. 13, para 38.

<sup>17</sup> Case C-848/19 P, *Germany v. Poland*, *supra* n. 13, para 42, citing C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, Judgment of 2 April 2020, paras 80 and 181.

<sup>18</sup> L. Marin, *What did the COVID-19 crisis teach us about European solidarity? Incomplete integration, conflicts of sovereignty and the principle of solidarity in EU law*, in F. de Abreu Duarte, F. Palmiotto Ettore (eds.), *Sovereignty, Technology and Governance after Covid-19: Legal Challenges in a Post-Pandemic Europe*, Oxford-New York, 2022, p. 51.

play between EU-led decarbonization and national prerogatives on energy mixes.

The principle of solidarity – as framed by the CJEU – goes beyond emergencies and entails a preventive dimension: the EU can resort to it to avoid the occurrence of crises; in this aspect lies the specificity of Article 194(1) TFEU in relation to Article 222, assessed by the Court<sup>19</sup>. In contrast, the relation between Article 122(1) and 194(1) TFEU has not been addressed in the *OPAL* Judgement. This is curious, also in light of the fact that the measures adopted in the aftermath of the crisis are mostly based on Article 122(1) TFEU: it must be recalled that this procedure does not involve the European Parliament and it allows the Council to decide at qualified majority<sup>20</sup>.

With this analysis of the principle of solidarity in the energy constitutional framework, we can now assess the measures adopted in the aftermath of the energy crisis.

### **3. The EU and the energy crisis: *REPowerEU* and other initiatives.**

In the effort to design a timely reaction to the energy crisis, the EU institutions have enacted several measures, of both legislative and non-legislative nature, and solidarity comes often into play as a guiding principle.

A first remark to be made concerns the semantic complexity of the word solidarity, which is, e.g., employed as indicating solidarity arrangements between States, but also as a solidarity contribution: in the latter case, it clearly conceals a tax<sup>21</sup>. The aim of this section is to navigate through the most significant provisions enacting solidarity.

The *REPowerEU* is the strategic masterplan redesigning the whole energy policy, both in its internal and external dimensions<sup>22</sup>. In this effort, the Plan has four interrelated main objectives: saving energy; diversifying supplies; compensating for reduced fossil fuel imports by scaling up the deployment of renewable energy; and “smartly [combining] investments and reforms”. It was accompanied by a set of documents focusing on particular aspects of this shift in energy policy, such as the financial dimension, and the Joint Communication on the EU’s external energy relations, among others<sup>23</sup>. For these reasons, *REPowerEU* is certainly a step in the direction of strengthening the stra-

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<sup>19</sup> Case C-848/19 P, *Germany v. Poland*, *supra* n. 13, para 69.

<sup>20</sup> As per Article 16(3) TEU.

<sup>21</sup> Articles 14-18 of [Council Regulation \(EU\) 2022/1854](#) of 6 October 2022 on an emergency intervention to address high energy prices.

<sup>22</sup> *Supra* n. 1.

<sup>23</sup> *Ibid.*

tegic autonomy of the EU.

Building on this ambitious programmatic document, the EU adopted also binding instruments. The first set of measures, passed before the summer, is Regulation No. 2022/1032 on gas storage, which provided for gas storage minimums and provisions on storage infrastructures<sup>24</sup>, and Regulation No. 2022/1369 on coordinated demand-reduction measures<sup>25</sup>; then we have the Regulation No. 2022/1854 on an emergency intervention to address high energy prices in the EU (hereinafter: Regulation Emergency Intervention or REI)<sup>26</sup>.

These regulations have been completed by another set of instruments, adopted in December 2022, such as Regulation No. 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders (hereinafter: Regulation Gas Purchases or RGP)<sup>27</sup>; Regulation No. 2022/2577 laying down a framework to accelerate the deployment of renewable energy<sup>28</sup>; and Regulation No. 2022/2578 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices<sup>29</sup>. All the measures have Article 122(1) TFEU as the legal basis, with the exception of Regulation No. 2022/1032 on gas storage, based on Article 194(2) TFEU.

Regulation No. 2022/1369 on coordinated demand-reduction has been challenged by Poland with an annulment action. Poland contends that the measure affects domestic energy mixes, and it breaches the principle of energy solidarity<sup>30</sup>. More broadly, Poland has disputed also other measures aimed at reducing carbon emissions<sup>31</sup>. For some States, energy should be kept a domestic competence, as much as possible.

While a complete overview of these measures is not possible here, this contribution will focus on solidarity as articulated in two significant measures, namely Regulation Emergency Intervention and Regulation Gas Purchases.

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<sup>24</sup> [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.

<sup>25</sup> [Council Regulation \(EU\) 2022/1369](#), of 5 August 2022, on coordinated demand-reduction measures for gas.

<sup>26</sup> [Council Regulation \(EU\) 2022/1854](#), of 6 October 2022, on an emergency intervention to address high energy prices.

<sup>27</sup> [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.

<sup>28</sup> [Council Regulation \(EU\) 2022/2577](#), of 22 December 2022, laying down a framework to accelerate the deployment of renewable energy.

<sup>29</sup> [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.

<sup>30</sup> [Case C-675/22](#)

<sup>31</sup> [Poland's legal challenges against carbon emission tax, published in OJ](#), in *EULawLive*, 28 August 2023.

#### **4. Regulation Emergency Intervention: solidarity as an instrument of stabilization of the energy market.**

As anticipated above, one of the most significant measures is the Regulation Emergency Intervention or REI. It has the aim of “moderating” the market, capping the revenues for electricity generators using infra-marginal technologies, targeting renewable, nuclear, lignite, for example, with a duty of reinvestment to the benefit of the final consumers (revenue cap). It provides that Member States shall ensure that the surplus revenues deriving from the application of the cap are used to support final electricity consumers with measures mitigating the impact of high electricity prices (Article 10).

While this provision is inspired by a redistributive logic of solidarity, another interesting dimension of solidarity embedded in this Regulation rests in the solidarity agreements between Member States. Since at domestic level States have different energy mixes, not all States can support their final customers in a symmetric manner. Therefore, Member States with net import of electricity above 100% shall conclude agreements to share the surplus revenues with the main exporting Member State in a spirit of solidarity (Article 11 REI). Such solidarity agreements are also encouraged, in particular, to reflect unbalanced trading relationships. These agreements mirror the solidarity agreements of the Security of supply Regulation of 2017<sup>32</sup>, which have been mandated but not implemented for long, since States have been reluctant to conclude them. These agreements do suggest a corrective idea of solidarity, i.e. a market-related idea of solidarity meant to correct the distortive effects of the instabilities of the market and their consequences in the relations between States.

In addition, REI provides for measures organizing forms of solidarity to mitigate the effects of the crisis, introducing a solidarity contribution, i.e. a tax, on the profits of companies active in the crude petroleum, natural gas, coal, and refinery sectors. The solidarity contribution, additional to regular taxes (Article 16), is calculated on taxable profits which are above a 20% increase of the average of the taxable profits in the last four years (Articles 14-18).

This tax will be to the benefit of households and companies, mitigating the effects of high retail prices for electricity. In this respect, on the use of the proceeds from the temporary solidarity contribution, Article 17 provides that, among other destinations, “in a spirit of solidarity between Member States, Member States *may assign a share of the proceeds to the common financing*

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<sup>32</sup> 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.

of measures to reduce the harmful effects of the energy crisis, including support for protecting employment”, and to promote investments in energy efficiency, including cross-border projects, and in the Union renewable energy financing mechanism as per Article 33 of Regulation 2018/1999<sup>33</sup>.

This seems to be a translation of the fully-fledged energy solidarity of Article 194(1) TFEU, as interpreted by the CJEU, in the sense that, next to beneficiaries most hit by the crisis, a share of the proceeds can be assigned to the financing of measures aimed at mitigating the harmful effects of the energy crisis, including cross-border projects, and in the Union renewable energy financing mechanism. Yet, the measure has been adopted on the legal basis of Article 122(1) TFEU. At this purpose, it has been observed by Leigh Han-cher that the Council Legal Service had opined that Article 122(1) TFEU can be the legal basis of measures aimed to “react” and counter the effects of an emergency<sup>34</sup>. Instead, a measure providing for funding to enact reforms seems to be an expression of a proactive – and not reactive – policy<sup>35</sup>.

Both the revenue cap and the solidarity contribution, provided for in this Regulation, have been challenged by private litigants with annulment actions: their legal basis has been disputed, among other grounds. The cases are currently pending<sup>36</sup>. Though we know that the standards for the litigation of EU measures by private parties are very stringent, it can be discussed whether a tax has been correctly adopted with the procedure of Article 122(1) TFEU.

The Commission has reviewed the different measures of the REI and not all of them have been successful<sup>37</sup>. For example, the Commission is not going to propose a prolongation of the demand reduction measures, nor of the infra-marginal revenue cap. The revenues collected with the cap were lower than the expectations. Secondly, the differences in implementation among Member States contributed to the limited success of the measure. Overall, some of the measures adopted have failed the objective of mitigating the asymmetric consequences of the crisis, because of the fragmentation of the EU energy market.

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<sup>33</sup> 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.

<sup>34</sup> L. Hancher, *Solidarity on Solidarity Levies and a Choice of Energy Mix. A sound legal basis for emergency action in the EU's energy markets*, in *VerfBlog*, 8 February 2023.

<sup>35</sup> For a broader understanding on the cycle of measures to react to a crisis, see S. Villani, *supra* n. 2, at 144.

<sup>36</sup> *Case T-759/22* and *Case T-802/22*.

<sup>37</sup> Report from the Commission, 5 June 2023, on the Review of Emergency Interventions to Address High Energy Prices in Accordance with Council Regulation (EU) 2022/1854, [COM\(2023\)302 final](#).

## 5. Regulation Gas Purchases: an effective correction of the fragmentation of national sovereignty in energy mixes?

After the EU's decision to quit Russian fossil fuels by 2027 under the *REPowerEU* strategy, the Regulation Gas Purchases (RGP) has provided for a demand aggregation mechanism, with the aim to overcome the traditional fragmentation of domestic energy markets. In particular, the measure has the aim to "negotiate better prices and reduce the risk of Member States outbidding each other on the global market"<sup>38</sup>. Furthermore, the RGP provides also for a market correction mechanism, to prevent excessive gas prices and excessive intra-day volatility in energy derivatives markets; and a gas emergency scheme, as a mechanism for gas allocation for Member States affected by a regional or Union gas supply emergency.

The Regulation Gas Purchases provides for solidarity through a better coordination of gas purchases. This is made in two steps: the demand aggregation, which is compulsory, and the joint purchasing scheme, which is voluntary. The Commission is facilitating the process with the creation of an ad hoc Steering Board, composed by representatives of each Member State and tasked with the facilitation of demand aggregation and joint purchasing. For example, it supports the Commission assessing the contracts and the *Memo-randa of Understanding* notified by companies.

Instead, the participation in the Joint Purchasing Scheme (JPS) is voluntary. Gas companies participating in the demand aggregation may coordinate elements of the conditions with their suppliers or use joint purchase contracts with their suppliers. However, all natural gas companies must participate in the demand aggregation process as one of the means to meet gas storage targets, thus supporting the attainment of the goals of the Regulation No. 2022/1032.

The scheme requires Member States to participate in the aggregation of gas demand equal to 15% of their 2023 gas storage filling target (per Article 10). As one can observe, 15% is not a great share of the filling targets, so this joint purchase mechanism could have - in the best case - a corrective effect only. Also, the JPS is on a voluntary basis, in the effort to help smaller States and companies to access markets at better conditions.

The measure entered into force on 31 March 2023 with a validity of one year and it has met some success: according to press sources, the Commission is considering turning this first temporary scheme into a permanent

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<sup>38</sup> A. Barnes, *EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment*, OIES Paper: NG 176, Oxford Institute for Energy Studies, 2022.

one<sup>39</sup>, because the tenders have been successful<sup>40</sup>: for example, the demand has exceeded expectations in the first tender<sup>41</sup>.

This scheme is the evolution of the EU Energy Platform, one of the first achievements of *REPowerEU*. The Energy Platform supports the common purchase of gas, fulfilling three functions: demand aggregation and restructuring, by pooling demand; reinforcing the security of supply, with improved use of import, storage, and transmission infrastructure; and improving the international outreach, concluding long-term cooperation frameworks, supporting the purchasing of gas and hydrogen, and clean energy project development<sup>42</sup>.

This Regulation manifests the effort to mitigate the asymmetrical consequences of the energy crisis in a context of integration and fragmentation: as known, each Member State has the right to determine its own energy mix<sup>43</sup>. In other words, the Commission tries to prevent the most negative effects of a crisis, which for some States might entail an energy supply crisis. Solidarity is here employed to correct the asymmetries embedded in the design of the European energy markets, as composed of several domestic national markets.

Overall, considering both measures together, we can argue that solidarity has been deployed to correct (or prevent that) the persistent fragmentation of national energy markets might endanger the security of supply for some States. European solidarity is therefore integrating the paradigm of fairness into the relations between States.

## **6. The mitigation of the energy crisis between national sovereignty and supranational integration.**

With the *REPowerEU* Plan and several legislative measures passed in 2022, the EU is addressing the crisis, partially coordinating the responses of the Member States and avoiding that free riding could compromise energy security for some states: this seems still related to solidarity in energy security, which is the minimum legacy of the *OPAL* case and expression of solidarity linked

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<sup>39</sup> K. Abnett, J. Payne, *EU proposes permanent scheme for joint gas purchases*, Reuters, 5 September 2023.

<sup>40</sup> Information publicly available on the webpage of the European Commission concerning the *EU Energy Platform*.

<sup>41</sup> K. Abnett, *EU to open third round of joint gas buying in September*, Reuters, 23 August 2023.

<sup>42</sup> *Supra* n. 1.

<sup>43</sup> On States' energy rights, see K. Haraldsdóttir, *The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU*, in *European Energy and Environmental Law Review*, 2014, p. 208; and K. Huhta, *The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, in *International & Comparative Law Quarterly*, 2021, p. 991.



to emergencies, as provided for in Article 122(1) TFEU<sup>44</sup>. Next to a coordinated effort, some States remain active in securing their domestic markets, and this feeds the frustration of others, who possess fewer economic resources to address this crisis and invoke a stronger supranational intervention<sup>45</sup>.

The energy crisis created a situation where an asymmetrical shock will create exponentially more asymmetrical consequences, because of the fragmented nature of the European energy market<sup>46</sup>. It is therefore important that emergency measures can address these imbalances, to grant energy security and to correct the distortive effects created by the crisis<sup>47</sup>.

If the measures are certainly inspired by solidarity, some observations can be made precisely on this principle. First, solidarity is – once again – linked to an emergency, and the use of Article 122(1) TFEU as legal basis confirms it. Article 122(1) TFEU deals with economic solidarity in case of “difficulties (...) in the supply of certain products, notably in the area of energy”. This procedure allows the Council to decide at qualified majority, excluding the European Parliament. This entails by-passing the rules and guarantees typical of the ordinary legislative procedure, also including an impact assessment. Additionally, Article 122(1) TFEU has been used for many disparate measures, from supporting Greece during the refugee crisis<sup>48</sup> to the SURE during the pandemic<sup>49</sup>: is this provision becoming the general *passe-partout* legal basis for emergency regulation, for any situation requiring urgent action at EU level?

Though it is not uncommon that emergencies cause “deviations” from the ordinary course of action<sup>50</sup>, it is to be observed that also in the EU system, the increased resort to Article 122 TFEU witnesses a shift toward intergovernmentalism in relation to the mitigation of the effects of emergencies<sup>51</sup>.

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<sup>44</sup> A. Bartenstein, *European energy solidarity: strengthening the EU's crisisability*, Fondation Robert Schuman, European Issues n°655, 7 February 2023.

<sup>45</sup> A. Delfs, K. Kowalcze, V. Dezem, *Germany Plans €54 Billion Package to Contain Energy Surge*, Bloomberg, 22 November 2022; J. Liboreiro, V. Genovese, *Germany faces scrutiny from EU peers over massive €200 billion aid scheme to cushion high gas bills*, Euronews, 4 October 2022. For similar observations, see Report COM(2023)302 final, *supra* n. 37.

<sup>46</sup> N. Berghmans, *The energy crisis shows the importance of European solidarity in the face of asymmetric shocks*, Fondation Robert Schuman, European Interview n°116, 12 July 2022.

<sup>47</sup> For the idea of solidarity as corrective justice, see Eleftheriadis, *supra* n. 5.

<sup>48</sup> Council Regulation (EU) 2016/369, of 15 March 2016, on the provision of emergency support within the Union.

<sup>49</sup> Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

<sup>50</sup> K. L. Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, in *Journal of Constitutional Law*, 2004, p. 1001. For EU law, see B. De Witte, *Guest Editorial: EU emergency law and its impact on the EU legal order*, in *Common Market Law Review*, 2022, p. 3.

<sup>51</sup> S. Fabbrini, *Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis*, in *Comparative Political Studies*, 2013, p. 1003; F. Schimmelfennig, *Liberal Intergovernmentalism and the Crises of the European Union*, in *Journal of Common Market Studies*, 2018, p. 1578.

Second, in several horizontal inter-state solidarity measures there is an important voluntaristic dimension, in the sense that States are left free to decide to activate forms of solidarity, in contrast to mandatory solidarity initiatives, perhaps because of the urgency and legitimacy issues explained above. These measures do not seem to be inspired by a vision of further Europeanization of the markets, but rather by the preservation of domestic competences, where the EU intervenes to correct the most dangerous effects of the crisis. Along these lines, though there might be also a redistributive component in these emergency measures, aimed at protecting households and companies, the redistributive effects of solidarity are to be measured within States; their horizontal (inter-state) effects seem inspired by a corrective logic<sup>52</sup>, mainly to address the asymmetric consequences of the crisis.

Though unprecedented and unthinkable before the Ukrainian war, a final question mark remains on the long-term effects of the crisis for the fragmentation of the European energy market. In similar terms, the evolution of the scope of the principle of solidarity in energy law after the *OPAL* case is yet to be seen. As to the current energy crisis, solidarity is certainly the buzzword. Instead, a more structural reform of the energy market, inspired by a more robust supranational rationale is not in sight. It might be in that context that we could appreciate the full potential of the solidarity principle as envisaged by the CJEU in the *OPAL* case, also to support more ambitious European decarbonization policies.

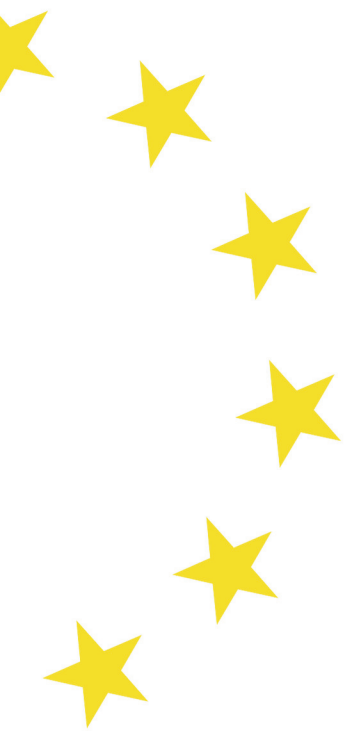
### ***Unus Pro Omnibus, Omnes Pro Uno? The Energy Crisis, REPowerEU and the Principle of Solidarity***

Solidarity is a general principle of EU law and a core value permeating the process of integration; furthermore, several policies do recognise it as a guiding principle and objective. This contribution is devoted to the principle of solidarity as implemented in some measures enacted to mitigate the effects of the energy crisis. After a short introduction to the principle, as interpreted by the Court of Justice in the *OPAL* case, the contribution will assess the EU's response to the energy crisis, known under the framework of *REPowerEU*. Two prominent legislative measures will be assessed, before sketching some observations on the role of Article 122(1) TFEU and solidarity, on the nature and scope of solidarity provisions, and on the persistent causes for fragmentation within the EU energy market.

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<sup>52</sup> See Eleftheriadis, *supra* n. 5.



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