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research paper

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THE EU'S RESPONSE TO THE WAR-INDUCED ENERGY CRISIS: LEGAL AND BUDGETARY ISSUES

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ABSTRACT

Russia's aggression of Ukraine caused a severe energy crisis for the European Union (EU). The purpose of this paper is to examine the core legal measures that the EU deployed since the start of the war to address a spike in energy prices, to facilitate the green transition and to develop an industrial policy for the net-zero age. The paper argues that the EU measures adopted to respond to Russia's aggression in the fields of energy and industry have exploited potentials of the EU treaties and contributed to mitigate the energy crisis – thus preserving public support for Ukraine's cause too. Nevertheless, the paper also discusses how EU interventions in the energy market and efforts to decarbonize industry have caused legal and budgetary issues. In particular, the paper assesses the legality of some of the emergency measures, such as a windfall tax on surplus profit for energy companies. Moreover, it considers the challenges to the EU internal market level playing field resulting from the relaxation of EU state aid law – especially in the absence of corresponding supranational spending to fund the green industrial deal – and highlights the risks for EU competitiveness, in line with the recommendations of the Draghi report.

Keywords: War in Ukraine, European Union, energy, industry, emergency measures, legality, level playing field, funding

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1. Introduction

Wars have unintended consequences. In particular, Russia's war against Ukraine, and the measures adopted by the European Union (EU) to sanction the aggressor, produced major turmoil on the energy markets. Many EU member states had significant energy dependencies from Russia, with the EU as a whole importing 40% of its gas, 27% of its oil, and 46% of its coal from Russia in early 2022. Consequently, Russia could weaponize its resources leading to skyrocketing energy prices, a spike in inflation, and an economic slowdown. As reported by the EU Agency for the Cooperation of Energy Regulators (ACER) electricity prices sharply increased in 2022, from a prior average of 35 €/MWh, to over 300 €/MWh, with intra-day spikes of over 3000 €/MWh.[1] Moreover, as highlighted by the EU statistical agency EUROSTAT, annual inflation more than tripled in the EU in 2022,[2] forcing the European Central Bank (ECB) to quickly raise interest rates in 2022/2023 by 450 basis point to an all-time high of 4%.[3] At the same time, as indicated by the Organization for Economic Cooperation and Development (OECD), war-induced high inflation combined with post-pandemic bottlenecks to weaken economic growth.[4] All this threatened the competitiveness of the European economy, the welfare of households and the liquidity of firms – potentially breaking the EU's steadfast stance in support of Ukraine.

The purpose of this paper is to examine from an EU law and policy perspective the key measures that the EU deployed in 2022-2024 to respond to Russia's aggression of Ukraine in the fields of energy and industry and to address its side effects for citizens and businesses. Specifically, the paper examines the emergency interventions in the energy markets that the EU rolled out to tackle skyrocketing prices of gas and electricity and to support households and businesses in weathering the energy crisis. Moreover, it analyzes the structural policies that the EU introduced to phase out from Russian fossil fuels and accelerate the transition towards renewable energies, including through greater flexibility in the application of state aid rules and new EU funding to repower the green transition. Finally, the paper also outlines the development of a brand-new EU industrial policy for net-zero age, mapping the legal measures that the EU adopted to promote a green deal

[1] ACER, Wholesale Electricity Market Monitoring 2022: Key Developments, 28 February 2023, available at https://acer.europa.eu/sites/default/files/documents/Publications/Electricity_MMR_2022-Key_Developments.pdf

[2] EUROSTAT, Annual inflation more than tripled in the EU in 2022, 9 March 2023, available at https://ec.europa.eu/eurostat/web/products-eurostat-news/w/DDN-20230309-2

[3] European Central Bank, Key ECB Interest Rates, available at https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html

[4] OECD, "Russia's war of aggression against Ukraine continues to create serious headwinds for global economy, OECD says", 22 November 2022, https://www.oecd.org/newsroom/russia-s-war-of-aggression-against-ukraine-continues-to-create-serious-headwinds-for-global-economy.htm

industrial plan, to foster a regulatory environment for clean energies, and to strengthen trade defense instruments against unfair global competition.

As the paper argues, the EU constitution enabled the EU "to insure domestic tranquility",[5] as the EU adopted ground-breaking measures to help EU citizens and businesses weather the domestic consequences of the war and cushion the energy crisis resulting from Russia's aggression of Ukraine. In line with the goal set by EU leaders in the March 2022 Versailles Declaration to "b) reducing our energy dependencies; and c) building a more robust economic base"[6] the EU accelerated the phasing-out from Russian fossil fuels and launched a new industrial policy for the green transition. Among others, the EU introduced emergency measures to cap the price of oil and to correct the unjustified increases in the price of gas. Furthermore, the EU adjusted its state aid framework and approved new financing measures to support public investment in renewable energies. Finally, the war in Ukraine also pushed the EU to reconsider its industrial policy strategy. To facilitate the decarbonization of industry, the EU approved a new regulatory framework for the net-zero age, while also fostering the resilience of supply chains and access to critical raw materials. At the same time, the EU strengthened the competitiveness of its domestic industries also by defending it against unfair global competition on the green transition.

Nevertheless, as this paper maintains, the EU's response to the energy crisis raised a number of challenges. On the one hand, emergency interventions in the energy markets posed issues of domestic legality, with especially the adoption by the Council of the EU of a solidarity contribution for energy producers who had made surplus profits being subjected to multiple legal challenges. On the other hand, EU measures adopted to facilitate the green transition and the decarbonization of industry – notably the relaxation of state aid rules – have threatened the level playing field at the heart of the EU internal market, given the differences in member states' fiscal margins of intervention. Otherwise, the EU public investment in strategic technologies and the green industrial deal has been negligible, due to constraints in the EU fiscal constitution. Yet, this state of affairs has significantly challenged the competitiveness of the EU industry especially in light of massive investments in clean energy made by other global players, such as the United States through the 2022 Inflation Reduction Act (IRA). This poses long-term challenges for the EU economy.

As such, this paper is structured as follows. Section 2 examines the core measures adopted by the EU in the fields of energy and industry in response to the war in Ukraine, including interventions in the energy market, support for the green transition and development of an industrial policy for the net-zero age. Section 3 discusses the consequences of these war-related developments. Section 4, however, critically considers some of the challenges that EU action in energy and industry raised, including on level playing field and funding. Section 5, finally, concludes.

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[5] US Const. Preamb.

[6] Informal meeting of the Heads of State or Government, Versailles Declaration, 10-11 March 2022, para 7.

2. The core measures

2.1. Interventions in the energy market

To deal with ever higher energy prices, the EU institutions adopted a barrage of legal measures. To begin with, in June 2022, the European Parliament (EP) and the Council adopted a regulation on the basis of Article 194(2) TFEU, on the EU's energy policy, laying out rules with regard to gas storage.[7] The regulation amended a prior piece of EU legislation on the security of gas supplies and set filling targets and filling trajectories for member states with regard to the filling of underground gas storages facilities in their territories. Specifically, on the understanding that "[t]he escalation of the Russian military aggression against Ukraine since February 2022 has led to unprecedented price increases [… which] are likely to fundamentally change the incentives to fill underground gas storage facilities in the [EU]",[8] the regulation required member states to fill 80% of their gas storages facility by 1 November 2022, and 90% by 1 November 2023 and subsequent years.[9] To this end, the regulation required member states to report progression in their filling targets by 15 September,[10] and, in case of "a substantial and sustained deviation"[11] from the target, empowered the Commission to "take a decision as a measure of last resort to require the Member State concerned to take measures that effectively remedy the deviation."[12] The regulation also introduced a reporting requirement for the Commission to the EP and the Council by 28 February 2023, and annually thereafter, with an overview of the measures taken by member states to fulfil the storage obligations.[13]

Furthermore, in August 2022, the Council of the EU adopted, on the basis of Article 122(1) TFEU, a regulation on coordinated demand-reduction measures for gas.[14] In the awareness that "the recent escalation of disruption of gas supply from Russia points to a significant risk that a complete halt of Russian gas supplies may materialise in the near future, in an abrupt and unilateral way"[15] the regulation introduced both a voluntary and a mandatory demand reduction mechanism for gas. Specifically, Article 3 required member states to "use their best efforts to reduce their gas consumption in the period from 1 August 2022 to 31 March 2023 at least by 15 % compared to their average gas consumption in the period from 1 August to 31 March during the five" proceedings years. Furthermore, Article 4 established a mechanism to declare "a Union alert", whereby the Council, on a proposal from the Commission, could take the "political […] decision to trigger a mandatory Union-wide demand-reduction obligation."[16] In this case, pursuant to Article 5, the regulation set a mandatory gas reduction of 15%. According to Article 6, member states were "free

[7] 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, OJ 2022 L 173/17
[8] Ibid, recit 1
[9] Ibid, Art. 1(2) adding Art 6a to 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, OJ 2017 L 280/1.
[10] Ibid, Art 6a(7)
[11] Ibid, Art 6a(11)
[12] Ibid
[13] Ibid Art. 1(5) adding Art 17a to Regulation (EU) 2017/1938
[14] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas, OJ 2022 L 206/1
[15] Ibid, recit 5
[16] Ibid, rec 11

to choose the appropriate measures to reduce demand" provided these measures neither "unduly distort competition or the proper functioning of the internal market in gas" nor "endanger the security of gas supply of other Member States or of the [EU]."[17] The regulation also granted to the Commission monitoring powers.[18] Yet, in case of "risk that a Member State will not be able to fulfil the mandatory demand-reduction obligation", the Commission enforcement powers were limited to "request the Member State to submit a plan setting out a strategy to effectively achieve the demand-reduction obligation."[19]

The regulation, given its "exceptional nature,"[20] had an initial validity of one year.[21] However, in March 2023, the Council adopted an amending regulation, also based on Article 122(1) TFEU, which prolonged the demand-reduction period for demand-reduction measures until 31 March 2024.[22] Considering that "severe difficulties persist for the security of energy supply[, t]he global situation on the gas market has not improved since February 2022 and the [EU] continues to rely on certain volumes of Russian gas to meet its overall gas demand,"[23] the regulation extended the 2022 demand-reduction measures "until the end of the winter of 2023-2024,"[24] while introducing also additional reporting requirements for member states.[25] However, if in March 2023 the "extension of Regulation (EU) 2022/1369 constitute[d] an emergency measure in response to persistant and new severe difficulties in the supply of energy" in March 2024 the same conditions were not met: therefore, the Council did not further renew the regulation and rather replaced it with a non-binding recommendation to continue a 15% voluntary demand reductions for gas.[26]

Furthermore, in October 2022 the Council of the EU adopted another regulation,[27] also based on Article 122 TFEU, on emergency interventions to address the "current energy crisis."[28] The regulation noted that the war in Ukraine "resulted in substantial additional increases in, and volatility of, the price of electricity"[29] – both in the wholesale and the retail market. At the same time, it pointed out that "[t]he stark increase of energy prices is substantially contributing to the general inflation in the euro area and slowing down economic growth in the [EU]."[30] Therefore, the regulation stated that "Russia's war of aggression against Ukraine, and the hybrid war which is thereby being carried out, have created a crisis situation which requires the adoption of a set of urgent, temporary and exceptional measures of an economic nature to address the unbearable

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[17] Ibid, Art 6(1)
[18] Ibid, Art 8
[19] Ibid, Art. 8(2)
[20] Ibid, recit 29
[21] Ibid, Art 10
[22] Council Regulation (EU) 2023/706 of 30 March 2023 amending Regulation (EU) 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation, OJ 2023 L 93/1.
[23] Ibid, recit 3
[24] Ibid, recit 21
[25] Ibid, Art. 1(5) amending Art 8 of Council Regulation (EU) 2022/1369.
[26] Council of the EU press release, "Security of gas supply: member states agree on recommendation to continue voluntary demand reduction measures", 4 March 2024.
[27] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ 2022 L 261I/1
[28] Ibid, recit 5
[29] Ibid, recit 1
[30] Ibid, recit 5

effects on consumers and companies."[31] Content-wise, the regulation introduced three "exceptional, targeted and time-limited measures"[32] to mitigate the effects of high electric energy prices: First, it set targets to reduce electricity consumption; Second, it introduced a cap on market revenues that producers receive from the generation of electricity; and third, it established a mandatory solidarity tax from EU companies with activities in the crude petroleum, natural gas, coal and refinery sectors to contribute to the affordability of energy for households and companies.[33]

More in detail, Article 3 of the regulation required member states to "endeavour to implement measures to reduce their total monthly gross electricity consumption by 10 % compared to the average of gross electricity consumption in the corresponding months", while Article 4 required member states to reduce consumption by at least 5% during peak hours. Moreover, Article 6 introduced a mandatory cap on market revenues, specifying that producers of energy from the sources listed in Article 7 – hence: wind energy, solar energy, geothermal energy, hydropower, biomass fuel, waste, nuclear energy, lignite, crude petroleum products and peat – could receive "a maximum of 180 EUR per MWh of electricity produced."[34] On the basis of Article 10, then, "Member States shall ensure that all surplus revenues resulting from the application of the cap on market revenues are used to finance measures in support of final electricity customers that mitigate the impact of high electricity prices on those customers, in a targeted manner." To this end, the regulation left open to member states the possibility to, inter alia, arrange "direct transfers to final electricity customers,"[35] clarifying also that "Where revenues obtained directly from the implementation of the cap on market revenues [...] are insufficient to adequately support final electricity customers, Member States shall be allowed to use other appropriate means such as budgetary resources for the same purpose and under the same conditions."[36]

Beside the cap on market revenues, the regulation also introduced a temporary solidarity contribution for companies in the crude petroleum, natural gas, coal and refinery sectors for fiscal years 2022 and 2023.[37] As the regulation made clear, this windfall tax "should act as a redistributing measure to ensure that the companies concerned which have earned surplus profits as a result of the unexpected circumstances, contribute in proportion to the improvement of the energy crisis in the internal market."[38] Specifically, Article 15 of the regulation identified the base for calculating the temporary solidarity contribution as "the taxable profits, as determined under national tax rules, in the fiscal year 2022 and/or the fiscal year 2023 [...] which are above a 20 % increase of the average of the taxable profits [...] in the four fiscal years starting on or after 1 January 2018", while Article 16 indicated that "[t]he rate applicable for calculating the temporary solidarity contribution shall be at least 33 %" of the abovementioned base. Pursuant to Article 17, member states were free to use proceeds from the temporary solidarity contribution to, inter alia, provide "financial support

[31] Ibid, recit 8
[32] Ibid, Art. 1
[33] Ibid.
[34] Ibid, Art 6(1)
[35] Ibid, Art 10(4)(b)
[36] Ibid, Art 10(3)
[37] Ibid, Art 15
[38] Ibid, recit 51

measures for final energy customers, and in particular vulnerable households"[39] and "financial support measures to support companies in energy intensive industries provided that they are made conditional upon investments into renewable energies, energy efficiency or other decarbonisation technologies."[40] The regulation, which had standard monitoring[41] requirements, "shall apply until 31 December 2023"[42] but it tasked the Commission to carry out a review of the provisions on the windfall tax by 15 October 2024 "in view of the general situation of the fossil fuel sector and the surplus profits generated."[43]

As the energy crisis continued, however, pressure mounted to introduce a price cap on the costs of oil and gas. In October 2022,[44] the European Council flagged the possibility of "a temporary dynamic price corridor on natural gas transactions"[45] or "a temporary EU framework to cap the price of gas in electricity generation"[46], but due German and Dutch reluctance progress on this matter was slow.[47] Eventually, however, in December 2022, the Council of the EU – in coordination with international partners, especially the US – introduced a price cap on Russian oil, at 60$ per barrel.[48] This measure was set up as part of an EU round of sanctions against Russia. Specifically, a Council decision enacted on the basis of Article 29 TEU,[49] and an identically worded Council regulation enacted on the basis of Article 215 TFEU,[50] followed by a Commission implementing regulation,[51] prohibited the maritime transport of crude oil and petroleum products, and relatedly the provision of technical assistance, brokering services and financing or financial assistance, of petroleum which originates in Russia, except provided the price did not exceed the value of 60$ per barrel.[52] The price cap was operational as of 5 December 2022 for crude oil, and 5 February 2023 for petroleum products, with a commitment to review its operation every two months.

Furthermore, also in December 2022 the Council of the EU approved a package of three regulations – all based on Articles 122(1) TFEU – which sought to address "skyrocketing energy prices in the [EU]."[53] The package included a regulation on enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchange of gas across borders;[54] a regulation laying

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[39] Ibid, Art 17(1)(a)
[40] Ibid, Art 17(1)(c)
[41] Ibid, Art 19
[42] Ibid, Art 22(2)
[43] Ibid, Art 20(2)
[44] European Council conclusions 20-21 October 2022, EUCO 31/22.
[45] Ibid para 18.c)
[46] Ibid para 18.d)
[47] Germany & the Netherlands, Joint non-paper on gas prices in the European Union, 11 October 2022
[48] Council of the EU press release "Russian oil: EU agrees on level of price cap", 3 December 2022
[49] Council Decision (CFSP) 2022/2369 of 3 December 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, OJ 2022 L 311 1/8
[50] Council Regulation (EU) 2022/2367 of 3 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2022 L 311 I/1
[51] Commission Implementing Regulation (EU) 2022/2368 of 3 December 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2022 L 311 I/5
[52] Ibid, Annex
[53] 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, OJ 2022 L 335/1, recit 1.
[54] Ibid

down a framework to accelerate the deployment of renewable energy;[55] and, crucially, a regulation establishing a market correction mechanism (MCM) to protection EU citizens and the economy against excessively high prices.[56] The first regulation essentially promoted a mostly voluntary[57] mechanism to allow for "demand aggregation and joint gas purchasing by undertakings established in the [EU]."[58] To this end, Article 5 empowered the Commission to "contract the necessary services of an entity established in the [EU] through a procurement procedure," tasking the gas purchasing consortium to seek offers from natural gas suppliers in third countries,[59] provided these were not subjected to EU restrictive measures, or directly or indirectly owned or controlled by Russia.[60] Moreover, the regulation also put in place measures to enhance the use of liquefied natural gas (LNG) facilities, gas storage facilities and pipelines,[61] and to strengthen inter-state solidarity in case of a gas emergency.[62] Finally, to address the "extremely high and volatile natural gas prices"[63] resulting from Russia's aggression of Ukraine, the regulation introduced special measures to prevent excessive gas prices and excessive intra-day volatility in energy derivatives markets.[64] Specifically, Article 15 required trading venues to set up by 31 January 2023 "for each energy-related commodity derivative traded on it, an intra-day volatility management mechanism based on an upper and lower price boundary ('price boundaries') that defines the prices above and below which orders may not be executed ('intra-day volatility management mechanism')," while Article 16 gave to competent national authorities and to the European Securities and Market Authority (ESMA) a supervisory role.

While this intra-day volatility management mechanism was largely left to market forces to operationalize, the regulation establishing a MCM set up a publicly-enforced regime to handle exceptionally high energy prices[65] – coming close to a form of price cap for gas. As the regulation pointed out, "Russia's weaponisation of gas supply and market manipulation through intentional disruptions of gas flows have led to skyrocketing energy prices in the [EU]"[66] and "[f]ollowing the damage to the Nord Stream 1 pipeline which was likely caused by an act of sabotage in September 2022, there is no likelihood that gas supplies from Russia to the [EU] will resume at pre-war levels in the near future."[67] As a result, the ordinary price-formation mechanisms for the EU gas market – which primarily relied on the standard pricing set at the Dutch Title Transfer Facility (TTF) – appeared no longer reliable.[68] To deal with this situation, therefore, the regulation introduced "a temporary [MCM] for orders placed for trading TTF derivatives [...] to limit episodes of excessively

[55] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ 2022 L 335/36.
[56] 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, OJ 2022 L 335/45
[57] Council Regulation (EU) 2022/2576, Art 10(1)
[58] Ibid, Art 1(1)(a)
[59] Ibid, Art 7(1)(b)
[60] Ibid, Art 8
[61] Ibid, Art 12
[62] Ibid, Art 23
[63] Ibid, recit 41
[64] Ibid, Art 15
[65] Council Regulation (EU) 2022/2578
[66] Ibid, recit 1
[67] Ibid, recit 3
[68] Ibid, recit 5

high gas prices in the [EU] which do not reflect world market prices."[69] The regulation, however, pushed back the entry into force of the MCM to 1 February 2023,[70] and introduced two tight conditions for its activation: as clarified in Article 4, the price of gas shall "exceed[] EUR 180/MWh for three working days," and this must be "EUR 35 higher than the reference price" provided by the daily average price of the LNG, as calculated using several global benchmarks. If such conditions were met, the ACER would publish a notice,[71] requiring market operators not to trade commodities over the reference value, "for a minimum of 20 working days."[72] Yet, Article 5 introduced an automatic deactivation mechanism of the MCM "if the reference price is below EUR 145/MWh for three consecutive working days", and – reflecting major worries that the MCM may impair the functioning of financial markets – Article 6 gave the Commission wide powers, also in consultation with ESMA, to "suspend the MCM at any time by means of an implementing decision, where unintended market disturbances or manifest risks of such disturbances occur that negatively affect security of supply, intra-Union flows of gas or financial stability."

Both the regulation on reliable price benchmarks and exchange of gas across borders, and the regulation establishing a MCM were initially valid for a period of one year.[73] However, both acts required the Commission to issue a report on the usefulness of these instruments,[74] and their review.[75] As a result, in December 2023 the Council of the EU extended until 31 December 2024 the validity of the price benchmark regulation,[76] and until 31 January 2025 the validity of the MCM regulation,[77] considering that "severe difficulties persist for the Union's security of energy supply,"[78] and that "[t]he level of gas prices could have a negative impact on the economic situation of the [EU], on its industrial competitiveness and on the purchasing power of its citizens."[79]

2.2. Support for the green transition

Besides the above-mentioned war-related emergency measures, the EU responded to the energy crisis caused by Russia's aggression of Ukraine by accelerating the energy transition. In 2019, the EU had already set the goal to become the first carbon neutral continent,[80] and a core pillar of the post-pandemic EU economic recovery program had centered on the green transition. The war in Ukraine, however, led to an acceleration of this path. In particular, in March 2022, the European Commission put forward a plan named RePowerEU, which outlined a roadmap for a more

[69] Ibid, Art 1
[70] Ibid, Art 12
[71] Ibid, Art 4(3)
[72] Ibid, Art 4(7)
[73] Council Regulation (EU) 2022/2578, Art 12; Council Regulation (EU) 2022/2576, Art 31
[74] Council Regulation (EU) 2022/2576, Art 30
[75] Council Regulation (EU) 2022/2578, Art 10
[76] Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application OJ 2023 L
[77] Council Regulation (EU) 2023/2920 of 21 December 2023 amending Regulation (EU) 2022/2578 as regards the prolongation of its period of application OJ 2023 L
[78] Ibid recit 5
[79] Ibid, recit 9
[80] European Commission Communication, "The European Green Deal", 11 December 2019, COM(2019) 640 final.

affordable, secure and sustainable energy.[81] The Commission plan rested essentially on a two-pronged strategy. On the one hand, the Commission envisioned broadening the flexibility of EU state aid laws, to enable member states to support households and companies facing the energy crisis, while providing more incentives to improve energy efficiency and decarbonize. On the other hand, the Commission set the target to reduce faster the dependence on Russian fossil fuels through a series of measures designed to speed up the transition towards renewable energies.

On the state aid front, in March 2022 the European Commission approved a Temporary Crisis Framework (TCF) for state aid measures to support the economy following the aggression against Ukraine by Russia,[82] which in view of the "challenges resulting from the geopolitical situation [...] set[] out the possibilities Member States have under EU State aid rules to ensure liquidity and access to finance for undertakings [...] that face economic challenges under the current crisis."[83] The TCF gave wide latitude to member states to subsidize the cost of energy for households and companies, especially small and medium enterprises (SMEs), until 31 December 2022. In July 2022, however, the Commission amended the TCF, further increasing the maximum amount of funding that member states could provide to undertakings, while incentivizing investments in renewable energy.[84] And in October 2022 the Commission adopted a new TCF, which inter alia also coordinated the state aid framework with the recently adopted regulations on emergency interventions in the energy markets.[85]

Subsequently, in March 2023 the European Commission amended the General Block Exemption Regulation (GBER),[86] and replaced the TCF with a new Temporary Crisis and Transition Framework (TCTF), with a stronger focus on facilitating the energy transition.[87] The TCTF enabled Member States to cushion the economic impact of Russia's aggression of Ukraine and, until 31 December 2023, to (i) grant limited amounts of aid to companies affected by the current crisis; (ii) ensure that sufficient liquidity remains available to businesses; (iii) compensate companies for the additional costs incurred due to exceptionally high gas and electricity prices; and (iv) incentivise additional reduction of electricity consumption. At the same time, the TCTF enabled member states to provide state aid until 31 December 2025, to (i) accelerate the roll-out of renewable energy, storage and renewable heat relevant for REPowerEU and (ii) decarbonise industrial production processes. In November 2023, however, the Commission prolonged the possibility to grant state aid till 30 June

[81] European Commission Communication, "RePowerEU: Joint European Action for more affordable, secure and sustainable energy", 8 March 2022, COM(2022) 108 final.
[82] Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2022/C 131 I/01, C/2022/1890, OJ 2022 C 131I1
[83] Ibid para 21
[84] Communication from the Commission Amendment to the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2022/C 280/01, OJ 2022 C 280/1
[85] Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2022/C 426/01, OJ 2022 C 426/1
[86] European Commission press release, "State aid: Commission amends General Block Exemption rules to further facilitate and speed up green and digital transition", 9 March 2023
[87] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2023/C 101/03, OJ 2023 C 101/3

2024,[88] and in May 2024 – in response to farmers' protests – it further extended public support for firms in the agricultural and fisheries sector.[89]

Yet, the European Commission's decision to give greater room for maneuver to member states in subsidizing the energy transition caused concerns given differences in national budgetary capacity. As such, in May 2022 the European Commission further teased out the RePowerEU plan,[90] detailing steps to increase energy saving, diversify energy imports, ensure sufficient level of gas storage, enhance connectivity of the energy grids within the EU and between the EU and its neighbors, and financially support the clean energy transition. In its RePowerEU plan, in particular, the Commission proposed raising €20 billion additional resources from the auctioning of Emission Trading Scheme (ETS) rights and allocating these to the energy transition. Moreover, the Commission proposed to redirect up to €225 billion from the post-pandemic Next Generation EU (NGEU) Recovery Fund – which the EU had funded through the issuance of common debt in the aftermath of the Covid-19 pandemic[91] – to finance energy transition measures in member states affected by soaring energy costs and retaliation by Russia.[92]

Eventually, in February 2023, the EP and the Council approved the RePowerEU regulation,[93] which amended the 2021 regulation establishing the Recovery and Resilience Facility (RRF)[94] to further support financially the green transition. By recognizing the "direct links between a sustainable recovery, building the [EU]'s resilience and energy security, reducing dependence on fossil fuels, in particular from Russia, and the [EU]'s role in a just and inclusive transition"[95] the RePowerEU regulation required member states to amend their National Recovery and Resilience Plans (NRRP) by adding a new RePowerEU chapter, with reforms and investments designed to "a) improving energy infrastructure [...]; b) boosting energy efficiency [...]; c) addressing energy poverty; d) incentivizing reduction of energy demands; e) addressing internal and cross-border energy transmission."[96] To this end, the RePowerEU regulation made available to member states ad additional budget of €20 billion in grants,[97] and empowered them to request further loan assistance

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[88] Communication from the Commission – Amendment to the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia C/2023/8045, OJ 2023 C.
[89] Communication from the Commission – Second amendment to the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia C/2024/3123, OJ 2024 C.
[90] See European Commission Communication, 'RePower EU Plan', 18 May 2022, COM(2022)230 final.
[91] Fabbrini
[92] See European Commission proposal for a regulation of the European Parliament and the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulation (EU) 2021/1060 , Regulation (EU) 2021/2115, Directive 2003/87/EC and Decision (EU) 2015/1814 , 18 May 2022, COM(2022)231 final.
[93] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC, OJ 2023 L 63/1 [hereinafter RePowerEU regulation].
[94] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ 2021 L 57/17 [hereinafter RRF regulation]
[95] RePowerEU regulation, recit 2
[96] Ibid, Art. 1(8) adding a new Article 21c(3) to the RRF regulation
[97] Ibid, Art 1(8) adding a new Article 21a to the RRF regulation

under the RRF,[98] tapping on the unused resources of the NGEU Recovery Fund. Moreover, the Regulation also enabled member states to re-direct up to 7.5% of cohesion spending,[99] as well as resources from the Brexit Adjustment Reserve,[100] towards RePowerEU targets.

2.3. Development of an industrial policy

If the war in Ukraine pushed the EU to reduce its energy dependences from Russia, and accelerate the green transition, it also highlighted the need to increase the resilience of the EU economic base, addressing strategic dependencies in multiple sectors, including critical raw materials and semi-conductors needed to decarbonize industries.[101] In fact, the pressure to phase out of fossil fuels and develop renewable energies technologies raised a novel awareness on the importance of an EU industrial policy designed to support the transition towards a green economy. The urgency of a dedicated green industrial policy, furthermore, was increased by policy measures adopted in other developed economies, notably the US, which allocated major amounts of resources in the form of subsidies and tax credits to incentivize companies to invest in clean technologies. As a result, in late 2022 and early 2023 the largest EU member states – Germany, France and Italy – jointly and severally called for promoting an EU industrial policy fit for the 21st century, with measures to support the EU's competitiveness and facilitate the industrial adjustment to the net-zero age.[102]

Along these lines, in February 2023 the European Commission unveiled a "Green Deal Industrial Plan for the Net-Zero Age"[103] which laid out detailed proposals to speed up net-zero industrial transformation in the EU. The Commission underlined how the war in Ukraine and the "phase-out of Russian fossil fuels has accelerated a new industrial revolution,"[104] and consequently put forward a strategy to lead the way on this path. To this end, the Commission proposed changing the EU regulatory environment, with a dedicated Net-Zero Industry Act (NZIA), defining simple and operational criteria for identifying net-zero supply chains projects of strategic interests. Moreover, the Commission unveiled opportunities for private investment in renewable energies, and proposed to set up a dedicated funding scheme, named Strategic Technologies for Europe Platform (STEP), designed to provide extra public funding to four EU programs, namely InvestEU, Horizon, the Innovation Fund and the European Defense Fund.[105] Finally, the Commission also

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[98] Ibid, Art 1(3) adding a new Article 14(6) to the RRF regulation
[99] Ibid, Art 3
[100] Ibid, Art 4
[101] Versailles Declaration, para. 21
[102] See Bunderministerium fur Wirschaft under Energie, Franco-German manifesto for a European industrial policy fit for the 21st century, 19 December 2022; Italian non-paper "A European Resilience and Competitiveness Agenda: Reinforcing the EU Industrial Base, Relaunching Competitiveness", 2 February 2023; Ministero delle imprese e del made in Italy, Una visione condivisa per una strategia industriale dell'UE verso la transizione verde e digitale, 3 March 2023
[103] European Commission Communication, "A Green Deal Industrial Plan for the Net-Zero Age", 1 February 2023, COM(2023) 62 final.
[104] Ibid, p. 1
[105] See European Commission proposal for a Regulation of the European Parliament and of the Council establishing the Strategic Technologies for Europe Platform ('STEP') and amending Directive 2003/87/EC, Regulations (EU) 2021/1058, (EU) 2021/1056, (EU) 2021/1057, (EU) No 1303/2013, (EU) No 223/2014, (EU) 2021/1060, (EU) 2021/523, (EU) 2021/695, (EU) 2021/697 and (EU) 2021/241, 20 June 2023, COM(2023)335 final.

identified a set of trade defense instruments to grow the EU internal market for green industrial technologies and protect it from unfair global competition.[106]

Based on the Commission's roadmap, between 2023 and 2024 the EP and the Council adopted the Chips Act,[107] the Critical Raw Materials Act,[108] and the NZIA:[109] these regulations – all based on Article 114 TFEU, the EU's internal market clause, and as far as the Chips Act is concerned, Article 173 TFEU, on industry – enhanced the EU regulatory framework for innovative technologies for the green deal, and promoted the industrial transition. Furthermore – as part of a broader package of mid-term reforms of the EU Multiannual Financial Framework (MFF) – in early 2024 the EP and the Council approved the STEP regulation,[110] on the basis of TFEU Articles 164 (on the European social fund), 173 (on industry), 175-177-178 (on cohesion policy), 182 (on technological development) and 192 (on environment). STEP set aside €1.5 billion "from existing Union programs"[111] to support "the development or manufacturing of critical technologies throughout the [EU], or safeguarding and strengthening their respective value chains […especially in] clean and resource efficient technologies, including net-zero technologies as defined in the [NZIA]."[112] Finally, the EP and the Council also upgraded the EU trade defense toolbox – which already included a regulation screening foreign direct investments,[113] and an international procurement instrument[114] – by enacting among others a regulation on foreign subsidies distorting the internal market[115] and the Anti-Coercion Instrument.[116]

With the war in Ukraine continuing and growing global economic competition, however, in April 2024 the European Council approved a "new European competitiveness deal."[117] The European

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[106] See also European Commission & High Representative, European economic security strategy, 20 June 2023, JOIN(2023) 20 final

[107] Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act), OJ 2023 L 229/1

[108] Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ 2024 L

[109] Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724, OJ 2024 L

[110] Regulation (EU) 2024/795 of the European Parliament and of the Council of 29 February 2024 establishing the Strategic Technologies for Europe Platform (STEP), and amending Directive 2003/87/EC and Regulations (EU) 2021/1058, (EU) 2021/1056, (EU) 2021/1057, (EU) No 1303/2013, (EU) No 223/2014, (EU) 2021/1060, (EU) 2021/523, (EU) 2021/695, (EU) 2021/697 and (EU) 2021/241 OJ 2024 L [herein after STEP regulation]

[111] Ibid Art. 3

[112] Ibid Art 2(1)(a)

[113] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 L 79I/1

[114] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) OJ 2022 L 173/1

[115] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market OJ 2022 L 330/1

[116] Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, OJ 2023 L

[117] European Council Conclusions 17-18 April 2024, EUCO 12/24, sec. IV

Council conclusions – which built on a high-level report on the future of the EU internal market authored by former Italian Prime Minister Enrico Letta[118] – sketched an holistic approach to "ensure [the EU] long-term competitiveness, prosperity and leadership on the global stage and to strengthen its strategic sovereignty,"[119] with action in multiple policies including the single market, the capital markets union, industry, research and innovation, energy and trade. The European Council roadmap has now been followed in May 2024 by the Council of the EU,[120] and while a report on the future of the EU economic competitiveness commissioned to former ECB President Mario Draghi is awaited soon, in July 2024 European Commission President Von der Leyen – in the political guidelines she presented for re-election at the EP – has promised that she will present "a new Clean Industrial Deal for competitive industries [...] within the first 100 days of the mandate."[121]

3. The consequences

EU action in the fields of energy and industry in response to the war in Ukraine has been highly consequential from both a formal and substantive EU law perspective. From a formal point of view, the core measures adopted by the EU, especially interventions in the energy market, have revealed a growing confidence in utilizing Article 122(1) TFEU. As is well known, this clause, which is located in Chapter 1 of Title VIII TFEU, on "Economic Policy", states that "Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon 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." Article 122(2) TFEU, instead, affirms that "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned."

Article 122 TFEU had been occasionally used by the EU before. Specifically, the predecessor of Article 122(1) TFEU, Article 103 Treaty establishing the European Economic Communities (TEEC), on conjunctural policy, had been utilized in the 1970s to deal with the oil crisis.[122] Moreover, more recently, Article 122 TFEU had been used to address both the euro-crisis and the Covid-19 pandemic. In the first case, the Council had established the European Financial Stabilization Mechanism (EFSM), providing loans to Greece, on the basis of Article 122(2).[123] In the second case, Article 122(1) TFEU had been used to set up a framework for crisis-relevant medical counter-measures in the

[118] See Enrico Letta, Much More than a Market: Speed, Security, Solidarity, 17 April 2024

[119] EUCO 12/24, para 11

[120] Council of the EU Conclusions "A competitive European industry driving our green digital and resilient future, 24 May 2024, Doc 9893/24

[121] European Commission President-elect Ursula von der Leyen, "Europe's Choice : Political Guidelines for the next European Commission 2024-2029", 18 July 2024, 8

[122] See e.g. Council Regulation (EEC) No 1893/79 of 28 August 1979 introducing registration for crude oil and/or petroleum product imports in the Community OJ 1979 L 220/1

[123] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism OJ 2010 L 118/1

event of a health emergency.[124] Furthermore, the Council had adopted both SURE[125] – a temporary unemployment re-insurance system to mitigate layoffs during the pandemic – and especially the EU Recovery Instrument (EURI)[126] – a key piece of legislation for the establishment of the NGEU Recovery Fund and the issuance of EU common debt – on the basis of Article 122 TFEU generally, without specifying which paragraph of this provision served as legal basis.[127]

To tackle the energy crisis, however, the EU resorted to Article 122(1) TFEU five times in 2022, and three of the emergency acts adopted in the aftermath of Russia's aggression of Ukraine were subsequently renewed in 2023. As Merijn Chamon has argued, the increased reliance on Article 122 TFEU constitutes a "paradigm-changing"[128] development, as it increases the ability of the EU to "adopt far-reaching economic policy measures."[129] In fact, Article 122(1) TFEU refers to the ability of the Council to intervene "in particular if severe difficulties arise in the supply of certain products, notably in the area of energy" – which was the case at stake in the energy interventions acts. Yet, this case is non-exhaustive, and, as Article 122(1) TFEU states, more broadly the EU could intervene to adopt, in a spirit of solidarity, "the measures appropriate to the economic situation."

From a substantive point of view, furthermore, the action taken by the EU in the field of energy interventions contributes to strengthen solidarity as the core principle of EU energy law.[130] As it has been argued, in response to the war in Ukraine, "in a very short period of time, the EU has adopted several legal instruments to address the energy crisis. All of these legal emergency instruments rely heavily on the idea of solidarity and highlight its role in the EU's crisis responses."[131] This aligns with, and strengthened, the approach to solidarity embraced by EU courts just before the start of the war in Ukraine in the *OPAL* case: both the General Court[132] and the European Court of Justice (ECJ)[133] had ruled that the principle of energy solidarity enshrined in Article 194(1) TFEU constituted a legally binding principle of EU law. Consequently, the EU courts had struck down a decision by the Commission enabling the German energy market regulatory authority to exempt the Russian state-owned company Gazprom from having to comply with rules on third-party access and tariffs regulation in the use of the OPAL pipeline (connecting the Nord Stream 1 pipeline to the power grid

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[124] Council Regulation (EU) 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level OJ 2022 L 314/64

[125] 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 OJ 2020 L 159/1

[126] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis OJ 2020 L 433I/23

[127] See Bruno de Witte, The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635, 654

[128] Merijn Chamon, "The Use of Article 122 TFEU: Institutional Implications and Impact on Democratic Accountability", report commissioned by the European Parliament Constitutional Affairs Committee, September 2023, 41

[129] Ibid 21

[130] Kaisa Huhta & Leonie Reins, "Solidarity in European Union Law and its Application in the Energy Sector" (2022) 72 International & Comparative Law Quarterly 771.

[131] Ibid, 733 (internal citation omitted)

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

[133] Case C-848/19 P *Germany v. Poland* ECLI:EU:C:2021:958

in Central and Western Europe).[134] The EU courts' decisions – which protected the energy interests of Poland and the Baltics states, which were worried that Gazprom's monopoly would increase dependence on Russian gas supply and threaten energy security in Europe – affirmed the central value of solidarity in EU energy law. Emergency measures adopted since Russia's aggression of Ukraine have substantively confirmed this.

At the same time, also from a substantive viewpoint, EU action to promote a new industrial policy for the net-zero era constitutes a watershed too.[135] For years, the idea that the EU could develop its own industrial policy was regarded as unorthodox, as the EU was primarily concerned in establishing an internal market and ban unfair competition between member states. Yet, in response to the war in Ukraine the EU adopted the NZIA, the Critical Raw Materials Act, as well as a Chips Act and STEP. The first two are based on the standard Article 114 TFEU, the internal market legal basis. The Chips Act instead relies on both Article 114 and Article 173 TFEU, on industry. STEP, finally, draws on multiple legal bases including industry, cohesion and technological development. In all these legal acts the use of the internal market, or industry, legal bases are pushed towards a new goal, namely positioning the EU to address in a supranational way a more threatening geo-strategic environment. In fact, all these measures have all been designed to increase the resilience of EU supply chains, to reduce foreign dependences, and to adjust to the reality of the new, selective, globalization.[136]

As Armin Steinbach has argued, the new EU economic security strategy, and the measures adopted in response to the war in Ukraine, reveal a "turn to strategic autonomy".[137] Since at least the Covid-19 pandemic, the EU had been debating at policy level how to strengthen its strategic autonomy – admittedly a vague political, rather than legal, concept, which generally referred to the idea of increasing the EU's ability to make decisions independently, while taking into account its interests and values.[138] Yet, following Russia's aggression of Ukraine, the EU has now enacted legislative measures that consistently push in that direction: "[d]riven by security-of-supply concern, the EU has rapidly become independent from Russian energy supplies and redirected efforts away from market-driven dependence to security-centred diversification. The goal of reducing dependence has driven the EU's more general push towards a EU-based production of key technologies, notably through the EU [NZIA]."[139] This has consequential implications for EU law and policy, especially as efforts to strengthen EU economic competitiveness continue in the new EU institutional cycle.

[134] Max Münchmeyer, "The Principle of Energy Solidarity: *Germany v. Poland*" (2022) 59 Common Market Law Review 915

[135] See Editorial Comments, "Paying for the EU's Industry Policy" (2023) 60 Common Market Law Review 617.

[136] See Harold James, "The new globalization and the economic consequences of Brexit" in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume V. The Trade & Cooperation Agreement* (OUP 2024)

[137] Armin Steinbach, "The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict" (2023) 34 European Journal of International Law 973

[138] See Editorial Comments, "Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem" (2022) 59 Common Market Law Review 313

[139] Steinbach (n 137) 1005

4. The challenges

4.1. Domestic Legality

The measures adopted by the EU to intervene in the energy markets have been subjected to a number of legal challenges before EU courts.[140] In particular, several major undertakings in the petroleum sector have brought action for annulment pursuant to Article 263 TFEU, challenging the legality of the windfall tax introduced by the Council regulation on emergency interventions to address high energy prices.[141] Similarly, energy companies in the renewable sector have challenged the legality of the cap on market revenues also set by the same Council regulation on emergency interventions in the electricity sector.[142] These private undertakings have similarly complained, inter alia, that Article 122 TFEU provided an invalid legal basis for the Council to adopt such measures, that the interventions violated the principle of proportionality enshrined in Article 5(4) TEU, that they infringed on the right to property as protected in Article 17 of the EU Charter of Fundamental Rights, and that – with regard to the solidarity contribution on surplus profits – it violated the general principle of legal certainty and the presumption against retroactivity.

Furthermore, a direct action for annulment before the ECJ has also been lodged by Poland against the Council, challenging the legality of the regulation on the coordinated demand reduction for gas.[143] In its plea, Poland also challenged the use of Article 122 TFEU as a valid legal basis, and claimed that the act should have been based on Article 194(2) TFEU in conjunction with Article 192(2)(c) TFEU. Poland's challenged essentially had to do with the voting procedure. Under Article 122 TFEU the Council decides by qualified majority voting (QMV). According to Article 194(2) TFEU, instead, EU measures in the field of energy "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)(c) [TFEU]," which introduces a special legislative procedure, under which the Council acts unanimously. As such, Poland primarily claimed that the main objective of the gas demand reduction regulation is to have a significant effect on the conditions for exploiting energy resources, the choice between different energy sources and the general structure of a Member State's energy supply, while further alleging also a breach of the principle of energy solidarity.

At the time of writing, none of these cases have yet been adjudicated by either the General Court or the ECJ. In substantive terms, the introduction through legislation of either a revenue cap or a special levy on firms that have made extraordinary profits due to alteration of standard market conditions may not appear unreasonable. In fact, the legality of some windfall taxes introduced during the energy crisis has been upheld at national level. In Italy, for example, the Corte Costituzionale ruled in early June 2024 that the introduction by Italian legislation of a temporary tax on surplus profits for energy companies was neither arbitrary nor disproportionate.[144] In

[140] Leigh Hancher, "EU Energy Market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead", SIEPS European Policy Analysis, January 2024

[141] See Case T-803/22 *Petrogas E&P Netherlands v. Council*, pending; Case T.802/22 *ExxonMobil Producing Netherlands v. Council*, pending.

[142] Case T-759/22 *Electrawinds Shabla South v. Council*, pending.

[143] Case C-675/22 *Poland v. Council*, pending

[144] Corte Costituzionale, sentenza 111/2024

particular, the Court ruled that in the context of the energy crisis, it was not unreasonable for the Italian legislature "to identify the enormous price increase of energy products in the exceptional situation at play and the specific market in which energy companies operate – when certain conditions occur – as a sign of wealth."[145] The Italian Corte Costituzionale therefore opened the door to a temporary solidarity contribution – providing a jurisprudential path that may be followed also by EU courts.

However, in procedural terms, the introduction of emergency measures in the energy market raises additional questions, which go beyond those adjudicated at national level. On the one hand, there is an important formal legal point raised by Poland in its challenge, on the choice of legal basis. Since Article 122(1) TFEU explicitly states that this legal basis must be used "without prejudice to any other procedure provided for in the Treaties", the Council should "attach special attention to the context in which the measure would be adopted, if that measure could also be adopted pursuant to a different legal basis."[146] Admittedly, in a prior dispute the ECJ had rejected a challenge by Poland against the EP and the Council, ruling that the use of Article 191 TFEU on environmental policy, which requires qualified majority voting in the Council, rather than Article 192(2)(c) TFEU, which requires unanimity, was legal because the effect of the contested act on Poland's energy mix was only indirect.[147] Yet, the contested measure in that case concerned the ETS, a clearly environmental measure, rather than gas reduction, which could have more likely been adopted as an energy measure – like, after all, the 2022 gas storage regulation. Furthermore neither of the two legal basis under dispute in the 2018 *Poland v. Parliament and Council* case included a "without prejudice" clause such as that of Article 122(1) TFEU.

On the other hand, the substantively more significant legal issue to be addressed is whether a Council regulation adopted on the basis of Article 122(1) TFEU can serve as a valid way to introduce a solidarity contribution, which is effectively a direct tax. As the use of Article 122 TFEU as a legal basis for EU action has significantly increased in recent years, a number of judgments have now been delivered by both national and EU courts on this provision. For example, in *Pringle* the ECJ ruled in the abstract that Article 122 TFEU could not be used to establish a permanent stability mechanism to finance euro-zone countries,[148] and in *Anagnostakis*[149] it held that Article 122 TFEU "cannot serve as a basis for adopting a measure or a principle enabling, in essence, a Member State to decide unilaterally not to repay all or part of its debt."[150] Furthermore, in December 2022 the German Bundesverfassungsgericht ruled that Article 122 TFEU constituted a lawful legal basis for the adoption of the EURI.[151] Nevertheless, none of these cases concerned the use of Article 122 TFEU for the introducing a tax measures imposing a burden on legal persons.

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[145] Ibid, para 7.1.3 (my translation: original "non appare arbitrario che il fortissimo aumento dei prezzi dei prodotti energetici nell'eccezionale situazione congiunturale e lo specifico mercato in cui le imprese energetiche operano siano stati identificati dal legislatore – al verificarsi di una serie di condizioni – come un indice rivelatore di ricchezza")

[146] Chamon [report], 23

[147] Case C-5/16 *Poland v. Parliament and Council*, ECLI:EU:C:2018:483

[148] Case C-370/12 *Pringle*, ECLI:EU:C:2012:756, para 116

[149] C-589/15 P, *Anagnostakis v. Commission*, ECLI:EU:C:2017:663

[150] Ibid para 71

[151] 2 BvR 547/21, 2BvR 798/21, Judgment of 6 December 2022

Yet, it is legally questionable whether this clause can be used to introduce a windfall tax on legal persons. From a strictly legal perspective, Chapter II of Title VII of the TFEU – laying out the EU primary law "Tax provisions" – only empowers the Council to unanimously harmonize laws on indirect taxation. Furthermore, from a constitutional perspective, the fact that a direct tax can be imposed on legal persons by the Council of the EU, acting by QMV, without any involvement of the EP, raises significant democratic questions. It is indeed a fundamental principle of constitutionalism since the American Revolution that there cannot be taxation without representation. However, because under Article 122 TFEU the EP has no role, "the democratic legitimacy of the decision-making procedure pursuant to that provision" is problematic.[152] Surely, the solidarity contribution was introduced in response to the war in Ukraine on a purely temporary and exceptional basis. But, it remains to be seen if this can suffice to upheld it.

4.2. Level playing field

The EU's responses to the energy crisis unleashed by Russia's aggression of Ukraine, furthermore, have also caused other domestic legal challenges. In particular, the EU effort to accelerate the phasing out from Russian fossil fuels and to support the green transition of firms and households has significantly undermined the conventional EU competition law framework, threatening the level playing field at the basis of the EU internal market. As is well known, since the inception of the EU integration project, the TEEC put in place rigid state aid rules limiting the amount of subsidies that member states could provide to their domestic firms, so as to ensure a fair level playing field in the internal market. Certainly, Article 107 TFEU – today's core treaty provision on state aid – authorizes some specific forms of subsidies. However, in response to the war in Ukraine, through the adoption of the TCF and then the TCTF and the reform of the GBER, the EU largely widened the room for maneuver of member states to grant aids to support businesses and households in weathering the high costs of energy, and to invest in renewables.

Yet, as Juan Jorge Piernas Lopez has pointed out "the wide scope of this Temporary Framework raises doubts as to its complementarity with the existing State aid rules, apart from raising cohesion concerns linked to dissimilar financial capacity of Member States."[153] In fact, the Commission decision to empower member states to subsidize their domestic firms and households has resulted in very different degrees of national interventions – which have largely depended on the budgetary resources, the so-called fiscal space, of each member state. Admittedly, as a result of the war in Ukraine the Commission extended in 2022 and 2023 the suspension of the Stability & Growth Pact[154] – the centerpiece of EU fiscal rules, imposing spending constraints on member states, which had been put on hold in 2020 following the outburst of the Covid-19 pandemic.[155] This empowered all member states to run deficits to support their economies. However, as European Commissioners for the Economy and for the Internal Market Paolo Gentiloni and Thierry Breton jointly pointed out, because of the different

[152] Chamon [report] 34

[153] Juan Jorge Piernas Lopez, "The Transformation of EU State Aid Law... and Its Discontents" (2023) 60 Common Market Law Review, 1623, 1652

[154] See European Commission press release 'European Semester Spring Package', 23 May 2022, IP/22/3182.

[155] Fabbrini (OUP) 41

fiscal headroom of each EU member state, governments' interventions created disparities, threatening the level playing field of the EU internal market.[156]

In fact, as reported by the European Commission Vice-President in charge of Competition Policy Margrethe Vestager in January 2023, €672 billion of state aid were approved under the TCF in 2022 by the 27 EU member states – but of these €350 billion of subsidies were given by Germany alone, with France and Italy spending €150 billion and €50 billion each, hence a total of 82% was absorbed by the 3 largest member states only.[157] In particular, German government subsidies to the domestic industry – with a special €200 billion package approved in September 2022 to shield against surging energy prices[158] – caused widespread concerns. Consequently, the Commission crisis-related state aid policy has increasingly been subjected to criticism – especially by smaller, less protectionist member states.[159] However, if through the application of state aid law the Commission has emerged "as a 'de facto crisis management authority,'"[160] it has struggled to compensate this through appropriate supranational balancing measures – due to difficulties in raising appropriate EU funding.

4.3. Funding

The prevailing EU strategy to address the socio-economic damages caused by the war in Ukraine and its resulting energy crisis has been to empower member states to spend more of their national resources. Instead, the EU has struggled to raise supranational resources to support the green transition and facilitate the development of a net-zero industry. As mentioned above, the RePowerEU regulation made available to member states an additional €20 billion of grants, raised through the auction of further ETS quotas, assigned on the basis of a methodology reported in Annex I, which privileged Poland and Italy. Furthermore, the RePowerEU regulation also empowered member states to request unused loans from NGEU.[161] As a result, by September 2023 four member states – namely Greece, Poland, Portugal and Slovenia – requested additional loan support, while six countries – Belgium, Czechia, Spain, Croatia, Lithuania and Hungary – requested for the first time loan support under NGEU[162] (thus joining the seven who had requested them from the start: namely, Greece, Italy, Cyprus, Poland, Portugal, Romania and Slovenia).

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[156] Paolo Gentiloni & Thierry Breton, "I 200 miliardi della Germania sulle bollette: serve una risposta europea comune e solidale", Op-ed, *Il Corriere della Sera*, 3 October 2022.

[157] European Commission Executive Vice-President Margrethe Vestager, Letter, 13 January [2023], Annex

[158] https://www.reuters.com/business/energy/german-govt-agrees-relief-package-response-soaring-energy-prices-sources-2022-09-29/

[159] See Commission's consultation on the Temporary Crisis and Transition Framework, Joint non-paper by Denmark, Finland, Ireland, the Netherlands, Poland and Sweden, 23 December 2023, joined also by the Czech Republic, Hungary, Latvia and Slovakia on 2 February 2023.

[160] Lopez (n)1624

[161] Rosalba Famà, "RePowerEU" in Federico Fabbrini & Christy Petit (eds), *Research Handbook on Post-Pandemic Economic Governance and NGEU Law* (Elgar 2024)

[162] See European Commission - Recovery and Resilience Task Force, "Final overview of Member States' loan requests under the RRF. Note to the Council and European Parliament", 1 September 2023, <https://commission.europa.eu/system/files/2023-09/01092023-Final-overview-of-MS-loan-requests-under-the-RRF_en.pdf>

Nevertheless, beyond these EU resources designed to finance new RePowerEU chapters in NRRPs, there have no other real sources of supranational funding for the energy transition. On the one hand, the NZIA, the Critical Row Materials Act and the Chips Act have exclusively changed the regulatory framework, without providing any new source of public funding, on the expectation that private funding will mobilize by itself. On the other hand, also the STEP regulation has only re-deployed existing resources. The 2023 European Commission work-program had mentioned the plan to create a new "European Sovereignty Fund",[163] and President Ursula von der Leyen had previously endorsed this idea as a way to strengthen European sovereignty building on the experience of NGEU.[164] In fact, the June 2023 Commission proposal for a regulation establishing STEP had called for reinforcing the firepower of existing EU instruments with "an additional total amount of EUR 10 billion,"[165] as part of a mid-term revamping of the MFF, worth a total of €75 billion.[166] During the legislative process, the EP even called to increase the STEP budget by an extra €3 billion.[167] However, due to opposition in the Council, the final version of the STEP regulation only set aside a budget of €1.5 billion of funding for the net zero transition, drawing these resources "from existing Union programs."[168]

As it has been pointed out, the EU constitutional architecture in the field of economic governance poses major constraints on the ability of the EU to raise financial resources.[169] Substantively, Article 310 TFEU requires the EU to balance its budget, which is effectively financed by national transfers. Furthermore, institutionally, Article 312 TFEU requires the MFF to be approved by unanimity, while Article 311 TFEU imposes unanimous approval in the Council, and parliamentary ratification, for the adoption of the Own Resource Decision – the key EU's revenues act. Given this cumbersome unanimity-based decision-making system and national control on the size of the EU budget, it is unsurprising that the 27 heads of state and government of the European Council decided to cut back the size of STEP to just €1.5 billion,[170] as it would eventually remain.[171] Member states' control of the EU's purse constrain its ability to properly fund policies.

Ironically, moreover, constitutional fiscal constraints are also re-emerging in the EU at the national level too.[172] In particular, in November 2023 the Bundesverfassungsgericht declared unconstitutional and void Germany's second supplementary budget act of 2021, which provided for the transfer of an authorization to borrow €60 billion, granted in response to the Covid-19 pandemic and not needed in 2021, to the Energy and Climate Fund, since renamed the Climate

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[163] Guillaume Ragonnaud and Marin Mileusnic, "Strategic Technologies for Europe Platform", European Parliament Research Service, February 2024.

[164] European Commission President Ursula von der Leyen, speech, 4 December 2022

[165] COM(2023) 335 final, 7

[166] European Commission Communication, Mid-term revision of the Multiannual Financial Framework 2021–2027, 20 June 2023, COM(2023)336 final, 10.

[167] European Parliament press release, "A STEP towards supporting EU competitiveness and resilience in strategic sectors", 17 October 2023

[168] STEP regulation, Art. 3

[169] Fabbrini (OUP)

[170] See European Council meeting – Multiannual Financial Framework 2021-2027 Negotiating Box, 15 December 2023, EUCO 23/23, para 12

[171] European Council conclusions, 1 February 2024, EUCO 2/24, para 13

[172] Clara Bösche, "La crise allemand du *Schuldenbremse* : un symptôme à prendre au sérieux en Europe", Fondation Robert Schuman Paper 734, 29 January 2024.

and Transformation Fund.[173] Because the German Basic Law enshrines a debt brake rule, an authorization to borrow can only be taken by the lower house of Parliament on the basis of an extraordinary emergency. On a legal challenge from the opposition, therefore, the Bundesverfassungsgericht ruled that the government and the parliamentary majority had violated the constitutional debt break by authorizing additional borrowing for Covid-19 related purpose, but shifting these resources to a different political objective, namely the promotion of climate protection and transformation. The Court's ruling, however, caused a €60 billion hole in the government's budget, significantly restricting its ability to continue funding the green transition.

Yet, the structural weaknesses in the EU fiscal constitution – combined with the constraints stemming from national basic laws – are increasingly problematic, given steps by other international players to heavily invest and drive the green transition. This is most visible in the 2022 IRA,[174] a piece of US legislation promoted by President Joe Biden which, despite its name, is primarily geared towards investing in domestic energy production, while promoting clean energy. Among others, the IRA authorizes $783 billion in federal spending on energy and climate change, including tax credits to spur investment in clean energy and manufacturing. The IRA has proved to be extremely popular, lulling a number of EU-based firms to shift production in the US to seize the fiscal benefits resulting from this ground-breaking program. And additional pieces of US legislation – including the 2022 CHIPS and Science Act[175] – have provided further financial incentives for firms to reshore in the US, authorizing roughly $280 billion in new federal funding to boost domestic research and manufacturing of semiconductors, including $39 billion of grants for chips manufacturing. In light of these global developments, the measures adopted by the EU in the field of energy and industry appear largely unsuitable to support the competitiveness of the EU economy, unless more funding is made available ahead.

5. Conclusions

This paper has examined the EU's response to the war in Ukraine in the field of energy and industry, assessing the EU's constitution ability to insure domestic tranquillity. As Russia's weaponization of fossil fuels resulted in an energy crisis, which threatened domestic firms and households, and therefore the EU's potential support for Ukraine, the EU adopted a number of emergency interventions to regulate the energy markets. The paper analysed these measures, while also mapping the EU legal acts passed to support the green transition and the decarbonization of industry, and overviewing the novel tools put in place to develop an industrial policy for the net-zero age.

As the paper maintained, the EU's response to Russia's aggression of Ukraine has been wide-ranging, and the EU constitution empowered the EU to take highly consequential measures. In particular, the EU repeatedly used emergency powers under the Treaties to cap excessive energy prices, and revenues; it strengthened transnational solidarity in the energy sector; and leveraged internal market competences to push for a green industrial deal.

[173] BVerfG, 2 BvF 1/22, Judgment of 15 November 2023. ò
[174] Pub. L. 117-169
[175] Pub. L. 117-167

Nevertheless, the EU's effort to insure the domestic tranquillity in time of war has been hampered by several challenges. Some of the EU energy emergency measures, including a windfall tax on surplus profits, have been challenged in court as in illegal exercise of direct tax power. The EU decision to relax state aid law and allow member states to subsidize heavily domestic firms and households have threatened the level playing field at the heart of the EU internal market. And the EU has provided only limited supranational funding to drive the green transition and finance strategic developments. Compared to the US IRA, therefore, the EU's action has appeared weaker, confirming that structural constraints in the EU's fiscal constitution pose a long-term challenge for the EU's economic competitiveness.

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