COLLANA DI STUDI SULL'INTEGRAZIONE EUROPEA
55

LUISA MARIN

Solidarity and Crises in the European Union:

a constitutional principle in the pandemic and energy crises

CACUCCI EDITORE
BARI

This research is funded by the European Union's Horizon 2020 research and innovation program (Marie Skłodowska-Curie grant agreement No 891762 - European University Institute, 2020-2024), and by the Department of Economics of the University of Insubria.

In copertina:
foto dell'autrice @Francesca Ripamonti.

COLLANA DI STUDI SULL'INTEGRAZIONE EUROPEA
55

LUISA MARIN

SOLIDARITY AND CRISES IN THE EUROPEAN UNION:

a constitutional principle in the pandemic and energy crises

CACUCCI
EDITORE
2024

Collana di Studi sull'integrazione europea

Direzione
Giandonato Caggiano Ivan Ingravallo Ennio Triggiani Ugo Villani

Comitato scientifico
Mads Andenas, Sergio M. Carbone, Marta Cartabia, Gianluca Contaldi, Carlo Curti Gialdino, Biagio De Giovanni, Angela Del Vecchio, Angela Di Stasi, Paolo Fois, Marc Jaeger, Diego J. Liñán Nogueras, Roberto Mastroianni, Paolo Mengozzi, Claudia Morviducci, Bruno Nascimbene, Lina Panella, Ornella Porchia, Guido Raimondi, Lucia Serena Rossi, Mario Sarcinelli, Silvana Sciarra, Christian Tomuschat, Gian Luigi Tosato, Claudio Zanghì

Comitato dei referees: Pia Acconci, Roberto Adam, Chiara Amalfitano, Amedeo Arena, Roberto Baratta, Maria Eugenia Bartoloni, Maria Caterina Baruffi, Francesco Bestagno, Franco Botta, Ruggiero Cafari Panico, Susanna Cafaro, Cristina Campiglio, Andrea Cannone, Giovanni Cellamare, Bernardo Cortese, Antonella Damato, Carmela Decaro, Patrizia De Pasquale, Valeria Di Comite, Marcello Di Filippo, Giuseppe Di Gaspare, Davide Diverio, Madia D'Onghia, Ugo Draetta, Fabio Ferraro, Pietro Gargiulo, Italo Garzia, Mario Gervasi, Edoardo Greppi, Massimo Iovane, Simone Marinai, Fabrizio Marongiu Buonaiuti, Gerardo Martino, Maria Rosaria Mauro, Michele Messina, Francesco Moliterni, Luciano Monzali, Paola Mori, Francesco Munari, Lorenzo Federico Pace, Rossana Palladino, Franca Papa, Nicoletta Parisi, Marco Pedrazzi, Piero Pennetta, Emanuela Pistoia, Angela Maria Romito, Francesco Rossi Dal Pozzo, Vito Rubino, Gianpaolo Maria Ruotolo, Illa Sabbatelli, Andrea Santini, Gianluca Selicato, Girolamo Strozzi, Marisa Tufano, Chiara Enrica Tuo, Michele Vellano, Gabriella Venturini, Gianfranco Viesti, Roberto Virzo, Alessandra Zanobetti

I volumi pubblicati in questa Collana sono sottoposti a referaggio anonimo, con la sola eccezione di quelli caratterizzati dalla particolare autorevolezza scientifica o dalla specifica competenza dell'Autore nell'argomento trattato.

Via Nicolai, 39 - 70122 Bari – Tel. 080/5214220
http://www.cacucci.it e-mail: info@cacucci.it

a mia madre
e a mio padre
i miei primi maestri

CONTENTS

CHAPTER 2

THE PANDEMIC CRISIS
AND THE PRINCIPLE OF SOLIDARITY

RINGRAZIAMENTI

Questo libro è il frutto di alcune crisi (europee) e di alcune transizioni (personali), e di queste ne è l'espressione.

Sono numerosi i colleghi con i quali ho condiviso questo progetto fin dal suo concepimento presso l'Istituto Universitario Europeo di Fiesole, dove sono stata Marie Curie Fellow (2020- 2024), sotto la supervisione della Prof. ssa Deirdre Curtin.

L'idea di fondo, in una forma molto embrionale, è stata sviluppata in occasione di un progetto sulla crisi pandemica. Sempre all'Istituto ho discusso di (parti di) questo lavoro con i Professori Leigh Hancher e Mathias Siems, beneficiando della ricca comunità dei 'visiting', tra i quali ricordo in modo speciale i colleghi Alessandra Arcuri e Ottavio Quirico.

Al di fuori della comunità di Fiesole, questo libro è il frutto di scambi e confronti con i colleghi e amici del mondo accademico italiano (e non solo), in particolare con Susanna Cafaro, Emanuela Pistoia, Giulia Rossolillo, Giuseppe Morgese, Alessandro Nato e Nicola Ruccia; Cristina Fasone e Giuseppe Martinico; con i colleghi 'dell'energia' Kaisa Huhta, Katja Yafimava, Sara Pugliese, e Max Münchmeyer.

Un sentitissimo ringraziamento va al Prof. Gianluca Contaldi, che ha avuto la ventura di leggere il manoscritto completo, ai revisori anonimi e ai Direttori della Collana; la mia riconoscenza speciale va a Costanza Di Francesco Maesa e a Michele Gigli, per il prezioso e costante supporto editoriale durante questo processo.

Aldilà del pur importante impegno di questo libro, in questi anni ho gestito numerosi progetti, e tra questi ricordo con piacere quelli con i colleghi Sarah Tas e Salvo Nicolosi, sperando di avere altre occasioni per lavorare insieme in futuro.

All'Università dell'Insubria il Prof. Vincenzo Salvatore e la Prof.ssa Maria Cristina Pierro mi hanno accolta facendomi sentire a casa nel Dipartimento di Economia di Varese, insieme ai colleghi giuristi ed economisti con i quali condivido il mio quotidiano di ricerca e insegnamento per i nostri studenti.

In vari momenti del mio rientro professionale dai Paesi Bassi all'Italia diversi colleghi mi hanno supportata con consigli ed inviti; tra questi rivolgo un pensiero di particolare riconoscenza alla Prof.ssa Angela Di Stasi e al Prof. Luigi Daniele.

Al di fuori dei miei orizzonti professionali, l'impegno di questo lavoro è stato alleggerito dalle amiche e dagli amici di Milano, che saluto affettuosamente, e dalla mia famiglia: carissimi Aaron, Giulia e Lorenzo, grazie di cuore!

INTRODUCTION

THE EUROPEAN UNION IN A 'POLYCRISIS', GOVERNANCE CRISES, AND SOLIDARITY

1. The EU in a state of 'polycrisis'

The last few decades of integration have been described as an expression of a 'polycrisis', a term first associated to the EU by former European Commission President, Jean-Claude Juncker, to describe the multiplicity of crises hitting the EU.[1] The concept of 'polycrisis' was theorised by philosopher Edgar Morin, with co-author Anne Brigitte Kern, in 1999 as the interwoven and overlapping crises affecting humanity, including the most severe crisis, *i.e.*, climate change.[2]

Indeed, the EU has been navigating through a turbulent period of crises, for almost two decades. First, the constitutional treaty ratification crisis, which

---

[1] In a speech held in Athens in 2016, the then European Commission President Jean-Claude Juncker defined polycrisis as the confluence of multiple, mutually reinforcing challenges facing the EU, from 'the worst economic, financial and social crisis since World War II' through 'the security threats in our neighborhood and at home, to the refugee crisis, and to the UK referendum', that 'feed each other, creating a sense of doubt and uncertainty in the minds of our people' (full speech available at the press corner of the European Commission). This expression has since been employed in the scientific debate to explain the new fractures in the European political space: see J. ZEITLIN, F. NICOLI, B. LAFFAN, *Introduction: the European Union beyond the polycrisis? Integration and politicization in an age of shifting cleavages*, in *Journal of European Public Policy,* 2019, pp. 963-976.

[2] E. MORIN, A.B. KERN, *Homeland Earth: A Manifesto for the New Millennium*, New York, 1999, p. 74. For a recent account, see E. MORIN, Faced with the polycrisis humanity is going through, the first resistance is that of the spirit, *Le Monde*, 24.1.2024, available online.

led to the abortion of the project of a Constitutional Treaty: though it paved the way for the reform achieved with the Treaty of Lisbon, it meant the abandonment of a more explicit constitutional federal narrative within the EU.

Second, was the crisis generated by subprime mortgages, in 2007-2008, the most severe financial crisis since the Great Depression of 1929, which evolved for the EU into a sovereign debt crisis or the 'euro-crisis', in 2009-2010; then we refer to the migration or refugee crisis, in 2015-2016, which witnessed the arrival in the EU of less than 1.5 million displaced persons.[3]

In addition, two major crises hit the EU as an integration project, Brexit and the rule of law crisis: these could be defined as existential or ontological crises since they concern the EU as an integration project.[4] With Brexit, in 2016 the UK held a referendum to leave the EU, initiating a process that led to its withdrawal in 2020; the rule of law crisis refers to the democratic backsliding enacted by illiberal democracies of the former Eastern and Central European bloc.[5]

Lately, the pandemic crisis (2020-2021) and the energy crisis consequent to the Russian invasion of Ukraine in 2022 complete this picture of polycrisis (2021-2022). In respect of the pandemic, in addition to the health emergency, all EU countries have been confronted, albeit differently, with the economic consequences caused by the numerous lockdowns enacted to control and limit the spread of the COVID-19 virus.

With the energy crisis, the EU has experienced a gas supply shortage as a consequence of the sanctions decided by the EU against Russia. Together with the need to secure a short-term alternative gas supply, the EU has used the geopolitical crisis to accelerate the policy shift toward more sustainable energy production, one of the goals of the EU, crucial to reaching its climate change mitigation targets.

---

[3] For a more in-depth understanding of the phenomenon see the data published on the website of the Shelter Project.

[4] According to Cross, all crises can be framed to some extent as existential crises: M.K.D. Cross, *Explaining Existential Crises*, in M.K.D. Cross (ed.), *The Politics of Crisis in Europe*, Cambridge, 2017, pp. 22-53. See also B. de Witte, *Guest Editorial: EU emergency law and its impact on the EU legal order*, in *Common Market Law Review*, 2022, pp. 3-18; G. Martinico, *The tangled complexity of the EU constitutional process: the frustrating knot of Europe*, Abingdon, 2022; for an early account of the financial crisis as an existential one, see A.J. Menéndez, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, pp. 453-526.

[5] A. Södersten, E. Hercock (eds.), *The Rule of Law in the EU: Crisis and Solutions*, in *SIEPS-Swedish Institute for European Policy Studies*, 2023; J.-W. Müller, *Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states*, *Eurozine*, 21 March 2014. For a more comprehensive account, see J.-W. Müller, *Should the EU protect democracy and the rule of law inside Member States*, in *European Law Journal*, 2015, p. 141; D. Kochenov, P. Bárd, *The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, in E. Hirsch Ballin, G. van der Schyff, M. Stremler (eds.), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society*, The Hague, 2020, p. 243-287.

What do these crises have in common?

The Constitutional Treaty, Brexit, and the rule of law crisis can be framed as crises concerning the EU as a project of legal integration among liberal democracies, or ontological crises.

With the pandemic and the energy crises, more recently, as with the eurozone and refugee crises, the EU has experienced a crisis that, though originating from an external factor, turned into a crisis for the EU as a governance system. In the taxonomy I propose, an external factor triggers a situation of crisis or emergency that evolves into a governance crisis.[6] A governance crisis can be defined as a situation where the EU has failed to react effectively and swiftly to a situation of crisis, both at the supranational level and/or at the domestic level, since, *e.g.*, the EU is hindered from providing effective solutions, or states contribute to undermining the effectiveness of EU action.[7]

In my interpretation, a triggering factor causes a crisis, which, as a consequence, would then generate, first of all, the need for the EU to establish itself as a successful governance actor, *i.e.*, providing effective solutions and instruments to react to those crises. These solutions require policies and funding and must be implemented through legal instruments. However, all EU actions and legal instruments are constrained by the current constitutional setting, where entrenched policy preferences find expression in the legislation. Both the rules codified in the treaties and the secondary law represent the crystallisation of policy preferences which can be hard to change.

Precisely because of this perspective, we have to stress that the effectiveness of the EU as a governance system is defined by the legal constraints embedded in the constitutional framework. First, we have the principles of conferral and attributed competences: these define, with some rigidity, the perimeter of the legality of EU policies and legal instruments. Second, EU treaties do embed constitutional constraints affecting the legality of policy choices: the no bail-out clause, or the national sovereignty clauses in energy mixes are examples of these constitutional constraints embedded in the treaties. Third, the EU has limited financial instruments to face crises: the EU

---

[6] It is outside of the scope of this research to examine the process of crisification, *i.e.*, the process of construction of the crisis. For insight into the construction of crises as the results of a process of crisification, see V. Moreno-Lax, *The "Crisification" of Migration Law: Insights from the EU External Border*, in S. Burch Elias, K. Cope, J. Goldenziel (eds.), *The Oxford Handbook of Comparative Immigration Law*, Oxford, 2024.

[7] T.A. Borzel, *From EU governance of crisis to crisis of EU governance: Regulatory failure, redistributive conflict and Eurosceptic publics*, in *Journal of Common Market Studies,* 2016, p. 8. In the political analysis discourse, the salience of these crises is such as to define them as existential: R. Balfour, *Why are Europe's Crises "Existential"?*, GMFus.org webpage, 2016. See also *Forward Thinking on Europe's existential crisis with Marco Buti*, McKinsey Global Institute webpage, 24.1.2024. This seems to find confirmation in Angela Merkel's speech at the Council summit of 28 June 2018, according to which the migration crisis could be a 'make or break' issue for the EU: Migration 'make or break' issue for Europe, warns Germany's Merkel.

budget -in a nutshell- gives the EU the financial means to cover its fees, and is task-oriented, rather than policy-oriented.[8] Fasone and Lindseth have explained that the EU has a fractured metabolic constitution, in the sense that it has a limited capacity to convert resources into policies for the attainment of a public goal. The EU relies mainly on the taxing power of the Member States and consequently has a limited autonomous capacity to address challenges and face crises.[9] We could continue explaining the fractured metabolic constitution of the EU and highlighting that the implementation of EU policies relies heavily on domestic administrations.

In the interpretation I propose, these crises have some commonalities and can be explained, to some extent, as being the results of incomplete supranational integration processes. Incomplete integration processes mean that some state competences have been transferred to the supranational level, while others have remained in the hands of states, or that supranational governance is not so effective. This entails that EU policies must be enacted in a context of constitutional constraints, determined by the attribution of competences. At the same time, EU integration is increasingly approaching policy areas closely connected to the exercise of core state powers, as explained by Genschel and Jachtenfuchs.[10] Yet, when approaching areas traditionally considered to be expressions of core state powers, the EU does not enjoy the full mandate and toolkit that states normally have, namely the capacity to mobilise resources to fulfil these targets, in particular concerning budget and administration. This also means that the solutions to those crises might entail a process of competition and contestation between sovereign authorities on the definition of those competences and on the interpretation of constitutional constraints: these can be labelled as competing sovereignties.[11]

In the interpretation I propose, to some extent, both processes (incomplete integration and competing sovereignties) feed and reinforce each other in a vicious circle, which damages the EU and the integration process. In this context, a legal system is - by definition- put under stress; however, the same legal system should find, in itself, the flexibility and the adaptability to overcome the rigidity of codified transfers of sovereignty, as agreed in the treaties.

---

[8] C. Neumeier, *Political own resources: Towards a legal framework,* in *Common Market Law Review,* 2023, pp. 319-344.

[9] C. Fasone, P.L. Lindseth, *Europe's fractured metabolic constitution: From the eurozone crisis to the coronavirus response*, in *LUISS School of Governace SOG Working Paper,* 2020, n. 61.

[10] P. Genschel and M. Jachtenfuchs (eds.), *Beyond the regulatory polity?: The European integration of core state powers*, Oxford, 2014.

[11] This process has a political dimension which remains outside of the scope of this work. The rise of populist parties in several Member States has a role in this dynamic. For a study on the role of populist parties, see L. Pierdominici, G. Martinico, *Miserie del sovranismo giuridico. Il valore aggiunto del costituzionalismo europeo*, Roma, 2023.

To sum up, we argue that the incomplete supranational integration processes are codified in an incomplete federal constitution. This incompleteness, however, does not exempt the EU from acting to preserve the goods created, such as the euro, economic integration, the internal market, and the Area of Freedom, Security, and Justice.

After this first introduction to the EU in a state of polycrisis and its internal governance crises, the next section will further expound on the governance crises and expression or side-effects of incomplete integration processes.

2. Governance crises as side-effects of incomplete supranational integration

This section elaborates on the past 'crises' of the EU as governance crises.[12] These crises are, according to my thesis, also expressions of the constitutional constraints in which the EU operates. It is here argued that a common element of EU crises is attributable, primarily, to a level of incompleteness in the European integration processes, as explained above.

What I frame as incompleteness is, on a closer analysis, the result of a preference – chosen since the Treaty of Maastricht – for limited transfers of sovereignty to the EU; this, in turn, requires that crises are managed in conformity with the constitutional constraints of the system, including respect for the attribution of competences conferred on the EU.

The eurozone and refugee crises illustrate this thesis.

2.1. Lessons from the eurozone and refugee crises

The Economic and Monetary Union (EMU) has meant the construction of a single currency, on an incomplete post-national sovereign idea: a monetary union as an exclusive competence of the EU, whereas fiscal and economic policies were originally firmly left in the hands of the Member States.

Rosas and Armati described it as a house built starting with the roof, *i.e.*, monetary policy without laying the necessary foundations of economic policy.[13] As stressed by Eleftheriadis,[14] economists alike have observed that the EMU was developed from the wrong premises, and that it looked like 'a half-built house', in the words of the American economist Rogoff.[15] He argued it

---

[12] This idea is an elaboration of 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 Ettorre (eds.), *Sovereignty, technology and governance after Covid-19: legal challenges in a post-pandemic Europe*, Oxford, 2022, pp. 51-75.

[13] A. Rosas, L. Armati, *EU constitutional law: an introduction*, Oxford, 2018, pp. 220-235.

[14] P. Eleftheriadis, *Corrective Justice Among States*, in *Jus Cogens*, 2020, pp. 7-27.

[15] K.S. Rogoff, *Crash Time*, in *Project Syndicate*, 7.9.2018.

was a 'catastrophic mistake to put monetary union ahead of fiscal and political union', concluding that a 'monetary union without a fiscal union is an accident waiting to happen'. In similar terms, Bergsten wrote that 'the European crisis is rooted in a failure of institutional design'; in his view, the solution would be to 'rewrite the Eurozone's rule book and complete the half-built euro house'.[16] From an economic perspective, in the USA these problems are addressed through fiscal transfers. In contrast, in EU monetary governance, on the one hand, states have lost control over their monetary toolkit, while the European Central Bank, on the other hand, is constrained by the prohibition on monetary financing laid down in Article 123 TFEU. Similarly, another significant constraint comes from Article 125 TFEU with the no bail-out clause.

In short, the EU has been entrusted by states with limited instruments to govern the economic aspects connected with this currency, and vice versa: states have lost control of their monetary policies, and are bound, except during the COVID-19 emergency,[17] by the rules of the Stability and Growth Pact. This combination made it a non-optimal currency area, since this decoupling of monetary and economic policies can create uneven distributive effects within it.[18] Furthermore, the constraints of the Stability and Growth Pact have long hindered counter-cyclical fiscal policies in the countries where those were most needed. This was observed in all its consequences during the financial crisis of 2008, which further amplified the internal unbalances between Member States 'debtors' and 'creditors'. The so-called 'debtor countries' could not adopt counter-recessive policies because of the limits on the public debt; not having any monetary policy to use, they felt 'their hands were tied'. This had multiple negative effects since it contributed to the nurturing of anti-Europe movements in many countries, and, at another level, it contributed to creating poverty and social tensions in some countries, *e.g.*, Greece.[19]

From a different perspective, the incompleteness of integration also applies to the so-called refugee crisis. Though the legal and policy contexts differ from the EMU in many aspects, it is here suggested that the incompleteness of the integration process is a feature that characterises asylum and migration control policies for several reasons: the EU is exercising shared competences and, though it has developed an administrative apparatus (such as the EU Agency for Asylum and Frontex), it nevertheless requires extensive organisational and financial commitment from states, which are controlled

---

[16] C.F. Bergsten, *Why the Euro will survive*, in *Foreign Affairs*, 1.9.2012.

[17] The Stability and Growth Pact provided for a general escape clause that was activated at the outbreak of the pandemic. See the Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis of 23 March 2020, available at the official portal of the Council.

[18] K.S. Rogoff, *op. cit.*

[19] E. Doxiadis, A. Placas (eds), *Living Under Austerity: Greek Society in Crisis*, Berghahn Books, 2018.

and monitored in the way that they comply with EU rules. Incompleteness also means a sectoral or piecemeal approach to integration, in the sense that the common external borders do not imply a supranational asylum law policy, but rather a policy coordinating the competences and duties of the Member States in asylum. The system set up with the Dublin Regulation is built upon this logic, and its downsides are also affecting the Schengen area: states have reintroduced controls at internal borders, putting the Schengen system in jeopardy.[20] The Dublin system codifies geographical disparities and asymmetrical duties between frontline states and states concerned with secondary movements; one of its pillars, the first entry criterion, has never been radically reformed.[21] Incomplete integration here means that a high level of fragmentation characterises these policies, as does a poor level of compliance with EU rules by states.[22]

The above discussion of the past crises leads us to some reflections: governance crises are to some extent the result of the 'constitutional incompleteness' explained above. However, the lessons learned from the past crises suggest that, precisely because of the choices engrained in the constitutional setting - as the EMU suggests - or as an expression of entrenched policy preferences - as the asylum and migration policies indicate – European integration has led to the codification of the structural disparities existing between states and has limited the options previously available to states to mitigate the negative effects of external events. At the same time, the Union is driven to react to crises to preserve its goals as a governance system. It is precisely in these contexts of crises that the openness of the European constitutional project emerges and can lead to innovative solutions (2.2). However, from a different perspective, these moments are occasions for the proliferation of vertical conflicts for sovereignty (2.3). The next sections will illustrate these elements.

2.2. Crises and the flexibility of the constitutional framework

In the taxonomy proposed above, the EU is constrained in its ability to provide solutions to crises and emergencies, by the legal framework, in

---

[20] S. Salomon, J. Rijpma, *A Europe without internal frontiers: Challenging the reintroduction of border controls in the Schengen area in the light of union citizenship*, in *German Law Journal*, 2023, pp. 281-309; S. Montaldo, *The COVID-19 emergency and the reintroduction of internal border controls in the Schengen area: Never let a serious crisis go to waste*, in *European Papers*, 2020, pp. 523-531.

[21] E.L. Tsourdi, *The emerging architecture of EU asylum policy: insights into the administrative governance of the common European asylum system*, in F. Bignami (ed.), *EU law in populist times: Crises and prospects*, Cambridge, 2020, pp. 191-226; B. Nikolić, P. Pevcin, *How to improve sustainability of the Schengen agreement on open borders?*, in *International Migration,* 2022, pp. 244-257.

[22] The measures envisaged in the Commission's New Pact on Migration and Asylum of September 2020 do not represent a radical change in this trend.

particular, by the principle of conferral, and attributed competences, in addition to the specific policy-bound constitutional constraints embedded in the Treaties. Another fundamental aspect recalled above is that the EU has limited funding available for its crises since the EU budget is typically constructed as expenses oriented. To sum up, the EU faces significant challenges in making sure that a crisis does not turn into a governance crisis.

In addition, several aspects must be stressed. First, as stressed by Dougan, there is a certain mismatch between legal provisions and the complexity of societal challenges the EU is called to face.[23] Contemporary societal challenges are of a scale and complexity that go beyond the policy and legal boundaries of competences as defined in the Treaties. In such cases, by definition, the legal system of the EU is put under stress.

A second aspect that must be added is that EU law accommodates a limited number of provisions to govern crises or, to frame it in more legal terms, emergencies. As stressed by de Witte, the EU constitutional framework does not provide for a general emergency regime: "The EU Treaty rules must be used in good and bad times, in normal times and in crisis times."[24] Yet, treaties provide for emergency competences, and some regular provisions can be used to prevent and manage emergencies.

This means that EU crises, and their complexities, must be addressed through the legal toolkit at the disposal of the EU. This has happened in the most recent crises. At the same time, once a crisis is manifest there is a political negotiation of the emergency measure and then the legal provisions are stretched or interpreted in a way as to make sure that the solution fits the legal framework.

This situation urges policy-makers and lawyers to interpret the constitutional framework with flexibility, to ensure that the solutions designed are functional and can mitigate the consequences of the emergency. Occasionally, solutions can be found outside the treaty framework. Crises do test the flexibility and the resilience of the constitutional systems. Moreover, the inherent complexity of the socio-economic challenges that crises entail does represent a stress on the principle of attributed powers.[25]

It is precisely in these occurrences that conflicts of sovereignty can emerge.

2.3. Conflicts of sovereignty as the result of incomplete integration processes

We have explained above that crises often require emergency measures that do not necessarily match the articulation of EU competences. These can

---

[23] M. Dougan, *EU Competences In An Age of Complexity And Crisis: Challenges And Tensions In the System of Attributed Powers*, in *Common Market Law Review*, 2024, pp. 93-138.

[24] B. de Witte, *Guest Editorial: EU emergency law and its impact on the EU legal order*, in *Common Market Law Review,* 2022, pp. 3-18, at p. 5.

[25] M. Dougan, *op. cit*.

turn into governance crises. This section argues that incomplete integration processes and (governance) crises nurture vertical conflicts of sovereignty.

Dialogical processes concerning core features of the EU legal system and their meaning are not new within the context of European integration. However, depending on the quality of the interactions in each context, we can have a dialogical or a conflictual interaction, which can lead to claims touching upon core tenets of sovereignty.

Since the early days of European integration, the European Court of Justice and higher domestic courts have adjudicated on the boundaries of the sovereignty transferred through the integration process.[26] Constitutional conflicts have fed the legal dimension of the process of European integration and contributed to shaping a doctrine of legal integration based on dialogue among higher courts, on respect and recognition of each other's positions and prerogatives. In different manners and styles, courts have set boundaries to protect core values and principles of the legal order, yet never disregarding the authority of the other court.[27] These interactions have been rationalised by scholarship using theories of constitutional pluralism, which have merit in explaining and composing both dialogical and conflictual interactions between courts.[28]

Opposed to this, and departing from the dialogue narrative, I frame the conflict of sovereignty as a process of competition between actors in sovereignty claims and open contestation between authorities.[29] In recent years, old

---

[26] At the beginning of European legal integration, the interactions between the Court of Justice of the European Union (CJEU) and higher national courts, including constitutional courts, was centred around conceptions of supremacy of EU law and its implications for national legal orders. Several courts have engaged in this dialogue, and these interactions have proved to be fruitful for the development and consolidation of a new legal order, which did not federalise Member States and thus left supreme courts with a margin of appreciation in defining the interactions between themselves and the supreme court of the Union, the Court of Justice.

[27] M. Cartabia, *Principi inviolabili e integrazione europea*, Milano, 1995; M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed.), *Sovereignty in transition*, Oxford, 2003, pp. 501-537.

[28] The literature on constitutional pluralism is vast. For some recent and non-exhaustive references, see G. Martinico, *The tangled complexity of the EU constitutional process*, cit.; A. Bobić, *The jurisprudence of constitutional conflict in the European Union*, Oxford, 2022; A. Bobić, *Constitutional pluralism is not dead: an analysis of interactions between constitutional courts of Member States and the European Court of Justice*, in *German Law Journal*, 2017, pp. 1395-1428. On its side, the Court of Justice has never written its doctrine of European sovereignty; instead, it has built a doctrine of supremacy or primacy which presupposed sovereignty of the European legal order, and it has completed it with its doctrine on the autonomy of the EU legal order, expressed in Opinion 2/13. This autonomy narrative, together with primacy, is in my interpretation the very core of the sovereignty doctrine of the Court of Justice.

[29] These processes emerged dramatically after the enlargement of 2004, the Treaty of Lisbon, and also as a consequence of the rise of neo-sovereigntist and populist politics, which increasingly contest the process of European integration and the EU in general. The Treaty of Lisbon provided the toolkit for the emergence of conflicts of sovereignty and processes of contestation between the supranational

and new claims to sovereignty are gaining ground on the political and legal stage of the EU, and both the eurozone and the refugee crises have become the object of conflicts of sovereignty involving non-majoritarian institutions. In my taxonomy, the element defining a conflict of sovereignty is the challenge towards the source of authority.

One crucial example is the *Weiss* judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*) on the Public Sector Purchase Programme (PSPP) of 5 May 2020.[30] Furthermore, the conduct of countries such as Hungary in the context of its migration control policies enacted in the aftermath of the refugee crisis represents a (politically driven) legal conflict of sovereignty.[31]

The *Weiss* judgment of the *BVerfG* is a judgment of a court that is aware of creating a conflict of sovereignty because it had declared as *ultra vires* and not applicable in Germany the judgment of the CJEU in *Weiss* and also the decisions adopted by the European Central Bank on the PSPP.[32] The *BVerfG* used its own domestic interpretation of the principle of proportionality to question the legitimacy of the reasoning of the CJEU. Secondly, the *BVerfG* refrained from interrogating the European Court a second time, getting to the point of questioning the interpretation of the CJEU on EU law, and stating that some parts of the CJEU's judgment in *Weiss* were *ultra vires*: thus, it approached the CJEU in a hostile way, with a clear denial of the CJEU's competence to interpret EU law. The uncooperative model chosen by the *BVerfG* makes this judgment a conflict of sovereignty. The reaction of the Court of Justice, with an assertive press release, witnesses this conflict touching upon the primacy of EU law.[33] Therefore, by choosing to refrain from activating a second preliminary reference to the CJEU, the *BVerfG* chose a conflictual approach, in a clear denial of the CJEU's role as primus inter pares, *i.e.*, as the first European law court.

---

and national constituencies of the Union: Article 50 TEU and Article 4(2) TEU are cases in point. It is not by chance that Hungary and Poland have become big sponsors of constitutional identity and constitutional pluralism, though the meanings they give to these concepts are foreign to European constitutionalism. On conflicting sovereignties as the expression of the political conflict between neo-sovereigntist populist parties and traditional politics, see C. Bickerton, *"Parliamentary", "Popular" and "Pooled": Conflicts of Sovereignty in the United Kingdom's Exit from the European Union*, in *Journal of European Integration*, 2019, p. 887; see also N. Brack, R. Coman, A. Crespy, *Unpacking Old and New Conflicts of Sovereignty in the European Polity*, in N. Brack, R. Coman, A. Crespy (eds.), *Understanding Conflicts of Sovereignty in the EU*, London, 2021.

[30] *BVerfG*, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15.

[31] L. Marin, S. Penasa, G. Romeo, *Migration crises and the principle of solidarity in times of Sovereignism: challenges for EU law and polity*, in *European Journal of Migration Law*, 2020 (1), pp. 1-10.

[32] CJEU, judgment of the Court (Grand Chamber) of 11 December 2018, case C-493/17, *Weiss and others*, ECLI:EU:C:2018:1000.

[33] Court of Justice of the European Union, Press Release No 58/20, Luxembourg, 8 May 2020.

In the context of new sovereigntists, instead, the challenges to the EU and its sovereignty are caused by illiberal governments, with Poland and Hungary heading the group.

These states engage in a conflictual and confrontational attitude with EU institutions, promoting political conflicts that have been translated into legal battles. For example, in Hungary, the conflict of sovereignty that emerged in the context of the arrival of asylum seekers has been deliberately fuelled by the government, which refused to be among the beneficiaries of the relocation decisions. For a long time now, the Hungarian government has challenged the EU's competences – for example, with the Hungarian migrant quota referendum of 2016 – and has not properly implemented instruments of asylum law.[34] Furthermore, Hungary and Poland have challenged before the CJEU the legitimacy of the relocation decision, without success, claiming a conflict of competences and a violation of national prerogatives.[35]

If this section shows that conflicts of sovereignty are increasing, concern different types of actors, and are based on a multitude of rationales, it must be acknowledged that the preference expressed since the Treaty of Maastricht for limited transfers of competences to the EU, in a context of limited administrative and substantive integration, has shown some limitations: indeed, incomplete integration processes bring with them constitutional conflicts, occasionally leading to conflicts of sovereignty, more precisely on the definition of the boundaries of that transfer of sovereignty, or on the implications of the asymmetric integration process for a state's competences. Additionally, if incomplete integration does not confer on the EU the toolkit needed to protect supranational common goods, it might create disequilibria that should be fixed thanks to the overall flexibility of the system. In this context, the general principles of EU law, representing its core values, play a crucial role in securing the flexibility and resilience of the EU as a constitutional system. It is in this context that we will elaborate on the principle of solidarity, in the next section.

---

[34] In the Hungarian case, the refugee crisis intersects with the rule of law crisis: as well as being a by-product of incomplete integration, in the sense of a system where ultimately states are left to deal with the consequences of migration based on geographical criteria, this crisis is also a choice enabled by the incompleteness of the enforcement system of EU law, which structurally relies on Member States' bureaucracies to be implemented. Additionally, the Article 7 TEU procedure requires unanimity, with the exclusion from the vote of the Member State concerned. Poland has added an episode to the conflict of sovereignty saga with judgment K 3/21 of the Polish Constitutional Tribunal of 7 October 2021, in which Poland refuses *tout court* the primacy of EU law, offering another direct challenge to EU law and a blatant conflict of sovereignty.

[35] CJEU, Judgment of the Court (Grand Chamber) of 6 September 2017, joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary* v. *Council of the European Union*, ECLI:EU:C:2017:631. On these challenges and on the conflicts for sovereignty that resulted, see L. Marin, *Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation*, in *Freedom Security, Justice European Legal Studies,* 2019, pp. 55-74.

3. Solidarity and crises: our hypothesis

Solidarity is a constitutional principle of the EU legal system and it assumes a special role in the governance of crises.

Our hypothesis is that, beyond a political meaning, solidarity has a function as a legal principle in the resolution of crises.[36] During crises, solidarity is invoked as a principle and as a value that can bring flexibility to the constitutional system and support the process of finding a solution to the emergency. For this reason, it is a principle that offers a prism of analysis and assessment of the impact of a crisis on European integration.

In my interpretation, solidarity is one of the vectors of flexibility of the European legal system, and it is used to find a solution when an external factor (financial external shocks, human migration, viruses) mitigates the negative effects that competing sovereignties cause for the functioning of the EU. Solidarity is invoked as the principle to fix integration fractures, precisely like in the Japanese *kintsugi* technique, where a gold fluid is used to put together the pieces of broken ceramics; solidarity is supposed to reconcile the EU and its Member States when conflicts emerge in a traumatic manner. Consequently, solidarity, this time interpreted as a value, boosts the legitimacy of the EU, in the sense of its capacity to deliver policy reforms and public goods when needed. Solidarity is also meant to supplement the capacity of the EU to meet citizens' expectations irrespective of the (limited) competences it has been vested with – an expression of the EU's incomplete constitution.

With this function in mind, solidarity is referred to in numerous legal provisions governing emergencies, such as Article 122 TFEU.

Yet, in the context of crises we should distinguish between the politics of solidarity and solidarity as a legal principle of EU law. Our analysis will focus on the legal dimension of solidarity: it will consider its role as a general principle of EU law as it is implemented during crises in order to expand more broadly on its significance as a legal principle.

As known, the principle of solidarity is a general principle of the EU, found in core treaty provisions, as well as in the case law of the Court of

[36] Solidarity is one of the buzzwords recurring in high-level political speeches at EU level. For example, solidarity features in the addresses on the State of the Union (SoU) of the former President of the Commission J.-C. Juncker: in the SoU address of 2017 but also SoU address of 2018 it is invoked both as solidarity from the EU to the states, thus as vertical solidarity, but also as horizontal solidarity, between states [see the European Commission official webpage, SoU 2018]. In similar terms, President von der Leyen regularly refers to solidarity in her speeches. For example, in the SoU 2022 solidarity has been referred at 11 times [cf the European Commission official webpage for SoU addresses]. Furthermore, solidarity is prominent also in the Speech by President von der Leyen at the European Parliament Plenary on the EU coordinated action to combat the coronavirus pandemic and its consequences and in the Statement by President von der Leyen on energy.

Justice. Yet its precise legal meaning as a general principle of EU law is not fully clear; this affects its justiciability. Recently, the Court of Justice recognised it as a legally binding principle and thus capable of leading to the annulment of an act conflicting with it.[37]

At the same time, in the last few years we have been able to observe difficulties in translating this legal principle into solidarity-driven policies and legal instruments.[38] Though it is acknowledged that solidarity policies and practices can be contingent upon context-related factors,[39] this book argues that the latest crises can be considered as learning points as to the meaning and place of solidarity in the context of European governance and can teach us something new as to the nature of the principle of solidarity within the EU.

4. Book idea, research question, and methodology

Against this background, the main purpose of this book is to analyse and assess how the EU has reacted to the pandemic crisis and the energy crisis, considering that:

- a pivotal role has been played by the principle of solidarity, both as a buzzword of the political debate and as a general legal principle of the European Union,
- in the recent crises, Article 122 TFEU has provided an important legal basis for the adoption of measures to mitigate the effects of those crises. In this context, inter-state solidarity is one of its core elements.[40]

---

[37] CJEU, Judgment of the Court (Grand Chamber) of 15 July 2021, case C-848/19 P, *Federal Republic of Germany v. European Commission (Opal)*, ECLI:EU:C:2021:598.

[38] See C. Favilli, *La solidarietà flessibile e l'inflessibile centralità del sistema Dublino, in Diritti Umani E Diritto Internazionale,* 2021, pp. 85-101; C. Favilli, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'«emergenza» immigrazione*, in *Quaderni Costituzionali,* 2015, pp. 785-787; S. Morano-Foadi, *Solidarity and responsibility: Advancing humanitarian responses to EU migratory pressures*, in *European Journal of Migration and Law*, 2017, pp. 223-254; E. Tsourdi, *Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System*, in *Maastricht Journal of European and Comparative Law,* 2017, pp. 667-686; R. Bieber, F. Maiani, *Sans solidarité point d'Union européenne*, in *Revue Trimestrelle de Droit Européen,* 2012, pp. 295-327.

[39] P. Genschel, M. Jachtenfuchs, *Postfunctionalism reversed: solidarity and rebordering during the COVID-19 pandemic*, in *Journal of European Public Policy*, 2021, pp. 350-369.

[40] This provision offers two distinct legal bases. The first - Article 122(1) TFEU - enables the adoption of general economic policy measures, taken in a spirit of solidarity between Member States, "if severe difficulties arise in the supply of certain products, notably in the area of energy"; whereas the second - Article 122(2) TFEU - provides for financial assistance measures, in case a Member State "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". With these procedures, the Council decides by qualified majority on a proposal of the Commission, and the European Parliament is not involved at all. Only in Article 122(2) TFEU, the President of the Council shall inform the EP of the decision taken, whereas in the first case

Solidarity is one of the general principles of EU law. It operates at the constitutional level of the EU, and, at the same time, it can be interpreted as a policy-related principle, being a norm guiding the implementation of several EU policies.

For these reasons, this book aims to investigate the meaning of the principle of solidarity as a legal principle of the EU, starting from its implementation as a principle governing the search for solutions to EU crises.

The main research questions this book aims to answer is:

What is the legal meaning of the principle of solidarity as implemented in the context of the pandemic and energy crises, and what can it tell us about the general challenges underlying solidarity?

4.1. Case selection and case justification: incomplete integration processes in the policies of economic coordination and energy

To answer the research questions, the analysis will focus on two cases, the pandemic crisis and the energy crisis. These crises have been chosen because they represent the most recent crises the EU has been confronted with, and because they both relate to policies connected to the economic dimension of European integration. Second, both crises have entailed an increased reliance on Article 122 TFEU as a legal basis to implement solidarity. Third, they relate to policies that have strategic relevance for the EU, domestically and on the global stage. Fourth, considering the peculiarities of the legal frameworks governing economic coordination and energy policies, the principle of the most different cases suggests they could be good test cases to discern the qualities of the independent variable, in this case, solidarity.[41]

As explained above, economic coordination and energy policies present some commonalities.

Economic coordination was strongly dissociated from the governance of the monetary union, an expression of what I have framed above as an instance of incomplete integration. Economic policy coordination was initially conceived of as a weak *sui generis* coordination competence of the EU, which in practice evolved into something with a rather complex definition.[42]

---

they are not obliged to do so. If the second legal basis mandates for financial assistance measures, the first one is broader in scope. The measures must pertain to the coordination of economic policies.

[41] According to the most different cases logic, "researchers should compare cases that are different on all variables that are not central to the study but match in terms that are, thereby emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable." R. Hirschl, *The question of case selection in comparative constitutional law*, in *American Journal of Comparative Law,* 2005, pp. 125-156, at 139.

[42] G. Contaldi, *Politica economica e monetaria (diritto dell'Unione europea)*, in *Annali dell'Enciclopedia del diritto*, 7, Milano, 2014, p. 811-845; G. Contaldi, *Diritto europeo dell'economia*, Torino, 2019; S. Cafaro, *L'evoluzione della costituzione economica dell'Unione: si è conclusa l'era*

In particular, the latter interpretation explains that the EU is called on to deliver public goods without having the toolkit typical of states, namely budgetary sovereignty and taxation powers.

In the context of the energy policy, similar observations can be made.

In the case of energy, we have a supranational competence coupled with a persistent level of fragmentation of domestic energy markets and forms of preservation of domestic competences on the determination of energy mixes, according to Article 194 TFEU. Also, in the case of energy, this can be framed as the codification in the European constitutional charter of a pre-condition that preceded integration, *i.e.*, the fact that states until then pursued different energy policies, based on a combination of factors, such as the availability of certain natural resources, geopolitical relations with states and the presence of infrastructure.

Not all 'solidarity policies or actions' related to the pandemic and the energy crises are included in this monograph: in particular, the coordination of the EU's response in health matters has been excluded because health is governed under a different EU competence.[43] Though several aspects of health policy do relate to 'stronger' EU competences (namely common commercial policy and public health, just to name some), the expansion of the scope of the current research to health would have required a different research hypothesis.

4.2. Research methodology and book overview

The book will proceed to test the hypothesis, *i.e.*, that governance crises do help us understand the core of the principle of solidarity in relation to EU crises, by answering the main research question.

For this reason, the book will proceed -chapter 1- with a conceptual framing of the principle of solidarity in the context of EU law, with a special focus on financial solidarity. This chapter will sketch a conceptualisation of solidarity, and will define its meaning(s) as a legal provision, and *loci* of operation. At the same time, in the conceptual framework we will explore the challenges of solidarity in the context of the European Union.

The analysis will proceed with the case studies, where the implementation of the principle of solidarity during recent crises will be assessed. The chapters of the cases selected have a common framework, an expression of the taxonomy proposed here.

---

della stabilità?, in *Quaderni AISDUE,* 2022; A. Damato, P. De Pasquale (a cura di), *Politica economica e monetaria dell'Unione europea. Procedura legislativa e ruolo delle istituzioni*, Napoli, 2016.

[43] According to Article 6, letter a) of the TFEU, the protection and improvement of human health falls under a competence where the Union can coordinate, support and complement the actions of the Member States. At the same time, according to Article 4 (1), letter k) of the TFEU, the Union exercises a shared competence with the Member States, in the case of 'common safety concerns in public health matters, for the aspects defined in this Treaty'.

The analysis will first delve into the legal framework and how it articulates the relationship between the EU and Member States, and the governance of the policy considered. Attention will be paid to constitutional constraints engrained in the treaties.

Secondly, it will be discussed whether the treaties have given a specific meaning or interpretation to solidarity in the policy context considered will be assessed.

In a third section, the factors triggering the crisis and its implications for the EU will be analysed, both for the EU and in its relations with the Member States.

Subsequently, the analysis will focus on the measures adopted by the EU to face the crises, giving special attention to the solutions adopted and their implications for solidarity, among other aspects.

The chapter will conclude with an analysis of the principle of solidarity, *i.e.*, with an assessment of how solidarity has been implemented to mitigate the effects of the crisis, considering the specificities of the measures adopted. The analysis of the principle of solidarity focuses on the impact of the measures adopted, on their legal basis, and the features of solidarity.

In the last part, chapter 4, the book will focus on the cross-cutting issues emerging from the implementation of solidarity as a legal principle deployed to mitigate the effects of those crises.

This work will conclude by developing a reflection on solidarity as a general principle of EU law, starting with the lessons learned from the case studies. It will focus on solidarity as a principle governing European integration, reflecting upon its role in EU crises, as a vector of flexibility in the European constitutional system.

CHAPTER 1

SOLIDARITY AS A CONSTITUTIONAL PRINCIPLE OF THE EUROPEAN UNION

SUMMARY: 1. The principle of solidarity in EU law: political commitment, value, and legal principle. – 1.1. Which solidarity for the project of European integration?. – 1.2. The polymorphism of solidarity: solidarity across EU policies. – 1.3. The polymorphism of solidarity: solidarity as a constitutional clause. – 2. Financial solidarity in the EU. – 2.1. The challenges underlying financial solidarity for the EU polity. – 2.2. Financial solidarity and redistribution in the law of the Union. – 3. Solidarity, crises, and the duty to protect European public goods.

1. The principle of solidarity in EU law: political commitment, value, and legal principle

1.1. Which solidarity for the project of European integration?

"L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble: elle se fera par des réalisations concrètes, créant d'abord une solidarité de fait. Le rassemblement des nations européennes exige que l'opposition séculaire de la France et de l'Allemagne soit éliminée: *l'action entreprise doit toucher au premier chef la France et l'Allemagne."*

This quote from the Schuman Declaration pronounced in 1950, also known as '*le discours de l'horloge'*, of the then French Minister of Foreign Affairs Robert Schuman, suggests that solidarity is one of the core paradigms of European integration, laying at its very heart.[1] Solidarity here was meant to indicate a process of creation of interdependences between member states, thanks to integration.

The Schuman Declaration was the political manifesto that shaped the integration process based on a precise vision, for a project to be built on the ruins of the Second World War. This project created a context of economic interdependence, first for coal and steel, and later on for the whole economic sector.

[1] See the 'Schuman declaration' of 9 May 1950, available in the official portal of the Union.

This 'spillover effect' contributed to shaping the first decades of European integration, explained in political theory through 'neofunctionalism'. The focus was, first, economic, and it aimed to create a situation of integration and interdependence between states.[2] The economic integration was enabled by an institutional integration process, entailing the creation of institutions, procedures, and new legal instruments.

More than 70 years later, solidarity is still a very salient topic for European integration. Solidarity represents today a core legal principle of EU law, an important epicentre within the context of European policymaking, and a value that can be interpreted according to multiple meanings. However, approaching solidarity in the context of the European Union means clarifying the fundamental question of how to frame solidarity as a value, a political commitment (and process), and a legal principle for an entity such as the European Union. This section discusses solidarity as a value binding a community, as a political commitment, and as a legal principle to a unique entity such as the European Union.

In this context, a fundamental interpretation of solidarity is provided by sociologist Emile Durkheim: in his book 'The Division of Labour in Society'

---

[2] "World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war.

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto solidarity*. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point.

It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.

This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent. In this way, there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions". Source: 'Schuman declaration' of 9 May 1950, available in the official portal of the Union.

of 1893, Durkheim developed the idea of solidarity as the constituent element of societies. His theoretical construction of organic or modern solidarity is recognised as a relevant interpretation for the EU of today. According to this, solidarity is interpreted as a value for a modern society where solidarity is not the result of a homogeneous set of values, beliefs, customs, and traditions, such as what Durkheim called mechanical solidarity. Instead, organic solidarity is derived from the mutual interdependence between different social groups, based on respect and recognition of the diversity of values and cultures.[3]

The 'organic' solidarity of modern pluralistic societies, based on the recognition of diversity and otherness, can be identified as a valid interpretation of solidarity within the European Union.[4] We could call this multi-cultural solidarity which should be the paradigm of social life within contemporary societies.

As we have seen above, a core significance of solidarity is that it is a value constituting a binding element within communities. In the context of the European Union, solidarity can be found at the crossroads of multiple relations and directories.

The first axis concerns the actors that solidarity impacts. If the first meaning of solidarity as a value is related to persons within social communities, solidarity can also be related to communities, in particular public entities and states. Within the EU, the first interpretation of solidarity is inter-state solidarity,[5] but solidarity is by no means confined to this.

In this context, a connected cleavage concerns the direction of solidarity, in particular the vertical dimension it can acquire, alongside its horizontal dimension. In EU law, the vertical dimension means a solidarity obligation of the States toward the Union and vice-versa. This vertical dimension, from the states to the Union, is also the first meaning of the principle of solidarity in EU law, in the interpretation given by the CJEU: in this context, solidarity was interpreted as a tool to support the duties of the states in implementing EU law. From this perspective, solidarity was used in a binomial with the principle of loyalty (loyalty and solidarity).[6] In contrast, the horizontal dimension, which refers to relations between states, is embedded into the notion of solidarity in the sense of *in solidum obligari*, and means burden sharing and repartition of the costs and risks connected to integration.

---

[3] A. Bobić, *The Individual in the Economic and Monetary Union: A Study of Legal Accountability*, Cambridge, 2024.

[4] K.-P. Sommermann, *Some Reflections on the Concept of Solidarity and its Transformation into a Legal Principle*, in *Political Communication,* 2014, pp. 10-24, at 12.

[5] F. Croci, *Solidarietà tra stati membri dell'Unione europea e governance economica europea*, Torino, 2020.

[6] R. Bieber, F. Maiani, *op. cit*.; P. Mengozzi, *L'idea di solidarietà nel diritto dell'Unione europea*, Bologna, 2022.

Though inter-state solidarity is among the first interpretations of this concept, the role acquired by individuals in the context of the process of integration makes us argue that the full potential of interpersonal solidarity is yet to be explored.[7] This applies to solidarity in its interpersonal dimension, between EU citizens beyond the confines of state communities. The challenge of migration brings to the fore yet another perspective of solidarity, *i.e.*, solidarity toward third-country nationals. This is certainly one of the most salient challenges for contemporary western societies, yet a challenge that Europe is not mastering as it should and could do. The interpersonal dimension of solidarity is certainly a sensitive one, as it reaches and touches upon social rights and social welfare. It should not be forgotten that the project of European integration started as a project of integration based on economic liberalism, with the competences in respect of social welfare originally left in the hands of the Member States.

Against the background of this conceptual framing of solidarity in the context of European integration, the next section will look at the role of solidarity in the Treaties.

1.2. The polymorphism of solidarity: solidarity across EU policies

What is the place of solidarity in the Treaties? Was solidarity in the Founding Treaties? Solidarity has had a place in the Treaties since the foundation of the EU. First, it was referred to in the Preambles of the Treaty of Paris, of Rome, and the Treaty of Maastricht.[8] With the latter, solidarity is also mentioned in substantive provisions, such as Article A, Article J.1 and Article 2 TEC.[9]

In the Treaty of Lisbon, solidarity is indicated in Article 2 of the TEU as one of the values on which the EU is founded. Similarly, the Charter of Fundamental Rights also refers to solidarity as a core value from which several rights are derived, in harmony with the heritage of XX-century constitutionalism and the relevance gained by social rights.[10]

---

[7] X. Groussot, A. Zemskova, K. Bungerfeldt, *Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-of-Law Crisis, and why Solidarity Is Essential*, in *Nordic Journal of European Law Issue,* 2022(1), pp. 1-19; A. Bobić, *The Individual in the Economic and Monetary Union*, cit.

[8] Solidarity has been integrated in the Preambles of the Treaties since the Treaty establishing a Coal and Steel Community: « Conscients que l'Europe ne se construira que par des réalisations concrètes créant d'abord une solidarité de fait, et par l'établissement de bases communes de développement économique», Source: Preamble of the ECSC Treaty; see also the Preamble of the Treaty of Rome and of the Treaty of Maastricht.

[9] See the Treaty of Maastricht.

[10] The literature on solidarity as a value expressing social rights is rich. For references, see A. Nato, *La cittadinanza sociale europea ai tempi della crisi economica*, Bari, 2020; A. Sangiovanni, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, pp. 213-241; S. Giubboni, *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, Bologna, 2012.

Furthermore, the founding treaties do indicate several notions of solidarity, and the different notions of solidarity are also expressions of the relations that solidarity is supposed to permeate and regulate.

The treaties do proclaim solidarity as a value and as an objective of the Union. Solidarity is in the Preamble and also in Article 2 TEU, which is the provision on the founding values of the EU. Solidarity is here indicated as a value of (European) society, and as an expression of the values common to the Member States. Solidarity is also one of the founding values of the internal market, a social market economy, and it is listed as a value that the EU should promote, both 'between generations' but also among Member States (Article 3 TEU). Solidarity also guides the EU's relations with the wider world, as provided for in Article 3(5) TEU.[11]

Next to these general provisions of the TEU, and leaving aside other sector-specific provisions,[12] solidarity finds a specific application in several policies of the TFEU.

Within the context of the current research, and without prejudice to the analysis that will be carried out with the case studies (chapters 2 and 3), focusing on economic solidarity as implemented during the pandemic and the energy crises, this analysis will be confined to the EMU and the asylum policies, in light of our starting hypothesis based on those crises (see supra, Introduction). These are illustrative as these policies do embed an idea of integration that is asymmetrical or incomplete, as discussed above (see supra, Introduction). Furthermore, this incompleteness fosters conflicts for sovereignty.

For example, in the context of the EMU and the context of asylum, solidarity coexists with responsibility. This is an expression of the asymmetrical integration models embedded in the treaties and the legislation and does represent an expression of entrenched policy preferences.

In the AFSJ, solidarity acquires a clear role in a couple of provisions but permeates the whole title since other provisions enable institutions to adopt measures enhancing solidarity: as is the case of Article 78(3) TFEU. In Article 67 TFEU, the general provision of Title V on the AFSJ, solidarity between Member States is interpreted as the foundation of the common policy on asylum, immigration, and external border control, but the same policies should

---

[11] Among the general principles of the EU's external action and of the CFSP, solidarity is framed as having a multi-dimensional meaning, as solidarity of the EU toward the international community (Article 21 TEU), solidarity among Member States in their international relations (Article 24(2) TEU), but also from the states toward the EU (Article 24(3) TEU).

[12] *E.g.* Article 122 TFEU and Article 222 TFEU. The first one deals with economic policy, whereas the second one, the so-called 'solidarity clause', which also expresses an idea of systemic solidarity, governs situations where a member state is hit by a terrorist attack or is victim of a natural or man-made disaster. See also U. Villani, *Editoriale: immigrazione e principio di solidarietà*, in *Freedom, Security and Justice: European Legal Studies*, 2017, pp. 1-4.

be "fair towards third-country nationals" and stateless persons.[13] Article 80 TFEU is the sector-specific provision on borders, asylum, and immigration, and sets out "the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States" as the overarching norm guiding the development and implementation of the policies on borders, asylum and immigration.[14] Here solidarity is to be read together with responsibility, and forms a single principle with at least two clearly indicated facets.[15]

In similar terms, the hendiadys of solidarity and responsibility can be found in the provisions of the EMU governing the coordination of economic policies. In the context of the EMU it has indeed been argued that negative solidarity between Member States means that states have to maintain their domestic budgets in line with EU obligations and also in a spirit of responsibility toward other Member States.[16]

This idea is very close to the one embedded in the context of the policies of asylum and migration management. I argue that it is precisely the same idea of solidarity, strongly related to responsibility and delegation, and it is functional in governing instances of asymmetrical or incomplete integration.

The analysis conducted on the notions of solidarity as entrenched in the treaties does suggest that solidarity is a multi-faceted legal principle, and its functioning pertains to the complex set of interactions between the different entities composing the Union.

For this reason, the next section will analyse the constitutional relevance of the principle of solidarity, from an evolutionary perspective.

1.3. The polymorphism of solidarity: solidarity as a constitutional clause

This section discusses another meaning of solidarity as a general principle of EU law. For a long time, solidarity has been deployed by the Court of Justice in its case law, together with other general principles, such as loyal cooperation. Its precise legal content had remained somehow undefined, and for this reason, it was previously argued that it did not have a clear identity

---

[13] See Article 67(2) TFEU.

[14] Article 80 TFEU states that: "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

[15] G. Morgese, *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in G. Caggiano (a cura di), *I percorsi giuridici dell'integrazione*, Torino, 2014, p. 364. See also S. Morano-Foadi, *Solidarity and responsibility*, op. cit.

[16] V. Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis*, Cambridge, 2020.

as a legally binding principle.[17] However, this has changed and solidarity has now been on multiple occasions recognised as a legally binding principle, capable of causing the annulment of acts of the European Commission.[18] More recently, the Court has reiterated the relevance of solidarity as one of the fundamental principles of EU law, arguing that the EU budget is an expression of the principle of solidarity.[19] These topical positions by the Court have renewed the interest of the scholarship on this principle and contributed to the debate on its content and identity as a general principle of EU law.[20]

Solidarity, together with loyal cooperation, and other principles, has been part of the legal toolkit of EU law since the beginning, but can we argue that solidarity is one of the foundational principles of the EU?[21] The answer to this question is affirmative. Since the early days, the ECJ has resorted to the principle of solidarity to buttress the construction of the EU as a new legal order. Solidarity has been referred to as a general principle, part of the toolkit used by the ECJ to secure the implementation of EU instruments into domestic legal orders. So, in the early days, solidarity was often intertwined with loyalty and was used as a constitutional clause supporting the reasoning of the Court arguing for a full enforcement of EU law into domestic legal orders. In this function, solidarity as a legal principle has been interpreted as a constitutional clause, permeating the European integration project, together with fairness, (mutual) trust, and loyal cooperation, which can be reconducted to the social value of loyalty.[22]

As a legal principle, solidarity is the legal expression of a tie that binds a community, since it translates into a principle ordering legal relations.[23] In its

---

[17] E. Küçük, *Solidarity in EU law: an elusive political statement or a legal principle with substance?*, in A. Biondi, E. Dagilyté, E. Küçük (eds.), *Solidarity in EU law: legal principle in the making*, Cheltenham, 2018.

[18] CJEU, Judgment of the Court (Grand Chamber) of 15 July 2021, case C848/19 P, *Federal Republic of Germany v. European Commission (Opal)*.

[19] CJEU, Judgment of the Court of 16 February 2022, case C-156/21, *Hungary v. Parliament and Council*; Judgment of the Court of 16 February 2022, case C-157/21, *Poland v. Parliament and Council*.

[20] X. Groussot, A. Zemskova, K. Bungerfeldt, *Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-of-Law Crisis, and why Solidarity Is Essential*, in *Nordic Journal of European Law*, 2022(1), pp. 1-19; K. Lenaerts, S. Adam, *La solidarité, valeur commune aux États membres et principe fédératif de l'Union européenne*, in *Cahiers de Droit Européen*, 2021, pp. 307-417.

[21] A. Biondi, E. Dagilyté, E. Küçük, *Solidarity in EU law: legal principle in the making*, Cheltenham, 2018. See also E. Karageorgiou, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy*, Lund, 2018.

[22] S. Morano-Foadi, *Solidarity and responsibility*, op. cit., at 227.

[23] K. Lenaerts, S. Adam, L*a solidarité, valeur commune aux États membres*, cit.; V. Borger, *The Currency of Solidarity*, cit.; V. Moreno-Lax, *Solidarity's Reach: Meaning, dimensions and implications for EU (external) asylum policy*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 744; S. Morano-Foadi, *Solidarity and responsibility, op. cit.*; E. Tsourdi, *Solidarity at work?*

constitutional dimension, solidarity is a general clause of the system, with a more complex definition. First of all, its meaning is evolving, it is not a static clause. In the early days, it was used by the CJEU to foster the affirmation of EU law as an autonomous legal order. In a second moment, it became clear that it had legal potential as a principle permeating relations between individuals in the context of the EU as an internal market. This is a politically sensitive interpretation of solidarity since it relates to and impacts domestic social systems. Third, solidarity operates as a constitutional clause governing relations between states and the EU; it contributes to conferring legitimacy on the action of the EU in times of complex challenges, entailing governance crises. At the same time, it confers flexibility onto the system, when treaty reforms stagnate, leaving open the possibility of constitutional adaptations. To conclude, the principle of solidarity contributes to the resilience of the overall constitutional system of the EU.

Having discussed the constitutional function of solidarity, the next section will elaborate on one of the translations of solidarity in the context of the European Union, *i.e.*, the financial solidarity between member states.

2. Financial solidarity in the EU

After this first framing of solidarity as a general principle of EU law, this section will explore one specific interpretation of solidarity in the constitutional system of the EU, *i.e.*, financial solidarity.

The traditional narrative in the EU has been that EU treaties do represent the economic constitution of an internal market project, concerned with the progressive liberalisation of domestic markets.[24] Social aspects of economic integration have been left to states, which kept their competence in taxation matters: issues concerning the redistribution of wealth were not central for the EU, which was primarily concerned with the regulation required to open up the markets.[25]

Later developments in European integration, with the EMU, did not fundamentally alter this constitutional framework: indeed, one of the core rules

---

The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System, in *Maastricht Journal of European and Comparative Law*, 2017, pp. 667-686; G. Morgese, *Principio di solidarietà e proposta di rifusione del regolamento Dublino*, in E. Triggiani *et al.* (a cura di), *Dialoghi con Ugo Villani*, Bari, 2017, pp. 471-476; K.-P. Sommermann, *Some Reflections on the Concept of Solidarity and its Transformation into a Legal Principle*, in *Archiv des Völkerrecht*, 2014, pp. 10-24; A. Sangiovanni, *Solidarity in the European Union*, *op. cit*.

[24] M. Poiares Maduro, *We the court: The European Court of Justice and the European economic constitution*, London, 1998.

[25] G. Bizioli, *Building the EU tax sovereignty: Lessons from federalism*, in *World Tax Journal*, 2022, pp. 407-433.

of the system is embedded into the *no bail-out* clause as per Article 125 TFEU. The core principles are the financial autonomy and financial responsibility of each member state. As has been argued by Borger, the treaty provisions codify within the EMU an idea of negative solidarity.[26]

Yet, irrespective of these provisions, several crises have created a need to find solutions - raising the question of redistribution across states of the EU. This begs the question: to what extent is there a place for financial solidarity in the context of the EU, which is based on the principle of financial autonomy and responsibility of the Member States?

In other words, one of the expressions of the principle of solidarity in its economic interpretation entails financial assistance among member states. Is there room for financial solidarity in the context of EU law? How and to what extent? These questions will guide the following sections.

2.1. The challenges underlying financial solidarity for the EU polity

The first question guiding this analysis concerns which forms or types of solidarity we can assert for an actor like the European Union. As recalled in this chapter, the European Union is not a state, nor an international organisation in the classical meaning of the term. So, what do we mean by financial solidarity in the context of the European Union?

With the evolution of European integration, the idea of solidarity has been changing and we can identify different possible meanings of solidarity which correspond to possible varieties of the idea of solidarity, ranging from a more minimalistic meaning of solidarity for international organisations to a more maximalist meaning, close to the state model of solidarity. Across this spectrum, we can reflect on where the European Union locates itself.

Furthermore, every crisis the EU has experienced in recent decades has pushed the EU to find solutions within the available toolkit. Against this background, we must deal with the different options of this spectrum, and from a perspective of critical legal scholarship, we can then discuss which is the most suitable position.

Starting from possible conceptualisations of solidarity and considering the politics of intergovernmental solidarity drawing on the EMU crisis, Philip Trein has elaborated on the idea of solidarity, distinguishing between negative and positive solidarity.[27] In the international context, the most classical situation is solidarity between states, or negative solidarity, which is the more

---

[26] V. Borger, *The Currency of Solidarity*, cit.; V. Borger, *How the debt crisis exposes the development of solidarity in the euro area*, in *European Constitutional Law Review*, 2013, pp. 7-36.

[27] P. Trein, *Federal dynamics, solidarity, and European Union crisis politics*, in *Journal of European Public Policy*, 2020, pp. 977-994, at 980.

embryonic meaning of solidarity. This applies to the extent that it is legally appropriate in the context of existing intergovernmental contracts.

According to the framing of Trein, developed along the theory of Durkheim:

> "(…), negative solidarity entails that governments consider solidarity only appropriate in the strict sense of existing intergovernmental contracts and that fiscal consequences should have priority over social consequences. Positive solidarity means that actors regard solidarity morally appropriate, even if it goes beyond existing intergovernmental contracts, and give priority of social consequences over fiscal consequences."[28]

In the framework of negative solidarity, the fiscal consequences of solidarity are considered more important than the social ones. According to this line of reasoning, negative solidarity has few chances to increase political and social integration: in contrast, it can result in de-solidarisation and disintegration.

Within the European Union, while the politics of solidarity are slowly emancipating themselves from this approach, the affirmation of solidarity as a legal principle across EU policies is strongly influenced by the underlying political and economic dynamics and constrained by the constitutional framework of the EU's public finances. More precisely, the uncertain emancipation of the EU from an international paradigm of public finances is exposing one of the core issues of the politics of solidarity, *i.e.*, the intertwinement between the fiscal and moral consequences of integration: this nexus has long been at the heart of every debate about solidarity in the context of the European Union.[29]

Yet, it is here argued that EU law offers avenues for reflection and appreciation, and the next section will in particular be devoted to the rules integrating financial solidarity into the framework of EU law.

2.2. Financial solidarity and redistribution in the law of the Union

One of the crucial aspects of solidarity as a legal principle in the EU is its connection with (solidarity as) financial support to one or more member states in a situation of crisis. As recalled in the Introduction, crises do require the Union and states to activate themselves and enact reforms or, more broadly, to solve emergencies with adequate policy solutions. Therefore, one salient dimension of solidarity in relation to governance crises is the idea of financial solidarity. In the context of the Union, we have to distinguish

[28] P. Trein, *op. cit.*, p. 980.

[29] P. Trein, *op. cit.*, p. 980.

between horizontal or inter-state solidarity or vertical solidarity, between the Union and states, and vice-versa.

The key question for this section is: to what extent do the treaties and EU policies integrate the paradigm of financial solidarity? This section will answer this question, which is instrumental to understanding which idea of solidarity is embedded in the EU framework.

First of all, several policies translate financial solidarity into EU law and the EU budget is in itself an instrument of financial solidarity.[30] More precisely, several policies do provide for solidarity with a strong redistributive component: this is the case in the Common Agricultural Policy (CAP), the cohesion policy, and, to some extent, financial assistance clauses.[31] Through these policies, the EU has long since implemented and administered funding instruments where the main paradigm was redistribution, *i.e.*, ensuring that some categories of market actors or territories, otherwise financially fragile, could be supported by EU instruments. Considering that several policies do implement financial solidarity with redistributive elements, solidarity as redistribution is not foreign to EU law. Yet, this meaning of solidarity has been confined to sectoral policies, and the financial impact of these instruments is relatively small.

In contrast, there is no principle of financial equalisation embedded in any clause governing relations between states in the context of the EU. Financial solidarity as a principle that governs relations between public entities is to be found within state communities. Furthermore, some federal states are governed by principles of financial equalisation – entailing the reallocation of resources across states of the federation.

For example, the German Constitution provides for a mechanism of financial transfers across states of the Federation. The principle of financial equalisation is an expression of the *Bundestreue* or federal comity clause, as stated

---

[30] C. Cinnirella, *Financial Solidarity In EU Law: An Unruly Horse?*, in *Quaderno Aisdue - Serie Speciale*, 2022, 22 May 2023.

[31] Since the beginning, the CAP has aimed to support the agricultural policy and farmers; it is a common policy to all EU countries. It is managed and funded at European level from the resources of the EU's budget. A good share of its budget is devoted to direct payments to farmers, to support them with a safety net when facing lower than average incomes and other uncertainties related to markets and weather extremes. This significant component makes up the first line of the CAP budget, which is the European agricultural guarantee fund (EAGF), with an allocation of €291.1 billion. Up to €270 billion will be provided for income support schemes, with the remainder dedicated to supporting agricultural markets. Financed by the EAGF, direct payments are a safety net for farmers facing lower than average incomes compared to the rest of the economy, as well as uncertain markets, weather extremes, pests and diseases, or weak bargaining power in the food chain. At about EUR 270 billion for the 2021-2027 period (multiannual financial framework, current prices), direct payments account for 72% of EU CAP funds (EUR 378.5 billion) (3.2.2). EU legislation sets financial allocations for each Member State; source: European Parliament, Fact sheets on direct payments, available online.

by the German Constitutional Court in 1952.[32] In similar terms, the Spanish Constitution provides for a system of financial solidarity as an expression of solidarity enshrined in Article 2 of the Constitution. At the EU level, in contrast, there is no general clause of financial equalisation across the states of Union.[33] Financial equalisation would require fiscal transfers between member states and this is perceived as very contentious in several political circles. Furthermore, a financial equalisation instrument at the supranational level would seem to presuppose a fiscal competence the EU does not have.

This section has shown that solidarity can be interpreted within the EU as financial assistance, and that redistribution is not foreign to the EU system. Yet, redistribution as financial transfers between states triggers questions of political and constitutional relevance.

3. Solidarity, crises, and the duty to protect European public goods

In this section, we have examined the principle of solidarity as posited in the treaties. Solidarity lies at the heart of complex relations between the EU and states, and between states. At the same time, solidarity has strong potential as a principle regulating relations between citizens across state communities, a potential that has not yet been fully explored.

The principle of solidarity is also crucial when a governance crisis occurs, for several reasons. A crisis is a situation where the EU is faced with the limits of its constitutional mandate. Yet, a crisis requires a solution to be designed in a policy and implemented through legal instruments. In this context, the complexity of social challenges the EU faces is at odds with the rigidity of attributed competences. The principle of conferral enables but also constrains the search for solutions to protect European public goods. It is in this context, that solidarity comes into play as one of the factors which imports flexibility to the whole system.

---

[32] See Article 107-2 of the *GrundGesetz*; *BVerfG*, 117,1952, para. 131; C. Larsen, *States Federal, Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism*, in *American Journal of Comparative Law*, 1999, pp. 429-488, at 436.

[33] However, the theme of the financial losses or gains deriving from participation in the Communities and the Union has long been part of the political debate of some states. To quote an emblematic example, the UK and other states have been complaining about rebates concerning the CAP.

CHAPTER 2

THE PANDEMIC CRISIS AND THE PRINCIPLE OF SOLIDARITY

SUMMARY: 1. Economic policy in the legal order of the European Union. – 1.1. The economic policy coordination in the system of the Economic and Monetary Union: the Treaty of Maastricht. – 1.2. The evolution of economic governance, between crises and constitutional transformations. – 2. The principle of solidarity in economic policy coordination: any lesson learned from the euro crisis?. – 2.1. Constitutional constraints on inter-state solidarity in the structures of the EMU: solidarity as self-responsibility. – 2.2. The euro crisis and the pitfalls of the edifices of the EMU. – 2.3. Testing the constitutional boundaries of the EMU: the European Financial Stabilization Mechanism (EFSM), the European Financial Stability Facility (EFSF). – 2.4. The European Stability Mechanism (ESM): a first scratch to the principles of responsibility and autonomy of national budgets. – 2.5. The Pringle case and the relationship between financial solidarity and the no-bailout clause. – 2.6. Which solidarity for the euro crisis? The CJEU's doctrine on solidarity in Pringle. – 2.7. The solidarity shield of the European Central Bank: unconventional monetary policies, solidarity, and conflicts for sovereignty. – 3. The pandemic crisis, and the challenges it represented for the EU. – 3.1. The pandemic crisis and the challenges it has triggered for the EU multi-level governance system. – 3.2. The first measures supporting the economic dimension of the pandemic crisis. – 3.3. A change of paradigm in tackling post-pandemic recovery. – 4. The mitigation of the effects of the pandemic crisis against the prism of solidarity. – 4.1. The programme SURE: 'borrowing for lending' solidarity in the first instrument to mitigate the effects of the pandemic on labour markets. – 4.2. SURE and its limited conditionality: anticipating a paradigm shift after the ESM?. – 4.3. SURE and its guarantees: the EU's reputation benefitting the most indebted states. – 4.4. SURE and solidarity: a first trial of fiscal solidarity backed jointly by the EU budget and States. – 5. Next Generation EU and redistributive solidarity across Member States. – 5.1. The legal design and the technical solutions adopted. – 5.2. The functioning of NGEU: a change of paradigm without treaty reforms. – 5.3. The RFF Regulation: solidarity as (re-)distribution and its conditionalities. – 5.4. The EU as a borrower on the financial markets: a step ahead towards a metabolic constitution?. – 5.5. The emergence of the EU budget as the vector of solidarity. – 5.6. The seal of constitutionality of the German Constitutional Court on the Own Resources Decision: signals of peace after Weiss?. – 5.7. The 'boosted' solidarity of Next Generation EU. – 6. Post-pandemic economic solidarity: consolidating a new meaning of solidarity within the EU?

1. Economic policy in the legal order of the European Union

1.1. The economic policy coordination in the system of the Economic and Monetary Union: the Treaty of Maastricht

In this section, I will analyse the provisions concerning European economic governance, one of the two pillars of the Economic and Monetary

Union (EMU). In particular, the provisions of the economic policy will be analysed to reconstruct the legal framework underpinning the measures that have been adopted to mitigate the consequences of the pandemic crisis. In my taxonomy, set out in the Introduction, EU rules have created a system of incomplete integration, and, once a crisis has developed, remedies have to be designed to protect the goods created through integration. In this context, solidarity plays a crucial role, and becomes one of the flexibility clauses of the whole European constitutional architecture.

The EMU has been explained as a policy that was developed based on the idea of asymmetrical integration.[1] Its main goal and accomplishment is the introduction of a single currency, the euro, which has replaced the various national currencies previously in force in Eurozone countries. It is a policy characterised by some differentiation, since not all Member States participate in the Eurozone.[2] Additionally, in the context of the EMU, the fathers of the euro have built a single currency premised on an incomplete post-national sovereign idea, *i.e.*, the monetary union as an exclusive competence of the EU, while fiscal and economic policies were left in the hands of the Member States, though the EU has been endowed with a *sui generis* coordination policy, atypical when compared to the traditional articulation of EU competences.[3] This bifurcation of integration paradigms was certainly strong immediately after the adoption of the euro. The Franco-German breach of the 3% rule in 2003 and, later on, the sovereign debt crisis exposed the weaknesses of this choice. With time, the governance of economic coordination has been progressively reinforced.[4] In section 1.2. we will briefly expand on this evolution.

---

[1] A. Hinarejos Parga, *The Euro area crisis in constitutional perspective*, Oxford, 2015.

[2] S. Verhelst, *Differentiated Economic and Monetary Integration*, in *Studia Diplomatica*, 2013, pp. 19-32; E. Pistoia, *Limiti all'integrazione differenziata dell'Unione europea*, Bari, 2018; S. Baroncelli, *Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU*, in *European Papers*, 2022, pp. 867-887.

[3] See the combined reading of Article 2(3) TFEU ("The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide") and Article 119(1) TFEU ("For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition"). For a more in depth analysis see G. Contaldi, *Politica economica e monetaria (diritto dell'Unione europea)*, in *Annali dell'Enciclopedia del diritto*, Milano, 2014, pp. 811-845; G. Contaldi, *Diritto europeo dell'economia*, Torino, 2019; N. Ruccia, *L'Unione economica e monetaria*, in *Elementi di Diritto dell'Unione europea, Parte Speciale, Il Diritto sostanziale alla prova dell'integrazione politica*, Milano, 2023, pp. 146-220.

[4] C. Fasone, N. Lupo, *Learning from the Euro-crisis. A new method of government for the EU economic policy coordination after the pandemic?*, in *STALS Research Paper (4)2023*, 2023, pp. 1-24; N. Ruccia, *L'Unione economica e monetaria*, op. cit.

This original choice of asymmetric integration can be explained according to different perspectives. The first one is based on economic scholarships, and it justifies the choice as the result of a struggle between different economic visions: the 'monetarists', on the one hand, and the 'economists', on the other.[5] While economists argue that the coordination of economic policies logically precedes monetary integration, monetarists argue that the starting point should have been establishing exchange rates or the introduction of a common currency, and the coordination of economic policies would have followed. The monetarists had their view enshrined in the design of the EMU.[6]

A second perspective focuses on the negotiations of the EMU provisions.[7] The core actors were France and Germany, who had different core ideas on how to build the EMU. Germany was focused on price stability and on the need to avoid excessive deficits, whereas France preferred some form of coordination.[8] These positions, dominant during the negotiations preceding the Treaty of Maastricht, led to the creation of the EMU based on two pillars: the German one, axed around Article 126 TFEU, consisting of the prohibition on excessive deficits, framed as a specific objective, with numerical targets detailed in the Stability and Growth Pact, and a procedure conducive to pecuniary sanctions, the Excessive Deficit Procedure.[9] The second is the so-called French pillar, which states that economic policies shall be regarded as a matter of common concern and shall be coordinated within the Council (Article 121 TFEU). The coordination of economic policies is governed by broad guidelines drafted by the Council, then formulated into a 'conclusion' of the European Council, and then reverted into a 'recommendation' by the Council.[10] This provision shows a clear preference for intergovernmental leadership of the economic coordination policy, and for soft law rather than hard law.

This means that the original legal foundations of the policies underpinning the euro display a crucial difference and there is unequal strength between the two pillars, reflecting the preferences of the core negotiators, Germany and France: since they did not oppose each other, the final compromise is the crystallisation of these preferences, both in policy and in governance. One

---

[5] A. Hinarejos Parga, *The Euro area crisis in constitutional perspective*, op. cit., at 6.

[6] J. Pisani-Ferry, *Only one bed for two dreams: A critical retrospective on the debate over the economic governance of the Euro area*, in *Journal of Common Market Studies*, 2006, pp. 823-844; H. Degner, D. Leuffen, *Brake and broker: Franco-German leadership for saving EMU*, in *Journal of European Public Policy*, 2021, pp. 894-901.

[7] J. Pisani-Ferry, *Only one bed for two dreams*, op. cit., at 826.

[8] *Ibidem*.

[9] Stability and Growth Pact adopted in 1997, with Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 209, 2.8.1997, pp. 1–5.

[10] Article 121(2) TFEU.

important consequence is that the pillar of budgetary discipline is governed by clear rules, and their breach leads to pecuniary sanctions. The pillar on economic policies' coordination, by contrast, is not protected by hard rules and can lead to a non-binding recommendation of the Council.[11]

In the context of economic governance, it must be observed that the EMU's original design was based on a limited transfer of sovereignty to supranational institutions and was rule-based.[12] Integration was supposed to result from State compliance with a series of rules adopted at the EU level. The main idea was not to transfer policy-making powers and discretion to supranational institutions but to impose limits on domestic policy-making powers and discretion at the national level. Respect by states for the rules of the game would have made the whole project function, in the design of the drafters of the Treaty of Maastricht.

1.2. The evolution of economic governance, between crises and constitutional transformations

The original design of the EU's economic governance was centered on a *sui generis* coordination policy, partially based on soft law rules, strengthened by rigid prohibition concerning the budgetary discipline. This atypical coordination competence evolved, as it soon became clear that its weakness was a challenge to the effectiveness of its rules. While an overall examination of this evolution would be outside the scope of this work, the milestones of this evolution and their significance will be set out here. This evolution took place through the Stability and Growth Pact, with the creation of the European Semester, in 2011, and with the Fiscal Compact, in 2012.

The Stability and Growth Pact (SGP) adopted in 1997 was the first attempt to strengthen the rules concerning budgetary discipline and reduce moral hazard. It aimed to prevent overspending and ensure the enforcement of the ratio of 3% of GDP as the limit for the deficit and a ratio of 60% of GDP for the public debt level. The SGP works with a preventive arm, consisting of monitoring and prevention, and a corrective arm, the Excessive Deficit Procedure, entailing sanctions. In 1997, the economic pillar was complemented by the agreement on the creation of the Eurogroup,[13] that was supposed to remain informal and all the relevant decisions had to be the responsibility of the Ecofin Council.[14]

---

[11] J. Pisani-Ferry, *Only one bed for two dreams*, op. cit., at 827.

[12] A. Hinarejos Parga, *The Euro area crisis in constitutional perspective*, *op. cit.*, at 7.

[13] See the official site of the Eurogroup available online; M. Markakis, *The Political and Legal Accountability of the Eurogroup*, in M. Dawson (ed.), *Substantive Accountability in Europe's New Economic Governance*, Cambridge, 2023, pp. 132-153; D. Hodson, *The Rise and Fall of the Eurogroup*, in D. Hodson (ed.), *Governing the Euro Area in Good Times and Bad*, Oxford, 2011, pp. 38-53.

[14] J. Pisani-Ferry, *Only one bed for two dreams*, op. cit., at 828.

However, the effectiveness of this system was seriously undermined when, in 2003, both France and Germany breached the 3% rule, and the Council did not implement the black letter of the SGP. The situation generated an inter-institutional conflict, between the Commission and the Council, which was decided by the CJEU, substantially in favour of the Council.[15] The political nature of the main decision-maker, the Council, undermined the effectiveness of the rules. After the COVID-19 pandemic, the SGP was reformed in 2024, with many elements of continuity and some innovations.[16]

Later on, the governance was strengthened in 2011, with the creation of the European Semester, and in 2012, with the Fiscal Compact. To this list, we must add the European Stability Mechanism (ESM) which will be addressed in section 2.

The European Semester was created as part of the Six Pack reform, in 2011.[17] It creates an annual cycle of coordination of domestic economic and budgetary policies, to strengthen the analysis and the monitoring of domestic policies. In contrast, the Fiscal Compact is an intergovernmental Treaty on Stability, Coordination and Governance, and was adopted outside of treaty reform due to the opposition of the UK and Czech Republic.[18] It aims to re-inforce the budgetary policies of the euro-area countries. Overall, the Fiscal Compact ensures that national budgets are balanced or in surplus, controlling structural deficits at 0.5% of GDP or lower and providing for corrective measures that can be enforced before the CJEU, which can impose sanctions; it aims to prevent euro area countries' deficits growing excessively, boosting the impact of recommendations made by the European Commission; thirdly, it aims to improve the coordination of national economic policies.

The overall outcome is that economic policy coordination was originally assisted by weak institutional provisions compared to monetary policy, inspired by the need to safeguard central bank independence and price stability. Since the life of the EMU soon proved the shortcomings of these rules, economic policy has been reformed on multiple occasions, remaining a *sui*

---

[15] CJEU, Judgment of the Court (Full Court) of 13 July 2004, case C-27/04, *Commission v. Council*, ECLI:EU:C:2004:436.

[16] Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97, OJ L, 2024/1263, 30.4.2024. For a first assessment, see L.R. Pench, *The new Stability and Growth Pact: innovation and continuity in the light of NextGenerationEU*, in F. Fabbrini, C.A. Petit (eds.), *Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law*, Cheltenham, 2024, pp. 299-327.

[17] For more information see 'Economic Governance' in the summaries of EU legislation, available online.

[18] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (2012), available online. On the Fiscal Compact see, among others, M. Buti, M. Krobath, *Should the eurozone be less intergovernmental?*, Luiss SEP Policy Brief, 2019.

generis policy with a process of governance that has heavily reinforced the role of European institutions, the Commission and Council in particular.

2. The principle of solidarity in economic policy coordination: any lesson learned from the euro crisis?

This section will elaborate on the constitutional rulebook of the economic governance of the EMU, assessing whether the Treaties embed solidarity provisions or constraints on solidarity. In addition, the previous crisis – the sovereign debt crisis that arose from the subprime mortgage crisis - and the solutions adopted there will be discussed through the prism of the principle of solidarity.

2.1. Constitutional constraints on inter-state solidarity in the structures of the EMU: solidarity as self-responsibility

As introduced above, the legal framework of the EMU is not a framework based on solidarity.

Instead, the creation of the EMU has been premised on fixed exchange rates and the abandonment of national currencies, in favour of a common currency, without states having agreed on a comprehensive harmonisation of their economic policies, nor a strong federal budget or treasury.[19] In this vein, the core goal of the monetary policy is price stability, as entrenched in several provisions.[20]

Therefore, this choice is for asymmetric integration, *i.e.*, a monetary union assisted by a *sui generis* coordination competence of national economic policies, implying a reasonably limited or circumvented transfer of sovereignty to supranational institutions, which had to be balanced by the adoption of rules meant to constrain the divergences between Member States, for example, through a commitment to budgetary discipline, established in legal provisions.[21]

First, we have the prohibition on monetary financing under Article 123(1) TFEU. This rule forbids the ECB and national central banks from allocating credit to the Union institutions or Member States' authorities, and from purchasing government bonds. This means that states must finance themselves

---

[19] J. V. Louis, *Solidarité budgétaire et financière*, in C. Boutayeb (dir.), *La solidarité dans l'Union européenne*, Paris, 2011, p. 110.

[20] Article 3(3) TEU, Arts. 119(2), 127(1), 282(2) TFEU, Article 2(2) of the statute of the ECB.

[21] Article 119(3) TFUE states that "These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments."

through the markets, implying that when a public entity's economic and budgetary policy is not sound, the market will signal it. Secondly, we have the prohibition of measures establishing privileged access to financial institutions for Union or Member State authorities (Article 124(1) TFEU). Thirdly, the ban on bailouts or no bailout rule, as per Article 125(1) TFEU, means that neither the Union nor Member States shall be liable for or assume the commitments of other central governments, or regional, local, or other public authorities.

Another provision requires governments to commit to avoiding excessive deficits. Furthermore, the excessive deficit procedure aims at controlling and sanctioning this duty (Article 126 TFEU). Irrespective of the binding nature of these provisions, their enforcement proved to be complex in 2003, when France and Germany breached the rules and the Council failed to enforce the budgetary discipline against them.[22]

Against this background, the constitutional rules provide a limited backbone for solidarity in the economic governance of the EMU.

One of the core provisions is Article 122 TFEU, an exceptional legal basis for emergency situations, providing for two discrete legal bases.[23] It is a non-legislative, *i.e.*, executive-led procedure, totally in the hands of the Council.[24]

The first is the more general assistance provision, codified in Article 122(1) TFEU, and is the evolution of the old Article 103 EEC on conjunctural policies in the original EEC Treaty, which later evolved - with the Treaty of Maastricht - into Article 103 TEC. In the seventies this legal basis allowed the EEC to adopt emergency powers to set up mechanisms to tackle the oil crises. The reference to solidarity arrived with the Treaty of Lisbon. This provision allows for a broad scope of interventions with appropriate economic policy "measures", including regulations, and presupposes a situation of "severe difficulties aris(ing) in the supply of certain products, notably in the area of energy".[25]

---

[22] L. Schuknecht *et al*., *The stability and growth pact: Crisis and reform*, ECB Occasional Paper, 2011.

[23] B. de Witte, *Guest Editorial: EU emergency law and its impact on the EU legal order*, in *Common Market Law Review,* 2022, pp. 3-18. B. de Witte, *The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift*, in *Common Market Law Review,* 2021, pp. 635-682. M. Chamon, *The rise of Article 122 TFEU*, in *Verfassungsblog*, 2023. M. Chamon, *The use of Article 122 TFEU-Institutional implications and impact on democratic accountability*, EP Study PE 753.307, 2023. See also L. Hancher, A. de Hauteclocque, *Strategic Autonomy, REPowerEU and the Internal Energy Market: Untying the Gordian Knot*, in *Common Market Law Review,* 2024, pp. 55-92.

[24] M. Chamon, *The use of Article 122 TFEU-Institutional implications and impact on democratic accountability*, op. cit., at 9; and CJUE, Judgment of the Court (Grand Chamber) of 6 September 2017, joined cases C-643/15 and C 647/15, *Slovakia and Hungary v. Council*, ECLI:EU-C:2017:631, para. 62.

[25] Article 122(1) TFEU. See also 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 *Verfassungsblog*, 2023; L. Hancher, A. de Hauteclocque, *Strategic Autonomy, REPowerEU And The Internal Energy*

The second, Article 122(2) TFEU, provides that the Union can grant financial assistance to a member state when it "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control".[26] Exceptional occurrences is the condition legitimising the measures of financial solidarity, and the decision-maker is the Council, that "may grant, under certain conditions, Union financial assistance to the Member State concerned". 'Certain conditions' is another key term, embedding a form of conditionality to be specified by the measure. This exemplifies a model of vertical financial solidarity, from the Union to the Member States, an expression of the federal qualities of the EU. This aspect was also stressed by the CJEU in its case *Anagnostakis*, when it stated that Union law provides for (in Article 122(2) TFEU) assistance from the Union and not from the Member States.[27]

Further provisions organise forms of assistance: a reference should be made also to Article 136(3) TFEU that will be examined in the course of this section and to Article 143 TFEU, for Member States in the non euro-area with difficulties in the balance of payments.[28]

In the original design of the EMU, the decision to create a monetary union with a single currency was complemented by the obligations for national budgetary autonomy and responsibilities. Consequently, the treaty has created interdependence between Member States, and relied on individual responsibility and autonomy as the antidotes necessary for the looser provisions on the coordination of economic policies.[29]

In so doing, the treaty had created what for economists constitutes an impossible trinity:[30] the combination of a strict ban on co-responsibility for Member States' debts, a prohibition on monetary financing,[31] and interdepen-

---

Market, op. cit.; A. Sciaudone, *Articolo 122*, in A. Tizzano (a cura di), *Trattati dell'Unione Europea*, Milano, 2014, p. 1310.

[26] Article 122(2) TFEU.

[27] CJEU, Judgment of the Court (Grand Chamber) of 12 September 2017, case C-589/15 P, *Alexios Anagnostakis v European Commission*, ECLI:EU:C:2017:663, para. 76.

[28] Additionally, Article 143 TFEU allows the Council to grant assistance to member states outside the euro area experiencing problems in the balance of payments. The expression of solidarity this provision embeds has been linked by the CJEU with the principle of loyal cooperation, of Article 4(3) TEU, in line with its early case law. See CJEU, Judgment of the Court of 10 December 1969, joined cases 6/69 and 11/69, *Commission of the European Communities v French Republic*, ECLI:EU:C:1969:68, para. 16. Furthermore, Article 144 TFEU regulates a crisis in the balance of payments.

[29] V. Borger, *How the debt crisis exposes the development of solidarity in the euro area*, in *European Constitutional Law Review*, 2013, pp. 7-36.

[30] J. Pisani-Ferry, *The Euro crisis and the new impossible trinity*, Bruegel Policy Contribution, 2012.

[31] The prohibition on monetary financing can be interpreted as "a prohibition of institutionalised fiscal dominance in the form of explicit agreements between a government and a central bank similar to the Fed-Treasury agreement of 1942, which set the US central bank the goal of maintaining "relatively

dence between sovereigns and banks, which means "the combination of state responsibility for supervising (and if necessary rescuing) banking systems and the holding by these very banks of large stocks of debt securities issued by their sovereigns".[32]

When the euro crisis broke out, the first reaction to the crisis was to recall the importance of respect for the fiscal framework, and also to criticise and compensate for the lack of discipline suffered in the first decade of the eurozone. However, economists have observed that the higher vulnerability of euro area states to fiscal crises than non-euro area countries is telling about the misplaced emphasis on fiscal discipline as a reaction to this crisis.[33]

Instead, the crisis revealed the structural weaknesses of the system, which is precisely that the eurozone system, as it had been designed, could not properly function if put under stress. In other words, the constitutional framework of the eurozone had left open many questions that should have been addressed in case of crisis. This is precisely what has happened.

2.2. The euro crisis and the pitfalls of the edifices of the EMU

As explained above (section 1), the constitutional architecture of the EMU translated into law a project of asymmetrical integration. As underlined by economists, the crisis revealed that the EMU had also created interdependences. The Great Financial Crisis of 2007-2009, which later evolved into the Sovereign Debt Crisis, dramatically revealed that interdependencies exist at several levels, between economies, sectors, and states.[34]

When in 2007 the European financial sector was in trouble because of the shocks coming from the other side of the Atlantic (interdependence nr. 1), it became clear that these consequences would have also fallen to the states (interdependence nr. 2), which were called on to support their troubled banks, alongside interventions in support of the real economy. National budgets were put under strain, and this created doubts in the markets as to their

---

stable prices and yields for government securities" (*Ivi*, p. 6). As explained by Pisani-Ferry, this does not mean that the ECB cannot buy bonds on the secondary markets, an option used with Greece and Portugal, first, and then with Italy and Spain, with the Security Markets Programme (SMP). However, programmes such as the SMP are questioned as expanding the mandate of the EBC, since it does not have a strong mandate in this sense, given the separation between fiscal and monetary policy. In contrast, the ECB can contribute to the stability of the financial system, remaining firmly within its mandate, as per Article 127(5) of the TFEU. Indeed, the ECB motivated the launch of the SMP with the prevention of disruption to the proper transmission of monetary policy decisions, instead of the preservation of financial stability. However, this did not hinder the ECB under the Presidency of Mario Draghi from carrying out an unconventional monetary policy, such as the QE.

[32] J. Pisani-Ferry, *The Euro crisis and the new impossible trinity*, op. cit., at 4.

[33] *Ivi*, pp. 3-4. See also S. Cafaro, *L'evoluzione della costituzione economica dell'Unione: si è conclusa l'era della stabilità?*, in *I Post di AISDUE*, 2022, pp. 21-46.

[34] J. Pisani-Ferry, *The Euro crisis and the new impossible trinity*, op. cit., at 4.

creditworthiness (interdependence nr 3), putting the whole European banking sector in jeopardy (interdependence nr. 4).

Because of the four interdependences highlighted above, and especially the interdependence between sovereign debts and the banking sector, it soon became clear that the risk of contagion would have put the whole eurozone banking system in jeopardy. Again, some of the elements of the constitutional rulebook of the Eurozone proved to be untenable, creating what economist Jean Pisani-Ferry called a "new impossible trinity".[35] This system can be -in a nutshell- defined as a dysfunctional legal order, because it cannot effectively react to a crisis, when necessary.

It is precisely this context (of incomplete or asymmetrical integration and the occurrence of a crisis) that provides fertile ground for a governance crisis: a governance crisis occurs because the EU is 'inefficient' in protecting the common supranational goal (and good) of keeping the eurozone safe. Furthermore, the EU has not only been ineffective in its reaction, but States have also been hindered in their capacity to react, in the sense that they have lost control over exchange rates and also have a limited or in any case constrained fiscal capacity.[36] In other words, the EU rules have limited the room for manoeuvre traditionally enjoyed by states.

Let us now turn our attention to what has been done, against the background and alongside the constitutional constraints of the EMU.

2.3. Testing the constitutional boundaries of the EMU: the European Financial Stabilization Mechanism (EFSM), the European Financial Stability Facility (EFSF)

The crisis unfolded over the time through multiple events and phases. In the current sections, it will not be possible to assess the overall framework of answers and reforms triggered by the crisis. The focus will be the measures that have been adopted to cope with this crisis and to contribute to the preservation of public goods created through integration, *i.e.*, the single currency and the financial stability of the eurozone.

At one point it became clear that the crisis required intervention to avoid a default of Greece, and possibly of other peripheral states. In this vein, the Heads of State and Government declared that:

> "Euro area Member states will take determined and coordinated action, if needed, to safeguard, the financial stability in the euro area as a whole."[37]

---

[35] *Ibidem*.

[36] T.A. Borzel, *From EU governance of crisis to crisis of EU governance: Regulatory failure, redistributive conflict and Eurosceptic publics*, in *Journal of Common Market Studies*, 2016, pp. 8-31; G. Majone, *Rethinking the union of Europe post-crisis: Has integration gone too far?*, Cambridge, 2014.

[37] Statement by the Heads of State or Government of the EU, Brussels, 11 February 2010.

Following this, the change of approach entailed the establishment of emergency funds by the Union and the euro area states, clearly putting under stress the no-bailout clause and the prohibition on monetary financing, enshrined in Article 125 and 123 TFEU, respectively.

The first instrument was the Greek Loan Facility, a set of bilateral loans coordinated and administered by the Commission. The Loan was worth €80 bn and was accompanied by an additional €30 bn from the IMF.

The second instrument established a financial safety net in the amount of €500 bn, accompanied by additional €250 bn from the IMF, organised through two separate instruments: the European Financial Stabilization Mechanism (EFSM) and the European Financial Stability Facility (EFSF). The smallest amount, €60 bn, is located in the EFSM and corresponds to the amount available to the Union's own resources for payment appropriations. The EFSF was created in 2010 as a Société Anonyme, incorporated under Luxembourg law. It comprises €440 bn and has its legal basis outside of EU law. At its origin lies a decision of the representatives of the governments of the euro area Member States, taken within the 'Council'.[38]

As one can see, the need to create an instrument for the stabilisation of the euro and the choice of crafting it as a company under the law of one of the Member States, has meant the viability of the constitutional rulebook of the EMU has been questioned, and has initiated a process of constitutional transformation of the same.[39]

2.4. The European Stability Mechanism (ESM): a first scratch to the principles of responsibility and autonomy of national budgets

The next step taken by the EU in the governance of the crisis was the creation of the European Stability Mechanism or ESM, a permanent stability mechanism that should go beyond the temporality of the previous tools, the EFSF and the EFSM.[40]

The ESM is a mechanism that was established when the euro crisis revealed the need for support schemes. It is permanent and available to provide loans to Member States under specific conditions, through temporal programmes. Formally speaking, the mechanism designed to rescue the euro is an international institution governed by public international law and is

---

[38] C. Kilpatrick, *The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality*, in *Current Legal Problems*, 2017, pp. 337-363.

[39] H.C.H. Hofmann, K. Pantazatou, *The transformation of the European economic constitution*, in H.C.H. Hofmann, K. Pantazatou, G. Zaccaroni (eds.), *The Metamorphosis of the European Economic Constitution*, Cheltenham, 2019, pp. 2-24.

[40] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91, 6.4.2011, pp. 1–2.

located in Luxembourg.[41] It has an effective lending capacity of €500 bn. The financial assistance granted is subject to strict conditionality, which has been highly criticised in relation to macroeconomic choices made by institutions governing the disbursement of those funds, which include EU institutions and other actors, such as the International Monetary Fund.[42]

Its adoption was facilitated by a limited treaty reform of Article 136 TFEU, adopted thanks to the simplified revision procedure of Article 48(6) of the TEU;[43] the new section 3 of Article 136 TFEU provides that:

> "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

Yet, though Article 136(3) TFEU was adopted in March 2011, in the urgency of providing a timely reaction to the ongoing crisis, the European Stability Mechanism was adopted via an international treaty, to which all euro states are a party. Signed in February 2011, it entered into force in July 2012.

The reform of Article 136 TFEU is a step in the direction of the constitutional reform needed to adapt the treaties to the crisis. Yet, even on an ad hoc legal basis, the ESM puts the prohibition of the no-bailout clause of Article 125 TFEU under stress. The next section will be devoted to this analysis.

2.5. The Pringle case and the relationship between financial solidarity and the no-bailout clause

The legality of the ESM was disputed before the CJEU by an Irish politician, challenging the domestic implementation of the ESM, moving the Irish Supreme Court to refer the matter to the CJEU.

The CJEU argued for the compliance of the ESM with the treaties, and so did Advocate General (AG) Kokott, in the *Pringle* case.[44] Understandably, given that states had agreed on such a mechanism, even if the ESM put several treaty provisions under stress, the CJEU did not find room to annul the

---

[41] Treaty establishing the European Stability Mechanisms.

[42] See the ESM Guidelines on loans. In this regard, see C. Kilpatrick, *On the rule of law and economic emergency: The degradation of basic legal values in Europe's bailouts*, in *Oxford Journal of Legal Studies*, 2015, pp. 325-353; C. Kilpatrick, *The EU and its Sovereign Debt Programmes*, op. cit.

[43] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91, 6.4.2011, pp. 1–2.

[44] CJEU, Judgment of the Court (Full Court), 27 November 2012, case C-370/12, *Pringle v. Ir.*, ECLI:EU:C:2012:756; View of Advocate General Kokott, Case C-370/12, *Pringle v. Ir.*, ECLI:EU:C:2012:675.

instrument, being aware of the complex economic circumstances which made it necessary to find a solution.

The analysis of the Court focused on the compatibility of the Treaties with the ESM in its formal vest, *i.e.*, as an international treaty between Member States, concluded in parallel to EU law. Then, it examined its compliance with discrete treaty provisions, *i.e.*, its substantive compatibility with the constitution of the eurozone.[45]

A crucial issue in this analysis concerned the compatibility of the ESM with the no-bailout clause of Article 125 TFEU, in light of the objective of achieving the financial stability of the euro area. As to this purpose, the Court held that Article 125 is compatible with programmes granting financial assistance to another member state, also when read with Article 122(2) and 123 TFEU. However, it qualified this compatibility through some requirements.

First, the member state granted assistance must remain responsible to its creditors. This means that the constitutionality of the ESM is embedded in a market logic applicable to the state receiving financial assistance. The state-creditor relationship seems to be framed in civil law.[46]

Secondly, the granting of financial assistance must not release Member States from their obligation to keep a sound budgetary policy. In the words of the Court, there is a "Prohibition from granting financial assistance as a result of which the incentive of the recipient member state to conduct a sound budgetary policy is diminished".[47]

Third, a financial assistance programme must be "indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions".[48]

In other words, the CJEU anchors the constitutional legality of the ESM to the strict conditionality doctrine, epitomised in this paragraph of the reasoning:

> "However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions at-

[45] The Court recognized the compatibility of the ESM with the Treaties, because neither Article 122(2) nor any other provision confers a specific power on the Union to establish a permanent stability mechanism. Therefore, "the Member States are entitled, in the light of Articles 4(1) TEU and 5(2) TEU, to act in this area" (Judgment *Pringle*, para. 105).

[46] As the Court has stated, "Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union." (*Ivi*, para. 135).

[47] Judgment *Pringle*, para. 136.

[48] *Ibidem*.

tached to such assistance are such as to prompt that Member State to implement a sound budgetary policy."[49]

In contrast to the reasoning of the Court, Advocate General Kokott, in her View presented in the case, was more explicit in addressing the conflict between the ESM and the no-bailout clause and she did not refrain from referring to solidarity. Her way out and solution to the dilemma was to distinguish between a broad and a narrow reading of the no-bailout prohibition. In so doing, she traces an evolutionary or transformative path for the no-bailout clause, which clearly shows one of the pitfalls of the constitutional setting of the EMU.

More precisely, she distinguished between a broad and a narrow reading of the no-bailout clause, the first prohibiting every form of financial assistance, and thus going against the interests of (every member state of) the euro area: in her view, this reading stood in contrast with other treaty provisions, as well as solidarity. In her reasoning, only a narrow reading of the no-bailout clause is compatible with the principle of solidarity.[50]

At the same time, the Advocate General was careful about the potential meaning of inter-state solidarity: for this reason, she argued that the principle of solidarity does not allow for an inference that there is a duty to provide solidarity as arranged by the ESM. Instead, she opines that the Treaty provisions do not stand in opposition to a system voluntarily created by states to rescue the eurozone.[51]

In other words, the euro crisis made clear that the no-bailout clause stands as an obstacle to the capacity of the EU to provide solutions to complex problems, and the solution is to be found in carving out an interpretation of the provision framed by one of the flexibility clauses of the system, the principle of solidarity.

The merit of the approach taken by the Advocate General in her opinion is it demonstrates that, depending on circumstances - in this case, a crisis which entailed an emergency that the law needed to consider and tackle - rules can be interpreted with flexibility. Though Article 125 TFEU presented a hurdle to the attainment of a solution, she harmonised the system thanks to the flexibility provided by the constitutional order. In this case, the role of the principle of solidarity was one of a constitutional clause, utilised to provide flexibility.

---

[49] Judgment *Pringle*, para. 137.

[50] View of Advocate General Kokott in the case *Pringle*, cit.

[51] *Ivi*, para. 143: the AG argues that the system of the treaties does not support a broad interpretation of Article 125 as prohibiting states "in a case of emergency, for example, to prevent the serious economic and social effects associated with a State bankruptcy, from voluntarily providing mutual assistance". Accordingly, "Emergency assistance to any third State would be permitted, while emergency assistance within the Union would be banned. Such a prohibition, it appears to me, would call into question the very purpose and objective of a Union."

2.6. Which solidarity for the euro crisis? The CJEU's doctrine on solidarity in Pringle

This section aims to assess the ESM and the *Pringle* judgment through the lens of the principle of solidarity.

Solidarity is never referred to by the Court of Justice in *Pringle*. Nor does the Court refer to other general principles of EU law. Instead, it focuses on a legal analysis of the compatibility of the ESM with core Treaty provisions. This analysis is crucial for the legal viability of the ESM within the system of the treaties, which has been contested in several states,[52] and is the product of parallel integration, or of a process of constitutional dismantling or liminal legality.[53]

The path taken by the CJ is the product of a deliberate choice. Arguing on the basis of the general principles of law would have been risky in the sense that other courts might have later given their legitimate – and perhaps different - interpretation of the same legal principles, as happened years after with the *Weiss* case of the German Constitutional Court.[54] In the part of the reasoning concerning the no-bailout clause, the confrontation has been between the ESM, the no-bailout clause, and the risk concerning "the financial stability of the euro area as a whole".[55]

Second, focusing on core legal provisions kept the CJEU solidly within its field of competence, since it is the only court that has the authority to interpret the constitution of the eurozone.

Third, the measures in question were adopted in politically sensitive contexts, with debates in every state as to the domestic consequences of the crisis. Referring to the legal principle of solidarity, which relates to values that are also typical of state communities, would have brought the judgment into a sensitive and politically loaded area. The approach adopted avoided that risk of politicisation.

Furthermore, the CJEU echoed the political debate which paved the way for the creation of the ESM. At the political level, the stress has also been put on the collective interest in protecting the financial stability of the euro area as a whole.

---

[52] Germany and other Member States traditionally labeled as the Frugal Four, have been adamant in denying that solidarity between Member States would have constituted a transfer union.

[53] Respectively, J.F. Arribas, *Regulating European Emergency Powers: Towards a State of Emergency of the European Union*, College of Europe Dissertation, 2023; N. Scicluna, *Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis*, in *Journal of European Public Policy*, 2018, pp. 1874-1891; C. Kilpatrick, *The EU and its Sovereign Debt Programmes*, op. cit.

[54] *BVerfG*, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15.

[55] Judgement *Pringle*, para. 136.

In a statement of the 11th of February 2020, the Heads of State and Government held that:

> "Euro area Member States will take determined and coordinated action, if needed, to safeguard the financial stability of the euro area as a whole".[56]

Nevertheless, the ESM represents a form of solidarity within the EU, in the sense that it provides financial assistance not from the Union but directly from states through intergovernmental agreements.

I argue that the ESM is an expression of the principle of solidarity. However, the mechanism chosen for its implementation - an international treaty outside the EU legal order – challenges its role as a crucial principle of the EMU: neither the Court nor the institutions have recognised the role of solidarity as a guiding principle. Instead, they have accepted this dimension of inter-state solidarity coupled with the acceptance of 'liminal legality' into the EU legal order.[57]

However, even without an explicit reference to solidarity, by addressing the compatibility of the ESM with the constitution of the eurozone, the CJEU allowed for an understanding of the principle of solidarity in the context of the eurozone. First, the CJEU has declared legitimate the mechanism of the ESM with the system of the treaties. In this process, there is a form of protection for the supranational sovereignty expressed by the mechanism.[58] However, in doing so, the Court has also contributed to designing the boundaries of solidarity in the context of the eurozone.

The first boundary drawn by the CJ is that the financial solidarity embedded by the ESM does not obviate the need for the member states recipients of solidarity to uphold their responsibilities towards their creditors. In other words, receiving solidarity does not mean being released from a debt. For this reason, solidarity has been implemented with loans and not with grants. The functioning of the ESM is such that the assisted state does not leave its debt behind; instead, it assumes a debt with a new subject, the ESM.[59] Consequently, some states have been forced to conduct austerity-based policies and this has caused severe social consequences.

Secondly, the granting of financial assistance should not be framed as allowing states to be released from their duties to conduct a sound budgetary

---

[56] Statement by the Heads of State or government of the European Union, Brussels, 11 February 2010.

[57] C. Kilpatrick, *The EU and its Sovereign Debt Programmes*, op. cit.

[58] S. Saurugger, F. Terpan, *Normative transformations in the European Union: on hardening and softening law*, in *West European Politics*, 2021, pp. 1-20.

[59] M.A. Panascì, *Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution*, in *Common Market Law Review*, 2024, pp. 13-54.

policy. This boundary contributes to framing the domestic policies in the member state who receive solidarity since they cannot implement any expansive policies, nor any policy fostering economic growth.

A third boundary acknowledged by the CJ in the context of financial solidarity is that the assistance must contribute to the financial stability of the whole system and must be governed by strict conditionality.

2.7. The solidarity shield of the European Central Bank: unconventional monetary policies, solidarity, and conflicts for sovereignty

Another EU institution that played a central role in the context of the euro crisis is the European Central Bank (ECB). Its role and its strategies have been abundantly assessed in legal scholarship through the prisms of legitimacy, accountability, and democracy, to name just some of the main avenues of the debate.[60]

Under my understanding, the ECB's role can be assessed through the prism of solidarity.[61] This function became clear when Mario Draghi, then ECB President, gave a speech in which he announced that the ECB would do 'whatever it takes' to preserve the unity of the euro.[62] The complexity or technicality of the topic, *i.e.*, macroeconomic instruments, does not give weight to the argument that there is no solidarity in technical macroeconomic choices, since this assessment should be based on the effects they have on the EMU.

The consequence of this speech has been the OMT, an acronym for Outright Monetary Transactions. OMT indicate open market operations and imply selective purchases of sovereign debt released by states in distress receiving support under the ESM. The OMT has never been activated, but its announcement has been effective, as it contributed to lower the bond spreads, making its activation eventually unnecessary.

The second tool deployed by the ECB are the Asset Purchase Programmes (APPs), *i.e.*, the PSPP and the PEPP, standing for Public Sector Purchase

---

[60] T. Beukers, D. Fromage, G. Monti, *The new European central bank: Taking stock and looking ahead*, Oxford, 2022; T. Tesche, *Instrumentalizing EMU's democratic deficit: the ECB's unconventional accountability measures during the eurozone crisis*, in *Journal of European Integration*, 2019, pp. 447-463; D. Curtin, *'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency*, in *European Law Journal*, 2017, pp. 28-44.

[61] In legal scholarship, see T. van den Brink, M. Gargantini, *Models of Solidarity in the EMU. The Impact of COVID-19 After Weiss*, in *Utrecht Law Review*, 2021, pp. 80-102; G. Contaldi, *La solidarietà europea in campo economico ai tempi della pandemia da COVID-19*, in *Ordine Internazionale e Diritti Umani,* 2020, pp. 444-460. For economic and political science scholarship, see W. Schelkle, *The political economy of monetary solidarity: Understanding the euro experiment*, Oxford, 2017; W. Schelkle, *Monetary solidarity in Europe: can divisive institutions become 'moral opportunities'?*, in *Review of social economy,* 2023, pp. 84-104.

[62] Speech by the President of the ECB Mario Draghi at the Global Investment Conference in London, 26 July 2012.

Programme and Pandemic Emergency Purchase Programme. This is the Quantitative Easing (QE) of the ECB. The QE has been limited in its contribution to lowering the inflation rates, though by expanding the ECB's programmes of private sector asset purchases to include sovereign bonds, it contributed to the stability of the financial market and the overall stability of the EMU system.[63] As explained by Gargantini and van den Brink, the ECB has acted as a substitute for Member States properly coordinating their economic policies.[64]

However, the proper coordination of Member States' economic policies was designed, as recalled above, as a weak EU *sui generis* coordination policy, that has nevertheless evolved over the time, through crisis after crisis. In this context, in line with the central argument developed in this book, I argue that the solidarity policy of the ECB was functional in addressing the imbalances and the disequilibria created by incomplete or asymmetrical integration models. Overall, the ECB's unconventional monetary policy has been a vector for vertical solidarity, working from the Union to the states.

Yet, as recalled above (in the Introduction), this broad interpretation of the ECB's mandate has led to conflicts of sovereignty, notably with the German Constitutional Court, which is a non-majoritarian institution particularly active in scrutinising the boundaries of legitimacy of the EU's action (at times through the prism of domestic interpretation of principles of EU law). In the *Weiss* judgment discussed above, the Court substantially criticised the ECB's unconventional monetary policy, which it considered beyond the boundaries of its mandate.

It is nevertheless crucial to recall this judgment here, because the contented nature of the interpretation of the ECB's mandate, leading to what has been framed as monetary solidarity,[65] has been argued to be precisely when the COVID-19 crisis arrived in the EU: it was at that time clear to all the actors of the European governance, what the limits of the directions to be taken were, and the balance of responsibilities between democratic and technocratic institutions.

3. The pandemic crisis, and the challenges it represented for the EU

3.1. The pandemic crisis and the challenges it has triggered for the EU multi-level governance system

The pandemic outbreak in Europe entailed a health emergency and has been characterised by lockdowns affecting all dimensions of social life. The pandemic has represented an emergency of an unprecedented scale and as

[63] P. Andrade *et al*., *The ECB's asset purchase programme: an early assessment*, ECB Working Paper, 2016.

[64] T. van den Brink, M. Gargantini, *Models of Solidarity in the EMU*, op. cit.

[65] W. Schelkle, *The political economy of monetary solidarity*, op. cit.; W. Schelkle, *Monetary solidarity in Europe*, op. cit.

such it required regulators at different levels to act in a short-term frame in a variety of policy fields, from the health sector, to travel restrictions, to the economic dimension.

Given this, a preliminary observation should be made about the EU as a multi-level governance system hit by a complex phenomenon such as a pandemic of such scale, affecting a significant range of regulatory domains, cross-cutting the competences existing between EU, Member States, and even sub-state entities.

In this context, it should be recalled that the EU finds its legitimacy in the principle of conferral, meaning that it can intervene, regulate or coordinate domestic policies, on the basis of attributed competences, whereas in contrast states have general sovereign powers.[66] The complex patchwork of (different types of) competences, the cipher of the governance of the EU, is intertwined with the sovereign prerogatives of the Member States: just to give an example, protection of public health, public satefy and public security and dealing with crises are an expression of sovereign prerogatives and states have been clear in asserting their sovereignty in these domains. These can nonetheless interact with strong competences of the EU, for example free movement. This complexity in the different types of competences, which is further complicated by the fact that the EU might have occupied (or not) a policy field and enacted legislation, explains the chaos and at points even competition between states and the EU in the process of tackling the crisis. In the very first weeks, it should be recalled that states proceeded in a disorderly way, in a reflex of national sovereignty.[67]

While measures have been taken at different levels of governance, our focus will remain on the European Union. Since March 2020, European institutions, under the leading role of the Commission, have managed to decide on a number of measures: first, on pooling medical equipment and on research on a vaccine to defeat the virus;[68] secondly, coordinating efforts to allow EU citizens stranded outside the EU to travel back home,[69] and also imposing limited freedom of movement – during lockdowns – for selected categories of

---

[66] From the constitutional perspective, states might have different sub-state articulations, expressed in national constitutions, so we have an additional layer of governance.

[67] C. Benoît, C. Hay, *The antinomies of sovereigntism, statism and liberalism in European democratic responses to the COVID-19 crisis: a comparison of Britain and France*, in *Comparative European Politics*, 2022, pp. 390-410. See also L. Schramm, W. Wessels, *The European Council as a crisis manager and fusion driver: assessing the EU's fiscal response to the COVID-19 pandemic*, in *Journal of European Integration,* 2023, pp. 257-273.

[68] For example, at the end of March 2020, the European Council recognised the unprecedented challenge represented by the pandemic, and set up coordination in order to limit the spread of the virus, to coordinate national responses, promote research, but also tackle socio-economic consequences, and support citizens stranded in third countries. See Joint statement of the Members of the European Council, 26 March 2020.

[69] *Ibidem*.

persons in the health care sector.[70] Overall, after the first few weeks, the EU institutions demonstrated a solid reaction capability.

Among the different policy responses, we can distinguish between measures defining a relaxation or suspension of the legal framework, and measures adopted to mitigate the consequences of the crisis. Though a comprehensive analysis of all the measures would broaden excessively the scope of this research, in the upcoming section the focus will be on how solidarity has been enacted in the context of economic policy, as measures adopted to mitigate the consequences of the crisis on the economic sector, and having Article 122 TFEU as their legal basis. From this perspective, it is remarkable to observe that several measures have been adopted on the legal basis of Article 122 TFEU in recent years.[71] From the perspective of governance of the economic policy, the European Union took steps to compensate for the economic consequences of the pandemic, with a relaxation of state aid rules, and with the suspension of the Stability and Growth Pact, as awareness quickly developed as to the magnitude of the crisis.[72]

3.2. The first measures supporting the economic dimension of the pandemic crisis

Among the first emergency measures adopted by EU institutions to mitigate the economic consequences of the crisis,[73] we have the Pandemic Crisis Support (PCS) of the ESM,[74] for up to €240 bn, the European Guarantee Fund of the EIB,[75] for up to €24.4 bn, and other measures under existing EU budgetary programs, such as the Coronavirus Response Investment Initiative

---

[70] G. Caggiano, *COVID-19. Competenze dell'Unione, libertà di circolazione e diritti umani in materia di controlli delle frontiere, misure restrittive della mobilità e protezione internazionale*, in *I Post di AISDUE*, 2020.

[71] M. Chamon, *The rise of Article 122 TFEU*, op. cit.

[72] C. Schepisi, *Aiuti di Stato... o aiuti tra Stati? Dal Temporary Framework al Recovery Plan nel "comune interesse europeo"*, in *Rivista della Regolazione dei mercati*, 2021, pp. 110-147. See also Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM/2020/123 final; and Council of the EU, Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, Press release, 23 March 2020.

[73] *EU/EA measures to mitigate the economic, financial and social effects of coronavirus: state of play*, European Parliament Study PE 645.723, 2021. For an overview of the Council's positions, see the timeline of Council actions in response to the COVID-19 pandemic and the Commission's relevant webpage. See also L. Cicchi *et al*., *EU solidarity in times of Covid-19*, European University Institute Policy Brief, 2020; Y. Bertoncini, *European solidarity in times of crisis: A legacy to be deepened in the face of covid-19*, in *Fondation Schuman Policy Papers*, 21 April 2020.

[74] See the relevant ESM webpage.

[75] EIB, EIB Group moves to scale up economic response to COVID-19 crisis, Press release, 3 April 2020.

of the Cohesion Fund.[76] Other measures were also adopted by the European Central Bank: the Pandemic Emergency Purchase Program (PEPP) of the ECB guaranteed liquidity for 750 bn euro.[77]

These measures came alongside funds for research on a vaccine (140 million), funds for the EU Civil Protection Mechanism (125 million) and for the European Centre for Disease Prevention and Control (3.6 million).

In particular, the Pandemic Crisis Support, decided by the Eurogroup on 9th April 2020, and finalised and made operational with a decision of the ESM Board of Governors by mid-May 2020, was based on an existing Enhanced Conditions Credit Line (ECCL) and granted access to members of up to a maximum of 2% of the respective Member State's GDP. The measure followed the provisions of the ESM Treaty, and after a request by a state, the fund was to be made available within two weeks. The only condition to be respected was that the PCS would have to be used to finance direct and indirect costs of healthcare, cure and prevention due to the pandemic, incurred since February 2020.[78] The credit line was available until the end of 2022. No state requested to activate this line of support and this is worth investigation, per se. However, irrespective of this, on the ESM webpage one can read that "Pandemic Crisis Support played a useful role during the pandemic crisis by calming and reassuring financial markets that euro area countries could quickly gain access to emergency financing if needed."[79]

As recalled by former European Central Bank President Mario Draghi,[80] the scope and size of the pandemic required a mobilisation of an unprecedented nature. At the same time, other leading scholars suggested the need to find solutions by thinking outside the box,[81] meaning that the instruments adopted so far would have been unfit for purpose.

3.3. A change of paradigm in tackling post-pandemic recovery

"The challenge our economies are facing today is in no way similar to the previous crisis. This is a symmetric external shock. Moral hazard considerations are not warranted here. We must bear this in mind when we consider coronavirus

---

[76] European Commission, Commission sets out European coordinated response to counter the economic impact of the coronavirus, Press release, 13 March 2020; and also European Commission, *EU Coronavirus Response*, available online.

[77] See the relevant ECB webpage.

[78] See the term sheet of the ESM Pandemic Crisis Support, available online.

[79] See the relevant ESM webpage.

[80] B. Weder Di Mauro, R. Baldwin (eds.), *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes*, Paris & London, 2020; M. Draghi, *Draghi: we face a war against coronavirus and must mobilise accordingly*, in *Financial Times*, 25.3.2020.

[81] C. Closa, G. Papaconstantinou, M. Poiares Maduro, *EU and COVID-19: Time to think outside the box*, in *Euractiv*, 21.4.2020.

dedicated instruments. This is particularly true for any ESM instruments which were set up during the last crisis." Eurogroup President Mario Centeno expressed these thoughts following the Eurogroup videoconference of 24 March 2020.[82] In similar terms, former ECB president Mario Draghi has defined the coronavirus pandemic as a "human tragedy of potentially biblical proportions",[83] also emphasising its economic consequences, namely an increase in public spending and the need to cancel private debts. Economists agreed quite easily on the fact that an external factor, a pandemic caused by a virus, caused a massive symmetrical economic shock, the consequences of which would however be asymmetrical, both in their economic and social aspects.[84] This is a crucial aspect of the functioning of many European policies and this also proved to be one crucial factor in understanding the need for a change of paradigm.

The type of crisis, its magnitude and the long-term effects were immediately clear, beyond the exact quantification of the 'damage' caused by the corona pandemic. It is precisely because of the unprecedented nature of this challenge that some leading scholars immediately pointed to the need to find solutions by thinking outside of the box, thus intervening in a debate that was already showing a high level of polarisation.[85] This perspective was put on the table after the political debate in Europe took its first steps towards tackling the corona crisis with the same toolkit as used after the sovereign debt crisis, which hinged on the European stability mechanism (ESM).[86] The ESM has been controversial because it was based on 'strict conditionality' and it was constituted of loans; additionally, it has been associated with economic policies based on austerity and focused on a reduction of public debt. This recipe has caused severe economic consequences in several states, and additional tragic social consequences in Greece,[87] as recognised even by the troika.[88] Furthermore, this approach has been indicated as unfit for the crisis caused by the COVID-19 pandemic.[89]

---

[82] European Council, Remarks by Mário Centeno following the Eurogroup videoconference of 24 March 2020**,** Press release, 24 march 2020.

[83] M. Draghi, *Draghi: we face a war against coronavirus and must mobilise accordingly*, op. cit.

[84] See also European Commission, Summer 2020 Economic Forecast: Overview. A deeper recession with Wider Divergences, 7 July 2020.

[85] C. Closa, G. Papaconstantinou, M. Poiares Maduro, *EU and COVID-19*, op. cit.

[86] For a full account of the evolution of the political debate, see P. Genschel, M. Jachtenfuchs, *Postfunctionalism reversed: solidarity and rebordering during the COVID-19 pandemic*, in *Journal of European Public Policy*, 2021, pp. 350-369.

[87] UNHCR, Greece: "Troika bailout conditions are undermining human rights," warns UN expert on debt and human rights, Press release, 1 May 2013; E. Doxiadis, A. Placas, *Living under austerity: Greek society in crisis*, Berghahn, 2022.

[88] L. Papadimas, R. Maltezou, For hard-hit Greeks, IMF mea culpa comes too late, in *Reuters.com*, 6.6.2013.

[89] See D. Gros, EU solidarity in exceptional times: Corona transfers instead of Coronabonds, in *VoxEU*, 5.4.2020; D. Furceri *et al*., Fiscal austerity intensifies the increase in inequality after

It is precisely the need to overcome this approach that has become central in the negotiation of recovery instruments post the COVID-19 pandemic. This change of paradigm has been strongly invoked by some states, which were persuaded that the previous toolkit – *i.e.* the ESM, based on strong conditionality and loans – was insufficient to address the economic crisis caused by the pandemic, with clear counter-cyclical fiscal policies.

Against the background of this first reaction to the crisis, the chapter will continue assessing the measures adopted on the legal basis of Article 122 TFEU. Overall, it must be observed that, in comparison to the financial crisis, the political system has faced its role, responding to the consequences of the crisis, without relinquishing its responsibilities to technocratic agencies.

In particular, in addition to the SURE, the temporary Support to mitigate Unemployment Risks in an Emergency, a solidarity instrument to support workers' wages and businesses, the Commission managed to propose and broker a €750 bn long-term recovery plan, called Next Generation EU, which was approved in 2020.[90] The next section will be devoted to those measures.

4. The mitigation of the effects of the pandemic crisis against the prism of solidarity

4.1. The programme SURE: 'borrowing for lending' solidarity in the first instrument to mitigate the effects of the pandemic on labour markets

The acronym SURE stands for Support mitigating Unemployment Risks in Emergency. It was a programme worth €100 bn designed as a 'solidarity instrument' to support workers' incomes and businesses in navigating through the pandemic. SURE was the first instrument adopted on the legal basis of both Articles 122(1) and (2) TFEU and implements solidarity into an emergency measure.[91] The double legal basis is needed because Article 122(1) TFEU legitimises the guarantee component of the instrument, whereas Article 122(2) is relevant for the lending component.

SURE is an instrument that was aimed at protecting labour markets, with measures such as wage support funds and other solidarity measures for self-employed workers. Pursuant to this purpose, SURE aimed to mitigate the

pandemics, in *VoxEU*, 3.6.2021.

[90] For an overview, see European Commission, *Q&A: Next Generation EU - Legal Construction*.

[91] 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 L 159, 20.5.2020 (hereinafter: SURE Regulation), pp. 1–7. See also the final report on the instrument: European Commission, *SURE after its sunset: final bi-annual report*, COM(2023)291 final; additional data concerning the functioning of the SURE can be found on a dedicated page of the European Commission portal.

risks of unemployment and constituted a loan programme to support Member States. In a second wave, within SURE some funds were made available for the support of health-related measures, especially in workplaces.[92] The instrument entered into force in June 2020, became operational in September, and was available until the end of 2022.

The instrument SURE mobilised significant financial means to fight the negative economic and social consequences of the loss of employment caused by the pandemic. It gathered an amount of €100 bn, organised as loans granted to concerned Member States, on favourable terms.

These loans were granted by the EU, to support states in addressing the public expenditures mobilised to face the consequences of the pandemic on the labour market. Therefore, SURE was a measure that protected workers, both employed and self-employed, and operated as a second-line of defence, supporting short-time work schemes, against the risks of unemployment and loss of income.[93] According to the Commission: "The establishment of SURE is a further tangible expression of Union solidarity, whereby the Member States agree to support each other through the Union by making additional financial resources available through loans."[94]

As to the functioning of the SURE, the measure worked on the basis of a system of voluntary guarantees from Member States, based on their relative share of the total gross national income (GNI) of the European Union, calculated on the 2020 EU budget. In total 19 member states received loans amounting to €98.4 bn.[95]

4.2. SURE and its limited conditionality: anticipating a paradigm shift after the ESM?

The procedure for granting financial assistance was rather simple. After consultation with the state requesting assistance, the Commission proposed the granting of assistance, and the Council adopted an implementing decision. The Commission verified the sudden and severe increase in actual and planned

---

[92] European Court of Auditors, *Support to mitigate Unemployment Risks in an Emergency (SURE)*, Special Report 28/2022, available online.

[93] For example, short time work schemes and similar measures are "Public programmes that allow firms experiencing economic difficulties to temporarily reduce the hours worked while providing their employees with income support from the state for the hours not worked. Similar schemes exist for income replacement to the self-employed in emergency situations." SURE Regulation, Recital 7.

[94] See the dedicated webpage on the European Commission portal.

See also C. Dias, A. Zoppè, *The SURE: Main Features*, European parliament Study PE 645.721, 2021.

[95] For the overview of disbursements see the page dedicated to SURE on the European Commission portal.

public expenditure, on the basis of evidence produced by the member state.[96] Secondly, the Commission verified that the measures to be financed were related to the mitigation of the effects of the crisis on the work market. These two conditions, the first as the triggering condition, and the second as the eligibility condition, formed the limited conditionality of the SURE instrument.[97]

Other prudential rules (Article 9) required that the share of loans granted to the three Member States representing the largest share of the loans granted should not exceed 60 per cent of the total amount of the SURE, which is €100 bn. This was to limit the concentration risks of the scheme. At the same time, "The amounts due by the Union in a given year shall not exceed 10 per cent of the maximum amount referred to in Article 5".[98] This provision has aimed to limit annual exposure. Furthermore, to provide flexibility and reduce excessive exposure to individual Member States, the Commission, where appropriate, had the power to roll-over associated borrowings contracted on behalf of the Union. Overall, these constitute the prudential rules guaranteeing the financial solidity of the scheme.

4.3. SURE and its guarantees: the EU's reputation benefitting the most indebted states

As anticipated above, SURE was a lending scheme underpinned by a system of guarantees from the Member States and from the Union's budget. It aimed to allow the Commission to reach capital markets or financial institutions on behalf of the Union.

Looking more closely at the functioning of the SURE, the €100 bn are first borrowed by the EU on the financial markets, and the EU retains the primary responsibility for repaying the loans in case of default by a state on repayment of its own loans to the EU.

In this vein, Article 4 of the SURE Regulation provides that: "the Commission shall be empowered to borrow on the capital markets or with financial institutions on behalf of the Union at the most appropriate time so as to optimise the cost of funding and preserve its reputation as the Union's issuer in the markets".

The reputation of the EU protects more indebted states, as these states via the EU raise funds on the market on better terms: in practice, states access loans at lower interest rates than those they would pay if they reached out to the markets as single states.[99] The EU's credit rat-

---

[96] Article 6 of the SURE Regulation.

[97] *Ibidem*.

[98] Article 9(2) of the SURE Regulation.

[99] S. Giubboni, *Crisi pandemica e solidarietà europea*, in *Quaderni Costituzionali*, 2021, pp. 218-221.

ing of AAA has allowed states to save up to €9 bn, according to the Commission.[100]

As anticipated above, States are called upon to support the funding of the scheme with guarantees, *i.e.*, by counter-guaranteeing the risk borne by the Union in a voluntary manner. These state guarantees work as a buffer to protect the EU budget. The Regulation required that €25 bn had to be guaranteed by all states in order to make SURE available, in proportion to their relative share of the EU's total gross national income.[101] These do not constitute upfront contributions. In Article 11 of the SURE Regulation the procedure is amply detailed,[102] and states do guarantee the scheme in a manner proportional to their relative share of the EU's total gross national income.

The guarantees are provided in the form of irrevocable, unconditional, and on-demand guarantees by states and are based on Article 220 of the Financial Regulation, which assists the guarantee leg of SURE.[103] This is a crucial aspect that must be unpacked to grasp the functioning of solidarity in the SURE instrument. First, guarantees were provided by all member states and also by states that did not make use of the SURE loans.[104] Secondly, the guarantees by

---

[100] European Commission, *Report on the European instrument for Temporary Support to mitigate Unemployment Risks in an Emergency (SURE) following the COVID-19 outbreak pursuant to Article 14 of Council Regulation (EU) 2020/672 SURE: Two Years On*, COM(2022)483 final; and European Court of Auditors, *Support to mitigate Unemployment Risks in an Emergency (SURE)*, op. cit., at 17. See also European Commission, *Report on the European instrument for Temporary Support to mitigate Unemployment Risks in an Emergency (SURE) following the COVID-19 outbreak pursuant to Article 14 of Council Regulation (EU) 2020/672*, COM(2023) 291 final pp. 1 and 43.

[101] Article 12 of the SURE Regulation. See also European Court of Auditors, *Support to mitigate Unemployment Risks in an Emergency (SURE)*, op. cit., p. 17, and the information available on the Commission website.

[102] Article 11(4) of the SURE Regulation, 'Contributions to the Instrument in the form of guarantees from Member States', provides, in particular, that "Calls on guarantees provided by Member States shall be made pro rata to the relative share of each Member State in the gross national income of the Union as referred to in Article 12(1). Where a Member State fails, in full or in part, to honour a call in time, the Commission, in order to cover for the part corresponding to the Member State concerned, shall have the right to make additional calls on guarantees to other Member States. Such calls shall be made pro rata to the relative share of each of the other Member States in the gross national income of the Union as referred to in Article 12(1) and adapted without taking into account the relative share of the Member State concerned. The Member State which failed to honour the call shall remain liable to honour it. The other Member States shall be reimbursed for additional contributions from the amounts recovered by the Commission from the Member State concerned. The guarantee called from a Member State shall be limited, in all circumstances, by the overall amount of guarantee contributed by that Member State under the agreement referred to in paragraph 3."

[103] Article 220(1) of the Financial Regulation: "Financial assistance by the Union to Member States or third countries shall be in accordance with pre-defined conditions and take the form of a loan or a credit line or any other instrument deemed appropriate to ensure the effectiveness of the support. To that end, the Commission shall be empowered, in the relevant basic act, to borrow the necessary funds on behalf of the Union on the capital markets or from financial institutions."

[104] European Commission, COM(2023)291 final pp. 1 and 43. Eight states did not benefit from the SURE system and all states contributed to the guarantee leg of the SURE.

the Member States were needed because of specific circumstances concerning the EU Multiannual Financial Framework (MFF). For example, with the European Financial Stability Mechanism (EFSM), the EU budget could guarantee the loans. By contrast, the EU budget for 2020, the last year of the MFF 2014-2020, had no headroom available for financing the SURE. This specific circumstance generated the need for back-guarantees by Member States to allow rapid borrowing on the financial markets and deployment of the instrument in a short period.[105]

The conditions for the guarantees were agreed by the Commission and the Member States and are reflected in an agreement.[106] One of these conditions is the fees to be paid to the guarantor Member States.

The ratio of 25% means that 75% of the whole instrument is not guaranteed by states, but instead, by the EU budget. The guarantees by the Member States entail a form of inter-state solidarity, *i.e.*, less indebted states do support more indebted ones. At the same time, we observe that solidarity operates from the EU to states and the EU budget is the vector of this solidarity. Under my interpretation, we find in SURE both forms of solidarity: horizontal (inter-state) and vertical (from the EU to the States and vice versa). The budget of the EU is - to a significant extent - the vector of this multidirectional solidarity.

Another interesting aspect of the functioning of solidarity is that Member States can be called on to provide guarantees, *pro rata* to the relative share of each Member State in the gross national income of the Union. If a member state is unable to guarantee, the other Member States will be called upon on a *pro rata* basis, up to the overall amount of the guarantee contributed by each Member State. The functioning of the guarantees is, to some extent, solidarity. As recalled above, eventually all states provided guarantees.

On this aspect, the Council modified the proposal of the Commission.[107] According to the Council, the call is made *pro rata* based on the relative share of each Member State in the gross national income of the Union, whereas under the Commission proposal, the call would have been *pari passu*. Similarly, the Council clarified that a member state that fails to honour the guarantee is not freed from the call but remains liable to guarantee it. In addition, each Member State's liability on a guarantee call is limited by the overall amount

---

[105] The guarantee of the SURE instrument is different from the callable capital of the European Stability Mechanism (ESM). A guarantee is a promise of having funds available if needed. The guarantor is not a debtor but is available to share the burden if the debtor is unable to pay the guarantee. In a similar fashion, the ESM relied on 'callable capital'. Callable capital and guarantees are promises by Member States that they will be available to provide additional funds to the ESM in case of need. They are different from upfront disbursements, but they rely on a promise of a possible future disbursement of funds.

[106] European Commission, COM(2023)291 final, at 1.

[107] European Commission, COM(2023)291 final.

of the guarantee contributed by that Member State.[108] This means that the system of guarantees embeds solidarity; at the same time, states are not limitlessly exposed to guaranteeing the SURE fund. This creates a system of solidarity through risk sharing with controlled exposure, *i.e.*, a limited hazard to the risk of insolvency of other states.

Guarantees were provided voluntarily and once provided, they became irrevocable, unconditional, and on-demand. The system of guarantees meant that SURE bonds were highly credible to markets and credit rating agencies.[109] According to the Commission, states have saved € 9 bn on interest payments thanks to the SURE instrument. This was made possible by the SURE loans that were offered at lower interest rates than those states would have paid if they had issued sovereign debts as states.[110] This system of guarantees has been perceived as offering a system of "multiple layers of debt service protection, including explicit recourse to extraordinary support (…), creates the equivalent of a joint and several undertaking an obligation on the part of the EU member states to provide financial support to the EU", in the assessment of MOODY's.[111]

4.4. SURE and solidarity: a first trial of fiscal solidarity backed jointly by the EU budget and States

This section illustrates the idea of solidarity embedded in the SURE instrument. As illustrated above, the EU approved the SURE Regulation less than 2 months after the proposal. SURE was a crisis response instrument, that worked smoothly and simply: for example, funds were disbursed in less than one month after request.[112] With SURE we observe a form of financial solidarity aimed at achieving stabilisation goals for the job market.

First, solidarity was achieved through loans and not grants. In the ECA Report we read that the repayment is due between 2025 and 2050, with an average maturity of 14.5 years.[113] The conditionality embedded in the instrument was limited, in the sense that Member States received a broad latitude in deciding where to invest the funding, and the funding procedures were simplified because of the crisis. This limited conditionality is an expression of the change of paradigm set out above, since the decision-makers recognised that

---

[108] Eurostat, *Clarification on the treatment of guarantees provided by member states under the sure instrument*, methodological note, 11 September 2020, at 2.

[109] European Commission, COM(2023)291 final.

[110] European Commission, COM(2023)291 final, at 32. See also European Court of Auditors, *Support to mitigate Unemployment Risks in an Emergency (SURE)*, op. cit., at 17.

[111] C. Dias, A. Zoppè, *The SURE: Main Features*, op. cit., at 5.

[112] European Court of Auditors, *Support to mitigate Unemployment Risks in an Emergency (SURE)*, op. cit., at 20 and 34.

[113] European Court of Auditors, *Support to mitigate Unemployment Risks in an Emergency (SURE)*, op. cit.

the symmetrical nature of the factor triggering the crisis did not justify strict conditionality. For this reason, as aptly framed by Cinnirella, the solidarity realised with SURE is a form of solidarity for lending.[114]

Secondly, a strong solidarity component is embedded in the guarantees of the instrument. As discussed above, the guarantees were offered voluntarily by Member States, including those that did not benefit from the instrument, and work as a risk-sharing mechanism, contributing to guaranteeing the financing of the bonds on the financial markets. Eventually, the guarantee is pro rata, so the component of risk sharing is limited: this guarantee is not the solidaristic guarantee that was advocated for during the negotiation with the Eurobonds, but it remains a form of solidarity as risk sharing.[115]

To conclude, the SURE mechanism represents the first affirmation of the principle of financial solidarity using the EU budget and confirming the EU as a collective borrower on the financial markets. Solidarity is meant as economic solidarity to mitigate the effects of the pandemic on the job market.[116] It is not a supranational harmonised unemployment benefit scheme and it does not achieve a form of organic redistributive solidarity to protect workers.[117] Still, it embeds a form of integrated Union and inter-state solidarity, using the EU budget as a vector.[118] Solidarity as risk sharing between Member States is the most important feature of SURE, in the form of joint guarantees with small elements of fiscal solidarity.

5. Next Generation EU and redistributive solidarity across Member States

The Next Generation EU (or NGEU) has been the most innovative and powerful instrument adopted by the EU to overcome the economic and social

---

[114] Claudia Cinnirella refers to the solidarity of SURE as borrowing for lending, differently from the borrowing for spending of the NGEU. In C. Cinnirella, *Financial Solidarity In EU Law: An Unruly Horse?*, in *Quaderno Aisdue* - Serie Speciale, 2022.

[115] As to the meaning of solidarity, according to Lindner, solidarity as risk sharing between Member States is the most important feature of SURE. Solidarity is represented in the form of joint guarantees with small elements of fiscal solidarity: V. Lindner, *Solidarity without Conditionality. Comparing the EU Covid-19 Safety Nets SURE, Pandemic Crisis Support, and European Guarantee Fund*, SSRN Scholarly Paper, 4 January 2022. See also A. Baglioni, Arrivano gli Eurobond e hanno un carattere sociale, *Lavoce*, 28 October 2020.

[116] See also G. Morgese, *Solidarietà di fatto... e di diritto? L'Unione europea allo specchio della crisi pandemica*, in *EUROJUS - Numero Speciale: L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea.La crisi, la cura, le prospettive*, 2020, pp. 77-113.

[117] Giubboni stresses this aspect, underlying that solidarity is not meant as assistance. Giubboni seems to refer to a thick meaning of solidarity, that should entail a form of assistance in case of difficulty. S. Giubboni, *Crisi pandemica e solidarietà europea*, op. cit.

[118] N. Ruccia, *SURE, ovvero la prova del debito comune e della solidarietà*, in G. Morgese (a cura di), *La solidarietà europea: a che punto siamo?*, EUSTiC Jean Monnet Chair Working Papers, 2023, pp. 78-89; G. Morgese, *Solidarietà di fatto... e di diritto?*, op. cit.

consequences of the COVID-19 pandemic.[119] It represents a change of paradigm, in its size, composition, and design, a change of paradigm that has been already anticipated with SURE: the EU becomes a borrower on the markets.

5.1. The legal design and the technical solutions adopted

The NGEU is the result of a complex operation of legal engineering substantiating an industrial and economic policy shift.[120] The complexity of the solution is reflected in the length of the discussions needed within the European Council to reach a political agreement on the main lines of the whole program: 5 days, from the 17th to the 21st of July 2020.[121] This first political agreement was sealed in a legal act in December 2020, when EU institutions managed to defeat the opposition by Member States concerned with the rule of law backsliding as a consequence of the Conditionality Regulation.[122] The other instruments were approved immediately after.[123]

The NGEU has been built against the background of the constitutional constraints imposed by the Treaties: these are most notably the no bail out clause of Article 125 TFEU, which prohibits the EU from 'saving states', on the one hand, and the principle of budgetary balance enshrined in Article 310(1) TFEU, prohibiting the EU from taking out loans, on the other.[124] Given these constitutional limitations, the NGEU is grounded in a creative legal so-

---

[119] B. de Witte, *The European Union's COVID-19 recovery plan*, op. cit; F. Fabbrini, *Next Generation Eu: Legal Structure and Constitutional Consequences*, in *Cambridge Yearbook of European Legal Studies*, 2022, pp. 45-66; F. Fabbrini, *EU fiscal capacity: Legal integration after Covid-19 and the war in Ukraine*, Oxford, 2022; F. Fabbrini, *Fiscal policy in times of crises - An analysis of EMU Constitutional Framework*, EP Study PE 753.369, 2023; P. Leino-Sandberg, M. Ruffert, *Next Generation EU and its constitutional ramifications: A critical assessment*, in *Common Market Law Review*, 2022; P. Leino-Sandberg, *Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU*, in R. Weber (ed.), *EU Integration through Financial Constitution: Follow the Money?*, Oxford, 2023, pp. 161-188; M.A. Panascì, *Unravelling Next Generation EU As A Transformative Moment*, op. cit.; S. Baroncelli, *Differentiated Governance in European Economic and Monetary Union*, op. cit.; M. Patrin, *Governance by Funding: NGEU, Solidarity and the EU Institutional Balance*, REBUILD Centre Working Paper, 2023.

[120] B. de Witte, *The European Union's COVID-19 recovery plan*, op. cit.; J.F. Arribas, *Regulating European Emergency Powers,* op. cit.

[121] Special meeting of the European Council, Conclusions of 21 July 2020.

[122] 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 L 433I, 22.12.2020, pp. 23–27 (hereinafter EURI Regulation); Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, pp. 1–10; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

[123] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57 of 18.2.2021, pp. 17–75 (hereinafter RRF Regulation).

[124] G.L. Tosato, *The Union's budget balance pursuant to art. 310 TFEU: What is the impact on European anti-coronavirus measures?*, Luiss SEP Policy Brief, 2020. On the legal dimension of EU

lution. The idea has been to link the NGEU plan to the European budget, by massively expanding it, and by financing it thanks to the long-term issuance of debt on the financial markets by the Commission, on behalf of the EU. The debt would be repaid through the EU budget between 2028 and 2058, so over a potentially long period.

Looking in more detail, NGEU has been constructed based on three legal instruments. The first is the EU Recovery Instrument (EURI), adopted on the basis of Article 122 TFEU and operating as the control room for the NGEU.[125] The core of the NGEU is represented by the Recovery and Resilience Facility (RRF): this regulates the disbursement of the most significant part of the funds - grants and loans - to the Member States.[126] The RRF is adopted on the legal basis of Article 175 TFEU, the legal basis for economic, social and territorial cohesion policy. Instrumental to this system is the Own Resources Decision (ORD), adopted on the basis of Article 311 TFEU, which is a legal act of the Council.[127] This decision is very important and has a quasi-constitutional nature. This is the core of the instrument concerning revenue, it authorises the Commission to issue debt, borrowing funds on the financial markets and providing for the overall volume of the EU's liabilities and the essential conditions for the repayment. The ORD included an agreement on an exceptional and temporary increase of the EU's own resources ceiling by 0.6% of the Gross National Income of all member states which is reserved upfront to pay back the NGEU debt.[128]

The function of the EU Recovery Instrument (EURI) Regulation is to allocate the proceeds of borrowing on the markets to the different control measures and programmes it indicates, and for this reason it has been defined as the 'control room' of the overall system,[129] whereas the Recovery and Resilience Facility Regulation governs the functioning of this brand-new funding scheme, inspired by solidarity in recovery after the crisis, but also by a long-term EU vision of resilience, which finds expression in the connection of the RRF with the existing plans of the Commission for digital and sustainable economic transitions, expressed notably through the European Green

---

public finance law, see also B. de Witte, *The European Union's COVID-19 recovery plan*, op. cit., at 659 ff.

[125] EURI Regulation.

[126] RRF Regulation.

[127] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, pp. 1–10.

[128] More in detail, with the ORD three innovations have been made: a permanent rise from 1.20% to 1.40% of EU gross national income GNI as a transfer from the member states; a temporary increase of 0.60% GNI in the own resources ceiling to finance NGEU; a national contribution linked to the non-recycled plastic packaging waste. This is the first new EU resource created since 1988.

[129] A. de Gregorio Merino, *The Recovery Plan: Solidarity and the living constitution*, in *EULAWLive*, 6.5.2021, p. 4.

Deal.[130] The coupling of NGEU with the Multiannual Financial Framework (MFM) 2021-2027 completes the financial solution designed to enable NGEU. In addition, the Interinstitutional agreement between the European Parliament, Council, and Commission on budgetary discipline, on cooperation in budgetary matters, and on sound financial management, as well as on new own resources, paves the way for the introduction of new EU taxes to repay the capital and interests of NGEU, such as the EU Emissions Trading System (ETS) and a Carbon Border Adjustment Mechanism (CBAM), for example.[131]

5.2. The functioning of NGEU: a change of paradigm without treaty reforms

The core of the whole instrument is provided for in the EURI Regulation. The EURI Regulation was indeed the instrument that started the whole process governing the NGEU. It provides for the general framework provision of the scheme. It sets its main rules, for example concerning the scope and the allocation of the funds.[132]

One of the novelties of NGEU is its size, with an overall value of € 750 bn as defined in Article 2 of the EURI. The second novelty which represents a change of paradigm compared to the previous crisis mitigation measures, in particular, compared with the ESM, is the distribution between grants - € 384 400 million in the form of non-repayable support and repayable support through financial instruments- and loans - € 360 000 million to Member States for a programme financing recovery and economic and social resilience via support to reforms and investments-, as stated in Article 2 (2) letters a) and b) of the EURI.[133] Together with the amount of € 5 600 million for "provisioning for budgetary guarantees and related expenditure for programmes aiming at supporting investment operations in the field of Union internal policies" we reach a total amount of € 750 bn.[134]

Another core provision concerns the timeline of the funding procedures: for example, decisions concerning the granting of the loans were to be adopted by 31 December 2023 and the payments concerning the commitments of the NGEU shall be made by the end of 2026.[135]

---

[130] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "The European Green Deal", COM(2019)640 final, 11.12.2019.

[131] Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433I, 22.12.2020, pp. 28–46. For an analysis of the topic of EU's own resources, see A. Dobreva, *Reform of the EU system of own resources: State of play*, EPRS Briefing, 19 June 2023.

[132] Article 1 of the EURI Regulation: "Subject matter and scope".

[133] Article 2 of the EURI regulation: "Financing of the Instrument and allocation of funds".

[134] Article 2 (2) (c) of the EURI Regulation.

[135] Article 3 of the EURI Regulation.

The legal basis of EURI is Article 122 TFEU, and the Regulation does not specify whether it is Article 122(1) or 122(2). As recalled in the Introduction and in this chapter, the first section provides that the Council may decide 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. As to Article 122(2) TFEU, this enables the granting of Union financial assistance to a member state, in case of difficulties or natural disasters or exceptional occurrences beyond its control. Curiously, the Council Legal Service -in its note on NGEU- observed that the legal basis, in relation to the aim and content of the act, is Article 122(1) and not Article 122(2) TFEU.[136]

In the *Pringle* judgment the Court stated that Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems:[137] it is therefore curious that the Legal Service has indicated that the legal basis of NGEU -which is an industrial and economic plan for a process of economic recovery, and includes elements of financial assistance - is adopted under Article 122(1) TFEU.[138]

One of the problematic aspects of this legal basis is the temporality of the instrument. In particular, while the temporality concerning the spending of the funds is rather short (until 2026), the timing for the repayment of the loans granted to the states is rather long, meaning that states will have time from 2028 until 2058 to repay the debts they have contracted with the EU.[139] This criterion is not unproblematic as the requirement of temporal measures to justify resorting to the legal basis of Article 122 TFEU is *de facto* neutralised by an instrument with long-term consequences. This puts into question, among other things, the increased reliance on Article 122 TFEU, and the legitimacy of this choice.[140]

5.3. The RFF Regulation: solidarity as (re-)distribution and its conditionalities

The RFF is the main instrument governing the funding programme of NGEU, and it reflects an authentic change in the approach of the EU when

---

[136] Council of the European Union, *Opinion of the Legal Service on the Proposals on Next Generation EU*, 24.6.2020, available online.

[137] Judgment *Pringle*, para. 116.

[138] Furthermore, recalling the requirements of that provision, the Legal Service of the Council indicated a situation of urgency or of exceptionality, that the measures must be temporary, as interpreted by the CJEU in the *Balkan* case about Article 103 EEC, the predecessor of Article 122(1) TFEU: CJEU, Judgment of the Court of 24 October 1973, case 5-73, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*, ECLI:EU:C:1973:109. It is currently not undisputed that the *Balkan* case can be automatically transposed to the new Article 122 TFEU, considering the different aim and context of this provision.

[139] Cfr. B. de Witte, *The European Union's COVID-19 recovery plan*, *op. cit.*; P. Dermine, *The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture*, in *Legal Issues of Economic Integration*, 2020, pp. 337-358; P. Leino-Sandberg, M. Ruffert, *Next Generation EU and its constitutional ramifications*, op. cit., at 448.

[140] Critical on this aspect are P. Leino-Sandberg, M. Ruffert, *Next Generation EU and its constitutional ramifications*, op. cit.

concerned with a symmetric crisis with a strong impact on the internal market and social and territorial cohesion because of its highly asymmetrical consequences.[141] The RRF has been modified twice, with Regulation (EU) 2023/435 concerning the integration of *REPowerEU* chapters in national recovery and resilience plans, and with Regulation (EU) 2024/795 establishing the Strategic Technologies for Europe Platform (STEP).[142] This also indicates that the funding of measures adopted to respond to the energy crises and to enact reforms to critical digital technologies has been attracted under the funding of the RRF, and its governance.

Its core provisions govern the objectives of the Facility, its financing, and the allocation of resources to the different schemes and budgetary lines of the RRF.

Its legal basis is Article 175(3) TFEU, *i.e.*, the provision on cohesion policy, enabling actions outside the system of the dedicated Funds.[143] This shows another aspect of the creativity of the whole system of the NGEU, as Article 175(3) TFEU could be considered as a 'residual' legal basis within the cohesion policy. Indeed, the RRF is 'accidentally' anchored to the cohesion policy: social and territorial cohesion is only one of the six pillars of the RRF, together with the green transition and digital transformation, which are the drivers of the EU Green Deal, but also smart, sustainable and inclusive growth, social and territorial cohesion, health, and economic, social and institutional resilience, and, last but not least, "policies for the next generation, children and the youth, such as education and skills".[144] Furthermore, the funding of the RRF – a borrowing operation – is also exceptional, linked to the EU budget, and divergent from the funding of the cohesion policy, as its spending and its governance.

As to the allocation of funding, the biggest share of the RRF envelope is constituted of the loans component, € 360 bn, and € 312,5 bn, for the non-repayable financial support (grants).[145] This represents a change of paradigm

---

[141] RRF Regulation.

[142] 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, PE/80/2022/REV/1, OJ L 63, 28.2.2023, pp. 1–27; 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, PE/11/2024/REV/1, OJ L, 2024/795, 29.2.2024.

[143] Article 175(3) TFEU can be considered as the residual legal basis, within the cohesion policy. It states:

"3. If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions."

[144] Article 3 (f) of the RRF Regulation.

[145] Article 6 of the RRF Regulation.

from the ESM, that was strongly anchored to a creditor-debtor logic and a form of strict conditionality.

On its side, there are different forms and various degrees of conditionality embedded in the RRF. First, support shall not be used to substitute recurring national budgetary expenditure.[146] Secondly, there is a conditionality concerning the policy objectives indicated in Article 3 of the RRF above. A third form of conditionality is related to respect for the rule of law, with the Conditionality Regulation, and will be discussed *infra*, in section 5. A fourth form of conditionality is introduced in Article 10 and could be called economic governance conditionality: it requires respect for the principle of sound economic governance, as the RRF can be linked to the excessive deficit procedure of the Stability and Growth Pact. In substance, the RRF strengthens economic governance as it provides that the Commission can propose to the Council suspension of payments to a state not acting effectively to correct its excessive deficit.[147] A proposal for suspension or termination is reviewable and accompanied by safeguards. This conditionality is therefore very important, as it contributes to strengthening the budgetary discipline and its enforcement, overcoming the weaknesses observed with the implementation of the European Semester.[148]

The governance of the RRF represents another salient novelty. The Commission is the main actor in the implementation of the Facility in direct management.[149] Together with the Council, the Commission decides on the approval of the National Plans, and together with national governments it governs the implementation process and the assessment of the national Plans. So, it is a core actor and it pivots the dialogue between the European and the national executives. In sharp contrast to the solutions designed with the ESM, the governance of the RRF has led to the emergence of the euro-national proceeding,[150] drawing on some elements from the European Semester.

5.4. The EU as a borrower on the financial markets: a step ahead towards a metabolic constitution?

The pandemic crisis offered another demonstration that the EMU was constructed, from an economic viewpoint, on the wrong premises.[151] As has happened with the past and current crises that hit the EU, shocks can display

---

[146] Article 5 of the RRF Regulation.

[147] Article 10(1) of the RRF Regulation.

[148] C. Fasone, N. Lupo, *Learning from the Euro-crisis*, op. cit.

[149] Article 8 of the RRF Regulation.

[150] N. Lupo, *Il Piano Nazionale di Ripresa e Resilienza (PNRR) e alcune prospettive di ricerca per i costituzionalisti*, in *Federalismi.it*, 2022(1), pp. 4-13.

[151] Allan Rosas and Lorna Armati have titled the chapter on the EMU «Building a house starting from the roof? Economic and Monetary Policy», in A. Rosas, L. Armati, *EU constitutional law: an introduction*, Oxford, 2018, pp. 220-235.

important consequences on the stability of the euro and on the internal market, and can determine a severe economic recession. It is therefore crucial for the EU to be equipped with the tools (resources and governance) it needs to face these complex challenges, entailing a need for policies functional to the protection of public goods created by European integration and EU law.[152]

As recalled above (section 5.1.), the whole financing of the Next Generation EU takes place through the consolidation of the role of the EU as the borrower, in place of the Member States, and with the EU budget becoming the instrument enabling the funding of the operation.[153] It is not the first time the EU has borrowed money from the financial markets: it started with the EFSF, though the size of that instrument was limited. During the COVID-19 pandemic, the EU resorted again to the financial markets with the SURE instrument (section 4), right before NGEU.[154]

While the borrowing operation is not completely new, the size of the borrowing gives it a new meaning. This could be the case because the pandemic crisis arrived during the negotiation of the MFF. Together with the MFF 2021-2027, an interinstitutional agreement has been made, and the Commission has been engaged since December 2020 with proposing new resources of its own, in addition to the one based on non-recycled plastic waste. At the same time, a framework for a more structural reform of its own resource systems has been laid down.[155]

Regarding the revenues of NGEU, in addition to those proposed in 2020[156] – *i.e.*, transfers from the Member States and non-recycled plastic waste resource - the basket has been supplemented with the extended Emission Trading Scheme (ETS) and a Carbon-Border Adjustment Mechanism (CBAM).[157] The former is the main tool designed to foster climate change mitigation policies and decarbonisation, and it creates a 'cap and trade' system for trading polluting emissions,[158] while the latter is the global projection of the ETS, in

---

[152] C. Fasone, P.L. Lindseth, *Europe's fractured metabolic constitution: From the eurozone crisis to the coronavirus response*, Luiss SOG Working Paper 61, 2020.

[153] Council Decision (EU, Euratom) 2020/2053, of 14 December 2020, on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, Article 5 (1) (a), Article 6.

[154] A. Baglioni, Arrivano gli Eurobond e hanno un carattere sociale, *op. cit.*

[155] A. Dobreva, *Reform of the EU system of own resources*, op. cit.

[156] A. Dobreva, *System of own resources of the European Union: Amended legislative proposal*, European Parliament Study PE 754.572, 2023.

[157] A. Dobreva, *Reform of the EU system of own resources*, op. cit., OJ L 275, 25.10.2003, pp. 32–46, as modified by Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16.5.2023, pp. 134–202; Regulation 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, O.J. 2023, L 130/52.

[158] See the relevant Commission webpage on the EU Emissions Trading System.

the sense that it tries to export the EU's climate decarbonisation policy, an operation which has some controversial aspects.[159] Another item in the new resources of the EU budget is a share of the reallocated profits of very large multinational companies (based on Pillar 1 of the OECD/G20 Agreement).[160]

Though the weight of these new own resources within the system of the EU budget is currently not clear, it is important to recall that own resources will mean the consolidation of the financial autonomy needed by the EU to pursue the design, development, and implementation of EU policies geared towards the protection and realisation of EU public goods.[161] Only the consolidation of EU's financial autonomy will structurally equip the EU with the toolkit needed to achieve the solidarity necessary for the protection of the public goods that have been created with European integration,[162] healing the fracture of Europe's metabolic constitution.[163] The next section will explore the instrument of this transformation, the EU budget.

5.5. The emergence of the EU budget as the vector of solidarity

The COVID-19 pandemic represented a game-changer. The nature of the economic crisis, shared by all states and rendering some states more constrained than others because of the different possibilities for financing public debts on the markets, represented the 'perfect crisis' offering impetus for a change. In light of the constitutional constraints of the EMU, namely, the prohibition of monetary financing from the ECB enshrined in Article 123 TFEU, and the no bail out clause of Article 125 TFEU, the budget was chosen as the vector to enable the operation. This is one of the main novelties of NGEU, *i.e.*, the affirmation of the EU budget as a vector of solidarity across Member States.[164]

---

[159] See S. Perdana, M. Vielle, *Making the EU Carbon Border Adjustment Mechanism acceptable and climate friendly for least developed countries*, in *Energy Policy*, 2022; L. Hancher, A. de Hauteclocque, *Strategic Autonomy, REPowerEU And The Internal Energy Market*, op. cit.

[160] A. Dobreva, *System of own resources of the European Union*, op. cit.

[161] S. Cafaro, *L'evoluzione della costituzione economica dell'Unione,* op. cit.

[162] The argument has also been developed in the report presented and endorsed by the European Council and commonly known as the Four Presidents' Report. See H. Van Rompuy *et al*., *Towards a genuine economic and monetary union*, European Council Press release, 26 June 2012. See also J.C. Juncker *et al*., *Completing Europe's Economic and Monetary Union (Five president's report)*, 22 June 2015, avalaible online. In the literature, see M. Buti, G. Papaconstantinou, *European Public Goods: How can we supply more?*, Luiss SEP Policy Brief, 2022; M. Buti, M. Messori, *The role of European public goods in a central fiscal capacity*, in A. Bongardt, F. Torres, *The Political Economy of Europe's Future and Identity: Integration in crisis mode*, European University Institute and UCP Press, 2023, pp. 267 – 274; F. Fabbrini, *EU fiscal capacity: Legal integration after Covid-19 and the war in Ukraine*, op. cit.

[163] C. Fasone, P. L. Lindseth, *Europe's fractured metabolic constitution*, op. cit.

[164] C. Cinnirella, *Financial Solidarity In EU Law*, op. cit.

This occasional and exceptional function of the budget, around which States could converge in light of the exceptional circumstances caused by the COVID-19 pandemic, took place against the background of a more organic discussion on the function of the EU budget within the context of European integration. In particular, against the background of the evolution of the EU, it questioned if the current configuration of the EU budget is functional for the EU of today, since the EU budget is still constructed as a budget between states.[165]

As a general observation, the EU budget is rather limited: indeed, Member States have retained important competences connected to the functioning of domestic welfare systems (health, education), and, consequently, taxation. Secondly, the assumption underlying the EMU's asymmetrical architecture, providing for a mere EU coordination policy for domestic economic policies, was that if all states behave responsively, keeping a responsible fiscal discipline at home, the EU budget could remain small. As observed by Susanna Cafaro, this is a rather optimistic vision, based on the German ordoliberal doctrine influencing European integration, and also on the fact that exogenous shocks and their consequences were predicted based on a minimalistic interpretation, *i.e.*, as natural disasters and supply shortages, as in Article 122 TFEU.[166] In short, the drafters of the Treaty designed the EMU for what could be labelled as 'good weather' law.

Yet, the EU budget well represents the tension between two different paradigms of integration that can apply to the EU, *i.e.*, the international organisation model vs the supranational or federal model, but also between autonomy and solidarity, and even more precisely, between different types of solidarity.[167] From this same perspective, the nature of the revenues of the EU budget reflects these different interpretations and visions of the EU budget. For years, there has been a political discussion on the evolution of the EU budget, with the European Parliament requesting more EU own revenues, while states push for more rebates on their own contributions to the budget. In particular, the GNI-based resources, while being a residual component, have acquired

---

[165] R. Crowe, *An EU budget of states and citizens*, in *European Law Journal*, 2020, pp. 331-344. See also A. D'Alfonso, *Own resources of the European Union: Reforming the EU's financing system*, EPRS Briefing PE 630.265, 2021. In the literature, see J. Bachtler, C. Mendez, *Cohesion and the EU budget: Is conditionality undermining solidarity*, in *Governance and politics in the post-crisis European Union,* 2020, pp. 121-139; P. Trein, *Federal dynamics, solidarity, and European Union crisis politics*, in *Journal of European Public Policy,* 2020, pp. 977-994. On the same topic, C. Cinnirella, *Financial Solidarity In EU Law*, op. cit.

[166] S. Cafaro, *L'evoluzione della costituzione economica dell'Unione*, op. cit.; see also L. Mesini, *L'ordoliberalismo: un'introduzione alla Scuola di Friburgo*, in *Pandora Rivista*, 2016.

[167] C.A. Saunders, *Financial Autonomy vs. Solidarity: A Dialogue between Two Complementary Opposites*, in A. Valdesalici, F. Palermo, *Comparing fiscal federalism*, Leiden, 2018, pp. 40-59. See also P. Trein, *Federal dynamics, solidarity, and European Union crisis politics*, op. cit.

the function of the stabiliser of the EU budget. Together with the VAT-based own resource, these amount to 70-80% of annual EU revenue, indicated as national contributions. In other words, the most significant component of the revenues of the EU budget is an expression of state transfers rather than the EU's own revenues.[168]

Against the background of this debate, showing how a one-off instrument like NGEU has touched upon a crucial and thorny issue for the evolution of the EU, it is important to stress the function of the budget for NGEU, in particular the fact that the EU budget becomes the technical vector for the implementation of a new interpretation of solidarity among EU Member States. Furthermore, this time the solution was found within the system of the Treaties, in contrast to what has happened with the ESM.

This function of the budget also finds expression in the Conditionality Regulation and in the case decided by the CJEU on its validity.[169] As anticipated above, one of the conditionalities of the EU budget is expressly provided for in the so-called Conditionality Regulation, linking the disbursement of the funds of NGEU to respect for the rule of law. In this judgment, the CJEU could elaborate on the link between the EU budget and the principle of solidarity.

In this case, where Poland asked for the annulment of the Conditionality Regulation, the CJEU - deciding in the composition of the full court - made a crucial link between the values of the EU, among which we have the respect for the rule of law, the budget and the principle of mutual trust. In this part, accepting an argument brought by the European Parliament, the Court recalled that:

> " (…) the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law (see, by analogy, judgment of 15 July 2021, *Germany v Poland*, C-848/19 P, EU:C:2021:598, paragraph 38), and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based, as stated in paragraph 143 above, on the commitment of each Member State to comply with its obligations under EU law and to continue to comply, as is moreover stated in recital 5 of the con-

---

[168] R. Crowe, *An EU budget of states and citizens*, op. cit.

[169] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10; CJEU, Judgment of the Court (Full Court) of 16 February 2022, joined cases C-156/21 and C-157/21, *Hungary and Poland v. Parliament and Council*, ECLI:EU:C:2022:97 and ECLI:EU:C:2022:98.

tested regulation, with the values contained in Article 2 TEU, which include the value of the rule of law."[170]

This judgment is important because it consolidates the legally binding value of the principle of solidarity, already established in the *OPAL* case referred to above, and the authority of the Court in interpreting it, for example through the instrument of Article 263 TFEU.[171] The judgment takes a step forward in linking the budget to the principle of solidarity, and mutual trust.[172] From these principles derive legal duties that the Member States must respect when benefiting from solidarity measures.

An open question that remains from the link established between NGEU and the EU budget is to what extent the operation realised with NGEU paves the way for a more structural reflection on the political feasibility of an EU fiscal capacity, in order to consolidate the revenue dimension of the EU budget.[173] This question will be dealt with in chapter 4.

5.6. The seal of constitutionality of the German Constitutional Court on the Own Resources Decision: signals of peace after Weiss?

To some extent the road of the NGEU was paved by the German Constitutional Court, with the *Weiss* judgement of May 2020.[174] Even without considering the size of the investments needed after the COVID-19 crisis, after that judgment, it became clear in several arenas, both European and national, that technical and monetary solutions – namely, the OMT and the Secondary Markets Public Sector Asset Purchase Program (PSPP), the blueprint for the Pandemic Emergency Purchase Programme (PEPP) – could have led to constitutional challenges, especially in some states, like Germany.[175] Therefore, it became clear that political institutions had to face their responsibilities and take action. So, the political solution chosen for NGEU, though an expression

---

[170] CJEU, case C-156/21, *Hungary v. Parliament and Council*, para. 129; CJEU, case C-157/21, *Poland v. Parliament and Council*, para. 147.

[171] *Ivi*, para. 329.

[172] N. Ruccia, *SURE, ovvero la prova del debito comune e della solidarietà*, op. cit.; X. Groussot, A. Zemskova, K. Bungerfeldt, *Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-of-Law Crisis, and why Solidarity Is Essential*, in *Nordic Journal of European Law*, 2022, pp. 1-19.

[173] F. Fabbrini, *EU fiscal capacity*, op. cit.; F. Fabbrini, *Fiscal policy in times of crises*, op. cit.; G. Contaldi, *La solidarietà europea in campo economico ai tempi della pandemia da COVID-19*, op. cit.; and C. Cinnirella, *Financial Solidarity In EU Law*, op. cit.

[174] *BVerfG*, BvR 859/15, cit.

[175] F. Costamagna, *Il Next Generation EU e la costruzione di una politica economica europea: quale ruolo per democrazia e solidarietà?,* in *I Post di AISDUE*, 2021; A. Viterbo, *The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank*, in *European Papers*, 2020, pp. 671-685.

of legal engineering and also of some stretching of the constitutional boundaries, was also a reply -from the German Government- to the *Weiss* judgment.

However, as recalled above, the ratification of the ORD required a domestic law in Germany. It is in this context that the German domestic law was challenged before the *BVerfG*, by the extreme-right party Alternative for Germany following the German ratification by Parliament of the ORD decision. Though a first interim decision of the *BVerfG* prohibited the Chair of the Bundestag from approving the ORD, two weeks later the Court rejected the injunction on the promulgation of the domestic act ratifying the European decision, thus giving its green light to ratification of the ORD.[176]

After that decision on the promulgation of the domestic act of April 2021, the ruling of 6 December 2022 looked like a signal of peace after *Weiss*, since the Court denied that the ORD exceeded the competence conferred on the EU. This position is to be welcomed: a different decision, along the lines of the *Weiss* ruling, would have declared that the NGEU was *ultra vires* and thus could not have been implemented in Germany. This scenario was avoided. However, on closer look, the judgment gives several reasons for concern: first, the Court eventually questioned the compatibility of the ORD decision with several treaty provisions, namely Articles 125, 311, and 122 TFEU; second, while interpreting the relationship between the ORD decision and treaty provisions, and though dubious about its respect for the boundaries that the Treaties represent, the *BVerfG* avoided asking for a preliminary reference to the CJEU. This represents a reason for concern, as it departs from a model of cooperative dialogue between courts.[177]

5.7. The 'boosted' solidarity of Next Generation EU

The long-term recovery fund has materialised with the Next Generation EU initiative, which has been defined as the 'Hamiltonian moment' of the European Union.[178] In reality it is a temporary instrument meant to boost recovery and create long-term resilience, in harmony with the European Green Deal and with the digital agenda, and adopted in an effort to react to the

---

[176] *BVerfG*, Order of 15 April 2021, 2 BvR 547/21. See also the press release of the Court: *Unsuccessful application for preliminary injunction against promulgation of the domestic act ratifying the EU Own Resources Decision ('EU Recovery Package')*, Press release, 21 April 2021. See also *BVerfG*, Judgment of the Second Senate of 6 December 2022, 2 BvR 547/21, paras 1-47.

[177] *BVerfG*, 2 BvR 547/21, cit, paras. 1-47. For comments, see P. Dermine, A. Bobić, *Of Winners and Losers: A Commentary of the Bundesverfassungsgericht ORD Judgment of 6 December 2022: Cases 2 BvR 547/21 and 2 BvR 798/21, Own Resources Decision Judgment of 6 December 2022*, in *European Constitutional Law Review*, 2024, pp. 163-190; T. Nguyen, M. Van Den Brink, *An early Christmas Gift from Karlsruhe?,* in *Verfassungsblog*, 2022.

[178] German Finance Minister O. Scholtz referred to A. Hamilton, who in 1790, together with Madison and Jefferson, persuaded the American states to agree to a new national capital in return for the federal government taking over their war debts.

heavy economic legacy of the pandemic.[179] Additionally, the Next Generation EU represents the long-awaited alternative to the contentious corona-bonds, strongly supported by some states and steadfastly opposed by others. Beyond the political dimension, the legal road to corona-bonds could have been a tortuous one: being a form of debt mutualisation, corona-bonds may have required a treaty reform; additionally, in some cases, constitutional constraints at the domestic level might have further hindered the process.[180]

The Next Generation EU is a recovery plan that represents a change of paradigm, in its size, composition, and design. With a total size of €750 bn, the NGEU represents the most significant financial effort undertaken by the EU so far, considering that the yearly total EU expenditure for 2020 was €155.4 bn, to give an example.[181] Its final composition combines €390 bn in grants or subsidies, and loans of €360 bn.[182] The initial proposal of the Commission counted on €500 bn for the grant component, and 250 bn for the loans, but it was met with criticism by the 'frugal countries' (Austria, the Netherlands, Denmark and Sweden, often joined by Finland). The final distribution is still momentous in symbolic terms too, because the subsidy component remains larger than loans. Within the NGEU, the Recovery and Resilience Facility (RRF) amounts to €672.5 bn and is the most innovative and significant (post-coronavirus) funding scheme the EU has adopted so far. As already happened before, this funding too is an expression of conditionality, in the sense that the member state must submit a plan of economic reform (the National Recovery and Resilience Plan) to the Commission, and this must be approved by the Council. These plans must be in line with the recommendations of the European Semester.

Furthermore, NGEU, and the reliance of the RRF on grants, also embeds a genuine idea of solidarity in the sense of (re-)distribution between states, going beyond the creditor-debtor logic of the ESM.[183] Though new to the planet of economic solidarity, (re)-distribution is not foreign nor in con-

---

[179] See the official Commission webpage on the Recovery Plan for Europe.

[180] In addition to the well-known position of the German *BVerfG*, see also the Finnish case described by P. Leino-Sandberg, *Solidarity and Constitutional Constraints in Times of Crisis*, in *Verfassungsblog*, 2020.

[181] Council of the EU, EU budget for 2020: Council endorses deal with Parliament, Press release, 25 November 2019. It is nevertheless worth observing that several EU states have topped up the EU funding with internal recovery instruments. For Germany, the Konjunkturpaket, known as the Wumms Recovery Plan amounts to €130 bn, which is the 3,8% of the German GDP: A. Benramdane *et al.*, *Innovation and R&D in Covid-19 recovery plans: The case of France, Germany and Italy*, in *Ofce Le Blog*, 9 February 2021.

[182] European Commission, EU's Next Long-Term Budget & NextGenerationEU: Key Facts and Figures, 11 November 2020.

[183] L. Azoulai, *Editorial comments: A Jurisprudence of distribution for the EU*, in *Common Market Law Review,* 2022, pp. 957-968. M.A. Panascì, *Unravelling Next Generation EU As A Transformative Moment*, op. cit.

trast to the system of the Treaties. Several elements contribute to this thesis. First, some long-standing programmes of the EU budget do embed an idea of redistributive solidarity, if we think of policies such as the CAP and the Cohesion policy.[184] Secondly, the main spending programme of NGEU, the RRF Regulation, has been adopted on the cohesion policy legal basis, Article 175(3) TFEU. Third, among the tools chosen to implement the plan we have non-repayable funds, *i.e.* grants: this represents the most striking difference from the previous model of intervention, the ESM, strongly knotted to the constraints of the no bail out clause, with the tight interpretation of conditionality it has entailed. Last, the overall functioning of the RRF is also an expression of redistribution because states can decide if they prefer to ask for grants or loans. Overall, the EU budget has been functional in the design of a solidarity tool functioning as a redistributive tool among states with different powers on the financial markets.

The NGEU does not represent a federal treasury since it is guaranteed by the European budget, and it does not create a permanent system of mutualisation of outstanding debt. Furthermore, in order to represent a truly Hamiltonian moment it should also be matched by autonomous taxation competence of the EU; instead, the Own Resources Decision of the EU budget is actually composed of transfers or contributions from the Member States. In other words, the EU's own resources are in reality transferred resources.[185] For these reasons, the NGEU is not linked to the emergence of a fiscal capacity of the EU, nor to the creation of a European taxation power, nor to Eurobonds, long discussed in the aftermath of the euro crisis, but unacceptable for some countries. Yet, though NGEU does not represent the Hamiltonian moment of the EU, it certainly embeds a more innovative idea of solidarity.

6. Post-pandemic economic solidarity: consolidating a new meaning of solidarity within the EU?

Former ECB president Mario Draghi has defined the coronavirus pandemic as a "human tragedy of potentially biblical proportions",[186] also highlighting its economic consequences, namely an increase in public spending and the need to cancel private debts. Economists agreed quite easily on the fact that an external factor, a pandemic caused by a virus, has caused a

[184] C. Cinnirella, *Financial Solidarity In EU Law*, op. cit.

[185] See also B. de Witte, *The European Union's COVID-19 recovery plan*, op. cit., at 660; and D. Rinoldi, *BILANCIO UE/ La battaglia Parlamento-Consiglio in arrivo a settembre*, in *Il Sussidiario*, 27.7.2020.

[186] M. Draghi, *Draghi: we face a war against coronavirus and must mobilise accordingly*, op. cit.

massive symmetrical economic shock, the consequences of which were however asymmetrical, both in their economic and social aspects.[187]

The type of crisis, its magnitude and long-term effects were immediately clear, beyond the exact quantification of the 'damage' caused by the coronavirus pandemic. It is precisely because of the unprecedented nature of this challenge that some leading scholars immediately pointed to the need to find solutions by thinking outside of the box, thus intervening in a debate that was already showing a high level of polarisation.[188] This perspective was put on the table after the political debate in Europe took its first steps in the direction of tackling the corona crisis through the same toolkit as used after the sovereign debt crisis, which hinged on the European Stability Mechanism (ESM).[189] The ESM has been controversial because it was based on 'strict conditionality' and it was constituted of loans; additionally, it has been associated with economic policies based on austerity and focused on a reduction of public debt. This recipe has caused severe economic consequences in several states, and additional tragic social consequences in Greece,[190] as recognised even by the same troika;[191] this approach has been indicated as unfit for the crisis caused by the COVID-19 pandemic.[192]

At the same time, the road of the NGEU has been to some extent paved by the German Constitutional Court, with the *Weiss* judgment of May 2020. Even without considering the size of the investments needed after the COVID-19 crisis, after that judgment, it became clear in several arenas, both European and national, that political institutions had to face their responsibilities. Technical and monetary solutions, the monetary solidarity of Draghi's 'whatever it takes', would have not been sufficient this time and would have led to constitutional challenges, and potentially also conflicts of sovereignty.[193] Perhaps the difficult circumstances led the *BVerfG* to defuse a potential constitutional conflict with the challenge to the domestic ratification of the Own Resources Decision.

The measures adopted to address the consequences of the crisis in the economic context have been driven by the principle of solidarity, which is

---

[187] See also European Commission, *Summer 2020 Economic Forecast*, cit.

[188] C. Closa, G. Papaconstantinou, M. Poiares Maduro, *EU and COVID-19*, op. cit. See also A. Bénassy-Quéré, B. W. Di Mauro, *Europe in the Time of Covid-19*, Paris & London, 2020.

[189] For a full account of the evolution of the political debate, see P. Genschel, M. Jachtenfuchs, *Postfunctionalism reversed*, op. cit.

[190] UNHCR, *Greece: "Troika bailout conditions are undermining human rights," warns UN expert on debt and human rights*, cit; E. Doxiadis, A. Placas (eds.), *Living Under Austerity*, op. cit.

[191] L. Papadimas, R. Maltezou, *For hard-hit Greeks, IMF mea culpa comes too late*, op. cit.

[192] See D. Gros, *EU solidarity in exceptional times*, op. cit.; and D. Furceri *et al*, *Fiscal austerity intensifies the increase in inequality after pandemics*, op. cit.

[193] F. Costamagna, *Il Next Generation EU e la costruzione di una politica economica europea*, op. cit.

expressly indicated as a guiding principle in the context of Article 122(1) TFEU. The measures considered have been the SURE and the NGEU, adopted jointly on the legal bases of Article 122(1) and 122(2) TFEU.

SURE and NGEU share common features, besides their legal basis: in both cases, the EU budget becomes the vector of solidarity, in the sense of a process of mutualisation of risks that became more central in the core instrument designed by the EU to counter the COVID-19 crisis, which is the Next Generation EU initiative.

Considering the constitutional constraints imposed by the Treaties, most notably the no bail out clause of Article 125 TFEU, which prohibits the EU from 'saving states', on the one hand, and the principle of the budgetary balance enshrined in Article 310 TFEU, which states that the EU cannot take out loans, on the other,[194] NGEU has been grounded in a creative legal solution, stretching the treaty provisions. Yet this time, the whole construction remained within the legal framework posited by the Treaties, in contrast to the ESM.

Both SURE and NGEU are linked to the EU budget, for the repayments of the funds disbursed. In particular, thanks to the negotiation of the MFF, NGEU has been financed through the long-term issuance of debt on the financial markets by the Commission, on behalf of the EU. The debt will be repaid through the EU budget between 2028 and 2058, so over a potentially long time period, putting under stress the temporality of Article 122 TFEU and the budgetary balance of Article 310 TFEU.

As to the meaning of solidarity, the NGEU represents a paradigm shift in the interpretation of economic solidarity, because it departs from the debtor-creditor logic of the ESM, including support in the form of grants in the Recovery and Resilience Facility (RRF) Regulation. The vector of solidarity is the EU budget, employed to shortcut all the constitutional constraints that were in the process of being put in place and that, in some cases, were also framed as sovereignty conflicts.[195]

Yet, the NGEU does not represent a federal treasury since it is guaranteed by the European budget, and it does not create a permanent system of mutualisation of outstanding debt. It leaves on the table the constitutional question of how to reform the EU budget, to make it more functional to the EU as it has evolved, solving the knot of the EU's own resources.

Furthermore, the COVID-19 pandemic leaves the question of how to regulate emergency powers at the EU level and the increased resorting to Article 122 TFEU. These issues will be explored in chapter 4.

---

[194] G.L. Tosato, *The Union's budget balance pursuant to art. 310 TFEU*, op. cit. On the legal dimension of EU public finance law, see also B. de Witte, *The European Union's COVID-19 recovery plan*, op. cit., at 659 ff.

[195] On these aspects, see B. de Witte, *The European Union's COVID-19 recovery plan*, op. cit., and A. de Gregorio Merino, *The Recovery Plan: Solidarity and the living constitution*, op. cit. For example, the German Constitutional Court has rejected a challenge to the RRF.

CHAPTER 3

THE ENERGY CRISIS AND THE PRINCIPLE OF SOLIDARITY

SUMMARY: 1. Energy in the legal order of the European Union. – 1.1. From the origins to the internal markets for energy. – 1.2. The Treaty of Lisbon: energy as a shared competence of the EU. – 1.3. An incomplete constitution for energy?. – 2. The principle of solidarity in energy law. – 2.1. Solidarity and security of supply: the treaties and the right to solidarity. – 2.2. The OPAL case: a constitutional endorsement, but with what implications?. – 3. The energy crisis and its consequences: asymmetric shocks in a European (fragmented) energy market. – 3.1. The weaponisation of gas supply by Russia. – 3.2. The intertwinement of climate and energy crises and the interplay between the different EU policies. – 4. The EU's response to the energy crisis: REPowerEU as the strategic rethinking of EU energy policy. – 4.1. REPowerEU, between energy transition and solidarity. – 4.2. The integration of REPowerEU into the Recovery and Resilience Facility as another instance of integration through funding. – 5. Emergency measures for the energy crisis, between energy security and market intervention. – 5.1. Emergency measures intervening in price fundamentals: the Gas Storage Regulation amending the Security of Supply Regulation. – 5.2. (following) Council Regulation 2022/1369 on coordinated gas demand-reduction measures: a mandatory demand reduction for all categories of consumers. – 5.3. Emergency measures intervening in price determination: Regulation on an Emergency Intervention to address high energy prices in the EU. – 5.4. The December package of measures: 1) Regulation Gas Purchases and Aggregate EU. – A. Solidarity to better coordinate gas purchases: AggregateEU as the mirage of the EU's strategic autonomy. – B. Measures to prevent excessive gas prices and excessive intraday volatility in energy derivatives market. – C. The default solidarity mechanism applicable in cases without bilateral arrangements. – 5.5. The December package of measures: 2) an emergency measure to cut red tape in the transition toward renewable energy?. – 5.6. The December package of measures: 3) the dynamic price cap and solidarity as market intervention. – 6. Between market and regulation: solidarity and the need to limit asymmetrical consequences of the energy crisis. – 6.1. Some reflections on the context of energy law. – 6.2. The meaning of solidarity in energy law.

1. Energy in the legal order of the European Union

1.1. From the origins to the internal markets for energy

Costa v. ENEL of 1964 is one of the leading cases of the CJEU and is mainly known for the principle of primacy of EU law over domestic law.[1]

[1] Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

However, the facts underlying the decision concerned the nationalisation of private companies to form the national electricity company ENEL. The Italian lawyer Flaminio Costa - a shareholder of EdisonVolta, one of the companies concerned - challenged the nationalisation by refusing to pay a bill of 1,925 Italian liras, to ENEL. Seized with a preliminary reference, the Court affirmed that the Treaties enjoyed primacy over domestic law, though it denied that the nationalisation of electricity companies was against EU law, namely antitrust law. After this marginal application of the Treaty to the energy sector, other cases followed in the 1980s where the Court acknowledged that the rules on free movement applied to the energy sector: however, states were entitled to derogate from freedom of movement on grounds of public security, as energy was recognised as strongly interconnected with core economic interests, and national security.[2]

This early case law suggests that, as a rule, energy falls within the scope of the internal market, applying to it the typical logic of free movement rules, though it does enjoy a special position in the system of the Treaties. First, energy has been since the very outset a crucial rationale behind integration. The Coal and Steel Community was created precisely around the raw materials at the basis of the war and reconstruction industries. Back then, coal was the primary raw material, crucial for the production of energy.[3] Similarly, Euratom was focusing on nuclear energy.

Irrespective of the economic salience of energy, this policy was long protected from the influence of European integration and states have not agreed to supranational legislation 'interfering' with domestic prerogatives on energy. Being the sector perceived as crucial to national economies, Member States have not transferred significant regulatory powers to supranational institutions, nor allowed EU law to affect national energy monopolies.[4] In other words, the field of energy is an area in which national prerogatives are deeply

[2] 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, pp. 991 - 1010, at 995; see also K. Huhta, *The Evolution of the Public Security Defence in EU Free Movement Law: Lessons from the Energy Sector*, in *Cambridge Yearbook of European Legal Studies*, 2023, pp. 1-22.

[3] The same Schuman Declaration of 1950 was precisely pivoted on joining the production and exploitation of coal and steel, instrumental to the creation of economic interdependencies - framed as *de facto* solidarity and solidarity in production- which could have granted a future free from war. It stated: "(…) The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims." Source: Schuman Declaration, 9 May 1950, available online.

[4] K. Talus, *Introduction to EU Energy Law*, Oxford, 2016, p. 3. See also K. Huhta, *The Evolution of the Public Security Defence in EU Free Movement Law*, cit. See also K. Huhta, *The scope of state sovereignty under Article 194(2) TFEU*, cit.

rooted, because of expressions of national preferences, also grounded in the availability of natural resources.[5] Before EU harmonisation instruments, the situation was one of typically fragmented markets, which meant separate national energy systems, with high barriers to cross-border trade, and infrastructural hurdles. Furthermore, domestic markets were subject to different regulatory standards and technical arrangements. In addition, national energy mixes naturally might present divergences due to the different availability of natural resources.[6]

This course of action only started to change in the '80s. The experiences of market liberalisation in the United States and UK started to display effects in the EU, and national monopolies increasingly opened up to a market-oriented logic. The '90s signalled the first harmonisation packages in the field of energy, which laid down the basis for future regulation, but had little added value in terms of creating a functioning energy market, as was the case of the Second Energy Package.[7] Overall, the purpose of these two packages was to open up electricity and gas markets to competition, within member states.[8]

It was only in 2007 that a shift occurred: 2007 was a turning point in EU energy law and policy. Building upon the energy sector antitrust inquiry,[9] the Commission redesigned the EU's energy policy,[10] and the European Council of March 2007 endorsed this strategy.[11] The inquiry carried out by the European Commission on the level of competition in the context of the

---

[5] P. Bocquillon, T. Maltby, *EU energy policy integration as embedded intergovernmentalism: the case of Energy Union governance*, in *Journal of European Integration*, 2020, pp. 39-57, at 41-42.

[6] T. Jevnaker, *Differentiated integration in EU Energy Market Policy*, in B. Leruth, S. Gänzle, J. Trondal (eds.), *The Routledge handbook of differentiation in the European Union*, Abingdon, 2022, p. 289.

[7] K. Talus, *Introduction to EU Energy Law*, *op. cit.*, p. 4.

[8] T. Jevnaker, op. cit., p. 292.

[9] Communication of the Commission, of 10 January 2007, COM(2006)851 final, "Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)"; on its relevance, see also U. Scholz, S. Purps, *The Application of EU Competition Law in the Energy Sector*, in *Journal of European Competition Law & Practice*, 2011, pp. 62–77.

[10] Communication from the Commission to the European Council and the European Parliament of 10 January 2007, An energy policy for Europe, COM(2007)1 final.

[11] Brussels European Council, 8/9 March 2007, Presidency Conclusions, available online. More precisely, with the Brussels European Council of 8/9 March 2007, the highest political steering institution of the EU agreed on a new Energy Policy including a firm commitment to increase renewable energy to 20% of the primary energy supply in 2020 for the 27 EU-countries combined, increase energy efficiency by 20% by 2020 and increase biofuel in transport fuels in sustainable ways by 10% by 2020. They also agreed on a 30% reduction in greenhouse gas (GHG) emissions 1990 - 2020 on the condition that other countries also commit to reductions, and with a view to reduce GHG emissions by 60-80% by 2050. If an international agreement is not possible, they agreed that the EU countries should reduce GHG emissions by at least 20% for the period 1990 - 2020.

Further the EU leaders agreed to:

-better functioning of internal energy markets with better separation of production and transmission companies;

different energy sectors (electricity and gas) played a crucial role in preparing the Third Energy Package, adopted in 2009.

This package represented a policy change across three aspects: first, it enabled a deeper opening of domestic markets to a European supranational market. This was made possible by the full separation between network operators and energy production and supply, thanks to the provisions on unbundling in the European energy and gas sectors.[12] Though the European framework provides for different types of unbundling, the function of this instrument has been to open up to competition in several market sectors, and it is therefore considered one of the instruments that contributed to the creation of an internal market in the context of energy law,[13] together with the provisions concerning Third Party Access (TPA) to the networks. Second, this policy shift entailed the creation of an EU energy agency, ACER, a network agency with the main function of coordinating national regulators;[14] in addition, national regulatory

---

-increased international cooperation to secure energy supply and to cooperate with other energy importing countries on energy efficiency and renewable energy;

-the development of a new directive on renewable energy;

-strengthened cooperation on four high-priority Trans-European networks, including an off-grid electric network for off-shore windpower, an electric link from Germany and Poland to the Baltic countries (Baltic link), and a gas connection between Turkey and Austria (Nabucco pipeline);

-continue and strengthen ongoing energy and climate policies such as the Action plan on Energy Efficiency and the EU Emissions Trading Scheme that will be evaluated and might be expanded to land-use emissions and transport. Source: EU Presidency Conclusions and INFORSE-Europe Press Release (March 2007), available online.

[12] P.O. Eikeland, *EU internal energy market policy: Achievements and hurdles*, in V.L. Birchfield, J.S. Duffield (eds.), *Toward a Common European Union Energy Policy: Problems, Progress, and Prospects*, Berlin, 2011, at p. 293.

[13] Florence School of Regulation, Unbundling in the European electricity and gas sectors. See also E.J. Morrison, *Unbundling, Markets, and Regulation*, in M. Hafner, G. Luciani (eds.), *The Palgrave Handbook of International Energy Economics*, 2022, Berlin, 2022, pp 471–491.

[14] Regulation (EC) No 713/2009 of the European Parliament and of the Council, of 13 July 2009, establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, p. 1–14. This founding instrument has been replaced by Regulation (EU) 2019/942 of the European Parliament and of the Council, of 5 June 2019, establishing a European Union Agency for the Cooperation of Energy Regulators (recast), OJ L 158, 14.6.2019, p. 22–53.

According to Article 1 of the Regulation, the purpose of ACER is to "assist the [national] regulatory authorities [*omissis*] in exercising, at Union level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action and to mediate and settle disagreements between them [*omissis*].

ACER shall also contribute to the establishment of high-quality common regulatory and supervisory practices, thus contributing to the consistent, efficient and effective application of Union law in order to achieve the Union's climate and energy goals."

As discussed in the literature, the powers of ACER are not that pervasive, and significant regulatory powers have been kept at domestic level. See J. Vasconcelos, *Energy regulation in Europe: The politics of regulation and regulatory policy revisited*, in *Competition and Regulation in Network Industries*, 2019, pp. 240-249; A.L. Klopčič, B. Rončević, T.B. Valič, *The key player or just a paper tiger? The effectiveness of ACER in the creation and functioning of the EU's internal energy market*, in *Electricity Journal*, 2022, Article 107207; I. Maher, O. Stefan, *Delegation of powers and the rule of law: Energy justice in EU energy regulation*, in *Energy Policy*, 2019, pp. 84–93.

authorities were made independent from domestic governments.[15] Third, it created a competence to adopt 'network codes' and guidelines, a new type of instrument in EU energy law, enabled by Regulation 2009/714,[16] which contributed to shaping the EU's energy policy.[17] It was against the background of this policy evolution that, with the Treaty of Lisbon, energy received recognition as an autonomous EU policy, albeit shared with the Member States.

1.2. The Treaty of Lisbon: energy as a shared competence of the EU

After the policy shift decided in the Brussels European Council of 8-9 March 2007,[18] and the launch in the same year of the Commission proposals leading to the adoption of the so-called 'Third Package' in 2009, an autonomous EU energy competence was recognised in the Treaties, with the Treaty of Lisbon, also agreed in 2007. With Article 194 TFEU, the EU acquired a specific and dedicated competence in this domain. Energy policy became an area of shared competence (Art. 4(2) letter I of the TFEU). Previously, only an embryo of energy competence had emerged out of related areas, including, first, the internal market, and, secondly, the environment, just to mention the most significant.[19]

As per Article 194(1) TFEU, EU energy policy is constructed around four policy objectives:[20] the functioning of the energy market; the security of supply in the Union; energy efficiency and energy saving and the development of new and renewable forms of energy; and the promotion of the interconnection of energy networks.

On the new legal basis, the Commission prepared the next reform, launched in 2016, and adopted in 2019, known as the Clean Energy for All Europeans Package (or CEP).[21] The reform does not include specific legislation for the gas sector and prepared the transition from fossil fuels toward a carbon-neu-

---

[15] K. Huhta, *C-718/18 Commission v. Germany: Critical Reflections on the Independence of National Regulatory Authorities in EU Energy Law*, in *European Energy & Environmental Law Review*, 2021, p. 255.

[16] Regulation (EC) No 714/2009 of the European Parliament and of the Council, of 13 July 2009, on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, p. 15–35.

[17] K. Talus, *Introduction to EU Energy Law*, *op. cit.*, p. 4-5.

[18] European Council of 8-9 March 2007, Presidency Conclusions, available online.

[19] L. Hancher, *Energy and the Environment: Striking a Balance?*, in *Common Market Law Review*, 1989, pp. 475-512; P. Bocquillon, T. Maltby, *op. cit.*, p. 39. K. Talus, *Introduction to EU Energy Law*, *op. cit.*, p. 4-5. See also K. Huhta, *The scope of state sovereignty under Article 194(2) TFEU*, cit., including a detailed overview of the different legal bases used for the adoption of regulation in the field of energy.

[20] For a comment on Article 194 TFEU, see: M. Marletta, *Articolo 194 TFEU*, in A. Tizzano (a cura di), *Trattati dell'Unione Europea*, Milano, 2014, p. 1650 ff.

[21] European Commission: Directorate-General for Energy, *Clean energy for all Europeans*, Publications Office, 2019.

tral economy. Among its targets for 2030 are a 40% cut in greenhouse gas (GHG) emissions, and a target of 32% for renewable energy sources (RES) in the EU's overall energy mix.

The Package includes eight instruments, all adopted on the legal basis of Article 194(2) TFEU. The directives target energy performance in buildings, renewable energy, and energy efficiency.[22] The Regulations tackle the governance of the Energy Union, a new framework for risk preparedness, and a recast for ACER.[23] The electricity market is reformed with both a directive and a regulation, the latter setting principles for the internal EU electricity market and the former setting rules for the generation, transmission, distribution, supply, and storage of energy.[24] After the CEP, the 5th energy package, proposed in 2021 and adopted in 2024, increased the cut to GHG emissions from 40 to 55%, hence the name of the package as 'Fit For 55'.[25]

1.3. An incomplete constitution for energy?

A crucial aspect of the constitutional and policy shift that occurred with the Treaty of Lisbon is the codification of the right of the Member States "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) TFEU."[26]

---

[22] Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, OJ L 156, 19.6.2018, p. 75–91; 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), OJ L 328, 21.12.2018, p. 82–209. This instrument has been reformed several times; Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency, OJ L 328, 21.12.2018, p. 210–230.

[23] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ L 328, 21.12.2018, p. 1–77; Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, OJ L 158, 14.6.2019, p. 1–21; Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast), OJ L 158, 14.6.2019, p. 22–53.

[24] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), OJ L 158, 14.6.2019, p. 125–199; Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast), OJ L 158, 14.6.2019, p. 54–124.

[25] Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions "Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality', COM(2021)550 final.

[26] Art. 194 (2) TFEU.

This formulation of the treaty provision made commentators doubt the significance of this treaty reform. Some perceived the codification of this autonomous energy competence as providing political impetus and enhancing legal certainty;[27] others have appreciated it as a potential extension of an energy competence, including energy security, while others have interpreted it as a recognition of the status quo.[28]

In the interpretation I propose, this is a confirmation of a pattern recurrent in European integration, which I have framed as limited or incomplete Europeanisation (*supra*, Introduction): Member States have agreed to selectively deepen integration, with a clear delimitation and re-affirmation of their national prerogatives. In so doing, they have promoted an incomplete constitution for energy.[29]

Furthermore, some specificities concerning the energy sector must be spelled out, as they contribute to explaining this framework of 'incomplete constitution'. As is well known, energy markets are highly dependent on infrastructure. Typically, infrastructures are designed and constructed with domestic markets in mind.[30] It is therefore understandable that the starting point of European integration in the context of energy was characterised by fragmentation. Secondly, energy is crucial for the economy, as energy plays a pivotal role in the production process, and increasingly, every aspect of daily life. Third, energy is strongly connected to national security, broadly understood. This explains why states have agreed to a form of supranationalisation that preserves their domestic prerogatives in crucial aspects of domestic energy policies. Of course, these prerogatives are codified, but their interpretation can change with time and with the evolution of market integration. Yet, several elements do remain to ensure these domestic prerogatives, as illustrated by the example of 'golden shares': though in principle a limitation to fundamental freedoms, the Court of Justice, in its complex case law, has placed boundaries on their legitimacy in an effort to protect the internal market.[31]

---

[27] K. Haraldsdóttir, *The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU*, in *European Energy & Environmental Law Review*, 2014, pp. 208-218; H.S. von Sydow, *The Dancing Procession of Lisbon: Legal Bases for European Energy Policy*, in *European Energy Journal*, 2011, pp. 33-36, at 45.

[28] For opposing views, see H. Bjørnebye, *Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production*, The Hague, 2010. *Contra* see, H. Vedder, *The Treaty of Lisbon and European environmental law and policy*, in *Journal of Environmental Law*, 2010, pp. 285–299. For a recent account on the concept of the security of supply and energy security, see R. Fleming, M. Guérin, *Europe's security of gas supply legislation – a short legal history and latest developments*, in *Journal of Energy Natural Resources Law*, 2024, pp. 51-71.

[29] See *supra*, Introduction.

[30] See K. Huhta, *The scope of state sovereignty under Article 194(2) TFEU*, cit., p. 992; K. Huhta, *Capacity mechanisms in EU energy law: ensuring security of supply in the energy transition*, The Hague, 2019, p. 222.

[31] K. Huhta, *The scope of state sovereignty under Article 194(2) TFEU*, cit.; S. Pugliese, *Toward a Multilevel System of Investment Control Oriented to Crisis Management: Italian Golden Power in*

The considerations above lead us to consider that, in energy like in many other EU policies, EU treaty rules have been adopted to forge a new energy policy under shared competences when the pre-existing context was separate national systems with high barriers to cross-border trade; domestic energy markets were subject to diverse regulatory and technical solutions, and different energy mixes originating from national resources.[32]

Furthermore, the codification of the right of Member States to determine their energy rights is seen as an expression of resource nationalism.[33] With this term we mean that states try to keep or reclaim control over the exploitation of energy resources. This provision echoes a consolidated principle in international law and expresses the demand by states to keep control over energy because it is strongly connected with national security.[34] While energy policy is increasingly influenced by the overarching climate change mitigation objectives, and the meaning of this provision is to some extent confined by the enactment of new legislation concerning clean energy, we can nevertheless trace in this provision the codification of national prerogatives, which will still be used by states to challenge the delimitation and exercise of European competences. As explained in the Introduction, the complexity of societal challenges goes beyond the apparent simplicity of the principle of conferral. The codification of this type of provision can provide material for legal challenges that can become more salient constitutional conflicts or even conflicts of sovereignty.

Against this background, we argue that Art. 194 TFEU codifies in the treaties a form of incomplete integration, based on the logic of the internal market but where states can see some of their prerogatives recognised. This echoes the framework of asymmetrical integration already observed in the context of the Economic and Monetary Union (chapter 2). However, the increased salience of the climate crisis and the urgency of the policy shift in energy production challenge these state prerogatives. Furthermore, the integration of national systems into the European internal market creates interdependences between states that must be tackled with solidarity. The next section is devoted to exploring precisely these connections.

2. The principle of solidarity in energy law

The current section will discuss the integration of solidarity provisions in the context of energy law, starting from the treaties and considering also

---

the Framework of the EU FDI Screening Mechanism, in J.H. Pohl, T. Papadopoulos, J. Wiesenthal (eds.), *National Security and Investment Controls*, Cham, 2024; S. Pugliese, *Rethinking Just Transition in Investment Law Perspective: Incentives against Climate Crisis between Sustainability, Economic Security, and Strategic Industrial Planning*, in *LAWS*, 2024, 13(3), 37.

[32] T. Jevnaker, *op. cit.*, p. 289 ff.

[33] K. Huhta, *The scope of state sovereignty under Article 194(2) TFEU*, cit., p. 993.

[34] T. Jevnaker, *op. cit.*

secondary legislation. The guiding question is whether solidarity is finding a sector-specific meaning in each policy considered. Is the principle of solidarity one of the guiding principles of energy or is the policy considered based on responsibility and excluding solidarity? At another level, is solidarity organised into provisions and practices of solidarity?

2.1. Solidarity and security of supply: the treaties and the right to solidarity

The principle of solidarity is a core principle of energy policy. A first reference is enshrined in Article 122(1) TFEU, discussed in Chapter 2. In this context, it is important to recall that this provision offers a special legal basis for emergencies, with a non-legislative, *i.e.*, executive-led procedure, totally in the hands of the Council. It is a more general assistance provision, an expression of solidarity, and it allows for a broad scope of interventions through appropriate economic policy "measures", including regulations, and presupposes a situation of "severe difficulties aris(ing) in the supply of certain products, notably in the area of energy". Energy features among certain products allowing for solidarity, and this broad intervention seems to be expressly related to energy security, one of the paradigms of the energy trilemma.[35]

A second crucial reference is enshrined in Article 194 TFEU,[36] the dedicated provision for energy, and solidarity features as a guiding principle. The main understanding is that this is a sector-specific interpretation of the general EU law principle of solidarity. During the negotiation of the Lisbon Treaty, Poland was an active sponsor of the inclusion of this principle, given its vulnerable position between Germany and Russia.[37]

In addition to the treaties, solidarity and assistance mechanisms are provided for in secondary law. For example, a core instrument of EU energy regulation is the Security of Supply (SoS) Regulation of 2017.[38] This regulation implements the principle of energy solidarity to the security of supply for gas. In similar terms, Regulation 2019/941 on risk-preparedness provides for a similar mechanism (Article 15) in the context of electricity, and Directive 2009/119/EC on minimum stocks of crude oil and/or petroleum products arranges for emergency procedures in case of a major supply disruption (Article

---

[35] *Supra*, Chapter 2.

[36] See M. Marletta, *Articolo 194 TFEU*, in A. Tizzano (a cura di), *Trattati dell'Unione Europea*, Milano, 2014, p. 1650 ff.

[37] D. Buschle, *Energy solidarity: approaching a new constitutional principle: Case note on the Court of Justice's ruling in the OPAL case of 15 July 2021*, in *European Energy & Climate Journal*, 2021, pp. 66–70.

[38] 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 L 280, 28.10.2017, p. 1–56.

20).[39] To give an example, we will focus on the mechanisms provided for in the SoS Regulation.

The SoS Regulation of 2017, a recast of an earlier instrument of 2010, was adopted after the occupation of Crimea by Russia in 2014. Against an increased risk of disruption to gas supplies, the Commission adopted a European Energy Security Strategy,[40] aiming to design a comprehensive plan to strengthen the security of the energy supply and provide for immediate measures, in case of emergency. The European Energy Security Strategy led to an EU-wide simulation of a 'stress test' and a report on the implementation of the 2010 Regulation on the security of gas supply. These documents paved the way to the recast of the 2010 Security of Supply Regulation, eventually adopted in 2017.

One of the core elements of that Regulation is that it implements the principle of solidarity, as per Article 194(2) TFEU: Article 13 of Regulation 2017/1938 provides for a solidarity mechanism, in case of an emergency occurring in a Member State. According to this mechanism, a state can request the application of the solidarity measure as a last resort, after that state has exhausted all market-based measures and measures contained in each emergency plan.[41]

The solidarity mechanism operates in the following way: the requested Member State should reduce the gas flow to its own consumers other than protected consumers and reroute the exceeding gas supply to the requesting Member States. The solidarity-protected consumers of the requesting Member States are the beneficiaries of the solidarity mechanism.[42] The activation of this mechanism should lead to compensation which must cover the economic costs incurred by the requested state.[43]

---

[39] Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, OJ L 158, 14.6.2019, p. 1–21; Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (OJ L 265 9.10.2009, p. 9), as amended by Commission Implementing Directive (EU) 2018/1581 of 19 October 2018, OJ L 263, 22.10.2018, p. 57. and Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018, OJ L 328, 21.12.2018, p. 1.

[40] Communication from the Commission to the European Parliament and the Council, *European Energy Security Strategy*, 28 May 2014, COM(2014)330 final.

[41] Regulation (EU) 2017/1938 cit., Art. 13(3).

[42] According to Art. 13(4), if more than one Member State can provide solidarity to the requesting Member States, the requesting Member States shall use the most advantageous option, based on cost, speed of delivery, reliability and diversification of supply of gas.

[43] The activation of this mechanism should lead to compensation which must cover the cost of the gas delivered, the cost incurred during the process and the reimbursement for any compensation resulting from dispute proceedings. If Member States cannot agree on a compensation mechanism to be included in the arrangement, the Commission will propose a solution that both Member States should take utmost account of.

This provision had several shortcomings: first, the unwillingness of Member States to participate in the solidarity mechanism. Second, the risk of free-riding, potentially undermining trust among Member States. Despite the merit and the potential of this provision, no solidarity mechanism had been implemented by the end of year 2018.[44] This means that states are not keen to provide active support to their neighbours as regards energy security.[45] Furthermore, this mechanism has never been tested in a real full-scale emergency.

At the time of writing, nine solidarity agreements have been signed in the period 2020-2023, which is very little if compared to the numbers mandated by the Regulation.[46] Interestingly, even the Central European countries, which would be most affected by severe disruptions, have no agreement with their neighbours. Slovakia, for example, is potentially the most affected by a disruption of Russian gas and has no solidarity agreement with any of their neighbouring Member states. Hungary also has no solidarity agreement signed.

Against the background of this experience of poor implementation of the solidarity mechanism provided for in the SoS Regulation, the European Commission has proposed a default procedure applicable in the event a solidarity measure is requested, and no solidarity arrangement has been signed. This is Art. 23-26 of Regulation 2022/2576 Enhancing Solidarity, which has provided for default solidarity agreements.[47] The relevance of this framework is further proved by the new framework for decarbonised gas and hydrogen, adopted in 2024, which amends the SoS Regulation, extending its scope to include renewable and low-carbon gases in the natural gas grid.[48] Furthermore, the revised framework extends the solidarity mechanism, which ensures that EU countries will provide each other with 'solidarity gas' even in case of a severe emergency, by guaranteeing that a set of standard rules apply when EU countries have not signed bilateral agreements.[49] This consolidation demonstrates that solidarity is of paramount importance in the context of the energy market, and that given the strategic relevance of energy for national economies and national security, solidarity needs to be arranged through procedures established *ex ante* with binding rules.

---

[44] K. Yafimava, *EU solidarity at a time of gas crisis even with a will the way still looks difficult*, Oxford, The Oxford Institute for Energy Studies, 2023, p. 3.

[45] R. Fleming, M. Guérin, *op. cit*.

[46] For an overview of these agreements, see the dedicated page on the European Commission webpage.

[47] See *infra*, section 5.

[48] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 (recast), OJ L 2024/1789, 15.7.2024.

[49] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, Article 84.

2.2. The OPAL case: a constitutional endorsement, but with what implications?

The *OPAL* case represented a turning point in EU law because the CJ expressly ruled that the principle of solidarity in energy law is legally binding.[50] As recalled above, a specific EU energy competence was introduced by the Treaty of Lisbon, albeit European integration has been concerned from the beginning with the creation of a progressively integrated market of production factors. When a specific energy competence was negotiated, it was Poland that lobbied for the inclusion of the principle of solidarity through Article 194 TFEU, considering its vulnerable position in relation to Germany and its long-standing reliance on Russian supplies:[51] interestingly, it was the first country to use this principle in litigation.

The legal meaning and potential of the principle of energy solidarity remained to be explored until the Court was given the chance to adjudicate on a prominent case concerning the OPAL pipeline, which is one of the Nord Stream 1 onshore extensions. This case concerns a highly salient controversy, with important economic and geo-political implications for the EU and Member States: the construction of the pipeline Nord Stream 2, owned by Gazprom, conceals the strategic issue of reliance on Russian natural gas supplies.

Within the EU, different interests oppose each other: on one side, the Commission, Poland and Baltic States (next to the US and Ukraine) oppose the construction of the new pipeline, whereas Germany and Austria are strongly dependent on Russian gas.[52] Nord Stream 2 is a pipeline that adds to Nord Stream 1. The latter has been operational since 2011; the former was decided in 2015, and its construction began in 2018. Yet, this project is highly controversial due to its environmental and economic implications. Numerous legal disputes arose over this project, at the domestic, European, and international levels.[53] One of these reached the CJEU.

The issue arose when the Commission approved a decision of the German regulator amending a 2009 exemption of the OPAL pipeline from third-party access requirements under the Natural Gas Directive. This decision had the consequence of lifting the restrictions of the 2009 exemption on the capacity of the OPAL pipeline that could be used by Gazprom.[54]

---

[50] CJEU, Case T-883/16, *Poland v Commission*, ECLI:EU:T:2019:567; CJEU, Case C-848/19 P, *Germany v. Poland*, EU:C:2021:5981.

[51] D. Buschle, *op. cit*.

[52] M. Russel, *The Nord Stream 2 pipeline: Economic, environmental and geopolitical issues*, *EPRS Briefing*, 2021, PE 690.705, pp. 3-4.

[53] M. Russel, *The Nord Stream 2 pipeline*, op. cit.

[54] K. Yafimava, *OPAL Exemption Decision: a comment on the Advocate General's Opinion on its annulment and its implications for the Court of Justice judgement and OPAL regulatory treatment*, The

Poland challenged the decision before the General Court because that decision was potentially dangerous for its interests. Indeed, based on that decision Gazprom could bypass alternative transit routes via Poland, exposing Poland to (artificial) gas supply shortages. Secondly, increasing the ratio of Gazprom gas to be transited via NordStream would have increased dependence on Russia. For this reason, Poland argued that the Commission's decision infringed the principles of energy security and energy solidarity.[55]

Both the General Court in 2019 and the Court of Justice in 2021 relied in their reasoning on the principle of energy solidarity, a cornerstone of EU energy law, and decided to annul the decision of the Commission.[56] Therefore, the OPAL case represents a constitutional turning point in energy law.[57]

More precisely, in its judgment of the 15th of July 2021, the CJEU stated that the principle of solidarity of Article 194 TFEU is one of the specific expressions, in the field of energy, of the general principle of solidarity,[58] which is itself one of the fundamental principles of EU law. In doing so, the Court supports the idea that the principle of solidarity has a polymorphic nature, in the sense that, besides a core common to the whole EU system, the principle can be interpreted with different nuances across the different sectors where it is supposed to apply.[59] The Court expressly describes solidarity as "one of the fundamental principles of EU law", and "the spirit of solidarity between Member States" of Art. 194 TFEU is "a specific expression, in the field of energy", of the general principle of solidarity.[60]

In asserting the binding nature of the principle, the Court relied on the case law on the principle of solidarity in the context of relocation decisions, where Poland and other Visegrad countries were defendants in the infringement proceedings brought against them by the Commission.[61] This could be seen as a subtle message to Poland, hinting that respect for European legality can have both bitter and sweet fruits.

Oxford Institute for Energy Studies, Oxford, 2021.

[55] M. Münchmeyer, *The principle of energy solidarity: Germany v. Poland, in Common Market Law Review*, 2022, pp. 915-932.

[56] Case T-883/16, *Poland v* Commission, cit.; C-848/19 P, *Germany v. Poland*, cit.

[57] D. Buschle, *op. cit.*

[58] Case 848/19 P, *Germany v. Poland*, cit., para. 38.

[59] Case 848/19 P, *Germany v. Poland*, cit., para. 37. On the polymorphic nature of the principle, see 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 A. Duarte, F.P. Ettorre (eds.), *Sovereignty, technology and governance after Covid-19: legal challenges in a post-pandemic Europe*, Oxford, 2022, pp. 51-76.

[60] Case 848/19 P, *Germany v. Poland*, cit., para. 38.

[61] *Ivi*, para. 42 - 43; See also CJEU, Joined Cases 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), ECLI:EU:C:2020:257, paras. 80 - 181.

Another important element specified by the CJEU concerns the scope of the principle, which goes beyond security of energy supply.[62] This means that it applies to and intersects with all four different strands of the EU's energy policy. As recalled above, these objectives are: to (a) ensure the functioning of the energy market; to (b) ensure security of energy supply in the Union; to (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and to (d) promote the interconnection of energy networks.[63] Therefore, solidarity permeates all the different aspects of energy law and policies, as highlighted by Münchmeyer in his analysis of the case.[64]

A fourth element stressed by the Court is the systemic nature of the principle, in the sense that solidarity entails rights and obligations both for the EU and for the Member States. The dimensions of solidarity are vertical, *i.e.*, from the EU to States and vice versa, but also horizontal, between Member States. This is extremely important since it stresses an inescapable horizontal dimension of the principle, which might impact or even conflict with national prerogatives in energy law.[65] It should be recalled that Art. 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 great, all of its implications are not yet clear. As highlighted, the principle permeates all four dimensions of energy policy, including relations between states. Among the most significant and sensitive developments, we have the possible implications of this principle for the interplay between (EU-led) decarbonisation and national prerogatives on energy mixes, which is also highly salient against the background of the climate crisis.[66] Through this purpose, in the interpretation given by the CJEU, the principle of solidarity goes beyond emergencies and entails a preventive dimension, in the sense that the EU can resort to it to avoid the occurrence of crises.[67]

Furthermore, solidarity requires that the Commission verifies if there is a danger to gas supplies on the markets of the Member States. It entails a duty "to conduct an analysis of the interests involved (…), taking into account the interests both of the Member State and of the EU as a whole".[68] This has been

---

[62] Case C-848/19 P, *Germany v. Poland*, cit., paras. 37, 43.

[63] Case C-848/19 P, *Germany v. Poland*, cit., para. 37.

[64] M. Münchmeyer, *op. cit.*

[65] Case C-848/19 P, *Germany v. Poland*, cit.

[66] Poland has challenged several decarbonisation measures. See Poland's legal challenges against carbon emission tax, published in OJ, in *EULawLive*, 28 August 2023.

[67] Case C-848/19 P, *Germany v. Poland*, cit., para 69.

[68] Case C-848/19 P, *Germany v. Poland*, cit., para 53.

stressed by the Court, with special comparison with Article 222 TFEU. In contrast, the Court did not address the relationship between 194 and Article 122(1) TFEU. This would have been interesting because in recent years, we have witnessed an increased reliance on Article 122(1) TFEU as a legal basis for emergency regulations adopted by the Council with this special procedure.

Last but not least, one of the questions left by the OPAL case is whether the integrated approach in the definition of solidarity by the CJEU has left its seeds, and which fruits it will bear, against the background of the energy crisis that unfolded in 2021 and 2022?

One aspect of the OPAL judgment that has been criticised is that the Court of Justice has not provided any guidance on how the different interests of the Member States and of the EU as a whole are to be balanced in case of conflict. This is an issue that has been observed and that means that the solidarity obligation is of difficult justiciability and might trigger new litigation.[69]

3. The energy crisis and its consequences: asymmetric shocks in a European (fragmented) energy market

3.1. The weaponisation of gas supply by Russia

Russia was the main supplier of fossil fuels for the EU. As a consequence of the EU's sanctions policy, coal imports were banned in August 2022, and oil imports in December 2022.[70]

The energy crisis took shape, first, as a price crisis after the pandemic, which was caused by increased demand for energy. In a second wave, after the Russian invasion of Ukraine, and because of the weaponisation of gas supplies by Russia, the crisis became a crisis of supply and in the high prices reached by gas.

In the context of the energy crisis, like in other crisis contexts, the core pillars of the energy policy of the EU were put under stress: indeed, the crisis threatened the pillars of the energy trilemma, energy security, environmental sustainability, and energy equity (or affordability).[71] Indeed, the crisis of prices created energy poverty and contributed to inflation. Furthermore, the

---

[69] K. Yafimava, *EU solidarity at a time of gas crisis even with a will the way still looks difficult*, The Oxford Institute for Energy Studies, Oxford, 2023, p. 3.

[70] For an overview of the measures, see the dedicated page of the European Commission.

[71] R. Fleming, *The Energy Trilemma*, in M.M. Roggenkamp, K.J. de Graaf, R.C. Fleming, *Energy law, climate change and the environment*, Cheltenham, 2021, pp. 31-40.

As recalled by the European Court of Auditors, the International Energy Agency defines energy security as "the uninterrupted availability of energy sources at an affordable price". Hence, relative price stability concurs with the parameter of affordability: this broadens the idea of security of supply. Source: European Court of Auditors, special report n. 9/2024: Security of the supply of gas in the EU.

energy crisis occurred when member states' economies were just recovering from the COVID-19 pandemic.

The invasion of Ukraine by Russia made clear that several EU Member States were in a vulnerable position in relation to Russia, being highly dependent on its energy supplies.[72] In the natural gas sector, the situation was particularly complex, because of the infrastructural constraints that do not allow for a quick and smooth diversification process.[73]

For this reason, it is not surprising that the EU did not target Russian gas exports in its sanctions.[74]

The invasion of Crimea by Russia in 2014 did not trigger a policy change. After that, Germany, Italy, and France continued to deepen their energy dependency on Moscow.[75] However, with the invasion of Ukraine, policymakers agreed that a radical policy shift was needed. In the summer of 2022, Russia was cutting its gas supply as a retaliatory move against EU sanctions. In addition, several incidents occurred to pipelines such as Nord Stream, further threatening gas supplies from Russia.[76]

Overall, like with other crises, the energy crisis would have caused asymmetric consequences across EU Member States.[77] This was going to threaten the European market, and the lack of coordinated response from the EU would have increased the risk of uncoordinated responses from Member states, potentially endangering neighbouring states and, more generally, the internal market, similarly to what happened in the immediate aftermath of the COVID-19 outbreak in EU states.[78]

Therefore, the Commission raised support for the enactment of a policy shift, which materialised as a new policy: *REPowerEU*.

In addition to the EU-coordinated response, Member States adopted parallel individual measures that increased the complexity of the situation: for example, it should be stressed that the EU did not ban Russian gas imports.[79]

---

[72] Russia represented 45 % of all EU gas imports in the last year before Russia's invasion of Ukraine (2021). Source: European Court of Auditors special, special report n. 9/2024: "Security of the supply of gas in the EU".

[73] A. Prontera, *Winter is coming: Russian gas, Italy and the post-war European politics of energy security,* in *West European Politics*, 2023, pp. 382-407.

[74] B. McWilliams, G. Sgaravatti, S. Tagliapietra, G. Zachmann, *The EU can manage without Russian liquified natural gas*, Bruegel Policy Brief, 2023.

[75] A. Prontera, *op. cit.*, p. 47.

[76] M. Fulwood, J. Sharples, J. Stern, K. Yafimava, *The curious incident of the Nord Stream gas turbine*, Oxford Institute for Energy Studies, Oxford, 2022.

[77] Fondation Robert Schuman, Interview with N. Berghmans, *The energy crisis shows the importance of European solidarity in the face of asymmetric shocks*, European interview n° 116 12th July 2022, available online.

[78] On this phase, see L. Marin, *op. cit.*, pp. 51-75.

[79] B. McWilliams, G. Sgaravatti, S. Tagliapietra, G. Zachmann, *The European Union-Russia energy divorce: state of play*, Bruegel, 22 February 2024.

3.2. The intertwinement of climate and energy crises and the interplay between the different EU policies

The energy crisis, which intensified after the invasion of Ukraine by Russia and the events that followed as a reaction to the EU sanctions, intersected with a more structural climate change crisis, caused by humanity: this is the most dramatic aspect of the poly-crisis affecting humanity, in the words of philosopher Morin.[80] While a complete examination of the crises induced by global warming and affecting *e.g.* climate and biodiversity would go beyond the scope of the section, it is nevertheless necessary to lay out the core tenets of the connections between the more recent energy crisis and the more structural crisis affecting the planet.

In simple terms, the energy crisis is, first of all, a fossil fuels supply crisis. This creates, in the short term, the need to find alternatives; in the longer run, it requires an acceleration of the transition toward more sustainable energy production. The transition toward more sustainable energy production and decarbonisation responds to the goals of mitigating the effects of climate change.

In this respect, the energy policy shift designed in 2022 needs to be contextualised within the EU climate change mitigation policy designed by the Green Deal.[81] Furthermore, after the Green Deal, the EU has also adopted the EU Climate Law, which translates the policy goals and plans of the Green Deal into legal obligations.[82]

---

[80] E. Morin, A.B. Kern, *Homeland Earth: A Manifesto for the New Millennium*, New York, 1999.

[81] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions, of 11 December 2019, *The European Green Deal*, COM(2019)640 (hereinafter: *European Green Deal*).

[82] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021, establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law"), OJ L 243, 9.7.2021, p. 1-17. The current analysis cannot be considered exhaustive. Relevant legislation includes the Effort Sharing Regulation (ESR), the LULUFT and the Emission Trading System (ETS) Regulation. See Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, p. 26–42; Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, (OJ L 156 19.6.2018, p. 1); Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46. These instruments have been further amended by: Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, OJ L 111, 26.4.2023, p. 1–14; Regulation (EU) 2023/839 of the European Parliament and

In particular, the EU Climate Law defines the obligation to reach climate neutrality by 2050, and, by 2030, the target of a 55% reduction of GHG emissions, compared to the 1990 levels.[83] The articulation of an environmental policy geared toward the mitigation of the effects of climate change is also an expression of the international climate change regime, which is binding on the EU. This consists primarily of the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement.[84] These obligations constrain and guide the EU action in this domain, though they currently do not qualify as *jus cogens*.[85]

These considerations demonstrate how the measures to be deployed to mitigate the effects of the energy crisis must also be considered against the background of the existing legal framework enacted to mitigate the effects of the more structural environmental crisis, the effects of the global warming.[86]

Though a fully-fledged examination of EU competence in the context of the environment would fall out of the scope of this work, some aspects must be underlined. First, Article 191 TFEU endorses the EU with the competence to mitigate the effects of the climate crisis. Second, the EU is enacting an EU environmental policy that the Member States shall finance and implement. However, the EU can provide financial support from the EU Cohesion Fund, as per Article 192(5) TFEU.

Furthermore, the supranational competence of the EU in environmental policy is mitigated by the recognition of the sensitiveness of national interests involved: indeed, the ordinary legislative procedure is derogated from with a special legislative procedure applying when the Council is deciding on "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply", as per Art. 192(2) letter c) TFEU. As recalled above, the Treaty of Lisbon further embeds this specificity of the national energy mixes into a fully-fledged national sovereignty reserve in Article 194(2) TFEU, albeit the scope of this is limited by the enactment of legislation affecting domestic competences.

---

of the Council of 19 April 2023 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review, OJ L 107, 21.4.2023, p. 1–28.

[83] Regulation (EU) 2021/1119 ("European Climate Law").

[84] For reference, see Public International Law and Climate Change from the Law and Climate Atlas, Centre for Climate Engagement, available online.

[85] See O. Quirico, *Towards a Peremptory Duty to Curb Greenhouse Gas Emissions?*, in *Fordham International Law Journal*, 2021. See also M. Brus, A. De Hoog, P. Merkouris, *The Normative Status of Climate Change Obligations under International Law, Yesterday's good enough has become today's unacceptable*, Study requested by the JURI Committee, PE 749.395, June 2023.

[86] Edgar Morin, Anne Brigitte Kern first used the term polycrisis in their 1999 book, Homeland Earth. See E. Morin, A.B. Kern, *Homeland Earth*, *op. cit.*.

As the energy and the climate crises are intertwined, so are the policies and the measures enacted to mitigate these crises. The crucial question is to what extent the sovereignty reserve on national energy mixes, which entails a limitation to the EU's competence in energy, will be an obstacle to the achievement of the objectives of decarbonisation and energetic transition, as required by the climate crisis?[87] From another perspective, to what extent can the mitigation of the climate crisis become a vector for further Europeanisation of competences? The delimitation of the EU's competence can give states grounds to question the boundaries of the EU's powers.

The EU's competence in environmental policy also covers measures to mitigate the effects of climate change, and the need for a quick transition toward other sources of energy intersects with a more structural climate change crisis. This more structural crisis implies, at the end of the day, the need to create a shift toward more sustainable energy production, *i.e.*, decarbonisation policies, that require important investments.

4. The EU's response to the energy crisis: REPowerEU as the strategic rethinking of EU energy policy

In the current and next section, the analysis will focus on the measures taken to counter the effects of the energy crisis. The aim is, first, to present the measures adopted, whether policy documents or binding instruments, and, secondly, to analyse solidarity provisions, *i.e.*, those provisions that specifically implement the principle of solidarity. The scope of this research is to discuss how the principle of solidarity is translated into legal provisions.

A first remark to be made concerns the semantic complexity of the word solidarity, which is, *e.g.*, employed to indicate solidarity arrangements between states, but also as a solidarity contribution: in the latter case, it conceals a tax.

Paramount attention will be given to the idea of inter-state solidarity, though other forms of solidarity will also be considered, such as Union solidarity, when analysing the personal scope of the application of the principle. As to the material scope of the principle, what will be assessed is whether the principle has been translated into a specific measure embedding an idea of corrective solidarity, *i.e.*, solidarity to amend the side-effects of integration of fragmented markets, or redistributive solidarity, *i.e.*, solidarity toward the most vulnerable households or companies. As to its nature, it will be assessed whether we have a type of solidarity we can define as structural or preventive or rather an emergence-related solidarity.

---

[87] L. Hancher, A. de Hauteclocque, *Strategic Autonomy, REPowerEU and the Internal Energy Market: Untying The Gordian Knot*, in *Common Market Law Review*, 2024, pp. 55-92.

For this reason, the analysis will consider measures adopted on the basis of Article 194 and Article 122 TFEU, because the most recent crises have shown an increased reliance on Article 122 as a legal basis. Against this background, this section will assess the initiatives taken by the institutions in the aftermath of the crisis, in an attempt to mitigate the consequences of this crisis.

4.1. REPowerEU, between energy transition and solidarity

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 often comes into play as a guiding principle.

REPowerEU is the strategic masterplan designing the EU's response to the energy crisis, both in its internal and external dimensions.[88] The crucial aim of the Plan is to rapidly reduce, and eventually end, the EU's dependence on Russian fossil fuel imports, particularly natural gas, "by fast forwarding the clean transition and joining forces to achieve a more resilient energy system and a true Energy Union".[89] As such, it builds upon the EU Green Deal,[90] and works as a policy accelerator.

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; "smartly [combining] investments and reforms".[91] The Plan 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.[92] For these reasons, *REPowerEU* is certainly a step in the direction of strengthening the strategic autonomy of the EU in the context of energy.[93]

---

[88] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions, of 18 May 2022, *REPowerEU* Plan, COM(2022)230 final (hereafter: *REPowerEU* Plan). This Plan has been preceded by a Joint European Action for more affordable, secure and sustainable energy, presented on 8 March 2022, as COM(2022)108 final.

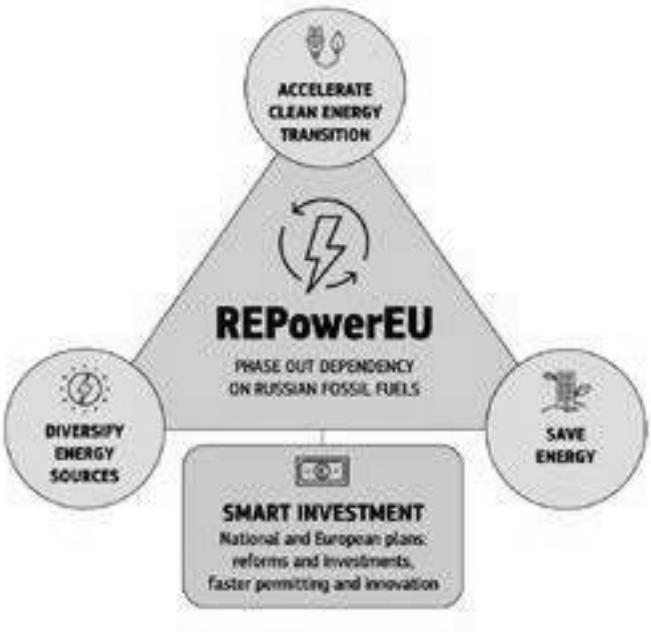
[89] *REPowerEU* Plan, Introduction.

[90] See COM(2019)640 final, *European Green Deal*.

[91] *REPowerEU* Plan, Introduction.

[92] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU external energy engagement in a changing world, JOIN/2022/23 final.

[93] L. Marin, M. Münchmeyer, *Recover and repower? REPowerEU, between crisis management, strategic autonomy, and constitutional constraints*, in *Diritti Comparati*, online, 2023.



Source: *REPowerEU*, 2022, p. 1.

Solidarity is a core principle of *REPowerEU*. It features prominently in the Plan, as a principle governing the response to the climate crisis, with which the energy crisis intersects, and also investments and preparedness. First, together with fairness, it is a core principle of the EU Green Deal. These principles should govern the transition toward cleaner energy, reinforcing "the need for effective employment, skills and social policies, in line with the European Pillar of Social Rights", since there is a need to accompany the economic transition with social measures.[94]

The association between fairness and solidarity certainly reflects a corrective dimension of solidarity, in the sense of a principle that aims at leveling the asymmetries and unbalances created by policies that can affect states in different manners; however, it also reflects a redistributive dimension of solidarity, since it aims to address the most vulnerable communities affected by this change. The starting point, like in many other legal domains, is that the energy crisis will display asymmetric consequences across states.[95] For this structural reason, and also because EU energy policy operates in a context

[94] *REPowerEU* Plan, p. 2: "Fairness and solidarity are defining principles of the European Green Deal. Our joint action to accelerate the clean energy transition therefore reinforces the need for effective employment, skills and social policies, in line with the European Pillar of Social Rights".

[95] *REPowerEU* Plan, p. 2: "Dependence amongst Member States on Russian energy sources differs as the energy situation and energy mixes differ from one country to the other".

of persistent fragmentation - solidarity and fairness are needed to act as the binder that supports states in reaching their goals, and mitigates the consequences of the transition.

Second, the Plan sets the objective of increasing investments to support the transition.[96] Since *REPowerEU* requires a fast transition to meet the targets of a reduction of GHG emissions, decarbonisation, and climate neutrality by 2050, as well as increasing renewables and energy efficiency, solidarity is also needed because the transition toward cleaner energy requires investments. In this context, solidarity is understood to mean inter-state solidarity, functional to the security of supply.[97] This relates to the most traditional interpretation of the principle of energy solidarity.

The implementation of the Plan is supported by the Social Climate Fund, a dedicated fund fed by the second revision of the ETS Directive, approved in 2023.[98] This is an important contribution to social equity and energy equity or affordability since the implication of the energy transition might be critical for vulnerable households and companies.

In particular, the Social Climate Fund is a dedicated funding instrument, to help the most affected vulnerable groups, such as households in energy or transport poverty, and to ensure that they are directly supported during the green transition. The Fund can be used to sponsor structural measures and investments in energy efficiency and renovation of buildings, clean heating and cooling and integration of renewable energy, as well as zero- and low-emission mobility solutions. In addition, the Fund can be partly used for temporary direct income support.[99]

In addition, the Plan relies on solidarity while discussing the interconnection and infrastructure needs. It takes the crisis as a chance to boost the realisation of long- pending plans, "with a particular focus on cross-border

---

[96] *REPowerEU* Plan, p. 12.

[97] *REPowerEU* Plan, p. 12: "This is the time to implement many long pending projects, with a particular focus on cross-border connections to build an integrated energy market that secures supply in a spirit of solidarity".

[98] Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, OJ L 130, 16.5.2023, p. 1–51. For a commentary on the new Social Climate Fund see the contribution of L. Heinrich available on the portal of the Florence School of Regulation. On ETS2, see Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16.5.2023, p. 134–202.

[99] The Social Climate Fund supports Member States with dedicated funding to avoid the most vulnerable groups being negatively affected by the green transition. States can support structural measures and investments in energy efficiency and renovation of buildings, clean heating and cooling, and integration of renewable energy, as well as in zero- and low-emission mobility solutions. States can also use the funding on temporary direct income support. For more information, see the dedicated page on the Commission portal.

connections to build an integrated energy market that secures supply in a spirit of solidarity."

Furthermore, the Plan of May 2022 deals with solidarity and solidarity arrangements under the heading of preparedness.[100] In this context, the Plan provides that in case of a severe supply disruption, states must be ready with solidarity measures to grant the security of supply to one another. While several tools can mitigate the effects, for example, refilling storage levels, implementing the EU Save Energy Communication, or updating contingency plans, in the Plan the Commission invites Member States to "conclude the outstanding bilateral solidarity arrangements between neighbouring countries".[101] The Commission recalls that the legal framework provides that "in case of extreme crisis Member States can request their neighbouring Member States solidarity measures".[102] These provisions have been enacted in the Regulation on Security of Supply of 2017, the provisions of which articulate the right to solidarity. However, its functioning is conditional on the conclusion of agreements between Member States,[103] and states have long been reluctant to conclude these agreements.[104] Furthermore, this hesitancy has paved the way for the enactment by the Council of a solidarity scheme to be deployed as a default scheme in Council Regulation 2022/2576 (see infra, section 5).

Even though "Solidarity measures are meant as last resort in the event of an extreme gas shortage to ensure supply to households, district heating systems and basic social facilities in the affected country",[105] solidarity is here a principle that should govern actions in exceptional cases of severe energy disruption and enable solutions to be found where states support each other. This type of solidarity is an expression of emergency-driven solidarity according to the typology proposed by Morgese, which is also embedded in several treaty provisions, such as Article 222 TFEU.[106] Article 122 is also an expression of this logic. In the context of energy, it is further related to the very core idea of energy security.

Last, there is an additional recognition of the importance of 'European solidarity', as a general binder for all the actions of the Commission.[107]

---

[100] *REPowerEU* Plan, p. 19.

[101] *REPowerEU* Plan, p. 19.

[102] *REPowerEU* Plan, p. 19.

[103] 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 L 280, 28.10.2017, p. 1–56, Article 13.

[104] K. Yafimava, *EU solidarity at a time of gas crisis even with a will the way still looks difficult*, cit.

[105] *REPowerEU* Plan, p. 19.

[106] G. Morgese, *La solidarietà tra gli stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018; See also S. Villani, *The concept of solidarity within EU disaster response law: a legal assessment*, Bologna, 2021.

[107] *REPowerEU* Plan, p. 20, at conclusions: "The time to reduce Europe's strategic energy dependence is now. *REPowerEU* accelerates diversification and more renewable gases, frontloads energy savings and electrification with the potential to deliver as soon as possible the equivalent of the

Overall, there is a strong reliance on solidarity in the Plan; solidarity is interpreted as a principle fostering the transition and correcting the asymmetries generated by it, for instance in its social dimension, by thinking of solutions for most vulnerable consumers; secondly, it is associated with the security of supply, and governing inter-state relations, in the sense that solidarity arrangements between states are provided for in case of severe disruptions that could affect energy security.[108]

4.2. The integration of REPowerEU into the Recovery and Resilience Facility as another instance of integration through funding

Another aspect to be examined concerns the funding of *REPowerEU*, which offers another interesting instance of integration through funding and becomes, therefore, an expression of the politics of solidarity within the EU.

Indeed, with Regulation 2023/435, the EU attracted the funding of the *REPowerEU* Plan under the umbrella of the Recovery and Resilience Facility (RRF) instrument, one of the pillars of the Next Generation EU.[109] This represents the interlinking of the energy transition targets of *REPowerEU* with the broader economic relaunch plans of the post-pandemic recovery instrument NGEU. This also means that the governance innovations experimented with in NGEU have been extended to the governance of *REPowerEU*.

To fund *REPowerEU*, the EU has mobilised about €300 bn, of which €225 bn is loans and €72 bn is grants.[110]

Additional RRF grants will be funded by the auctioning of the Emission Trading System (ETS) allowances, currently held in the Market Stability Reserve, worth €20 bn.[111] The ETS is a key tool for reducing greenhouse gas emissions and is a cornerstone of the EU policy to combat climate change.

Alongside this, other sources feed the financing of *REPowerEU*.[112] Unspent resources from a line of subsidy under the Cohesion policy, the SAFE

---

fossil fuels Europe currently imports from Russia every year. It does this with coordinated planning, in the joint interest and with strong European solidarity."

[108] K. Huhta, L. Reins, *Solidarity in European Union law and its application in the energy sector,* in *International & Comparative Law Quarterly,* 2023, pp. 771-791.

[109] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, (OJ L 057 18.2.2021, p. 17); this act has been modified by 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 L 63, 28.2.2023, p. 1–27.

[110] *REPowerEU* Plan, Annex 1.

[111] Article 21a of Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023. Additional information is available on the Commission portal.

[112] Article 21b of Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023.

(Supporting Affordable Energy) funding, will be used to provide direct support to vulnerable families and small and medium-sized businesses (SMEs) to support climate equity objectives, one of the pillars of the energy trilemma. An additional €5.4 bn in funds will come from the Brexit Adjustments Reserve that member states will be able to voluntarily transfer to the RRF to finance *REPowerEU* measures, as reported in the Commission Factsheet on the funding of the *REPowerEU* plan.[113] Overall, these voluntary transfers from various EU budgetary tools under shared management are up to € 52.3 bn.[114]

The deadline for requesting RRF loans was 31 August 2023.

As one can understand from this overview, the biggest share of the funding comes from the RRF instrument, which is one of the pillars of the Next Generation EU. The RRF Regulation has been amended to accommodate the financing of the energy plan to end dependence on Russian gas and to support Member States' transition toward cleaner energy. This means that the framework designed with the RRF can also become a model for other policies.

Core provisions of the amended RRF Regulation are Article 4(1) and revised Article 21. The former provision fully integrates the climate mitigation and energy transition goals into the RRF system,[115] while the latter regulates RR plans. In particular, the revised RRF Regulation requires *REPower* chapters in the national RR Plans.[116]

This means that the funding of *REPowerEU* is attracted under the umbrella of the governance innovations of Next Generation EU and what they represent for the EU as a polity.

---

[113] European Commission, Press Release, 14 December 2022, Commission welcomes political agreement on REPowerEU under the Recovery and Resilience Facility; see also the information sheet available on the Commission portal.

[114] A. D'Alfonso, *Agreement on REPowerEU chapters in recovery and resilience plans*, EPRS–European Parliamentary Research Service PE 739.330, 2023.

[115] In the RRF Regulation, Article 4 sketches the General and specific objectives of the RRF:

"In line with the six pillars referred in Article 3 of this Regulation, the coherence and synergies they generate, and in the context of the COVID-19 crisis, the general objective of the Facility shall be to promote the Union's economic, social and territorial cohesion by improving the resilience, crisis preparedness, adjustment capacity and growth potential of the Member States, by mitigating the social and economic impact of that crisis, in particular on women, by contributing to the implementation of the European Pillar of Social Rights, by supporting the green transition, by contributing to the achievement of the Union's 2030 climate targets set out in point (11) of Article 2 of Regulation (EU) 2018/1999, by complying with the objective of EU climate neutrality by 2050 and of the digital transition, *and by increasing the resilience, security and sustainability of the Union's energy system through the necessary reduction in dependence on fossil fuels and diversification of energy supplies at Union level, including by means of an increase in the uptake of renewables, in energy efficiency and in energy storage capacity*, thereby contributing to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the Union, fostering high quality employment creation, and contributing to the strategic autonomy of the Union alongside an open economy and generating European added value."

[116] Article 21c of Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023.

The RRF is part of a complex legal construction, which has been devised as a solution for the creation of an innovative plan to support states in their effort to get out of the asymmetric crises caused by the pandemic. From this perspective, the fact that a core part of the funding of the Plan is coming through the RRF means that the energy transition in the EU is somehow coupled with the economic coordination policy of the EU, which therein appears to become a super-competence of the EU. This develops it beyond the black-letter of the Treaties, as argued recently by Chamon.[117] Indirectly, this is an example of the growing bubble of the integration-through-funding approach pursued by the EU through recent crises, which deserves scrutiny for its implications for the constitutional setting of the EU.

In particular, the 'method' designed with Next Generation EU implies a new system of close coordination between national and European institutions.[118] The system designed with the EU RRF and the domestic Recovery and Resilience plans can be called a maxi 'euro-national proceeding', carving out the governmental function of steering the domestic political agendas toward the targets defined in recommendations of the European Semester and of the Stability and Growth Pact, "giving further teeth to those recommendations", as observed by Chamon.[119] Overall, this contributes to the growth of the 'integration-through-funding bubble', which calls into question respect for the current constitutional setting, especially because it seems to put the principle of conferral under stress.[120]

From another perspective, it has also been questioned whether reliance on this line of funding, which is administered by member states, might jeopardise the effective attainment of the strategic objectives of the *REPowerEU* Plan, also in relation to the different timeframes of the Plan and of the RRF, as put forward by the European Court of Auditors.[121]

If they do not heal the fractures of the European metabolic constitution, since national RRF plans are expressions of the national governments, the *REPower* chapters of the NRRF plans are certainly contributing to enhancing

---

[117] M. Chamon, *The rise of Article 122 TFEU: On Crisis Measures and the Paradigm Change*, in *Verfassungsblog*, 2023.

[118] N. Lupo, *Il Piano Nazionale di Ripresa e Resilienza (PNRR) e alcune prospettive di ricerca per i costituzionalisti*, in *www.federalismi.it*, 2022(1), pp. 4-13; C. Fasone, N. Lupo, *Learning from the Euro-crisis. A new method of government for the EU economic policy coordination after the pandemic?*, in *STALS Research Paper (4)2023*, 2023.

[119] M. Chamon, *The rise of Article 122 TFEU: On Crisis Measures and the Paradigm Change*, op. cit.

[120] B. de Witte, *Integration through Funding? The Union's Finances as Policy Instrument*, in R. Weber, (ed.), *The Financial Constitution of European Integration: Follow the Money?*, London, 2023, pp. 221-236; M. Dougan, *EU Competences In An Age of Complexity And Crisis: Challenges And Tensions In the System of Attributed Powers*, in *Common Market Law Review*, 2024, pp. 93-138.

[121] European Court of Auditors, Opinion nr. 04/2022.

the effectiveness of the European response to the energy crisis. One could find in this aspect an indicator of the persistent fragmentation embedded in the European energy market.

Certainly, the solution concerning the funding of the Plan is also a success, and it consolidates the development of the 'integration-though-funding' approach. With the *REPowerEU* Plan the EU has engaged in a clean energy transition while it secures its energy supplies from more reliable international partners. However, from another perspective, the EU's energy constitution is inherently constrained in its ability to develop a fully-fledged strategic autonomy given its need to respect the prerogatives of the Member States.

5. Emergency measures for the energy crisis, between energy security and market intervention

Next to this ambitious policy instrument aiming to contrast the consequences of the energy and climate crises, the EU adopted several binding emergency measures to mitigate the effects of the crisis. First, we have Regulation No. 2022/1032 on gas storage, which provided for gas storage minimums and provisions on storage infrastructures: strictly speaking, this is not an emergency measure and it was adopted through the expedited legislative procedure.[122] Then we have Council Regulation No. 2022/1369 on coordinated demand-reduction measures, which has been modified by 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,[123] and Council Regulation No. 2022/1854, adopted in October 2022, which was an emergency intervention to address high energy prices in the EU.[124]

These regulations were completed by another set of instruments, adopted in December 2022, such as Council Regulation No. 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks, and exchanges of gas across borders;[125] Council Regulation No. 2022/2577 laying

---

[122] 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 L 173, 30.6.2022, p. 17–33.

[123] Council Regulation (EU) 2022/1369, of 5 August 2022, on coordinated demand-reduction measures for gas, OJ L 206, 8.8.2022, p. 1–10; 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 L 93, 31.3.2023, p. 1–6.

[124] Council Regulation (EU) 2022/1854, of 6 October 2022, on an emergency intervention to address high energy prices, OJ L 261I, 7.10.2022, p. 1–21.

[125] 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,

down a framework to accelerate the deployment of renewable energy;[126] and Council Regulation No. 2022/2578 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices.[127]

All the measures have Article 122(1) TFEU as the legal basis, except Regulation No. 2022/1032 on gas storage, based on Art. 194(2) TFEU.

A first preliminary observation concerns the increased reliance on Article 122 TFEU as a legal basis, which is a treaty provision belonging to the chapter on economic policy.[128]

Article 122(1) TFEU enables the adoption of general economic policy measures, done in the spirit of solidarity between Member States "if severe difficulties arise in the supply of certain products, notably in the area of energy", as recalled above in section 2. The Council is the sole legislator in this special non-legislative procedure, deciding by qualified majority on a proposal of the Commission: the European Parliament is not involved at all. This means that solidarity measures enacted here are temporary and led by emergencies. We can therefore argue that this form of solidarity is emergency confined. Yet, the interesting question to assess is whether these measures do display long-term consequences.[129]

While the focus of this analysis will remain on EU measures, it must be preliminarily recalled that states have introduced autonomous initiatives concerning their domestic crisis mitigation instruments.[130] Furthermore, at the domestic level, states could not invest comparable amounts of money.

The case of Germany is emblematic of the weakness of the EU's competence in energy. Germany has designed a defence shield,[131] which has been described as a coordinated policy response to the energy crisis, based on a model of

---

OJ L 335, 29.12.2022, p. 1–35. This act has been modified by Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application, OJ L, 2023/2919, 29.12.2023.

[126] Council Regulation (EU) 2022/2577, of 22 December 2022, laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29.12.2022, p. 36–44. This instrument has been amended by Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, OJ L, 2024/223, 10.1.2024.

[127] 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 L 335, 29.12.2022, p. 45–60. This act has been modified by Council Regulation (EU) 2023/2920 of 21 December 2023 amending Regulation (EU) 2022/2578 as regards the prolongation of its period of application, OJ L, 2023/2920, 29.12.2023.

[128] See *supra*, Chapter 2 and *infra*, Chapter 4.

[129] CJEU, Judgment of the Court of 24 October 1973, Case 5-73, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*, ECLI:EU:C:1973:109.

[130] For an overview of these measures, see G. Sgaravatti, S. Tagliapietra, C. Trasi, G. Zachmann, *National policies to shield consumers from rising energy prices*, Bruegel Datasets, 2021.

[131] S. Amelang, J. wettengel, *Germany agrees 200-billion euro 'defence shield' against soaring energy prices*, available at Clean Energy Wire, 29.9.2022.

competitive corporatism.[132] The significant amount of resources invested (€200 billion), and also the overall objective of protection of the export-led growth model, have led to criticism by other states, and also by EU institutions.[133] This shows how a crisis, potentially symmetrical in its origin, but inherently asymmetrical due to the diversity of various affecting factors, such as fiscal capacities and domestic energy mixes, will create exponentially more asymmetrical consequences, because of the fragmented nature of the European energy market.

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.

5.1. Emergency measures intervening in price fundamentals: the Gas Storage Regulation amending the Security of Supply Regulation

One of the first measures adopted to react to the energy crisis is Regulation 2022/1032 on gas storage, amending Regulation 2017/1938 on security of gas supply (SoS Regulation) and Regulation 715/2009 on conditions for access to the natural gas transmission networks.[134] The latter regulation is part of the Third Energy Package.

This Regulation was enacted on the basis of Article 194(2) TFEU and it aims to provide for gas storage and enhance the security of supply. It requires all Member States with gas storage capacity to ensure that their underground is filled up to at least 80% capacity for winter 2022/2023 and to 90% from 2023. As such, it contributes by amending the Security of Supply (SoS) Regulation. As discussed above (section 2), the SoS Regulation is a crucial instrument of EU energy law, and it is the first instrument that implements the principle of energy solidarity in Art. 194 TFEU in secondary legislation.

This means that in the context of energy law, the principle of solidarity, enshrined in the treaties, has been codified and proceduralised in the SoS Regulation. The Gas Storage Regulation aims to secure the gas market, after the military aggression in Ukraine, and to protect the EU market from gas supply disruptions, reinforcing the security of gas supply.

---

[132] D. Di Carlo, A. Hassel, M. Höpner, *Germany's coordinated policy response to the energy crisis: shielding the export-led model at all costs*, Luiss LUHNIP Working Paper Series No. 1/2023, 2023.

[133] V. Malingre, *Germany's energy package sparks a wave of criticism in Europe*, Le Monde, 2022; J. Liboreiro, V. Genovese, *Germany faces scrutiny from EU peers over massive €200 billion aid scheme to cushion high gas bills*, EuroNews, 4.10.2022.

[134] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022, and two reports: European Commission, Report from the Commission to the European Parliament and the Council on certain aspects concerning gas storage based on Regulation (EU) 2017/1938 of the European Parliament and of the Council, COM(2023)182 final, and European Commission, Report from the Commission to the European Parliament and the Council on certain aspects concerning gas storage based on Regulation (EU) 2017/1938 of the European Parliament and of the Council, COM(2024)89 final. See also Regulation (EU) 2022/1032, cit.

Considering that the Russian aggression has made prices volatile, this measure is to be ascribed to a set of measures aimed at stabilising the fundamentals of the price determination, increasing gas storage, and contributing to the security of supply.

In this Regulation, provisions embedding solidarity can be found for example in the burden-sharing mechanism.[135] Member States without storage facilities on their territories should store gas volumes in neighbouring countries corresponding to at least 15% of their annual consumption. However, Member States have made limited use of coordinated instruments to fill gas storage, except for a memorandum of understanding between Italy and Greece, and another arrangement between Estonia and Latvia.[136]

The measure was successful in the sense that the filling target has been reached and overcome.[137] The Regulation has requested that states adopt measures to ensure that the filling trajectories and the filling targets are met.

In its first evaluation of the Regulation, the Commission assessed the effects on gas prices and gas savings, though the analysis is not rigorously counterfactual.[138] Interestingly, the Commission admits that the data available do not allow the establishment of clear conclusions on a potential link between storage targets and price developments. In contrast, the continued injection of storage reduced the risk of potentially lowering storage levels to a dangerous level, thus granting security of supply.[139] This assessment is confirmed in the second Report on the Gas Storage Regulation.

Overall, the interplay between gas demand reduction and gas storage provisions had contributed to driving down gas prices to pre-war levels in February 2023,[140] though based on available data the Commission could not conclude there was an autonomous correlation between Gas Storage obligations and gas prices.[141]

The novel element of the Regulation is the introduction of a common framework for gas storage measures, complementing market-based and regulatory measures, and provisions enabling member states to share storage

[135] As provided for in Article 6c of the Regulation. At this purpose we should distinguish between the default arrangement under Article 6c(1) and the optional burden-sharing mechanism under Article 6c(2).

[136] Report from the Commission to the European Parliament and the Council on certain aspects concerning gas storage based on Regulation (EU) 2017/1938 of the European Parliament and of the Council, COM(2023)182, p. 3. See also Report from the Commission to the European Parliament and the Council on certain aspects concerning gas storage based on Regulation (EU) 2017/1938 of the European Parliament and of the Council, COM(2024)89 final.

[137] COM(2024)89 final. Furthermore, several Member States have taken measures against Gazprom, to protect their energy security, as explained in COM(2023)182, pp. 6-7.

[138] COM(2023)182, p. 11.

[139] COM(2023)182, pp. 11-12.

[140] COM(2023)182, p. 12.

[141] COM(2023)182, p. 14.

resources.[142] In a nutshell, the Regulation creates a form of limited – up to 15% of storage obligations- solidarity concerning infrastructure, since adequate storage capacities can help mitigate the consequences of price volatility. Overall, it intervenes in the regulation of the gas market, providing for an obligation affecting one of the fundamentals of price determination, thus contributing to stabilising the market.

5.2. (following) Council Regulation 2022/1369 on coordinated gas demand-reduction measures: a mandatory demand reduction for all categories of consumers

This was the first emergency measure on energy adopted on the legal basis of Article 122(1) TFEU and is currently no longer in force.[143] In March 2024, states have agreed on a recommendation, *i.e.*, a non-binding instrument, aiming to voluntarily reduce their gas demand.[144]

With Regulation No. 2022/1369, the EU has adopted a procedure for coordinated demand-reduction measures for gas.[145] It aimed to stabilise the market and to avoid situations where the interruption of supply from Russia might have exposed the European market to excessive vulnerability. Therefore, reducing demand contributed to the filling of storage capacities, consequently ensuring adequate supply. This contributed to stabilise the market and to avoid energy price spikes.

The demand reduction measure was voluntary, and of 15% compared to the average gas consumption in the 5 years preceding the onset of the crisis. To address specific challenges of gas supply shortages, the Regulation provided for a new instrument, a Union alert, the activation of

---

[142] COM(2023)182, p. 14.

[143] Consolidated text: Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas amended by 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 L 93, 31.3.2023, p. 1–6. See also European Commission Proposal for a Council Regulation on coordinated demand reduction measures for gas, COM(2022)361 final, and also European Commission Proposal for a Council Recommendation on continuing coordinated demand-reduction measures for gas, COM(2024)101 final.

[144] Council Recommendation of 25 March 2024 on continuing coordinated demand-reduction measures for gas, OJ C, C/2024/2476, 27.3.2024. See also the Press Release available on the Council webpage.

[145] Art. 1 Council Regulation 2022/1369 as modified by Council Regulation (EU) 2023/706 of 30 March 2023 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation states: "whose aim is to "address situations of severe difficulties in gas supply, with a view to safeguarding Union security of gas supply, in a spirit of solidarity. These include coordination, monitoring and reporting on gas demand-reduction measures and the "possibility for the Council to declare (…) a Union alert as the Union-specific crisis level, triggering a mandatory Union-wide demand reduction obligation".

which was complex and required a situation of severe deterioration in the gas supply.[146]

In case of a Union alert, the gas demand reduction was mandatory and of 15%. The Regulation provided for guarantees as to the way to achieve the demand reduction, in the sense that the demand reduction had to respect some requirements: namely, not having distortive effects on competition; not endangering the security of supply of other Member States or the Union; and complying with the SoS Regulation (2017/1938) on protected consumers.

The Regulation provided for the governance of the instrument, by assigning the Commission a coordination and monitoring role, in particular in case an EU member state was not able to fulfill the mandatory demand-reduction obligation. In such a case, and if the state requested a solidarity measure as per Article 13 of the SoS Regulation, the Commission asked the state to submit a plan setting out a strategy to achieve a possible further gas demand reduction. After that, the Commission had to issue an opinion with comments and suggestions on the plan and had to inform the Council of its opinion. The member state was obliged to take due account of the Commission's opinion.[147]

In its report of March 2023, the Commission argued that the measure was necessary to stabilise the market.[148] For this reason, it proposed a prolongation of the measure of 12 months, to secure supply and to mitigate the consequences of the crisis for the market. Demand-reduction contributed to reducing price volatility. The Gas Coordination Group recognised the fundamental role of demand reduction to reduce pressure on a constrained market and to control gas price volatility.

In the analysis of the Commission, the application of the Regulation on gas demand reduction is embedded in solidarity. The Security of Gas Supply Regulation of 2017 is insufficient to address the disruption of a major gas supplier lasting for more than 30 days. Long-lasting disruptions could lead to a risk of uncoordinated action by Member States. A 'crisis situation' in one

[146] Art. 4 Council Regulation 2022/1369. The Union alert required an implementing decision of the Council, upon a proposal from the Commission. Its activation presupposed a situation of severe deterioration of the gas supply, or where five of more competent authorities had declared an alert at the national level, in conformity with the Security of Supply Regulation. Before the proposal, the Commission had to consult risk groups and the Gas Coordination Group (cf. Article 4 letter 5) of Regulation 2022/1369). The Gas Coordination Group is an expert group that advises the Commission to facilitate the coordination of security of supply measures in the event of a Union or regional emergency and is consulted by the Commission in the context of the establishment of the Preventive Action Plans and the Emergency Plans. Cf Art. 4 of 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.

[147] According to the procedure as per Article 8 of Regulation No. 2022/1369.

[148] European Commission, Report from the Commission to the Council: review on the functioning of Regulation (EU) 2022/1369 on coordinated gas demand reduction, COM(2023)173 final. A second report on the instrument is to be found in the document COM(2024)88 final.

Member State might cause a threat in neighbouring Member States and might endanger the functioning of the internal market. The asymmetrical exposure of states to these threats, because of their different energy mixes, does not mean the harm could not be generalised to all Member States.[149]

The report dated the 20th of March 2023: on the 30th of March the Council adopted Regulation (EU) 2023/706, extending its validity for 12 months.[150] The legal basis was again Article 122(1) TFEU.

These measures were not accepted without contestation: Council Regulation No. 2022/1369 on coordinated demand-reduction was challenged by Poland with an annulment action.[151] Poland contended that the measure affects domestic energy mixes and breached the principle of energy solidarity. More broadly, Poland challenged other measures aimed at reducing carbon emissions, but the current government announced its intention to discontinue those actions.[152] Clearly, for some states, energy should be kept a domestic competence, as much as possible.

For this assessment, it could be argued that the instrument embeds solidarity because a coordinated gas demand reduction comes into play to fill a gap of the SoS Regulation, as recognised by the Commission in its Report of March 2023.[153]

---

[149] COM(2023)173 final. See also Commission Staff Working Document, Analysis of coordinated demand reduction measures for gas Accompanying the document "Report from the Commission to the Council, review on the functioning of Regulation (EU) 2022/1369 on coordinated gas demand reduction, SWD(2023)63 final, 20.3.2023.

[150] 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 L 93, 31.3.2023, p. 1–6.

[151] Case C-675/22, Action brought on 2 November 2022, *Republic of Poland v Council of the European Union*, OJ C 7, 9.1.2023, p. 18.

[152] Poland has challenged several instruments alleging a violation of the principle of energy solidarity: C-505/23, Action brought on 8 August 2023 – Republic of Poland v European Parliament and Council of the European Union; C-442/23; Action brought on 14 July 2023, *Republic of Poland v European Parliament and Council of the European Union*, J C 304, 28.8.2023, p. 13–14; Case C-444/23: Action brought on 17 July 2023, *Republic of Poland v European Parliament and Council of the European Union*, OJ C 304, 28.8.2023, p. 15–16; C-445/23 R, Order of the Vice-President of the Court of 18 September 2023, *Republic of Poland v European Parliament and Council of the European Union* (case in progress); C-451/23, Action brought on 18 July 2023, *Republic of Poland v European Parliament and Council of the European Union*, OJ 2023 L 111, p. 1. Though the current government declared in February 2024 its intention to discontinue these legal challenges, according to the information available on the official CJEU portal, the cases are still pending.

[153] See Recital 26 of Regulation 2022/1369: "As the solidarity principle gives every Member State the right to be supported by neighboring Member States under certain circumstances, Member States who ask for such support should also act in a spirit of solidarity when it comes to reducing their domestic gas demand. Therefore, when requesting a solidarity measure under Article 13 of Regulation (EU) 2017/1938, Member States should have implemented all appropriate gas demand-reduction measures. The Commission should be able to request the Member State requesting a solidarity measure to submit a plan with measures to achieve possible further demand reductions. That Member State should take due account of the Commission's opinion." However, according to some energy scholars,

5.3. Emergency measures intervening in price determination: Regulation on an Emergency Intervention to address high energy prices in the EU

One of the most significant measures is Council Regulation No. 2022/1854, focused on an emergency intervention to address high energy prices in the EU (hereinafter: Energy Prices Regulation or EPR).[154] It has the aim of 'moderating' the market, in particular, introducing measures controlling price formation, and it provides for a reduction of the gross electricity consumption of each Member State by 10%; a temporary cap (€ 180 per megawatt hours) on market revenues obtained from the generation of electricity from certain sources (such as renewables, nuclear, lignite and crude oil), with a duty of reinvestment to the benefit of the final consumers (also known as revenue cap for infra-marginal producers); last but not least, it provides for a temporary solidarity contribution on the excess profits generated from activities in the crude petroleum, natural gas, coal and refinery sectors.[155]

These two instruments, the revenue cap (Article 6) and the solidarity contribution (Article 14) can both be interpreted as levies, and therefore, they were particularly controversial as to the choice of the legal basis, which is Art. 122(1) TFEU.

Starting from the solidarity contribution, this is a temporary levy on the profits of companies active in the crude petroleum, natural gas, coal, and refinery sectors.[156] The solidarity contribution, additional to regular taxes (Art. 16), is calculated on taxable profits which are above a 20 % increase in the average of the taxable profits over the last four years. This tax will be to the benefit of households and companies, mitigating the effects of high retail prices for electricity. In this respect, the use of the proceeds from the temporary solidarity contribution, provides that, among other destinations, "in a spirit of solidarity between Member States, Member States *may assign a share of the proceeds to the common financing of measures* to reduce the harmful effects of the energy crisis, including support for protecting employment", 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. The formulation of the provision indicates that states can voluntarily assign a share of the proceeds, but they are not obliged to do so.

---

the gas reduction leaves open much discretion to member states as to how to implement the demand reduction by 15%. According to Article 6(1) states are free to choose the appropriate measures to reduce demand, and this could represent a challenge. See K. Yafimava, *EU solidarity at a time of gas crisis even with a will the way still looks difficult*, cit., p. 19.

[154] Council Regulation (EU) 2022/1854, of 6 October 2022, on an emergency intervention to address high energy prices, OJ L 261I, 7.10.2022, p. 1–21. See also the Proposal for a Council Regulation on an emergency intervention to address high energy prices, 14 September 2022, COM(2022)473 final.

[155] Art. 1 EPR. For comments, see R. Fleming, M. Guérin, *op. cit.*; K. Huhta, L. Reins, *op. cit*.

[156] Articles 14-18 EPR.

This seems to be a translation of the fully–fledged energy solidarity of Art. 194(1) TFEU, as interpreted by the CJEU, in the sense that, along with 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 the Union renewable energy financing mechanism. Yet, the measure was adopted on the legal basis of Art. 122(1) TFEU.

Hancher observed that the Council Legal Service opined that measures adopted on the basis of Article 122(1) TFEU should be reactive and aimed to counter the effects of an emergency.[157] By contrast, a measure providing for funding to enact reforms seems to be an expression of a proactive – and not reactive- policy. One could argue that, though enacted to react to a crisis, it is the same crisis management cycle that also includes a preventive dimension, in the sense of risk management.[158]

Another core instrument of this Regulation is the revenue cap.[159] This is a mandatory cap on market revenues for infra-marginal producers. This Regulation does not establish the price of electricity on the market, but it provides for a cap on the market revenue to a maximum of 180 per MWh of electricity produced. Any surplus revenue above the cap will be restituted to the Member States. The cap applies to infra-marginal technologies and is temporary. This instrument too can be considered as a levy, since it entails that profits will be transferred to the state. The same concerns as to the choice of the legal basis are valid also for the revenue cap.

Interestingly, the differences existing among domestic markets on electricity are such that the application of the cap on revenues does not impact all Member States evenly, due to circumstances relating to their dependence on imports of electricity from other countries and their different energy mixes; it is therefore necessary for Member States with net imports of electricity equal to or higher than 100 to have access to agreements to share the surplus of these revenues with exporting Member States, in a spirit of solidarity (Article 11 Regulation No. 1854). For this reason, the Regulation provides for solidarity agreements which are encouraged to correct unbalanced trading relationships.[160] Yet, in its review of the EPR, the Commission did not report

---

[157] 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 *Verfassungsblog*, 2023; Council of the European Union, Opinion of the Legal Service on the proposals on Next Generation EU, No. 9062/20, Brussels, 24 June 2020.

[158] S. Villani, *Considerazioni sul principio di solidarietà energetica nel quadro giuridico dell'UE*, in *Federalismi,* www.federalismi.it, 2023, p. 144.

[159] Article 6 EPR.

[160] Article 11 - Agreements between Member States: «1. In situations where a Member State's net import dependence is equal or higher than 100 %, an agreement to share the surplus revenues adequately shall be concluded by 1 December 2022 between the importing Member State and the main exporting

any agreement concluded between Member States on the basis of Article 11 of the EPR. Therefore, we can – tentatively - conclude that no agreement has been signed,[161] as was the case for a long time with the solidarity agreements mandated by the SoS Regulation.

The Commission has reviewed the different measures of the Regulation and these have been quite unsuccessful.[162] Consequently, the Commission is not going to propose a prolongation of the 10% demand reduction measures, nor of the infra-marginal revenue cap. As to the latter, the Commission observed that the revenues collected were lower than expected. Secondly, the differences in implementation among Member States contributed to the limited success of the measure.[163] Overall, some of the measures adopted have failed in their objective of mitigating the asymmetric consequences of the crisis.

This measure has been challenged in court by private parties, through two annulment actions. The first one was brought by Electrawinds and challenged the revenue cap.[164] The second has been raised by EXXON MOBIL

Member State. All Member States may, in a spirit of solidarity, conclude such agreements which may also cover revenues coming from national crisis measures under Article 8, including electricity trading activities.

2. The Commission shall assist Member States throughout the negotiation process, as well as encourage and facilitate the exchange of best practices between Member States.»

Recital 38: «Given that by application of the cap on revenues not all Member States can support their final customers to the same extent due to circumstances relating to their dependence on imports of electricity from other countries, it is necessary for Member States with net imports of electricity equal or higher than 100% to have access to agreements to share the surplus revenues with the main exporting country in a spirit of solidarity. Such solidarity agreements are also encouraged, in particular, to reflect unbalanced trading relationships.»

See also the Commission proposal COM(2022)473 final, cit.:

«The very high energy prices currently faced by consumers generate exceedingly large financial gains not only for electricity generators with lower marginal costs, but also for companies in the oil, gas, coal and refinery sectors. These gains are primarily due to favorable external market factors caused by the Russian war and not by companies' own additional efforts or investments. These high energy prices create hardship for EU households and businesses, drive up inflation and necessary support measures raise public expenditure. Therefore, it is opportune to lower electricity demand across the EU to reduce the need for gas-fired electricity production and also redistribute some of the revenues garnered by companies in the different energy sectors, as a result of these exceptional circumstances, to alleviate difficulties for energy consumers and society in general. Such redistribution can be achieved by different instruments, depending on the circumstances of the sector, with the purpose of making these funds available to consumers or projects to strengthen the Union's energy autonomy including the possibility for Member States to channel parts of the contribution to Union funds in the spirit of solidarity or use them on the basis of agreements between Member States.»

[161] Report of the Commission COM(2022)302 final – the report does not mention such agreements at all.

[162] Report from the Commission to the European Parliament and the Council on the review of emergency interventions to address high energy prices in accordance with Council Regulation (EU) 2022/1854, COM(2023)302 final.

[163] *Ibidem*.

[164] Case T-759/22, Action brought on 2 December 2022, *Electrawinds Shabla South EAD v Council*, OJ C 71, 27.2.2023, p. 32–33.

and challenges the solidarity contribution, arguing inter alia that the measure was decided on the wrong legal basis.[165] The litigation is currently pending before the General Court. Though we know that the standards for the litigation of EU measures by private parties are very stringent, it can be questioned whether a solidarity contribution is a tax and whether it has been correctly the legal basis adopted has been correct has been correctly adopted through the procedure of Art. 122(1) TFEU, instead of Art. 113 TFEU.

Clearly, this Regulation indicates the extreme variety of measures adopted under the umbrella of solidarity in the context of Article 122(1) TFEU, which can be questioned given that this expands the powers of the Council against the prerogatives of other institutions.

5.4. The December package of measures: 1) Regulation Gas Purchases and Aggregate EU

With the analysis of the current instrument, we are going to assess a cluster of three regulations negotiated and adopted in parallel, in December 2022.

These are Council 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); Council Regulation No. 2022/2577 laying down a framework to accelerate the deployment of renewable energy, and Council Regulation No. 2022/2578 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices. All the measures have Article 122(1) TFEU as their legal basis. For these three measures, the Commission has proposed a 12-month prolongation of their validity.[166]

The first Regulation provides for a demand aggregation mechanism, to overcome the traditional fragmentation of domestic energy markets.[167] It aims to 'negotiate better prices and reduce the risk of Member States outbidding each other on the global market'.[168] Furthermore, the Regulation also pro-

---

[165] Case T-802/22, Action brought on 28 December 2022, *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council*, OJ C 54, 13.2.2023, p. 23–24.

[166] See the press release available on the Commission portal.

[167] 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 L 335, 29.12.2022, p. 1–35. European Commission, Proposal for a Council Regulation Enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks, COM(2022)549 final; European Commission, Report from the Commission to the Council on the main findings of the review of Council Regulation (EU) 2022/2576 of 19 December 2022, in view of the general situation of the gas supply to the Union, COM(2023)547 final. The validity of this regulation has been extended with Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application, OJ L, 2023/2919, 29.12.2023.

[168] A. Barnes, *EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment*, Oxford Institute for Energy Studies, Oxford, 2022.

vides 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.[169] These three instruments will be analysed in detail.

The Regulation is the most inspired to solidarity: interestingly, the principle is referred to, from the Preamble, with different meanings. Beyond the traditional 'spirit of solidarity between Member States', we find Union solidarity,[170] energy solidarity as a separate principle,[171] and emergency solidarity,[172] just to name the different conceptualisations we find in the Preamble.[173]

A. Solidarity to better coordinate gas purchases: AggregateEU as the mirage of the EU's strategic autonomy

One of the novelties of this Regulation is the mechanism of coordination of gas purchases which is presented as an expression of solidarity. Better coordination of gas purchases from external suppliers was considered crucial to lowering the EU's dependency on Russian natural gas and bringing prices down, and therefore functional to energy solidarity.

This is done in two steps: the demand aggregation, which is compulsory, and the joint purchasing scheme, which is voluntary.

The demand aggregation and joint purchasing scheme is made possible by a platform (operated by a private company) – AggregateEU - and it has been presented as the flagship initiative of the EU Energy Platform, including both EU states and Contracting Parties of the Energy Community.[174]

The Commission has facilitated the process with the creation of an *ad hoc* Steering Board, composed of representatives of each Member State

[169] Article 1 - Subject matter and scope: «1. This Regulation establishes temporary rules on:
(a) the expedited setting up of a service allowing for demand aggregation and joint gas purchasing by undertakings established in the Union; (b) secondary capacity booking and transparency platforms for LNG facilities and for gas storage facilities; and (c) congestion management in gas transmission networks. 2. This Regulation introduces temporary mechanisms to protect citizens and the economy against excessively high prices, by way of a temporary intra-day volatility management mechanism for excessive price movements and an ad hoc LNG benchmark, to be developed by the European Union Agency for the Cooperation of Energy Regulators (ACER). 3. This Regulation establishes temporary measures, for the case of a gas emergency, to distribute gas fairly across borders, to safeguard gas supplies for the most critical customers and to ensure the provision of cross-border solidarity measures.»

[170] Preamble, Recital 10.

[171] Preamble, Recital n. 14, 15 ff.

[172] Preamble, Recital n. 65 ff.

[173] Respectively, in the Preamble at Recital 10; 14 & 15; 65 ff.

[174] See the information available on the Commission portal.

and tasked with the facilitation of demand aggregation and joint purchasing. For example, it supports the Commission assessing the contracts and the Memoranda of Understanding notified by companies.

Participation in the Joint Purchasing Scheme, however, 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 ways to meet gas storage targets, thus supporting the attainment of the goals of the Gas Storage Regulation no. EU/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.[175] 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 proposal provides for joint purchases on a voluntary basis, in an effort to help smaller states and companies to access markets on better conditions.

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.[176]

The measure entered into force on 31 March 2023 with a validity of one year, then extended until the end of 2024: the Commission has depicted it initially as a success.[177] More recently, the volume of gas aggregated and matched has declined, perhaps also because of stabilising gas prices.

In 2024, the Commission proposed a new regulatory framework for the gas market, and demand aggregation and joint purchasing mechanism has been fully integrated into this new framework, as a voluntary measure.[178]

---

[175] As per Article 10 of Regulation 2022/2576.

[176] *REPowerEU* Plan, cit., p. 4-5.

[177] Information publicly available on the webpage of the European Commission concerning the EU Energy Platform. F. Luca, *Joint gas purchases, volumes down. Brussels gives up on fifth round of demand aggregation*, EuNews, 7.12.2023.

[178] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 (recast), OJ L, 2024/1789, 15.7.2024. Specifically, see Section 5, Article 42 and ff. The framework is completed by Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast), OJ L, 2024/1788, 15.7.2024. These instruments had a long gestation since they relate to proposals of the Commission of December 2021. See European Commission Proposal for a Directive

Overall, it is hard to give an objective assessment of the Joint Purchasing Scheme.[179] In two reports of 2023 and 2024, the Commission defined the instrument as successful, as the volumes aggregated during the first two rounds doubled mandatory demand aggregation. This means that market players have positively valued the joint purchasing mechanism: more precisely, they were keen to have such a mechanism operating on a voluntary basis.[180] The Commission has argued that the instrument has increased transparency of planned tenders and contracts for gas, because the Commission has a better view of upcoming tenders. However, the notifications of contracts have proved more sensitive because the pre-contractual stage is a very sensitive one for companies.[181]

The scheme was meant to contribute to stabilising the market and protect the most vulnerable actors. It was designed to benefit industries and smaller end users, enabling them to secure gas supplies at competitive prices by dealing directly with producers and exporters operating on the gas markets.

Overall, it is a platform to improve the match between demand and offer, providing market players with the tools they need to find and enter into contracts with new counterparts. While some states and market players are more cautious about the added value of the joint purchasing mechanism, the Commission argued it has contributed to strengthening the security of supply, and in some cases, it might have contributed to keeping prices down and controlled market volatility.[182]

This Regulation reflects an effort to mitigate the asymmetrical consequences of the energy crisis in a context of *integration with fragmentation*: as known, each Member State has the right to determine its own energy mix.[183] 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

---

of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and in hydrogen, COM(2021)803 final, and European Commission Proposal for a Regulation of the European Parliament and of the Council on the internal markets for renewable and natural gases and for hydrogen (recast), COM(2021)804 final.

[179] For an overview, see A. Barnes, *EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment*, *op. cit.*

[180] Report from the Commission to the Council on the main findings of the review of Council Regulation (EU) 2022/2576 of 19 December 2022, in view of the general situation of the gas supply to the Union, COM(2023)547 final. See also the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, State of the Energy Union Report 2024, COM(2024) 404 final.

[181] Report from the Commission to the Council on the main findings of the review of Council Regulation (EU) 2022/2576 of 19 December 2022, in view of the general situation of the gas supply to the Union, COM(2023)547 final.

[182] Report from the Commission to the Council on the main findings of the review of Council Regulation (EU) 2022/2576 of 19 December 2022, in view of the general situation of the gas supply to the Union, COM(2023)547 final.

[183] On states' energy rights, see K. Huhta, *op. cit.*; K. Haraldsdóttir, *op. cit*.

is here employed to correct the asymmetries embedded in the design of the European energy markets, being composed of several domestic markets.

Considering both measures together, we can argue that solidarity has been deployed to correct the persistent fragmentation of national energy markets and prevent this from endangering the security of supply for some states. European solidarity is therefore integrating the paradigm of fairness into the relations between states.

At another level, beyond the aggregation of demand and supply, the Regulation envisaged that Aggregate EU should encourage and facilitate the voluntary formation of purchasing consortia by grouping some of the companies participating in the demand aggregation process. This could benefit smaller companies from disadvantaged countries, as they could be aided in their access to LNG terminals. The formation of the EU Energy Platform Industry Advisory Group – with representatives from 27 energy companies - was instrumental in facilitating this process. However, because of the resistance displayed by some states and companies, and because of the legal complexities of this approach, especially in relation to EU competition rules, the consortia approach has been abandoned.[184]

The consortia could have become vectors for the consolidation of the EU's strategic autonomy in the context of the gas trade. However, the sensitivities embedded in this policy are still high and opinion is not in favour of the affirmation of a supranational integrated market in the context of energy. While a parallel between the Joint Purchasing Consortium and the Vaccine Purchasing Consortium has been established, critics have argued there is a lack of comparability between the two instruments. Overall, irrespective of the enthusiasm of the Commission, it is not possible to argue that the demand aggregation mechanism has been a vector of a significant policy reform.[185]

B. Measures to prevent excessive gas prices and excessive intra-day volatility in energy derivatives market

Furthermore, the Regulation provides for a temporary intra-day volatility management (IVM) mechanism to limit large price movements in energy-related derivatives contracts, in Chapter III.[186] This instrument enhances the protection of the single market by helping to avoid potential distortions to Europe's energy and financial markets.

---

[184] L. Hancher, A. de Hauteclocque, *op. cit.*, p. 68.

[185] A. Barnes, *EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment*, *op. cit.* pp. 19-21.

[186] See the information available on the Commission portal.

This instrument came into force on February the 15th 2023, and it was elaborated on in an implementing act adopted in March 2023, setting out the technical details regarding the application of the mechanism to derivatives linked to other virtual points in the EU.

Since the entry into force of these measures, prices have also decreased thanks to the combined effect of the Storage and of the Demand Reduction Regulations. So, to better assess these measures, the Commission asked for a report from ESMA in which it documented potential divergences in the implementation of the intra-day volatility mechanisms. ESMA recognised that, due to a "lack of protracted volatility during the period under scrutiny, it had a limited basis to provide an assessment of the effectiveness of the IVM in terms of potential positive or negative effects."[187]

In its assessment, the Commission has recognised that it is difficult to conclude with certainty, but that the IVM may help to limit dramatic price fluctuations and smoothen price patterns in highly volatile markets.[188] Overall, it may have an indirect market disciplinary effect.

C. The default solidarity mechanism applicable in cases without bilateral arrangements

Another important part of this Regulation concerns the default solidarity rules to be applied in case member states do not conclude bilateral solidarity agreements according to the Regulation on Security of Supply.

As recalled above, the Security of Supply Regulation of 2017 spelled out -in Article 13- the most articulated solidarity mechanism, applicable in case of a severe gas emergency, and governed by bilateral solidarity agreements between Member States. According to this mechanism, in case of emergency, a state has a right to solidarity from its neighbouring states. However, as explained above, states have been reluctant to draft solidarity agreements because of the sensitive nature of energy. With the arrival of the crisis, the Commission decided to put forward a mechanism meant to compensate for this lack of action and diligence by Member States.[189]

These provisions regulate a situation of severe gas supply shortage and do apply in the absence of bilateral agreements.[190] In addition, other provisions extend the solidarity obligation to critical gas volumes needed to ensure the adequacy of the electricity system, therefore preventing an electricity crisis.[191]

---

[187] COM(2023)547 final, p. 19.

[188] COM(2023)547 final, p. 17.

[189] Proposal for a Council Regulation Enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks, COM(2022)549, p. 6.

[190] Art. 27 and 28 of Regulation 2022/2576.

[191] Art. 23 – 26 of Regulation 2022/2576.

The rules are based on the principle of solidarity. When a state is facing a gas crisis, *i.e.*, is not able to cover the deficit in gas supply to its solidarity protected consumers or is not able to cover the essential volumes of gas consumption for the same category, or the critical volumes of electricity for security of supply, it can ask for support from other states and the Commission and the crisis managers will coordinate a response to face the crisis.

Member states obliged to provide solidarity are the ones connected to the requesting states and also those with LNG facilities with available capacity, since the default solidarity mechanism extends solidarity duties to them.

Solidarity is here the principle designing a mechanism of support between states to be provided for fair compensation. The maximum compensation is composed of the price of gas, storage and transportation costs, and litigation costs borne by the requested state. For the EU Member States providing solidarity an indirect cost not reflected in the price of gas is, for example, compensation for the curtailment of industry.

Overall, this solidarity compensation is to be interpreted as a joint and solidary or *in solido* obligation.[192] This has happened with a regulation adopted in 2024, the new framework for decarbonised gas and hydrogen (see *infra*, section 6.2).

Though these rules have not been tried in practice, the Commission has tested them in a so-called 'dry run exercise', which is a test based on a simulation between EU Member States' transmission system operators and the European Network of Transmission System Operators (ENT-SOG) for gas. This dry run exercise has shown several criticalities in the system. For example, the complexity of deciding what is fair compensation is a main barrier to requesting and providing solidarity, if not clarified in advance.[193]

In its Report of September 2023, the Commission advanced the idea that this provision be made permanent and replace the obligation of the Member States to sign bilateral agreements.[194] This would contribute to a substantial proceduralisation of the right/duty to solidarity and contribute to turning it into a fully-fledged obligation. This has happened with a regulation adopted in 2024, the new framework for decarbonised gas and hydrogen (see *infra*, section 6.2).

This Regulation also reflects the effort to mitigate the asymmetrical consequences of the energy crisis in a context of fragmentation. Solidarity is here employed to correct the asymmetries embedded in the design of the European energy markets, as composed of several domestic national markets.

---

[192] *Mutatis mutandis*, see G. Morgese, *La solidarietà tra gli stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018; S. Villani, *op. cit.*, p. 118 ff.

[193] Report from the Commission to the Council on the main findings of the review of Council Regulation (EU) 2022/2576 of 19 December 2022, in view of the general situation of the gas supply to the Union, COM(2023)547 final.

[194] Report COM(2023)547 final.

5.5. The December package of measures: 2) an emergency measure to cut red tape in the transition toward renewable energy?

Another Regulation adopted in the context of the measures to mitigate the energy crisis is Regulation 2022/2577, which lays down a framework to accelerate the deployment of renewable energy.[195]

This regulation provides for emergency temporary rules aimed at accelerating the permit-granting process, in the context of production of energy from renewable energy sources. More precisely, this Regulation targets specific renewable energy technologies, or projects capable of achieving a short-term acceleration in the deployment of renewables.[196]

This regulation is also emblematic of a crisis instrument aiming to streamline administrative procedures. Thought adopted in the context of the energy crisis measures, some of its novelties have been integrated into the renewable energy framework, adopted with the ordinary legislative procedure.[197]

5.6. The December package of measures: 3) the dynamic price cap and solidarity as market intervention

The last emergency measure adopted in the so-called December package is Regulation 2022/ 2578 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices.[198] This Regulation is one of the most important instruments adopted to mitigate the effects of the energy crisis and it is, as the IVM mechanism of Regulation 2022/2576, a measure of regulatory intervention in the market. The core novelty of this Regulation is the market correction mechanism (MCM), which is more commonly known as dynamic price cap. This measure has been advocated for by some states but opposed by others and initially by the Commission, which feared the consequences of interventionist measures for gas flows.

---

[195] Council Regulation (EU) 2022/2577, of 22 December 2022, laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29.12.2022, p. 36–44. The act has been amended by Council Regulation (EU) 2024/223 of 22 December 2023 amending Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy, OJ L 2024/223, 10.1.2024. See also European Commission proposal for a Council Regulation laying down a framework to accelerate the deployment of renewable energy, COM(2022) 591 final.

[196] Article 1 Regulation 2022/2577.

[197] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31.10.2023.

[198] 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 L 335, 29.12.2022, p. 45–60. This act has been modified by Council Regulation (EU) 2023/2920 of 21 December 2023 amending Regulation (EU) 2022/2578 as regards the prolongation of its period of application, OJ L 2023/2920, 29.12.2023. For a summary, see the dedicated page on the Commission portal.

The background of this measure is to be found in the relevance acquired by the TTF (Title Transfer Facility). The TTF is the main virtual market for the exchange of natural gas. With the seat in Amsterdam, the TTF is a virtual platform for gas trading in Europe, where gas producers and traders meet and make contracts. Though it is not the only gas index, over time it became the benchmark for natural gas in the European market. The gas price varies since it can be subject to fluctuations due to the supply–demand dynamic, price variations of alternative fossil fuels, but also geopolitical factors.[199]

Overall, the TTF performed well up to 2020 and the gas price was stable. With the lifting of the pandemic restrictions, and later on, with the weaponisation of gas supply by Russia, prices spiked and the functioning of the TTF has been questioned, because of the great price volatility and short-term price variability.[200] These variations paved the way for increased speculation, one of the factors determining price spikes. However, the current energy crisis is caused by a supply-demand imbalance mainly in relation to the Russian crisis.

For these reasons, given a tighter gas supply, one of the ways to contribute to controlling and stabilising the market is cutting gas demand, achieved with the Gas Demand Reduction Regulation 2022/1369, discussed above. Some of the emergency measures have indeed addressed the main fundamentals of price formation, such as demand and supply.

In addition to this, several states have asked for a price cap, a measure opposed by others, for its overall implications on the European market and also for its implications on the financial market, as highlighted by the European Central Bank.[201]

Eventually, states agreed a dynamic price cap, a cap to control gas spikes and to avoid supply crises. The instrument can be activated in case of spikes in gas prices, measured on the TTF, and used as a price reference for gas contracts. This dynamic price cap will apply as long as the prices remain high. This price cap is meant to be a mechanism of last resort to prevent episodes of excessively high prices, and not a regulatory intervention by the Commission on prices.

In a nutshell, the MCM is a regulatory tool designed to be activated when gas prices spike above the threshold of 180 €/MWh for three consecutive working days. It is not a regulatory intervention by the Commission on prices, an idea that has been heavily opposed because it is in contrast with the fundamentals of the EU market.[202]

---

[199] P.P. Raimondi, *Natural gas pricing mechanisms and the current crisis: drivers and trends*, in *AspeniaOnline*, 2022, online.

[200] P.P. Raimondi, *Natural gas pricing mechanisms and the current crisis: drivers and trends*, op. cit.

[201] K. Abnett, J. Lopatka, *EU states gear up for talks on gas price cap, but compromise elusive*, 9.9.2022, at *Reuters.com*.

[202] For an analysis of the shortcomings, see E. Ribakova, B. Hilgenstock, G.B. Wolff, *The oil price cap and embargo on Russia work imperfectly, and defects must be fixed*, Bruegel, 2023.

It sets itself as a form of market intervention, when the normal market functioning jeopardises (affordable) access to energy for some states. As stressed by the Commission, the gas price spikes "play a different role in various Member States, with price increases being more representative in some Member States (e.g. Central European Member States) than in other Member States (e.g. Member States at the periphery or with other supply possibilities)."[203]

Therefore, the MCM or dynamic price cap becomes a tool to mitigate the asymmetrical and detrimental effects of price instability for some countries.

"Indeed, while the financial risks and benefits are very different for various Member States, the MCM should constitute a solidary compromise, in which all Member States agree to contribute to the market correction and accept the same limits for the price formation, even though the level of malfunction of the price formation mechanism and the financial impacts of derivatives prices on the economy are different in some Member States. The MCM would therefore strengthen Union solidarity in avoiding excessively high gas prices, which are unsustainable even for short periods of time for many Member States. The MCM will help to ensure that gas supply undertakings from all Member States are able to purchase gas at reasonable prices in the spirit of solidarity."[204]

6. Between market and regulation: solidarity and the need to limit asymmetrical consequences of the energy crisis

6.1. Some reflections on the context of energy law

This section will evaluate solidarity as implemented in measures adopted to react to the crisis: these are the *REPowerEU* Plan and emergency crisis measures.

A first observation we can make is that the energy context is an interesting example of a weak Union competence, which is connected to several

[203] Recital 53 Regulation 2578 states that "The MCM is necessary and proportionate in achieving the objective of correcting excessively high gas prices at the TTF and derivatives linked to other VTPs. All Member States are concerned by the indirect effects of the price hikes, such as increasing energy prices and inflation. As regards the deficiencies in the price formation system, such deficiencies play a different role in various Member States, with price increases being more representative in some Member States (e.g. Central European Member States) than in other Member States (e.g. Member States at the periphery or with other supply possibilities). In order to avoid a fragmented action, which could divide the integrated Union gas market, common action is needed in a spirit of solidarity. This is also crucial in order to ensure the security of supply in the Union. Moreover, common safeguards, which may be more necessary in Member States without supply alternatives than in Member States with supply alternatives, should ensure a coordinated approach as an expression of energy solidarity."

[204] Recital 53, Regulation No. 2022/2578.

other policies, where states still have a considerable say, for example taxation. What does that mean?

It means that states and the EU can both provide answers to the energy crisis. This is significant as every state comes from a different starting point, including in terms of fiscal capacity: Germany, with its shield plan presented above (section 5), is a case in point. The fragmented nature of the European energy market, with states having different energy mixes, means that states may be hit by a crisis in different ways from each other. So, European solidarity intervenes in a context where different domestic economic circumstances, and more generally domestic fiscal policies, contribute to asymmetric effects and disparities. Furthermore, in the context of energy, the starting point is one of different energy mixes that are the result of natural, geographical, and geopolitical circumstances.

Another preliminary remark to be made is that solidarity is part of Article 122 TFEU, so invoking solidarity justifies, at least partially, resorting to the legal basis of Article 122 TFEU. This special decision-making procedure excludes the EP and departs from the ordinary paradigm of European democracy: therefore, the ingredient of inter-state solidarity must also be invoked as part of the justification for the choice of the special legal basis, shifting the leadership position completely to the Council who decide by qualified majority.

Furthermore, when we try and dig deeper into our research on the meaning of solidarity, other points can be developed: emergency measures adopted are a heterogenous group of initiatives, that aim to fundamentally intervene in supply and demand, and to control prices. Across this range of measures, there is a semantic promiscuity in the use of the concept of solidarity: the solidarity contribution of the EPR conceals a levy.

In terms of methodology, if we were to focus our assessment of solidarity exclusively on its implementation in crisis mitigation measures, we would derive a meaning of solidarity only from the interpretation given to it by the actors involved in this process, *i.e.*, the Commission and the Council. So, we try and contextualise as much as possible our assessment in its context of operation, *i.e.*, in its interaction with the existing legal framework.

6.2. The meaning of solidarity in energy law

In energy law, like in other EU competences, solidarity is a complex concept - certainly polymorphic - as it can be interpreted as inter-state solidarity and Union solidarity, to mention just two paradigmatic cases.

What does this mean and what can we say about the overall functioning of solidarity in the context of energy law?

First of all, the most salient meaning of solidarity relates to inter-state solidarity. Inter-state solidarity means that when a state is facing a crisis, other

states, mainly neighbouring states, have a duty to intervene to support the state in facing the crisis and grant it security of supply - unless this support becomes a threat to the security of the supply of the states called to help.

By contrast, Union solidarity relates to a procedural idea of solidarity, *i.e.*, solidarity that can be framed as an expression of loyal cooperation from institutions to states concerned with a crisis or a need situation. The substantive meaning of solidarity conveys the idea of receiving support with the gas supply in a situation of crisis.

In the context of the energy crisis, solidarity also means a form of regulatory intervention in the market to avoid some states paying higher prices than others. Integration creates interdependences and a persistent level of fragmentation within the EU requires regulatory intervention when prices indicate that the market is suffering or under stress.

However, the type and extent of regulatory intervention in the market is the object of political discussion.

First, the *REPowerEU* Plan and its integration into the instrument of the RRF mean the acceleration of the transition toward renewables and also the integration of these targets into the most significant economic recovery plan ever developed by the EU, where the funds are allocated through a logical expression of redistributive solidarity.

As to the emergency measures, the core significance of EU solidarity in the context of energy is one of market stabilisation, and the measures adopted by the EU concern both the fundamentals of price determination, *i.e.*, demand and supply, and the price itself: as is the case with the price dynamic cap and the IVM mechanism, which are last resort measures.

Some instruments have attempted to mitigate energy poverty situations, such as the solidarity contribution, provided for through the Energy Price Regulation. In my view it can be argued that there is a redistributive or distributive component of solidarity in the emergency measures adopted, as it can be argued that the legal framework of energy security provides for a distributive dimension: as is the case in the category of (solidarity-) protected consumers.

The very core of inter-state solidarity, when subject the initiative of Member States, *e.g.*, solidarity agreements, remains theoretical, *i.e.*,

> 'states do not take the initiative to implement EU law. The EU has tried to arrange these avenues of solidarity in its legislation, in several instances. For example, the right to solidarity in case of crisis, as codified in the SoS regulation, is one of the most detailed procedures implementing solidarity in the context of energy. However, its implementation was limited to solidarity agreements, which states were reluctant to conclude until 2018.

With the emergency measures, this right has been further expanded through the burden-sharing mechanism (GSR, Art. 6), interpreting solidarity

as a better exploitation of infrastructural capacity. Overall, solidarity is taking shape in several forms and manifestations, requiring states to take the initiative to implement it in bilateral or regional agreements. When states do not proactively implement solidarity, the EU has codified this duty in default solidarity provisions, through Regulation 2022/2576, Article 27, to create a framework granting energy security. The last package for decarbonised gas and hydrogen, adopted in 2024, amending the SoS Regulation, extends the scope of provisions on the gas market to include renewable and low-carbon gases in the natural gas grid.[205] This recent framework extends the default solidarity mechanisms to this domain, ensuring that EU countries will provide each other with 'solidarity gas' even in case of a severe emergency: by guaranteeing that a set of standard rules apply when EU countries have not signed bilateral agreements.[206] This represents a legacy of the energy crisis in the sense of a mandatory proceduralisation of solidarity into binding rules.

We do not have evidence of the functioning of these provisions. We should also stress that these provisions require that a state has met its obligations concerning gas storage, and in my view, this embeds an idea of solidarity related to a responsibility to implement domestically the safest conduct necessary so as not to jeopardise a state's own energy security. In a nutshell, in energy law, solidarity requires responsibility.

Other provisions arrange solidarity measures and transfers between states, but so far there is no data concerning their implementation.

In another dimension, perhaps concerning a vertical dimension of solidarity, some consider the Joint Purchase Mechanism to have the potential to develop the EU's strategic autonomy. Yet, the reality was more modest, and its implementation resulted in a platform increasing the transparency of the market.

To conclude, solidarity -as implemented in emergency instruments- certainly incorporates the paradigm of energy security, and with *REPowerEU* also energy sustainability and measures to mitigate energy poverty.

The relevance of this framework is further proved by the new framework for decarbonised gas and hydrogen, adopted in 2024, which amends the SoS Regulation, extending its scope to include renewable and low-carbon gases in the natural gas grid.[207] Furthermore, the revised framework extends the soli-

---

[205] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 (recast), OJ L 2024/1789, 15.7.2024.

[206] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, Article 84.

[207] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 (recast), OJ L 2024/1789, 15.7.2024.

darity mechanism, which ensures that EU countries will provide each other with 'solidarity gas' even in cases of severe emergency, by guaranteeing that a set of standard rules apply when EU countries have not signed bilateral agreements.[208] This consolidation demonstrates that solidarity is of paramount importance in the context of the energy market, and that given the strategic relevance of energy for national economies and national security, solidarity needs to be ensured through procedures established *ex ante* with binding rules.

[208] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, Article 84.

CHAPTER 4

CRISES, SOLIDARITY, AND THE ECONOMIC CONSTITUTION OF THE EU: BETWEEN TRANSFORMATIONS AND FLEXIBILITY

SUMMARY: 1. The challenges raised by emergencies and crisis law: shifting the barycentre of European integration?. – 1.1. The increasingly frequent resort to Article 122 TFEU as a legal basis and its legitimacy. – 1.2. Exceptional regulatory powers and their implications for the democratic principle. – 2. Solidarity and integration beyond crises: the thorny issue of a permanent fiscal capacity for the EU. – 2.1. The budget as an instrument of financial solidarity. – 2.2. EU crises, their legacy, and the politically thorny issue of a permanent fiscal capacity for the EU. – 2.3. Fiscal capacity as the necessary tool to compensate for the incompleteness and asymmetries of integration. – 2.4. The obstacles to the consolidation of the permanent fiscal capacity, between treaty reforms and constitutional transformations.

1. The challenges raised by emergencies and crisis law: shifting the barycentre of European integration?

This section aims to explore the correlation between solidarity and emergency powers, and in particular the implications of the increasingly frequent resort to emergency provisions when reacting to EU crises: specifically, the most recent crises have shown an increasing resort to Article 122 TFEU as a legal basis. While Article 122 merges a long-standing conjunctural emergency provision (Article 103 EEC then Article 100 TEC, now 122(1)TFEU) and a younger financial assistance provision (Article 122(2) TFEU), introduced with the Treaty of Maastricht as a counterweight to the no bail out clause (Article 125 TFEU), this provision had seldom been used until recently.[1] What are the implications of this choice for the institutional balance, and consequently, for European democracy? This section will explore this question.

---

[1] M. CHAMON, *The use of Article 122 TFEU: Institutional implications and impact on democratic accountability*, EP Study PE 753.307, 2023, at 14; L. HANCHER, A. DE HAUTECLOCQUE, *Strategic Autonomy, REPowerEU And The Internal Energy Market: Untying The Gordian Knot*, in *Common Market Law Review,* 2024, pp. 55-92. See also B. DE WITTE, *Guest Editorial: EU emergency law and its impact on the EU legal order*, in *Common Market Law Review*, 2022, pp. 3-18; B. DE WITTE, *The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift*, in *Common Market Law Review*, 2021, pp. 635-682.

1.1. The increasingly frequent resort to Article 122 TFEU as a legal basis and its legitimacy

It must be clarified at the outset that in Article 122 TFEU there are two discrete legal bases: the first is a general solidarity provision, and the second is a crisis provision which enables financial assistance to be granted under stricter conditions.[2]

Article 122(1) TFEU is a legal basis granting autonomous executive powers.[3] Within the limit of the boundaries given by the legal bases, institutions are free to adopt measures as they deem appropriate, enjoying an ample degree of discretion. While Article 122(1) is an exceptional legal basis but not an emergency clause, the second provision is undoubtedly a provision requiring a crisis.[4]

Article 122(1) TFEU gives ample room for intervention, as it provides that the Council can adopt 'any appropriate measure'; furthermore, given that it finds itself in the chapter on economic policy, the context suggests that every economic measure would fall within the scope of this provision.

The predecessor of Article 122(1) was regularly used in the seventies during the oil crisis and in the field of fisheries and agricultural policy. However, the completion of integration in those policies left Article 122(1) dormant for some years, until the introduction of a provision concerning financial assistance - now Article 122(2) TFEU: this provision was first used to establish the EFSM (discussed in chapter 2).[5]

Later on, during the refugee crisis, it was used to establish the Emergency Support Regulation adopted in 2016, allowing the Union to provide financial assistance to states affected by disasters.[6] The origin of this instrument was the political decision to support Greece in facing the economic consequences of the refugee crisis. Interestingly, during the pandemic, it was used to support the Healthcare Sector.[7]

---

[2] M. Chamon, *The use of Article 122 TFEU*, cit.; P. Dermine, A. Bobić, *Of Winners and Losers: A Commentary of the Bundesverfassungsgericht ORD Judgment of 6 December 2022: Cases 2 BvR 547/21 and 2 BvR 798/21, Own Resources Decision Judgment of 6 December 2022*, in *European Constitutional Law Review*, 2024, pp. 163-190.

[3] M. Chamon, *The use of Article 122 TFEU*, op. cit., at 9. As explained by Chamon, these are different from delegated acts and implementing acts and do not need to be associated to a legislative instrument, they are autonomous instruments: ivi, p. 12.

[4] M. Chamon, *The use of Article 122 TFEU*, op. cit.

[5] M. Chamon, *The use of Article 122 TFEU*, op. cit., p. 14; L. Hancher, A. De Hauteclocque, *Strategic Autonomy, REPowerEU and the Internal Energy Market*, op. cit. See also B. De Witte, *Guest Editorial*, op. cit.; B. De Witte, *The European Union's COVID-19 recovery plan*, op. cit.

[6] Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70, 16.3.2016 (Emergency Support Regulation), pp. 1-6.

[7] Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak,

While the circumstances in which it is appropriate to resort to Article 122(2) TFEU seem to be largely set out in the wording of the legal basis itself, the same does not apply to Article 122(1) TFEU, the boundaries of which are quite broad. Furthermore, so far few cases have discussed Article 122 TFEU as a legal basis: *Pringle* and *Anagnostakis*.[8] In its ORD Decision,[9] the German Constitutional Court (GCC) examined the role of Article 122 TFEU within the system of the treaties, while it was interrogated on Article 310 TFEU: interestingly, while it doubted the compatibility of the NGEU with Article 122 TFEU, the GCC - after *Weiss* - decided not to refer a preliminary question to the CJEU. This certainly represents a missed opportunity to interrogate the CJEU on the boundaries of Article 122(1) TFEU and 122 TFEU more generally.[10]

As for the CJEU, in *Pringle* it stated that Article 122(1) TFEU cannot be the legal basis for the adoption of a mechanism such as the ESM, because "Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems"[11] and also because that legal basis is Article 122(2) TFEU. The Court also stressed the differences between Article 122(2) TFEU and the ESM, namely that the ESM is between Member States and is permanent, whereas the financial assistance of the kind of Article 122(2) is from the Union and is temporary.[12] Another chance to interpret Article 122 TFEU reached the Court with the case *Anagnostakis*. Here the Court interpreted Article 122(1) TFEU as precluding financial assistance;[13] furthermore, it stated that Article 122(2) TFEU precludes measures which provide for permanent non-repayment of the debt based on necessity, because of the general and permanent nature inherent in the mechanism.[14]

Overall, the CJEU provided little guidance on the boundaries of Article 122(1) TFEU, which is a broad legal basis conferring ample discretionary powers on the Commission and Council, with the latter being the only decision-maker.

OJ L 117, 15.4.2020, pp. 3–8.

[8] CJEU, Judgment of the Court (Full Court) of 27 November 2012, case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756; View of Advocate Gen. Kokott, Case C-370/12, *Pringle v. Ireland*; ECLI:EU:C:2012:675; CJEU, Judgment of the Court (Grand Chamber) of 12 September 2017, case C-589/15 P, *Alexios Anagnostakis v European Commission*, ECLI:EU:C:2017:663.

[9] *BVerfG*, Judgment of the Second Senate of 6 December 2022, 2 BvR 547/21, paras. 1-47, available on the official portal of the *BVerfG*.

[10] P. Dermine, A. Bobić, *Of Winners and Losers*, op. cit.

[11] Judgment *Pringle*, para. 116, and concluded anyway for the compatibility of the ESM with the Treaties.

[12] Judgment *Pringle*, para. 118.

[13] Judgment *Anagnostakis*, paras. 69-70.

[14] Judgment *Anagnostakis*, para. 75.

It is currently disputed whether the measures adopted can only be temporary. An early interpretation of the CJEU in the seventies required measures to be temporary.[15] However, the different context and the current configuration of this provision as an ample legal basis for exceptional intervention in the context of economic policy might suggest that this early interpretation of CJEU should not be *ipso facto* transposed to the current provision.

Just to recall our analysis of the measures carried out in chapters 2 and 3, we must stress that on these legal bases the Council has adopted a broad variety of measures, including temporary instruments to control the fundamentals of the energy market, or to mitigate prices, but also measures to support states in their domestic policies of relaunching their economies after the pandemic, such as NGEU. In the context of energy measures, some cases are pending before the CJEU, including challenges by private parties.[16] However, the standing requirements are particularly strict, so it is not possible to say whether the CJEU will consider the merit of the boundaries of the legal basis.

Overall, this supports the idea that Article 122 TFEU constitutes a broad and flexible legal basis, conferring on the Council a power of intervention that is significant and exclusive.[17] For this reason, it is important to investigate the implications of this power for the democratic principle.

1.2. Exceptional regulatory powers and their implications for the democratic principle

This section will look at the implications of the increasing resort to Article 122 TFEU as a legal basis from the perspective of institutional balance and of the democratic principle.

In the context of crisis measures adopted under Article 122 TFEU, one complicating factor is embedded in the fact that several measures (SURE and NGEU) have been adopted on the double basis of Articles 122(1) and 122(2) together. However, while this complicates the assessment of the legality of the measures, and the assessment of the legality of the solutions adopted on these joint legal bases, it does not affect the discussion of the implications of resorting to the joint legal basis for institutional balance: indeed, one of the striking features of Article 122 is the exclusion of the role of the EP from the decision-making process.[18] Therefore, the first observation to be made is that

---

[15] Judgment of the Court of 24 October 1973, case 5-73, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof*.

[16] See *supra*, Chapter 3.

[17] M. Chamon, *The use of Article 122 TFEU*, op. cit.

[18] It must be stressed that Article 122(2) TFEU provides that the President of the Council shall inform the European Parliament of the decision taken. This is a duty of communication, ex-post, and does not entail participation in the decision-making process.

increasingly resorting to Article 122 TFEU undermines the role of the EP in the decision-making for measures within the sphere of economic policy, significant given the flexibility implied in Article 122(1) TFEU and the exceptional circumstances of Article 122(2) TFEU.

Second, since the Treaty of Nice, the unanimity rule has been replaced by a qualified majority. For this reason, the legal basis of Article 122 TFEU is particularly special. Firstly, it excludes the EP, the institution representing democratic legitimacy. Additionally, while entitling the Council to decide alone, it does not protect minority Member States, since it does not require unanimity.

This combination represents somehow an exception to the system of rules established by the Treaty and therefore urges the legislator to resort to Article 122 TFEU with caution. It also requires an explanation on the respect of the requirement of the 'without prejudice for another legal basis' of Article 122(1) TFEU.

For example, in the context of the energy crisis, Regulation No. 2022/1854 provided for a solidarity contribution and a revenue cap. Both measures can be considered as levies, so it is questionable whether they were adopted on the correct legal basis, or whether a more specific taxation legal basis ought to have been used.[19]

For the NGEU, with its complex construction involving three different instruments each adopted on a specific legal basis, the question is totally different. Yet, though the ORD decision was adopted with unanimity, and the RRF Regulation through the ordinary legislative procedure, it can be argued that the EURI Regulation is the foundation of the whole system. From this perspective, I think it is important to stress the need to justify resorting to this legal basis especially in relation to other legal bases, more respectful of the democratic principle.

Furthermore, from a different perspective, a more systemic reflection is required about emergency competences in EU law and their constitutional embedding. The growth of the European Union and the recurrence of crises should lead us to look again at emergency competences within the system of EU law. In particular, I argue that Article 122 TFEU should be reformed to integrate the EP into the decision-making process. The increased use of Article 122 TFEU as an emergency legal basis should prompt a broader reflection on the need to reform it. The EP could be involved during or after the approval of the measure. For this purpose, a parallel can be drawn between Article 122 TFEU and domestic provisions concerning executive regulatory powers, such as Article 77 of the Italian Constitution. This provides that, in special

[19] 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 *Verfassungsblog,* 2023, online; L. Hancher, A. de Hauteclocque, *Strategic Autonomy, REPowerEU And The Internal Energy Market*, op. cit.

circumstances, the Government can adopt decrees-law (*decreti-legge*), *i.e.*, decrees that exceptionally have the force of law.[20] What is interesting, is that the Parliament must validate ex post the action of the Government. This provision might be a blueprint for a revision of Article 122 TFEU, and provides one example entailing a form of participation of the EP.

Article 122 TFEU is a special legal basis, and it has a broad scope. For this reason, a role for the EP is worth consideration. Reasons concerning the speed of the decision-making process should not take precedence over the democratic quality of the decision-making. Furthermore, it has been demonstrated that the EP can work with simplified procedures, as happened during the COVID-19 pandemic.[21]

2. Solidarity and integration beyond crises: the thorny issue of a permanent fiscal capacity for the EU

2.1. The budget as an instrument of financial solidarity

As examined in the case studies (chapters 2 & 3), with NGEU the EU has enacted a broadly framed programme aiming for post-pandemic recovery together with a longer-term industrial transition plan. The integration of *REPowerEU* into the system of funding of the RRF has linked the EU's response to the energy crisis to the NGEU. This programme has been enabled by the EU budget, which has been used as a tool to create a programme of financial assistance within the Union and implement solidarity between states.

In a state, the budget is the tool a government can use to carry out its policies and also to face emergencies. For an international organisation, financing is normally dependent on state contributions. The recurrence of crises puts under stress the capacity of the EU to react to those crises, also because of the financial implications of the responses designed to mitigate the consequences of crises. Against this background, the EU budget and the financing of EU policies acquire a new relevance.[22]

Therefore, the question becomes:

How is the budget of the EU designed and what could be a functional construction for an EU budget, considering the nature and the scope of European integration today?

---

[20] For a reference, see the section documents of the Italian Constitutional Court page.

[21] S. Bendjaballah, V. Kreilinger, *COVID-19: The EU legislative process proves resilient and adaptable, but democracy has suffered*, SIEPS, European Policy Analysis, June 2021.

[22] C. Kilpatrick, *Explaining and Remedying the Near Absence of the Budget in EU Law Scholarship*, in *Common Market Law Review*, 2024, pp. 623-654.

Currently, the budget of the EU is oriented toward spending based on specific tasks. As outlined by Neumeier, this means that revenues must match the expenditures, and, consequently, the EU cannot run a deficit in its budget.[23] The EU is equipped with funds functional to the exercise of its policies, and within the framework of the multi-annual financial frameworks (MFF), it must respect yearly programming plans. In comparison to states, the EU is greatly constrained in the design of new policies, including crisis management plans. The same terminology used to indicate the means of the EU, *i.e.*, 'resources' or 'own resources', is also typical of EU law and does not equate to the taxes that domestic states can levy, just to offer another argument that stresses the difference between the budget of the EU and those of states.

This aspect of the finances of the EU affects its effectiveness and its reactivity as a governance system, in particular, once a crisis occurs. Yet, while scholarship has long focused on the constitutional dimension of the EU, its financing has been long overlooked.[24]

As recalled above (in Chapter 2 section 5.5.), one of the novelties of NGEU is the exceptional use of the EU budget as a vector to implement solidarity. This link between the EU budget and the principle of solidarity has also been recognised and confirmed by the CJEU in the cases concerning the validity of the Conditionality Regulation.[25] While several EU policies insist on the budget and do structurally represent instruments of solidarity, e.g., cohesion and agricultural policies, the size of the response given to the pandemic crisis and its meaning for economic solidarity is such as to give a new significance to the role of the budget as a solidarity instrument.[26] In particular, though NGEU is funded with an extraordinary increase in the EU budget, with a one-off operation, a broader question remains as to the role of the EU budget, and its future: how can it be reformed, be turned into an instrument functional and fit for the role of the EU as a governance system? How can the EU protect the legal goods created with European integration, and enhance its

---

[23] C. Neumeier, *Political own resources: Towards a legal framework*, in *Common Market Law Review*, 2023, pp. 319-344, at 321; G. Rossolillo, *From Own Resources to Fiscal Union*, in *The Federalist*, 2023, pp. 7-16; G. Rossolillo, *Risorse proprie, democrazia, e autonomia: il ruolo di istituzioni e Stati membri nella determinazione delle entrate dell'Unione europea*, in *Studi sull'Integrazione europea*, 2022, pp. 211-227. See also A. D'Alfonso *et al*., *Economic and Budgetary Outlook for the European Union 2023*, EPRS study PE 739.313, 2023.

[24] In similar terms, see C. Kilpatrick, *Explaining and Remedying the Near Absence of the Budget in EU Law Scholarship*, op. cit. One notable exception to the lack of attention on EU public finances is represented by C. Fasone, P. L. Lindseth, *Europe's fractured metabolic constitution: From the eurozone crisis to the coronavirus response*, 61 LUISS School of Government Working Paper, 2020, n. 61.

[25] CJEU, Judgment of the Court of 16 February 2022, joined cases C-156/21 and C-157/21, *Hungary and Poland v. Parliament and Council*.

[26] C. Cinnirella, *Financial Solidarity In EU Law: An Unruly Horse?*, in *Quaderno Aisdue - Serie Speciale*, 22 May 2023.

reaction capabilities, crisis after crisis? How can the EU budget become the tool to finance supranational policies, such as climate change mitigation and adaptation policies? These questions are legally relevant but also politically very sensitive.

In some states, this debate on the evolution of the EU budget is linked with fear of the EU transforming into a transfer union: *e.g.*, in Germany this is perceived as very problematic.[27] Yet, according to some economists, as a monetary union among diverse states, the EMU has operated as a transfer union since its start, and central states, *e.g.*, Germany and the Netherlands, have benefited most from the euro, while peripherical states have experienced "a higher real fiscal burden induced by the euro".[28] These questions are closely connected with the meaning of solidarity for the EU, as well as redistribution of wealth between states. At the same time, the budget is intrinsically linked with revenues; for states, the main source of revenue comes from taxation, and taxation is so far a typical expression of statehood, linked with fundamental questions of democracy and representation.[29] To put it in a nutshell, transforming the size, the aim, and the functioning of the budget might entail a fundamental evolution of the EU as a polity.

With this premise in mind, the next section will explore one of the legacies of these two crises, *i.e.*, the debate on the establishment of a permanent fiscal capacity for the EU.

2.2. EU crises, their legacy, and the politically thorny issue of a permanent fiscal capacity for the EU

The main legacy left by NGEU is its meaning for the debate on a fiscal capacity for the EU. Does NGEU represent the creation of a fiscal capacity for the EU? Is it permanent or can it become permanent? If that were to be the case, this would be the Hamiltonian moment of the EU.

This section will be divided into two parts. First, the analysis will focus on whether NGEU marks the establishment of a fiscal capacity and, second,

---

[27] D. Howarth, J. Schild, *Nein to 'Transfer Union': the German brake on the construction of a European Union fiscal capacity*, in *Journal of European Integration*, 2021, pp. 209-226.

[28] E. Perotti, O. Soons, *The Euro: A transfer union from the start*, in *Vox CEPR Policy Portal*, 2020; see also E. Perotti, O. Soons, *A diverse monetary union creates invisible transfers that justify conditional solidarity*, SUERF Policy Note, 2020; M. Wolf, *How the euro helped Germany avoid becoming Japan*, in *Financial Times*, 29.10.2019.

[29] See T. P. Woźniakowski, *Fiscal unions: Economic integration in Europe and the United States*, Oxford, 2022; T. P. Woźniakowski, *Building an EU central fiscal capacity-lessons from US history*, in A. Bongardt, F. Torres (eds.), *The Political Economy of Europe's Future and Identity: Integration in Crisis Mode*, European University Institute, 2023, pp. 243-251; P. Leino-Sandberg, *Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU*, in R. Weber (ed.), EU Integration through Financial Constitution: Follow the Money?, Oxford, 2023, pp. 161-188.

whether this fiscal capacity can become permanent, considering both the obstacles and the advantages.

In the political debate, NGEU has been labeled as the Hamiltonian moment for the EU. This is a reference to Alexander Hamilton, Secretary of the Treasury, remembered as one of the founding fathers of the US. Hamilton is one of the core politicians - together with Madison and Jefferson - behind the Compromise of 1790: Hamilton championed the consolidation of separate debts incurred by states into one public debt, with the Assumption Plan. The creation of the single federal debt for the states of the Federation was one of the pivotal moments in the history of the US.[30]

This reference to American history takes place after every crisis, though there are important differences between the US and the EU. First, it must be stressed that the EU decided first to set up a currency and a central bank, while the US started with powerful political decisions, such as the creation of a common debt, preparing the foundation for the edification of a new federation based on a strong tie.[31] I like to remember that renowned lawyers have described the integration process designed through the EMU as 'building a house starting from the roof',[32] resonating with an argument previously developed by economic scholars.

Yet, to understand what the legacy of NGEU for European integration can be, we should define what is a central fiscal capacity for the EU. A central fiscal capacity would mean the capacity of the EU to extract the revenues needed to provide public goods, *i.e.*, the power to tax, and more generally to extract resources.[33] It differs from the EU budget: as we have explained above, the EU has a budget and this is employed to 'fund' its policies: however, it is mainly expense-oriented and does not leave the EU room for intervention beyond these policies. Furthermore, the EU budget does not enable the EU to cope with 'crises' or exceptional situations requiring important disbursement of resources, for example, to enact countercyclical policies. In

---

[30] The next step has been the creation of the Bank of the United States, a predecessor of the Federal Reserve: "Central banks in the US are a lesson in change. Alexander Hamilton's Bank of the United States (1791) monetized the debts of the individual states through issuing new scrip and assured the credit worthiness of US debt, it established and minted a national currency, and it supported the expansion of manufacturing. The Bank of United States was an exercise in state-building, charged by George Washington and James Madison to bind together the individual states and charged by Congress to support the economy" in A. Black *et al.*, *Federal Central Banks: A Comparison of the US Federal Reserve and the European Central Bank*, Forumpress, 2018, at 5-6.

[31] T.P. Woźniakowski, *Building an EU central fiscal capacity-lessons from US history*, op. cit.

[32] A. Rosas, L. Armati, *EU constitutional law: an introduction*, Oxford, 2018.

[33] For an overview of the concept of 'fiscal capacity' see L.P. Feld, S. Osterloh, *Is a fiscal capacity really necessary to complete EMU?*, Freiburger Diskussionspapiere zur Ordnungsökonomik, No. 13/5, Albert-Ludwigs-Universität Freiburg, Institut für Allgemeine Wirtschaftsforschung, Abteilung für Wirtschaftspolitik, Freiburg i. Br., 2013; see also Enciclopedia Treccani, Neologismi, Fiscal Capacity, 2018.

macroeconomic terms, if today the budget of the EU amounts to 1,09 % of the GNI of the EU-27,[34] a fiscal capacity would mean a substantial increase of the EU budget so as to transform it into a tool functional for the mobilisation of resources, when needed.

As stressed by economists, an EU fiscal capacity would have the advantage of providing cyclical stabilisation at the supranational level. It would support national reforms and investments, but also deliver European public goods.[35] For example, the financial stability of the Eurozone can certainly be framed as a European public good. I find it very important to stress that this debate is not new: this necessity was emphasised after the first euro crisis and proposals were put forward back then.[36] Yet, though the solution is known, the remedy has not been enacted.

Against this premise, NGEU represents a temporary mechanism which is an expression of a fiscal capacity, or rather, of an ought-to-be fiscal capacity, *i.e.*, a centralised budget, funded at the supranational level, with the EU's own resources. NGEU was anticipated by SURE: however, considering that the guarantees of SURE were partially backed by Member States, it is the NGEU that represents the real step ahead in the establishment of a supranational expression of what could be a European fiscal capacity, for several reasons: its size, *i.e.*, 750 billion euros at 2018 prices, and that it authorises the Commission to borrow on capital markets. The second element, as explained by Fabbrini, is the transfer of these resources to the Member States. In my analysis, this makes NGEU an 'inter-state' fiscal capacity, because all the resources are transferred to states, and not directly to citizens or companies. NGEU is not designed to be administered by European institutions, and it could be questioned whether this falls within the boundaries of economic coordination policy or of cohesion policy.[37] Third, the repayment of NGEU's capital through new EU 'resources', as agreed with the interinstitutional agreement of 16 December 2020 on budgetary matters.[38] These reasons do

---

[34] See also A. D'Alfonso *et al.*, *Economic and Budgetary Outlook for the European Union 2023*, op. cit., 121.

[35] M. Buti, M. Messori, *A central fiscal capacity in the EU policy mix*, Centre for Economic Policy Research Discussion Paper, 2022. See also T. P. Woźniakowski, *Building an EU central fiscal capacity-lessons from US history*, op. cit.

[36] J. Pisani-Ferry, *Rebalancing the Governance of the Euro Area*, France Stratégie, Paris, 2015. See also P. Burriel *et al.*, *A fiscal capacity for the euro area: lessons from existing fiscal-federal systems*, Banco de España Occasional Paper, 2009; J. Pisani-Ferry *et al.*, *Options for a Euro-area fiscal capacity*, Bruegel policy contribution, No. 2013/01, 2013, Bruegel, Brussels. For a different position, see L.P. Feld, S. Osterloh, *Is a fiscal capacity really necessary to complete EMU?*, op cit.

[37] This observation is similarly formulated in V. Cannizzaro, *Neither Representation nor Taxation? Or,"Europe's Moment"–Part I*, in *European Papers*, 2020, pp. 703-706.

[38] Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on n, OJ L 433I, 22.12.2020, pp.

provide grounds for the thesis that the NGEU represents an embryo of fiscal capacity, administered at a decentralised level; it must be stressed it is a form of fiscal capacity that entails the intervention of the member states, and their political choices, for the implementation of the domestic plans.[39]

The next aspect to be assessed is whether NGEU represents a permanent fiscal capacity for the EU. For this purpose, two more observations should be made: the first concerns its exceptional one-off nature, and the second concerns the temporalities of NGEU.

As explained in Chapter 2, NGEU cannot represent a permanent fiscal capacity given its construction and its legal basis. The origin of NGEU, the EURI Regulation, was adopted on the legal basis of Article 122 TFEU. Considering that the Regulation does not specify the provision, we must consider that it is adopted on a joint legal basis of Article 122(1) together with Article 122(2) TFEU. This legal basis provides for the requirement of exceptional circumstances, a situation of crisis: only this triggers a legitimate resort to a non-legislative procedure entailing the adoption of an executive non-legislative instrument. Furthermore, the Council Legal Service opinion on NGEU stressed that Article 122 TFEU presupposes exceptional situations and provides for measures of a targeted and temporary character.[40] This means that Article 122 TFEU cannot be the legal basis for the establishment of a permanent fiscal capacity.

In addition to the legal basis, its construction as an exceptional one-off increase in the budget also adds weight to this main argument.

The second aspect concerning the temporary character of the NGEU is emphasised via the spending side of the plan (2021-2026). By contrast however, the repayment dimension of the plan is articulated on a longer timeframe, until 2058. Some commentators have criticised this aspect, arguing this represents a circumvention of the current rules.[41] I concur with the observation that the temporalities of NGEU are twisted: however, the long temporal window for repayment leads me to argue that NGEU represents a *de facto* temporal consolidation of the borrowing capacity of the EU, in contrast to the principle of balance between revenues and expenditures, enshrined in Article 310(1) TFEU; yet, the EU's fiscal capacity remains *de jure* exceptional and one-off, and functionally related to the pandemic (and energy) crises.

28–46. See F. Fabbrini, *Fiscal policy in times of crises-An analysis of EMU Constitutional Framework*, EPRS Study PE 753.369, 2023; F. Fabbrini, *EU fiscal capacity: Legal integration after Covid-19 and the war in Ukraine*, Oxford, 2022.

[39] V. Cannizzaro, *Neither Representation nor Taxation?*, op. cit.

[40] F. Fabbrini, *Fiscal policy in times of crises*, op. cit., at 28.

[41] P. Leino-Sandberg, M. Ruffert, *Next Generation EU and its constitutional ramifications: A critical assessment*, in *Common Market Law Review*, 2022, pp. 433 – 472.

Having explained that NGEU is not the consolidation of a permanent fiscal capacity for the EU, the question remains as to what will happen until the next crisis, and how this will be faced.

2.3. Fiscal capacity as the necessary tool to compensate for the incompleteness and asymmetries of integration

Another fundamental question left by NGEU is whether this temporally limited and exceptional fiscal capacity can become permanent and how this can be done. As outlined above, previous crises have led economists to argue that a permanent fiscal capacity is needed for the EU to be able to face the recurrent crises and to act as a supranational governance actor, endowed with a proper 'metabolic constitution', enabling the EU to carry out policies in a spirit of solidarity and subsidiarity.[42] In this section, I will not develop the economic argument; however, I will elaborate on the practice, to show that a permanent fiscal capacity is needed.

First of all, every crisis has left traces which support the argument that the establishment of a permanent fiscal capacity is necessary. For example, the euro-crisis has been tackled, first, with the EFSF and the EFSM, later turned into the ESM, which is permanent. Focusing on the permanent scheme, the ESM, it must be observed that this represents an instance of parallel integration since it developed outside the framework of the treaties;[43] in legal analysis, criticisms have been raised about its compatibility with the European constitutional framework.[44] Furthermore, in legal terms, this solution has raised many legal and constitutional issues that deserve consideration.[45] Though the ESM has been vetted by the CJEU who considered it compatible with the Treaties in *Pringle*, it is nevertheless questionable whether the first main instrument of macro-financial stabilisation of the eurozone should have been adopted as an international agreement between Member States and governed by institutions external to the EU. From another perspective, the solutions designed to face crises have been read as part of a process of constitutional transformation.[46]

---

[42] C. Fasone, P.L. Lindseth, *Europe's fractured metabolic constitution*, op. cit.

[43] J.F. Arribas, *Regulating European Emergency Powers: Towards a State of Emergency of the European Union*, College of Europe PhD Dissertation, 2023.

[44] C. Kilpatrick, *The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality*, in *Current Legal Problems*, 2017, pp. 337-363.

[45] A. Hinarejos, *The Court of Justice of the EU and the Legality of the European Stability Mechanism*, in *The Cambridge Law Journal*, 2013, pp. 237-240; P. Van Malleghem, *Pringle: a paradigm shift in the European Union's monetary constitution*, in *German Law Journal*, 2013, pp. 141-168.

[46] H.C. Hofmann *et al.*, *The Metamorphosis of the European Economic Constitution*, Cheltenham, 2019.

A second important instrument of crisis response is the NGEU: first designed for the pandemic, it has since also been employed in the enactment of reforms in the context of the energy crisis, with the integration of *REPowerEU* chapters into the national plans for Recovery and Resilience.[47] NGEU, with its articulated and creative construction and structure, has been analysed as an expression of creative interpretation of current constitutional provisions.[48]

These instruments do demonstrate the recurrent need for, first, financial stabilisation instruments, to cope with the effects of crises, and secondly, industrial recovery plans to enact countercyclical policies. These instruments have confirmed that the legal architecture of the EMU is missing some core components. The 'survival' of the ESM well after the euro crisis indicates that the current constitutional rules did not provide for important instruments. More precisely, though financial assistance plans are temporary, as economic cyclical trends are per se temporary, the financial assistance instrument should be permanent. However, recognising the persistent necessity of the instrument enabling financial assistance amounts to acknowledging that the original design of the EMU was somehow lacking.[49] Evidence of this is the fact that after the euro crisis, economists suggested the creation of an EU fiscal capacity.[50]

The argument that a permanent fiscal capacity to enact financial stabilisation instruments, and to finance counter-cyclical measures, is necessary, is also supported by the fact that economists have underlined that instances of asymmetrical integration such as the euro and the fragmented EU market created with the energy policy do require instruments enacting solidarity to correct the disequilibria stressed and increased by these areas of integration.[51]

Among economists, *e.g.*, as recalled above, Soons and Perotti argued that the EMU has worked as a transfer union, empowering or protecting some states more than others.[52] This strand of economic scholarship has the benefit of showing the actual functioning of the EMU and supports the thesis that measures enacting solidarity as systemic stabilisation and redistribution among states should be framed within the system of the treaties. This argu-

---

[47] See supra, Chapter 3.

[48] J.F. Arribas, *Regulating European Emergency Powers*, op. cit.; B. De Witte, *The European Union's COVID-19 recovery plan*, op. cit.

[49] G. Bizioli, *Building the EU tax sovereignty: Lessons from federalism*, in *World Tax Journal*, 2022, pp. 407-433, at 426.

[50] J. Pisani-Ferry *et al.*, *Options for a Euro-area fiscal capacity*, op. cit.

[51] P. Eleftheriadis, *Solidarity in the Eurozone*, Bank of Greece Working paper, 2019; P. Eleftheriadis, *Corrective Justice Among States*, in *Jus Cogens*, 2020, pp. 7-27. See also K. Huhta, L. Reins, *Solidarity in European union law and its application in the energy sector*, in *International & Comparative Law Quarterly*, 2023, pp. 771-791.

[52] E. Perotti, O. Soons, *The Euro: A transfer union from the start*, op. cit.; E. Perotti, O. Soons, *A diverse monetary union creates invisible transfers that justify conditional solidarity*, op. cit.

ment is important as it leads us to ascribe the measures that we have described within the theory of constitutional transformations.[53] For example, we can argue that the principle of budgetary balance as per Article 310(1) TFEU should be transformed to accommodate the need for supranational financing, under certain conditions, of counter-cyclical measures.

2.4. The obstacles to the consolidation of the permanent fiscal capacity, between treaty reforms and constitutional transformations

Yet, though we keep as a cornerstone of our reasoning the necessity of a permanent fiscal capacity, our attention should be now devoted to the obstacles hindering the consolidation of a permanent fiscal capacity, within the Treaties, and, in a second strand of analysis, on whether constitutional reforms are needed to enable change, or whether change can occur as an effect of constitutional transformations.

As to the obstacles to the establishment of an EU fiscal capacity, the current constitutional framework on budgetary rules does constrain the emergence of an autonomous EU fiscal capacity.

The first constitutional limitation we must consider is caused by the principles of universality and equilibrium: as mentioned above, Article 310(1) TFEU indicates that Union items of revenue and expenditure shall be shown in the budget and that these should be in balance.

At the same time, Article 312 TFEU states that the Multi-annual Financial Framework (MFF) sets the amount of the "ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations."

Article 312 TFEU, as reformed by the Treaty of Lisbon, crowns the Council as the new master of the budgetary procedure, originally developed with an Inter-Institutional Agreement (IIA): the Council decides with unanimity, and the Parliament gives its consent through the majority of its component members.[54]

These rules give states the option to use the MFF as a bargaining tool to exercise their veto powers, including in relation to policy issues unconnected to the negotiation of the budget. This means that the constitutional framework governing the EU budget is still constraining it as the budget of an

---

[53] M.A. Panascì, *Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution*, in *Common Market Law Review*, 2024, pp. 13-54. See also V. Borger, *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis*, Cambridge, 2020; H.C. Hofmann *et al.*, *The Metamorphosis of the European Economic Constitution*, op. cit.; A.J. Menéndez, *A European Union in constitutional mutation*, in *European Law Journal*, 2014, p. 127. Among the very first works on constitutional transformations, see J. H. Weiler, *The transformation of Europe*, in *Yale Law Journal*, 1991, pp. 2403-2483.

[54] Article 312(2) TFEU.

international organization and gives member states a significant voice in the development of the EU's public finances.[55]

Another important provision is Article 311 TFEU. This requires the EU budget to be financed by its 'own resources'; yet, these own resources are in reality often largely made up of resources transferred from states to the EU.

To sum up, Articles 310, 311, and 312 TFEU depict a constitutional framework that significantly limits the EU's room for maneuver to change its budget and borrow money, especially the rules governing the MFF and the ORD. The procedure of approval of the budget is highly intergovernmental: the MFF must be approved by the Council with unanimity and the ORD must be ratified by each Member State. This gives each and every state significant veto power and significantly undermines the autonomy of the decision-making process on the budget. In other words, the constitutional framework does constrain the emergence of an EU fiscal capacity due to the highly intergovernmental decision-making process, where states are the masters of the procedure which has been compared to a treaty reform.[56]

In contrast, to be able to develop a permanent fiscal capacity, the EU would need to be able to gain control over its resources, and this requires fundamental treaty reforms.

I will develop the argument focusing first on EU's own resources, and then on the necessary treaty reforms.

To develop an authentic fiscal capacity the EU should become capable of raising funds through taxation. As explained earlier, the EU's own resources are mainly resources transferred from states.[57] Therefore, the EU must develop its own resources, or political resources, other than funds transferred from states; by developing its own political resources, the EU should become able to finance its policies and devote a part of its budget to financing countercyclical measures, when needed. Only this change would allow the EU to establish an authentic fiscal capacity. This is currently not the case, since the EU budget is the expression of a strong intergovernmental leadership.

Indeed, Article 311 TFEU requires that the Council must vote unanimously on decisions concerning the EU's own resources and the EP is merely consulted. Furthermore, it postulates the approval of the ORD "by the Member States, in accordance with their respective constitutional requirements." This procedure for the approval of its own resources demonstrates a strong international twist of this procedure, which shares common features with the ordinary procedure for treaty revisions. Unanimity, together with the mere consultation of the EP, makes it a highly intergovernmental procedure; secondly,

---

[55] F. Fabbrini, *Fiscal policy in times of crises*, op. cit.

[56] B. De Witte, *The European Union's COVID-19 recovery plan*, op. cit.

[57] C. Neumeier, *Political own resources*, op. cit.; G. Rossolillo, *Risorse proprie, democrazia, e autonomia*, op. cit., at 211.

the unanimity rule means substantially a veto power in the hands of every single state. Every state can use this veto power over the EU's own resources, for the most disparate reasons: for instance, it happened when Hungary vetoed the MFA+ for Ukraine, a veto exploited to benefit from the rule of law conditionality on the RRF funds.[58] Second, the limited involvement of the EP is not adequate for a decision where the legitimacy of the decision-making should be firmly established at the supranational level. The resources of the EU should be an expression of the political will of the European co-legislators, European Parliament, and Council.[59]

Therefore, under the current treaty framework, the EU is hindered in its ability to develop an autonomous fiscal capacity. As to the constitutional reforms, we must stress several elements.

The main priority lies in amending the unanimity rule of Article 311 TFEU, thus removing the veto power every state can exercise for the most opportunistic reasons. The second priority lies in eliminating the participation of national parliaments in the ratification process and replacing this with the participation of the European Parliament, as an expression of a truly supranational democratic legitimacy. Overall, the treaty reform should provide the EU with a permanent sovereign fiscal capacity, by enhancing the role of the European Parliament, therein showing full respect for the constitutional principle of no taxation without representation.[60] This reform would represent the starting point of the constitutional framework necessary to implement a supranational fiscal capacity.[61]

[58] F. Fabbrini, *Fiscal policy in times of crises*, op. cit., at 30.

[59] F. Fabbrini, *Fiscal policy in times of crises*, op. cit.; G. Rossolillo, *From Own Resources to Fiscal Union*, op. cit.; G. Rossolillo, *The Financing of the European Union: a Proposal for Treaty Reform to Give the EU True Fiscal Capacity*, in *The Federalist*, 2020, at 269.

[60] G. Rossolillo, *The Financing of the European Union*, op. cit.

[61] For an interesting view on the option to develop an EU fiscal capacity starting from the current treaty framework, see G. Bizioli, *Building the EU tax sovereignty*, op. cit.

Conclusions

THE TRANSFORMATIONS OF SOLIDARITY AS A GENERAL PRINCIPLE OF EU LAW

Summary: 1. A moral or legal duty to intervene to protect the public goods of the EU?, –2. Between correction and redistribution: reaching the heart of the dilemmas of solidarity in the EU. –3. The many functions of the principle of solidarity in EU law: solidarity as a vector of constitutional transformations

This section sketches some overall observations concerning the principle of solidarity in EU law, drawing out some lessons on the transformation of this principle from its implementation into the instruments adopted during the last two crises. First, the focus will be the core identity of solidarity within the system of EU law, then on its material identity, and third on its function within the constitutional system of the EU, in relation to the attribution of competences between EU and Member States.

1. A moral or legal duty to intervene to protect the public goods of the EU?

This section expands on the core identity of solidarity as a principle of European integration. Though it is certainly a core principle of EU law, the role and meaning of solidarity as a legal principle in EU law is far from being completely clear.[1]

Solidarity is recognised as a founding value of the European Union, in Article 2 TEU, together with pluralism, non-discrimination, tolerance, justice, and equality between women and men: these principles are all indicated as values common to European society. The meaning of solidarity as a legal principle and an expression of a value is also recognised in the treaties, in

[1] V. Capuano, *La solidarietà nel diritto dell'Unione Europea*, Napoli, 2024; P. Mengozzi, *L'idea di solidarietà nel diritto dell'Unione europea*, Bologna, 2022; S. Villani, *The concept of solidarity within EU disaster response law: a legal assessment*, Bologna, 2021; F. Croci, *Solidarietà tra stati membri dell'Unione europea e governance economica europea*, Torino, 2020; G. Morgese, *La solidarietà tra gli stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018.

several provisions, though its content and definition in discrete policies are far from precisely delineated in their normative details and contours.[2] This leads us to say that solidarity has a polymorphic dimension as a legal principle because the same treaties codify different meanings of the principle of solidarity. This implies a variety of relational dimensions, be it solidarity of the Union with member states, among states, or even solidarity between generations, just to give some examples of how the treaties codify solidarity. Considering the context of European integration, it is here argued that solidarity has a systemic meaning, in the sense that it does concern the citizens of the member states as beneficiaries of solidarity in its transnational dimension,[3] and, in the context of asylum and migration, protection seekers and third-country nationals (TCNs), more generally.[4] Though not included in this analysis, the projection of EU solidarity toward TCNs is one of the most complex aspects of the achievement of solidarity within the EU.

This polymorphic dimension, meaning that the principle of solidarity can be diluted through different legal characteristics and nuances depending on the policies where it is operating, does not hinder us from making some observations, though the Court has not always been univocal in its resort to solidarity in its case law across different policies.[5] These reflections are supported by the recent case law of the CJEU, which stated that solidarity is a principle of EU law that is legally binding and justiciable, in the *OPAL* case.[6] Furthermore, the EU budget is one of the instruments giving material meaning and the ability to implement the principle of solidarity, as affirmed by the CJEU in the twin judgments on the validity of the Conditionality Regulation.[7] Based on these jurisprudential consolidations, we find it possible to draw out some common features of the principle of solidarity, elaborating on common threads that are embedded in the normative fabric of solidarity across the different policy domains and in the case law of the Court of Justice.

---

[2] See G. Morgese, *Solidarietà di fatto... e di diritto? L'Unione europea allo specchio della crisi pandemica*, in *EUROJUS* (Special Issue), 2020, pp. 77-113; E. Küçük, *Solidarity in EU law: an elusive political statement or a legal principle with substance?*, in A. Biondi, E. Dagilyté, E. Küçük, *Solidarity in EU law: legal principle in the making*, Cheltenham, 2018 pp. 38-60.

[3] On this aspect, see A. Sangiovanni, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, pp. 213-241. See also S. Giubboni, *La solidarietà come «scudo». Il tramonto della cittadinanza sociale transnazionale nella crisi europea*, in *Quaderni Costituzionali*, 2018, pp. 591-612.

[4] V. Moreno-Lax, *Solidarity's reach: meaning, dimensions and implications for EU (external) asylum policy*, in *Maastricht Journal of European and Comparative Law*, 2017, pp. 740-762.

[5] For example, in the context of relocation decisions, the CJ has been reluctant to frame solidarity as the foundation of the system, unlike the Advocate General in his Opinion. In contrast, in the domain of energy, the Court has recently judged that the principle of energy solidarity plays a fundamental role. See also CJEU, Judgment of the Court of 15 July 2021, case C-848/19 P, *Germany v. Poland*.

[6] Judgement *Germany v. Poland*, cit.

[7] Joined cases *Hungary and Poland v. Parliament and Council*, cit.

A first observation is that, across different crises, starting from the euro crisis to the more recent pandemic and energy crises, the EU has been faced with both symmetric and asymmetric crises challenging the public goods achieved through integration. In this framework, recognising the interdependences created with integration and acknowledging the asymmetric effects of those crises, has prompted the EU legislator and the Member States to act. Solidarity, a general principle of EU law, reflects a moral and legal duty to act to protect fellow states and their citizens; secondly, it reflects a duty to protect the public goods created through integration. This moral duty reflects the duty to intervene to support fellow humans in dire conditions, an expression of Rawls' principles of the theory of justice among states.[8] Even if we do not abide by an interpretation of the EU as a federal polity, we must acknowledge that the ties and the interdependencies created by integration do postulate a certain level of solidarity, to redress the imbalances created by integration. These imbalances have been demonstrated, both in respect of economic governance and the energy market. In a more visionary interpretation, solidarity could be seen as an expression of the stronger ties of political association created with the European Union.[9]

As the case-studies discussed have demonstrated, the EU has chosen, in every crisis, different options for its intervention. In all of the cases, beyond a general duty, the actual definition of how to implement solidarity has been left to the politics of solidarity.[10] The different conditions of these crises have contributed to shaping the -very different- answers provided. Initially, the solution was found outside the EU treaty framework, with the ESM. Secondly, during the pandemic crisis, the policy answer designed entailed a creative interpretation of the legal framework. Third, with the energy crises, the solution has been found within the treaty framework, which has been, occasionally, interpreted in a rather extensive manner, thanks to the ample discretion enshrined in Article 122 TFEU. In all situations, the actual definition of the content of solidarity has been shaped by political negotiations and bargaining.

The exceptional nature of the COVID-19 crisis, namely in its magnitude, size, and impact, provided a catalyst to implement a policy change, in addition to circumstances like the adoption of the new MFF. This set out the capacity

---

[8] J. Rawls, *A Theory of Justice*, Oxford, 1999, revised edition; J. Rawls, *Justice as fairness: A restatement*, Cambridge, 2001. See also P. Eleftheriadis, *Solidarity in the Eurozone*, op. cit.

[9] It is currently highly disputed whether the EU and its institutions do have the legitimacy required for this stronger interpretation of solidarity entailing distribution. I disagree with it, as distribution can be a key to address the role of individuals in the EU polity. *Contra*, see P. Eleftheriadis, *Solidarity in the Eurozone*, op. cit., at 18-19. See also J. Habermas, *Democracy, Solidarity, and the European Crisis*, in L. van Middelaar, P. Van Parijs, *After the storm: How to save democracy in Europe*, Lannoo, Meulenhoff-Belgium, 2015, p. 101.

[10] G. Bizioli, *Building the EU tax sovereignty*, op. cit.; L. Cicchi *et al.*, *EU solidarity in times of Covid-19*, European University Institute, 2020.

of the EU to react as an effective governance system, largely to protect the public goods it has created, such as the euro and freedom of movement.[11]

Yet, as explained above, the implementation of economic solidarity in the pandemic and energy crises has seen a crucial role for states in the translation of solidarity into tools and instruments, namely with NGEU and with national RR plans, to mitigate the consequences of the pandemic crisis and to foster industrial transition plans. For this reason, we argue that the interpersonal potential of solidarity to directly address EU citizens as individuals is yet to be explored. This means that the interpersonal ties that solidarity can create across EU citizens are still frozen, because of the mediation or intervention of states and their administrations. Reform would be needed to develop the potential of the EU to become a provider of effective protection for its own legal goods, but states frustrate this by not agreeing to long-needed reforms to enable the EU to become a more complete supranational governance system.

Having elaborated on the nature of the principle of solidarity as a legally binding principle, with a definition that is complemented and specified by the legislator, let us turn the attention toward the meaning of solidarity as a material principle of EU law.

2. Between correction and redistribution: reaching the heart of the dilemmas of solidarity in the EU

From another perspective, one that considers its material scope and identity, the principle of solidarity is a legal principle that has a programmatic nature and needs to be translated into legislative instruments, where the legislator has a high degree of discretion on how to enact solidarity in the specific context considered. This high degree of discretion is imbued with the politics of solidarity, discussed above.

The analysis conducted with the case studies has focused on the instruments which are the regulatory translation of these politics of solidarity. They reveal that the realisation of solidarity within the EU, including after a crisis, goes to the heart of one of its core dilemmas, *i.e.*, whether solidarity can entail redistribution across Member States. Every crisis embeds this dilemma. The core questions are:

To what extent is it acceptable and desirable that solidarity measures imply redistribution of wealth and resources between states and their communities?

---

[11] As observed by several authors, such as G. Morgese, *Solidarietà di fatto ... e di diritto?*, op. cit., and P. Genschel, M. Jachtenfuchs, *Postfunctionalism reversed: solidarity and rebordering during the COVID-19 pandemic*, in *Journal of European Public Policy*, 2021, pp. 350-369. From a different perspective, it should be observed that the EU has managed to learn from its mistakes, perhaps also thanks to the painful Greek experience with the euro-crisis.

Consequently, this solicits another question:

To what extent can and is it desirable that the EU becomes a vector of redistribution of wealth across states?

These are the crucial questions underpinning the implementation of solidarity across states, and they apply across policies. The thesis argued for here is that solidarity encompasses different ideas or interpretations of solidarity, ranging from a more minimalistic idea, where solidarity is meant to correct the effect of integration or to protect common goods that have been put under threat by a crisis, to a more organic form of solidarity, entailing the sharing of risk and – to some extent – resources. Across the different economic and energy crises of the last 15 years, the EU has shifted from a merely corrective paradigm of solidarity – represented by the ESM – toward a more authentic idea of solidarity embedding redistribution, expressed with NGEU. This means that solidarity can have the content that states decide it can have.

Corrective solidarity means solidarity that is geared toward protecting the legal goods created by integration, but does not lead to a redistribution of wealth and a sharing of risk across states. Corrective solidarity means that solidarity can be closely connected with responsibility.[12] In a context like the EU, where states that maintain national sovereignty in a context of supranational integration are united, responsibility is an expression of the national sovereignty states have preserved at the domestic level and is often a counterpart of solidarity.

The thesis I argue is that we have to recognise solidarity as a value and as a legal duty, because of the asymmetrical or incomplete integration model chosen in several areas of integration. More precisely, given this framework of 'agreed incompleteness', it must be recognised that integration produces interdependences and also externalities. When the effects of these appear, the principles of loyalty, together with solidarity and responsibility, mean intervention is required to correct the negative effects created by integration. This corrective dimension of solidarity is a crucial aspect of its identity as a legal principle of EU law and it is inspired by principles of corrective justice.[13] The corrective justice dimension has been stressed as crucial in the context of the Eurozone, because EMU has consolidated pre-existing asymmetries,[14] but in asylum and migration management the same narrative also applies. Integration with Schengen and the Dublin system has consolidated pre-existing

---

[12] *Mutatis mutandis*, see G. Morgese, *La solidarietà tra gli stati membri dell'Unione europea in materia di immigrazione e asilo*, op. cit.

[13] P. Eleftheriadis, *Solidarity in the Eurozone*, op. cit..

[14] Economic scholarship has developed this argument in several facets: see, for example, E. Perotti, O. Soons, *A diverse monetary union creates invisible transfers that justify conditional solidarity*, op. cit.

P. Eleftheriadis, *Solidarity in the Eurozone*, op. cit.

asymmetries, to the disadvantage of the most exposed countries, *i.e.*, frontline states. The analysis conducted with the case studies has demonstrated that this model also applies in the context of energy. It is therefore of paramount importance that solidarity, which is a legal principle of the EU and which has a connotation of corrective justice, can be effective and address the imbalances already existing within and consolidated by the policies adopted within the framework of EU law.

This corrective justice dimension has been overtaken by an idea of solidarity entailing distributive elements in the case of Next Generation EU, because of the provision for grants and not only loans, and also because of the link with EU guaranteed obligations, which avoided a massive increase in the public debt of states which had a less strong financial situation when hit by the pandemic. The COVID-19 pandemic has taught us that the higher the value of the goods at stake, the higher the interest in finding a political agreement on solidarity. The interdependence created with integration reveals a component of self-interest in the choice for solidarity. With the NGEU the EU has gone beyond this paradigm, because Article 122 TFEU has been used to borrow money on the financial markets; furthermore, the design of the disbursement component of the NGEU - based on Art 175 TFEU- includes also grants. The Commission has been authorised to borrow 'on behalf of the Union on the capital markets'.[15]

The broader scope of solidarity measures outlined with NGEU is determined by the fact that policy-makers decided to depart from the responsibility–oriented model typical of the euro crisis. In this sense, with the NGEU the EU has designed a counter-cyclical recovery plan, based on a package of instruments going beyond the financial stability paradigm.

However, if we also look at solidarity from the perspective of the relations between public authorities and individuals, we could make some additional observations, which concern the relational aspects underlying the principle of solidarity. When EU law addresses authentic transnational relations having redistribution effects among citizens of different member states, the political and legal salience of solidarity is higher.[16] This happens with similar dynamics in migration and asylum, but twofold. The first dimension is the one of solidarity of a member state toward an asylum seeker. The second dimension concerns the relation between the EU and states, in particular their acceptance of the EU's competence in an area where the EU is getting close to core state powers, such as deciding who has access to a state's territory and welfare system. This case helps us understand a crucial challenge in the development

[15] European Council Conclusions, 17-21 July 2020, EUCO 10/20, para A3.

[16] See E. Küçük, *Solidarity in EU law*, op. cit.; A. Sangiovanni, *Solidarity in the European Union*, op. cit.

of the principle of solidarity in the EU, namely its redistribution effects and its capacity to touch upon core state values, by re-defining the community of beneficiaries of a state measure.

The EU is in a critical phase of its life and solidarity is confirming this picture. The EU is evolving from negative solidarity toward a more organic form of solidarity which can have redistributive effects across and within its communities, but this evolution is complex and full of politicisation. The governance of the EU, which in some areas is hindered by forms of intergovernmentalism and paralysed by veto powers, contributes by fuelling these challenges.[17] What the coronavirus crisis has taught us is that Member States are ready to engage in solidarity when the prize at stake is high and shared between states. The dimension of self-interest is also there, but it can be reconciled with altruism. This factor has contributed to defusing the political conflict surrounding it, except for the persistent divergent visions of the 'frugal' states; consequently, this has contributed to limiting the conflict in this context, and to avoiding it turning into a sovereignty conflict, as has been experienced before.

3. The many functions of the principle of solidarity in EU law: solidarity as a vector of constitutional transformations

A third reflection concerns the role of solidarity as a constitutional principle, especially in relation to the principle of subsidiarity. What we have seen with the use of Article 122 TFEU is that, in relation to crises, the Council has resorted to its regulatory powers in order to take swift actions, deciding as a sole legislator. On numerous occasions, political actors resort to solidarity in their political processes. I do argue that there is nevertheless a legal dimension to introducing solidarity to the debate in this way, and more precisely, that here solidarity works as a clause that should import flexibility into the system. This corresponds to the constitutional function of solidarity, and it is in my view different from its operativity as a material principle governing the development of specific policies.

The constitutional function of the principle of solidarity is related to the nature of the EU, *i.e.*, of an entity based on Treaties between sovereign states with powers that are founded on the principle of attribution. This system of competences attributed to the EU is put under stress when crises occur.[18] Crises

[17] See B. De Witte, *Constitutional design of the European Union: getting rid of the unanimity rule*, video recording of 'Conversations for the Future of Europe', EUI-RSCAS Seminar Series, European University Institute, 3 June 2020.

[18] M. Dougan, *EU Competences In An Age of Complexity And Crisis: Challenges And Tensions In the System of Attributed Powers*, in *Common Market Law Review*, 2024, pp. 93-138.

do entail complex challenges, affecting multiple policy domains and interests, and they must be solved in a way that also reflects the output preferences of the core negotiators. It is in this context that the intergovernmental dimension has increased its relevance over recent decades. This axis has gained attention and weight in the political debate, and the increased resort to Article 122 TFEU is part of this process. The lack of Treaty reforms after Lisbon means that the constitutional framework has not been affected by major reforms, thus paving the way for constitutional transformation. In this context, solidarity is invoked to justify innovative interpretations of the treaty framework and thus to contribute to constitutional transformations of unchanged treaties: in this way, solidarity is an instrument functioning as a constitutional clause, contributing to fostering the resilience of the constitutional system by introducing flexibility to the same. Through this function, solidarity is closely connected with subsidiarity, and solidarity displays a constitutional face, giving new input to the principle of subsidiarity.[19] Solidarity becomes a tool for the development of integration, in the sense of a flexible reinterpretation of the boundaries given by the treaty rules.

Through this function as a constitutional clause, one of the flexibility clauses of the EU constitutional system, the actual definition of solidarity relies much on political power, *i.e.*, solidarity has a strong political dimension. It can be translated into multiple instruments. Furthermore, it is a principle that builds upon the principle of subsidiarity in the sense that it requires the EU to act, fostering the resilience of the EU as a constitutional system.

[19] For a reconstruction of the interaction between solidarity and subsidiarity in the context of migration and asylum, see L. Marin, E. Pistoia, *Captured between subsidiarity and solidarity: any European added value for the Pact on Migration and Asylum?*, in *Freedom, Security & Justice: European Legal Studies*, 2021, pp. 167-193.

BIBLIOGRAPHY

ANDRADE, P., J. BRECKENFELDER, F. DE FIORE, P. KARADI, O. TRISTANI, «The ECB's asset purchase programme: an early assessment», (2016) *European Central Bank Working Paper* No. 1956/2016.

ARRIBAS, J. F., «Regulating European Emergency Powers: Towards a State of Emergency of the European Union», *College of Europe*, 2023.

AZOULAI, L., «Editorial comments: A Jurisprudence of distribution for the EU», (2022) 59-4 *Common Market Law Review* 957-968.

BACHTLER, J., C. MENDEZ, «Cohesion and the EU budget: Is conditionality undermining solidarity», in R. COMAN, A. CRESPY, V.A. SCHMIDT (eds), *Governance and politics in the post-crisis European Union* Cambridge 2020, p. 121-139.

BARNES, A., *EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment*, The Oxford Institute for Energy Studies, 2022.

BARONCELLI, S., «Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU», (2022) 7 *European Papers* 867-887.

BENDJABALLAH, S., V. KREILINGER, «COVID-19: The EU legislative process proves resilient and adaptable, but democracy has suffered», in (2021) *SIEPS-European Policy Analysis*, June 2021:12.

BENOÎT, C., C. HAY, «The antinomies of sovereigntism, statism and liberalism in European democratic responses to the COVID-19 crisis: a comparison of Britain and France», (2022) 20-3 *Comparative European Politics* 390-410

BERTONCINI, Y., «European solidarity in times of crisis: A legacy to be deepened in the face of covid-19», *Fondation Schuman Policy Papers* 21 April 2020, online.

BEUKERS, T., D. FROMAGE, G. MONTI (eds), *The new European central bank: Taking stock and looking ahead*, Oxford University Press, 2022.

BICKERTON, C., «"Parliamentary", "Popular" and "Pooled": Conflicts of Sovereignty in the United Kingdom's Exit from the European Union», in (2019) *Journal of European Integration*, 887.

BIEBER, R., F. MAIANI, «Sans solidarité point d'Union européenne», (2012) 48-2 *Revue trimestrielle de droit européen* 295-327.

BIONDI, A., E. DAGILYTÉ, E. KÜÇÜK (eds), *Solidarity in EU law: legal principle in the making*, Cheltenham, Edward Elgar publishing, 2018.

Bizioli, G., «Building the EU tax sovereignty: Lessons from federalism», (2022) 14-3 *World Tax Journal* 407-433.

Bjørnebye, H., *Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production*, Kluwer Law International, 2010.

Black, A., *Federal Central Banks: A Comparison of the US Federal Reserve and the European Central Bank*, forumpress, 2018.

Bobić, A., «Constitutional pluralism is not dead: an analysis of interactions between constitutional courts of Member States and the European Court of Justice», (2017) 18-6 *German Law Journal* 1395-1428.

Bobić, A., *The jurisprudence of constitutional conflict in the European Union*, Oxford University Press, 2022.

Bobić, A., *The Individual in the Economic and Monetary Union: A Study of Legal Accountability*, Cambridge University Press, 2024.

Bocquillon, P., T. Maltby, «EU energy policy integration as embedded intergovernmentalism: the case of Energy Union governance», (2020) 42-1 *Journal of European Integration* 39-57

Bongardt, A., F. Torres, *The Political Economy of Europe's Future and Identity: Integration in Crisis Mode*, European University Institute, 2023.

Borger, V., *The Currency of Solidarity: Constitutional Transformation during the Euro Crisis*, Cambridge University Press, 2020.

Borger, V., «How the debt crisis exposes the development of solidarity in the euro area», (2013) 9-1 *European Constitutional Law Review* 7-36.

Borzel, T. A., «From EU governance of crisis to crisis of EU governance: Regulatory failure, redistributive conflict and Eurosceptic publics», (2016) 54 *Journal of Common Market Studies* 8-31.

Brack, N., R. Coman, A. Crespy, «Unpacking Old and New Conflicts of Sovereignty in the European Polity», in N. Brack, R. Coman, A. Crespy (eds), *Understanding Conflicts of Sovereignty in the EU*, Routledge, 2021.

Brink, T. van den, M. Gargantini, «Models of Solidarity in the EMU. The Impact of COVID-19 After Weiss» (2021) 17-3 *Utrecht Law Review* 80-102.

Brus, M., A. De Hoog, P. Merkouris, *The Normative Status of Climate Change Obligations under International Law, Yesterday's good enough has become today's unacceptable*, European Parliament Study PE 749.395, June 2023.

Burriel, P., P. Chronis, M. Freier, S. Hauptmeier, L. Reiss, D. Stegarescu, S. Van Parys, «A fiscal capacity for the euro area: lessons from existing fiscal-federal systems», (2020) *European Central Bank Occasional Paper* No. 239/2020.

Buschle, D., «Energy solidarity: approaching a new constitutional principle: Case note on the Court of Justice's ruling in the OPAL case of 15 July 2021», (2021) 10-3 *The European Energy & Climate Journal* 66-70

Buti, M., M. Messori, *A central fiscal capacity in the EU policy mix*, Centre for Economic Policy Research, 2022.

Buti, M., M. Krobath, «Should the eurozone be less intergovernmental», (2019) *Luiss School of European Political Economy Policy Brief,* 30 agosto 2019.

Buti, M., G. Papaconstantinou, «European Public Goods: How can we supply more?», (2022) *Luiss School of European Political Economy Policy Brief* 3/2022.

Cafaro, S., «L'evoluzione della costituzione economica dell'Unione: si è conclusa l'era della stabilità?», (2022) 2723 *Annali AISDUE*, p. 21-46.

Caggiano, G., «COVID-19. Competenze dell'Unione, libertà di circolazione e diritti umani in materia di controlli delle frontiere, misure restrittive della mobilità e protezione internazionale», (2020) 30 *I Post di AISDUE*.

Cannizzaro, V., «Neither Representation nor Taxation? Or,"Europe's Moment"–Part I», (2020) 5 *European Papers* 703-706.

Capuano, V., *La solidarietà nel diritto dell'Unione Europea*, Editoriale Scientifica, 2024.

Cartabia, M., *Principi inviolabili e integrazione europea*, Giuffrè, 1995.

Chamon, M., «The rise of Article 122 TFEU», *Verfassungsblog* 2023.

———, «The use of Article 122 TFEU-Institutional implications and impact on democratic accountability», European Parliament Study PE 753:307, 2023.

Cicchi, L., P. Genschel, A. Hemerijck, M. Nasr, *EU solidarity in times of Covid-19*, European University Institute, 2020.

Cinnirella, C., *Financial Solidarity In EU Law: An Unruly Horse?*, in *Quaderno Aisdue* - Serie Speciale, 2022

Contaldi, G., «La solidarietà europea in campo economico ai tempi della pandemia da COVID-19», (2020) 3 *Ordine Internazionale e Diritti Umani* 444-460.

Contaldi, G., *Diritto europeo dell'economia*, Giappichelli, 2019.

Contaldi, G., «Politica economica e monetaria (diritto dell'Unione europea)», in *Annali dell'Enciclopedia del diritto*, 7, Giuffrè, Milano, 2014, p. 811-845.

Costamagna, F., *Il Next Generation EU e la costruzione di una politica economica europea: quale ruolo per democrazia e solidarietà?,* in *I Post di AISDUE*, 2021

Croci, F., *La solidarietà tra stati membri dell'Unione europea e governance economica europea*, Torino, Giappichelli, 2020.

Cross, M. K. D., «Explaining Existential Crises», in Cross, M. K. D. (ed), *The Politics of Crisis in Europe*, Cambridge, Cambridge University Press, 2017, p. 22-53

Crowe, R., «An EU budget of states and citizens», (2020) 26-5-6 *European Law Journal* 331-344.

Curtin, D., «'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency», (2017) 23-1-2 *European Law Journal* 28-44

D'Alfonso, A., *Own resources of the European Union: Reforming the EU's financing system*, EPRS- European Parliamentary Research Service Briefing PE 630.265, 2021

D'Alfonso, A., *Agreement on REPowerEU chapters in recovery and resilience plans*, EPRS–European Parliamentary Research Service PE 739.330, 2023.

D'Alfonso, A., *et al*., *Economic and Budgetary Outlook for the European Union 2023*, EPRS study PE 739.313, 2023

Damato, A., P. De Pasquale, *Politica economica e monetaria dell'Unione europea. Procedura legislativa e ruolo delle istituzioni*, 72, Editoriale Scientifica, 2016.

de Gregorio Merino, A. *The Recovery Plan: Solidarity and the living constitution*, in *EULAWLive*, 6.5.2021, p. 4.

de Witte, B., «The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift», (2021) 58-3 *Common Market Law Review* 635-682.

de Witte, B., «Guest Editorial: EU emergency law and its impact on the EU legal order», (2022) 59 *Common market law review* 3-18.

de Witte, B., «Integration through Funding? The Union's Finances as Policy Instrument», in R. Weber (ed), *The Financial Constitution of European Integration: Follow the Money?*, Hart Publishing, 2023, p. 221-236.

Degner, H., D. Leuffen, «Brake and broker: Franco-German leadership for saving EMU», (2021) 28-6 *Journal of European Public Policy* 894-901.

Dermine, P., «The EU's response to the COVID-19 crisis and the trajectory of fiscal integration in Europe: Between continuity and rupture», (2020) 47-4 *Legal Issues of Economic Integration*.

Dermine, P., A. Bobić, «Of Winners and Losers: A Commentary of the Bundesverfassungsgericht ORD Judgment of 6 December 2022: Cases 2 BvR 547/21 and 2 BvR 798/21, Own Resources Decision Judgment of 6 December 2022», (2024) 20-1 *European Constitutional Law Review* 163-190.

Dias, C., A. Zoppè, *The SURE: Main Features*, European Parliament Study PE 645.721, 2021

Di Carlo, D., A. Hassel, M. Höpner, «Germany's coordinated policy response to the energy crisis: shielding the export-led model at all costs», (2023) *Luiss LUHNIP Working Paper Series* No. 1/2023

Dobreva, A., *Reform of the EU system of own resources: State of play*, EPRS Briefing, 19 June 2023.

Dobreva, A., *System of own resources of the European Union: Amended legislative proposal*, European Parliament Study PE 754.572, 2023.

Dougan, M., «EU Competences In An Age of Complexity And Crisis: Challenges And Tensions In the System of Attributed Powers», (2024) 61 *Common Market Law Review* 93-138.

Doxiadis, E., A. Placas, *Living under austerity: Greek society in crisis*, Berghahn Books, 2022.

Eikeland, P.O., *EU internal energy market policy: Achievements and hurdles*, in V.L. Birchfield, J.S. Duffield (eds.), *Toward a Common European Union Energy Policy: Problems, Progress, and Prospects*, Berlin, 2011, p. 293.

Eleftheriadis, P., «Solidarity in the Eurozone», 2019, Working Papers 256, Bank of Greece.

———, «Corrective Justice Among States», (2020) 2-1 *Jus Cogens* 7-27.

Enciclopedia Treccani, Neologismi, Fiscal Capacity, 2018.

Fabbrini, F., *EU fiscal capacity: Legal integration after Covid-19 and the war in Ukraine*, Oxford University Press, 2022.

Fabbrini, F., «Next Generation Eu: Legal Structure and Constitutional Consequences», (2022) 24 *Cambridge Yearbook of European Legal Studies* 45-66.

Fabbrini, F., *Fiscal policy in times of crises-An analysis of EMU Constitutional Framework*, EPRS Study PE 753.369, 2023.

Fabbrini, F., C. A. Petit (eds), *Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law*, Edward Elgar Publishing, 2024.

Fasone, C., P. L. Lindseth, «Europe's fractured metabolic constitution: From the eurozone crisis to the coronavirus response», (2020) *Luiss School of Government, SOG Working Paper 61/2020*.

Fasone, C., N. Lupo, «Learning from the Euro-crisis. A new method of government for the EU economic policy coordination after the pandemic?», *STALS Research Papers* 2023.4.1-24.

Favilli, C., «L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'«emergenza» immigrazione», (2015) 35-3 *Quaderni costituzionali* 785-787.

———, «La solidarietà flessibile e l'inflessibile centralità del sistema Dublino», (2021) *Diritti umani e diritto internazionale* 85-101.

Feld, L.P., S. Osterloh, *Is a fiscal capacity really necessary to complete EMU?*, Freiburger Diskussionspapiere zur Ordnungsökonomik, No. 13/5, Albert-Ludwigs-Universität Freiburg, Institut für Allgemeine Wirtschaftsforschung, Abteilung für Wirtschaftspolitik, Freiburg i. Br., 2013.

Fleming, R., *The Energy Trilemma*, in M.M. Roggenkamp, K.J. de Graaf, R.C. Fleming, *Energy law, climate change and the environment*, Cheltenham, 2021, pp. 31-40.

Fleming, R., M. Guérin, «Europe's security of gas supply legislation – a short legal history and latest developments», (2024) 42 *Journal of Energy & Natural Resources Law* 1-21

Fulwood, M., J. Sharples, J. Stern, K. Yafimava, *The curious incident of the Nord Stream gas turbine*, The Oxford Institute for Energy Studies, July 2022.

Genschel, P., M. Jachtenfuchs, *Beyond the regulatory polity?: The European integration of core state powers*, Oxford University Press, 2014.

Genschel, P., M. Jachtenfuchs, «Postfunctionalism reversed: solidarity and rebordering during the COVID-19 pandemic», (2021) 28-3 *Journal of European Public Policy* 350-369.

Giubboni, S., *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, Il mulino, 2012.

Giubboni, S., «La solidarietà come «scudo». Il tramonto della cittadinanza sociale transnazionale nella crisi europea», (2018) 38-3 *Quaderni costituzionali* 591-612.

———, «Crisi pandemica e solidarietà europea», (2021) 41-1 *Quaderni costituzionali* 218-221.

Groussot, X., A. Zemskova, K. Bungerfeldt, «Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-of-Law Crisis, and why Solidarity Is Essential», 5-1 *Nordic Journal of European Law* 1-19.

Habermas, J., «Democracy, Solidarity, and the European Crisis», in L. van Middelaar, P. Van Parijs, *After the storm: How to save democracy in Europe*, Lannoo, Meulenhoff-Belgium, 2015, p. 101.

Hancher, L., «Energy and the Environment: Striking a Balance?», (1989) *Common Market Law Review* 475-512.

———, «Solidarity on Solidarity Levies and a Choice of Energy Mix: A sound legal basis for emergency action in the EU's energy markets», *Verfassungsblog* 2023.

Hancher, L., A. de Hauteclocque, «Strategic Autonomy, REPowerEU And The Internal Energy Market: Untying The Gordian Knot», (2024) *Common Market Law Review* pp. 55-92.

Haraldsdóttir, K., «The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU», (2014) *European Energy and Environmental Law Review* 208-218.

Hinarejos Parga, A. H., *The Euro area crisis in constitutional perspective*, Oxford University Press, 2015.

Hinarejos Parga, A. H., «The Court of Justice of the EU and the Legality of the European Stability Mechanism», (2013) 72-2 *The Cambridge Law Journal* 237-240.

Hirschl, R., «The question of case selection in comparative constitutional law», (2005) 53-1 *The American Journal of Comparative Law* 125-156.

Hodson, D., «The Rise and Fall of the Eurogroup», in D. Hodson (ed), *Governing the Euro Area in Good Times and Bad*, Oxford University Press, 2011, 38–53.

Hofmann, H. C., K. Pantazatou, «The transformation of the European economic constitution», in H. C. Hofmann, K. Pantazatou, G. Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution*, Edward Elgar Publishing, 2019, 2-24.

Howarth, D., J. Schild, «Nein to 'Transfer Union': the German brake on the construction of a European Union fiscal capacity», (2021) 43-2 *Journal of European Integration* 209-226.

Huhta, K., *Capacity mechanisms in EU energy law: ensuring security of supply in the energy*

transition, Kluwer Law International BV, 2019.

Huhta, K., «C-718/18 Commission v. Germany: Critical Reflections on the Independence of National Regulatory Authorities in EU Energy Law», (2021) 30-6 *European Energy and Environmental Law Review* 255 - 265.

Huhta, K., «The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector», (2021) 70-4 *International and Comparative Law Quarterly* 991-1010.

Huhta, K., «The Evolution of the Public Security Defence in EU Free Movement Law: Lessons from the Energy Sector», (2023) *Cambridge Yearbook of European Legal Studies* 1-22.

Huhta, K., L. Reins, «Solidarity in European union law and its application in the energy sector», (2023) 72-3 *International & Comparative Law Quarterly* 771-791.

Jevnaker, T., «Differentiated integration in EU Energy Market Policy», in B. Leruth, S. Gänzle, J. Trondal, *The Routledge handbook of differentiation in the European Union*, Routledge, 2022, p. 289-309.

Karageorgiou, E., *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy*, Lund, 2018.

Katsanidou, A., A.-K. Reinl, C. Eder, «Together we stand? Transnational solidarity in the EU in times of crises», (2022) 23-1 *European Union Politics* 66-78.

Kilpatrick, C., «On the rule of law and economic emergency: The degradation of basic legal values in Europe's bailouts», (2015) 35-2 *Oxford Journal of Legal Studies* 325-353.

———, «The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality», (2017) 70-1 *Current Legal Problems* 337-363.

———, «Explaining and Remedying the Near Absence of the Budget in EU Law Scholarship», (2024) *Common Market Law Review* 623-654.

Klopčič, A. L., B. Rončevič, T. B. Valič, «The key player or just a paper tiger? The effectiveness of ACER in the creation and functioning of the EU's internal energy market», (2022) 35-9 *The Electricity Journal* 107207.

Kochenov, D., P. Bárd, «The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU», in E. Hirsch Ballin, G. van der Schyff, M. Stremler (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society*, The Hague, T.M.C. Asser Press, 2020, p. 243-287.

Küçük, E., «Solidarity in EU law: an elusive political statement or a legal principle with substance?», in A. Biondi, E. Dagilyté, E. Küçük (eds), *Solidarity in EU law: legal principle in the making*, Cheltenham, Edward Elgar publishing, 2018, p. 38-60.

Larsen, C., «States Federal, Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism», (1999) 47-3 *The American Journal of Comparative Law* 429-488

Leino-Sandberg, P., «Solidarity and Constitutional Constraints in Times of Crisis», *Verfassungsblog* 2020.

———, «Next Generation EU and its constitutional ramifications: a critical assessment», (2022) 59 *Common Market Law Review* 433-472.

———, «Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU», in R. Weber (ed.), *EU Integration through Financial Constitution: Follow the Money?*, Hart publishing, 2023, p. 161-188.

Leino-Sandberg, P., M. Ruffert, «Next Generation EU and its constitutional ramifications: A critical assessment», (2022) 59-2 *Common Market Law Review* 433 – 472

Lenaerts, K., S. Adam, «La solidarité, valeur commune aux États membres et principe fédératif de l'Union européenne», (2021) *Cahiers de Droit Européen* 307-417.

Lindner, V. *Solidarity without Conditionality. Comparing the EU Covid-19 Safety Nets SURE, Pandemic Crisis Support, and European Guarantee Fund*, SSRN Scholarly Paper, Rochester, NY, 4 janvier 2022.

Louis, J.-V., «Solidarité budgétarie et financière», in Boutayeb, C. (dir), *La solidarité dans l'Union européenne*, dalloz, 2011.

Lupo, N., «Il Piano Nazionale di Ripresa e Resilienza (PNRR) e alcune prospettive di ricerca per i costituzionalisti», (2022) 1 *federalismi.it* 4-13.

Maduro, Poiares M., *We the court: The European Court of Justice and the European economic constitution*, Bloomsbury Publishing, 1998.

Maduro, Poiares M., «Contrapunctual Law: Europe's Constitutional Pluralism in Action, in N. Walker (ed), Sovereignty in Transition, Hart, 2003.

Maher, I., O. Stefan, «Delegation of powers and the rule of law: Energy justice in EU energy regulation», (2019) 128 *Energy Policy* 84-93.

Marin, L., «Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation», (2019) 1 *Freedom, Security & Justice: European Legal Studies* 55-74.

Marin, L., «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 Ettorre (eds.), *Sovereignty, technology and governance after Covid-19: legal challenges in a post-pandemic Europe*, Oxford, 2022, pp. 51-75.

Marin, L., E. Pistoia, «Captured between subsidiarity and solidarity: any European added value for the Pact on Migration and Asylum?», (2021) 2 *Freedom, Security & Justice* 167-193.

Marin, L., S. Penasa, G. Romeo, «Migration crises and the principle of solidarity in times of Sovereignism: challenges for EU law and polity», (2020) 22-1 *European journal of migration and law* 1-10.

Marletta, M., «Articolo 194 TFEU», in A. Tizzano (a cura di), *Trattati dell'Unione Europea*, Milano, 2014, p. 1650.

Martinico, G., *The tangled complexity of the EU constitutional process: the frustrating knot of Europe*, Routledge, 2022.

Markakis, M., «The Political and Legal Accountability of the Eurogroup», in M. Dawson (ed), *Substantive Accountability in Europe's New Economic Governance*, Cambridge, Cambridge University Press, 2023, p. 132-153

MAJONE, G., *Rethinking the union of Europe post-crisis: Has integration gone too far?*, Cambridge University Press, 2014.

MENÉNDEZ, A. J., «The Existential Crisis of the European Union.», (2013) 14-5 *German Law Journal* 453 - 526.

———, «a European Union in constitutional mutation?», (2014) 20 *European Law Journal* 127.

MENGOZZI, P., *L'idea di solidarietà nel diritto dell'Unione europea*, Bologna University Press, 2022.

MESINI, L., *L'ordoliberalismo: un'introduzione alla Scuola di Friburgo*, in *Pandora Rivista*, 2016.

MIDDELAAR, L. VAN, P. VAN PARIJS, *After the storm: How to save democracy in Europe*, Lannoo Meulenhoff-Belgium, 2015.

MONTALDO, S., «The COVID-19 emergency and the reintroduction of internal border controls in the Schengen area: Never let a serious crisis go to waste», (2020) *European Papers* 523-531.

MORANO-FOADI, S., «Solidarity and responsibility: Advancing humanitarian responses to EU migratory pressures», (2017) 19-3 *European Journal of Migration and Law* 223-254.

MORENO-LAX, V., «The "Crisification" of Migration Law: Insights from the EU External Border», in K. COPE, S. BURCH ELIAS, and J. GOLDENZEL (eds), *The Oxford Handbook of Comparative Immigration Law* (Oxford: OUP, 2024).

MORENO-LAX, V., «Solidarity's reach: meaning, dimensions and implications for EU (external) asylum policy», (2017) 24-5 *Maastricht Journal of European and Comparative Law* 740-762.

MORGESE, G., *La solidarietà tra gli stati membri dell'Unione europea in materia di immigrazione e asilo*, Cacucci, 2018.

MORGESE, G., «Solidarietà di fatto... e di diritto? L'Unione europea allo specchio della crisi pandemica», (2020) 2020-speciale *EUROJUS* 77-113.

MORGESE, G., «Principio di solidarietà e proposta di rifusione del regolamento Dublino», in E. TRIGGIANI *et al.* (a cura di), *Dialoghi con Ugo Villani*, Bari, 2017, pp. 471-476.

MORGESE, G., *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in G. CAGGIANO (a cura di), *I percorsi giuridici dell'integrazione*, Torino, 2014, p. 364.

MORIN, E., A. B. KERN, *Homeland Earth: A Manifesto for the New Millennium*, Hampton Press, 1999.

MORRISON, E. J., «Unbundling, Markets, and Regulation», in M. HAFNER, G. LUCIANI (eds.), *The Palgrave Handbook of International Energy Economics*, Cham, Springer International Publishing, 2022, p. 471-491

MÜLLER, J.-W., *Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states*; *Eurozine*, 21 March 2014.

MÜLLER, J.-W., *Should the EU protect democracy and the rule of law inside Member States*, in (2015) *European Law Journal* 141.

MÜNCHMEYER, M., «The principle of energy solidarity: Germany v. Poland», (2022) 59-3 *Common Market Law Review* 915-932.

MCWILLIAMS, B., G. SGARAVATTI, S. TAGLIAPIETRA, G. ZACHMANN, «The EU can manage without Russian liquified natural gas», (2023) *Bruegel Policy Brie*f 16/2023.

MCWILLIAMS, B., G. SGARAVATTI, S. TAGLIAPIETRA, G. ZACHMANN, «The European Union-Russia energy divorce: state of play», (2024) *Bruegel Analysis*, 22.2.2024.

Nato, A., *La cittadinanza sociale europea ai tempi della crisi economica*, Cacucci, 2020.
Neumeier, C., «Political own resources: Towards a legal framework», (2023) 60-2 *Common Market Law Review* 319-343.
Nguyen, T., M. Van Den Brink, *An early Christmas Gift from Karlsruhe?,* in *Verfassungsblog* 2022.
Nikolić, B., P. Pevcin, «How to improve sustainability of the Schengen agreement on open borders?», (2022) 60-1 *International Migration* 244-257.
Panascì, M. A., «Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution», (2024) 61-1 *Common Market Law Review* 13 – 54
Patrin, M., «Governance by Funding: NGEU, Solidarity and the EU Institutional Balance», (2023) REBUILD Centre Working Paper No. 4, 2023, online
Pench, L. R., «The new Stability and Growth Pact: innovation and continuity in the light of NextGenerationEU», in F. Fabbrini, C.A. Petit (eds), *Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law*, Edward Elgar Publishing, 2024, p. 299-327.
Perdana, S., M. Vielle, «Making the EU Carbon Border Adjustment Mechanism acceptable and climate friendly for least developed countries», (2022) 170 *Energy Policy* 113245.
Perotti, E., O. Soons, «The Euro: A transfer union from the start», *Vox CEPR Policy Portal* 2020.
Perotti, E., O. Soons, «A diverse monetary union creates invisible transfers that justify conditional solidarity», *SUERF Policy Note*, 2020.
Pierdominici, L., G. Martinico, «Miserie del sovranismo giuridico. Il valore aggiunto del costituzionalismo europeo», Castelvecchi Editore, 2023.
Pisani-Ferry, J., «Only one bed for two dreams: A critical retrospective on the debate over the economic governance of the Euro area», (2006) 44-4 *Journal of Common Market Studies* 823-844.
Pisani-Ferry, J., «The Euro crisis and the new impossible trinity», (2012) *Bruegel Policy Contribution* 2012/01, January 2012.
———, «Rebalancing the Governance of the Euro Area», in M. Dawson, H. Enderlein, C. Joerges (ed), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* 2015, 62-82.
Pisani-Ferry, J., E. Vihriälä, G. B. Wolff, «Options for a Euro-area fiscal capacity», (2013) *Bruegel policy contribution*, No. 2013/01.
Pistoia, E., *Limiti all'integrazione differenziata dell'Unione europea*, Cacucci, 2018.
Prontera, A., «Winter is coming: Russian gas, Italy and the post-war European politics of energy security», (2024) 47-2 *West European Politics* 382-407
Pugliese, S., «Toward a Multilevel System of Investment Control Oriented to Crisis Management: Italian Golden Power in the Framework of the EU FDI Screening Mechanism», in J.H. Pohl, T. Papadopoulos, J. Wiesenthal (eds.), *National Security and Investment Controls*, Cham, 2024.
Pugliese, S., «Rethinking Just Transition in Investment Law Perspective: Incentives against Climate Crisis between Sustainability, Economic Security, and Strategic Industrial Planning», in *LAWS*, 2024, 13(3), 37.
Quirico, O., «Towards a Peremptory Duty to Curb Greenhouse Gas Emissions?», (2021) *Fordham International Law Journal* 923-965.
Rawls, J., *Justice as fairness: A restatement*, Harvard University Press, 2001.

RAWLS, J., *A Theory of Justice*, Oxford, 1999, revised edition.
ROGOFF, K.S., *Crash Time,* in *Project Syndicate*, 7.9.2018.
ROSAS, A., L. ARMATI, *EU constitutional law: an introduction*, Bloomsbury Publishing, 2018.
ROSSOLILLO, G., *The Financing of the European Union: a Proposal for Treaty Reform to Give the EU True Fiscal Capacity*, in *The Federalist*, 2020, p. 269.
ROSSOLILLO, G., *Risorse proprie, democrazia, e autonomia: il ruolo di istituzioni e Stati membri nella determinazione delle entrate dell'Unione europea*, in *Studi sull'Integrazione europea*, 2022, pp. 211-227.
ROSSOLILLO, G., *From Own Resources to Fiscal Union*, in *The Federalist*, 2023, pp. 7-16.
RUCCIA, N., «L'Unione economica e monetaria», in *Elementi di Diritto dell'Unione europea, Parte Speciale, Il Diritto sostanziale alla prova dell'integrazione politica*, Giuffrè, 2023, p. 146-220.
———, «SURE, ovvero la prova del debito comune e della solidarietà, in G. MORGESE (a cura di), La solidarietà europea: a che punto siamo?», in *EUSTiC Jean Monnet Chair Working Papers*, 2023, p. 78-89.
RUSSEL, M., *The Nord Stream 2 pipeline: Economic, environmental and geopolitical issues*, EPRS- European Parliamentary Research Service Briefing, PE 690.705, 2021.
SALOMON, S., J. RIJPMA, «A Europe without internal frontiers: Challenging the reintroduction of border controls in the Schengen area in the light of union citizenship», (2023) 24-2 *German Law Journal* 281-309.
SANGIOVANNI, A., «Solidarity in the European Union», (2013) 33-2 *Oxford Journal of Legal Studies* 213-241.
SAUNDERS, C.A., «Financial Autonomy vs. Solidarity: A Dialogue between Two Complementary Opposites», in A. VALDESALICI, F. PALERMO (eds), *Comparing fiscal federalism*, Leiden, 2018, pp. 40-59.
SAURUGGER, S., F. TERPAN, «Normative transformations in the European Union: on hardening and softening law», (2021) 44-1 *West European Politics* 1-20
SCHELKLE, W., *The political economy of monetary solidarity: Understanding the euro experiment*, Oxford, 2017
SCHELKLE, W., «Monetary solidarity in Europe: can divisive institutions become 'moral opportunities'?», (2023) 81-1 *Review of Social Economy* 84-104
SCHEPISI, C., «Aiuti di Stato... o aiuti tra Stati? Dal Temporary Framework al Recovery Plan nel" comune interesse europeo"» (2021) 1 *Rivista della Regolazione dei mercati* 110-147.
SCHOLZ, U., S. PURPS, «The Application of EU Competition Law in the Energy Sector», (2011) 2-1 *Journal of European Competition Law & Practice* 62-77.
SCHRAMM, L., W. WESSELS, «The European Council as a crisis manager and fusion driver: assessing the EU's fiscal response to the COVID-19 pandemic», (2023) 45-2 *Journal of European Integration* 257-273.
SCHUKNECHT, L., P. MOUTOT, P. ROTHER, J. STARK, «The stability and growth pact: Crisis and reform», (2011) *European Central Bank Occasional Paper* No. 129/2011.
SCIAUDONE, A., «Articolo 122», in A. TIZZANO (a cura di), *Trattati dell'Unione Europea*, Milano, 2014, p. 1310.
SCICLUNA, N., «Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis», (2018) 25-12 *Journal of European Public Policy* 1874-1891.

SGARAVATTI, G., S. TAGLIAPIETRA, C. TRASI, G. ZACHMANN, «National policies to shield consumers from rising energy prices», Bruegel Datasets, 2021

SGARAVATTI, G., S. TAGLIAPIETRA, G. ZACHMANN, «National policies to shield consumers from rising energy prices», 2022 Breugel Dataset.

SÖDERSTEN, A., E. HERCOCK (eds), «The Rule of Law in the EU: Crisis and Solutions», in (2023) *SIEPS-Swedish Institute for European Policy Studies*, 2023:1

SOMMERMANN, K.-P., «Some Reflections on the Concept of Solidarity and its Transformation into a Legal Principle», (2014) 52-1 *Archiv des Völkerrechts* 10-24

SYDOW, H. S. von, «The Dancing Procession of Lisbon: Legal Bases for European Energy Policy», (2011) 1-1 *European Energy & Climate Journal* 33-46.

SCHELKLE, W., *The political economy of monetary solidarity: Understanding the euro experiment*, Oxford University Press, 2017.

TALUS, K., *Introduction to EU Energy Law*, Oxford University Press, 2016.

TESCHE, T., «Instrumentalizing EMU's democratic deficit: the ECB's unconventional accountability measures during the eurozone crisis», (2019) 41-4 *Journal of European Integration* 447-463.

TOSATO, G.L., «The Union's budget balance pursuant to art. 310 TFEU: What is the impact on European anti-coronavirus measures?», *Luiss SEP Policy Brief,* 2020.

TREIN, P., «Federal dynamics, solidarity, and European Union crisis politics», (2020) 27-7 *Journal of European Public Policy* 977-994.

TSOURDI, E., «Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System», (2017) 24-5 *Maastricht Journal of European and Comparative Law* 667-686.

TSOURDI, E., «The emerging architecture of EU asylum policy: insights into the administrative governance of the common European asylum system», in F. BIGNAMI (ed) *EU law in populist times: Crises and prospects*, Cambridge University Press, 2020, p. 191-226.

VALDESALICI, A., F. PALERMO (eds), *Comparing fiscal federalism*, 10, Brill, 2018.

VAN MALLEGHEM, P.-A., «Pringle: a paradigm shift in the European Union's monetary constitution», (2013) 14-1 *German Law Journal* 141-168.

VAN ROMPUY, H., J. M. BARROSO, J.-C. JUNCKER, M. DRAGHI, «Towards a genuine economic and monetary union», 2012.

VASCONCELOS, J., «Energy regulation in Europe: The politics of regulation and regulatory policy revisited», (2019) 20-3 *Competition and Regulation in Network Industries* 240-249

VEDDER, H., «The Treaty of Lisbon and European environmental law and policy», (2010) 22-2 *Journal of Environmental Law* 285-299.

VERHELST, S., «Differentiated Economic and Monetary Integration», (2013) 66-3 *Studia Diplomatica* 19-32.

VILLANI, S., «Considerazioni sul principio di solidarietà energetica nel quadro giuridico dell'UE», (2023) 5 *federalismi.it* 118-149.

VILLANI, S., *The concept of solidarity within EU disaster response law: a legal assessment*, Bologna, Bononia University Press, 2021.

VILLANI, U., *Editoriale: immigrazione e principio di solidarietà*, in (2017) 3 *Freedom, Security and Justice: European Legal Studies* 1-4.

VITERBO, A., «The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank», (2020) 2020-1 *European Papers* 671-685.

Walker, N. (ed.), *Sovereignty in transition*, Bloomsbury Publishing, 2003.
Weder Di Mauro, B., R. Baldwin (eds), *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes*, CEPR Press, Paris & London, 2020.
Weder Di Mauro, B., A. Bénassy-Quéré (eds), *Europe in the Time of Covid-19*, CEPR Press, Paris & London, 2020.
Weiler, J. H. H., «The transformation of Europe», (1991) *Yale law journal* 2403-2483.
Woźniakowski, T. P., *Fiscal unions: Economic integration in Europe and the United States*, Oxford University Press, 2022.
Woźniakowski, T. P., «Building an EU central fiscal capacity-lessons from US history» in A. Bongardt, F. Torres (eds.), *The Political Economy of Europe's Future and Identity: Integration in Crisis Mode*, European University Institute, 2023, pp. 243-251.
Yafimava, K., *EU solidarity at a time of gas crisis even with a will the way still looks difficult*, The Oxford Institute for Energy Studies, 2023.
Yafimava, K., *OPAL Exemption Decision: a comment on the Advocate General's Opinion on its annulment and its implications for the Court of Justice judgement and OPAL regulatory treatment*, The Oxford Institute for Energy Studies, 2021
Zeitlin, J., F. Nicoli, B. Laffan, «Introduction: the European Union beyond the polycrisis? Integration and politicization in an age of shifting cleavages», (2019) 26-7 *Journal of European Public Policy* 963-976

COLLANA DI STUDI SULL'INTEGRAZIONE EUROPEA

diretta da
Giandonato Caggiano – Ivan Ingravallo – Ennio Triggiani – Ugo Villani

1. Ugo VILLANI, *Istituzioni di Diritto dell'Unione europea*[7], 2024.

2. Piero PENNETTA (a cura di), *L'evoluzione dei sistemi giurisdizionali regionali ed influenze comunitarie*, 2010.

3. Ennio TRIGGIANI (a cura di), *Le nuove frontiere della cittadinanza europea*, 2021.

4. Elena FALLETTI, Valeria PICCONE (a cura di), *Il nodo gordiano tra diritto nazionale e diritto europeo*, 2012.

5. Rossana PALLADINO, *Il ricongiungimento familiare nell'ordinamento europeo*, 2012.

6. Francesco CHERUBINI, *L'asilo dalla Convenzione di Ginevra al Diritto dell'Unione europea*, 2012.

7. Marina CASTELLANETA, *La libertà di stampa nel diritto internazionale ed europeo*, 2012.

8. Rosita DEL COCO, Emanuela PISTOIA (a cura di), *Stranieri e giustizia penale. Problemi di perseguibilità e di garanzie nella normativa nazionale ed europea*, 2014.

9. Andrea CANNONE (a cura di), *La protezione internazionale ed europea dei beni culturali*, 2014.

10. Angela Maria ROMITO, *La tutela giurisdizionale nell'Unione europea tra effettività del sistema e garanzie individuali*, 2015.

11. Giovanni CELLAMARE, *Le operazioni di peacekeeping delle organizzazioni regionali*, 2015.

12. Ennio TRIGGIANI, *Spunti e riflessioni sull'Europa*[3], 2021.

13. Ilaria OTTAVIANO, *Gli accordi di cooperazione territoriale nell'Unione europea*, 2017.

14. Gianpaolo Maria RUOTOLO, *La tutela dei privati negli accordi commerciali*, 2017.

15. Sara PUGLIESE, *Il rischio nel diritto dell'Unione europea tra principi di precauzione, proporzionalità e standardizzazione*, 2017.

16. Ivan Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea*, 2017.

17. Luca Paladini, *Il Servizio europeo per l'azione esterna – Aspetti giuridici e prospettive di sviluppo*, 2017.

18. Anna Iermano, *La nozione di* pena *tra forma e sostanza nel sistema di tutela europeo*, 2018.

19. Andrea Cannone, *Violazioni di carattere sistemico e Convenzione europea dei diritti dell'uomo*, 2018.

20. Teresa Maria Moschetta, *Il ravvicinamento delle normative nazionali per il mercato interno. Riflessioni sul sistema delle fonti alla luce dell'art. 114 TFUE*, 2018.

21. Ennio Triggiani, Anna Maria Nico, Maria Grazia Nacci (a cura di), *Unione europea e governi territoriali: risorse, vincoli e controlli*, 2018.

22. Antonietta Damato, *La tutela degli interessi finanziari tra competenze dell'Unione e obblighi degli Stati membri*, 2018.

23. Giandonato Caggiano (a cura di), *Integrazione europea e sovranazionalità*, 2018.

24. Emanuela Pistoia, *Limiti all'integrazione differenziata dell'Unione europea*, 2018.

25. Nicola Ruccia, *Caratteri, limiti e prospettive dell'Unione bancaria*, 2018.

26. Francesco Cherubini, *Le decisioni nel sistema delle fonti dell'ordinamento europeo*, 2018.

27. Claudia Morini, *La tutela dei diritti dei gruppi religiosi nel contesto regionale europeo*, 2018.

28. Giuseppe Morgese, *La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo*, 2018.

29. Valeria Di Comite, *La dimensione europea dell'istruzione superiore*, 2018.

30. Lorenzo Federico Pace, *Il regime giuridico dell'euro*, 2018.

31. Maria Caterina Baruffi, Matteo Ortino (a cura di), *Dai Trattati di Roma a Brexit e oltre*, 2018.

32. Davide Diverio, *Limiti all'accesso al mercato dei servizi. Prospettive interne ed europee*, 2019.

33. Caterina Fratea (a cura di), *Stato dell'arte e nuove sfide nel diritto europeo della concorrenza*, 2019.

34. Francesco Battaglia, *Il Mediatore europeo*, 2020.

35. Pierre de Gioia Carabellese, *Crisi bancaria e diritti dei creditori*, 2020.

36. Mario CARTA, *Unione europea e tutela dello stato di diritto negli Stati membri*, 2020.

37. Claudia MORINI, *Dialogo e partecipazione nella* governance *dell'Unione europea*, 2020.

38. Angela Maria ROMITO, *Ruolo e funzioni dell'*European Competition Network. *Dal regolamento (CE) n. 1/2003 alla direttiva ECN+*, 2020.

39. Denise MILIZIA (a cura di), *The new European Union. Different perspectives from different Member States*, 2020.

40. Alessandro NATO, *La cittadinanza sociale europea al tempo della crisi economica*, 2020.

41. Ilaria OTTAVIANO, *Profili di tutela giurisdizionale nell'Unione bancaria*, 2020.

42. Daniela VITIELLO, *Le frontiere esterne dell'Unione europea*, 2020.

43. Gianpaolo Maria RUOTOLO, *Scritti di diritto internazionale ed europeo dei dati*, 2021.

44. Maria Luisa TUFANO, Sara PUGLIESE, Mariaconcetta D'ARIENZO (a cura di), *Sovranazionalità e sovranismo in tempo di COVID-19*, 2021.

45. Lorenzo Federico PACE, *La natura giuridica dell'Unione europea: teorie a confronto. L'Unione ai tempi della pandemia*, 2021.

46. Claudio SCIANCALEPORE, *Le risorse proprie nella finanza pubblica europea*, 2021.

47. Giandonato CAGGIANO, Gianluca CONTALDI, Pietro MANZINI (a cura di), *Verso una legislazione europea su mercati e servizi digitali*, 2021.

48. Alessandro ROSANÒ, *I trasferimenti interstatali di detenuti nel diritto dell'Unione europea*, 2022.

49. Matteo MANFREDI, *La promozione e la tutela dei diritti economici e sociali nell'Unione europea. L'azione dell'UE tra politiche interne e relazioni esterne*, 2022.

50. Vito RUBINO, *Le clausole normative di mutuo riconoscimento nella prospettiva sovranazionale e in quella interna. Indagine sulla funzione e sulla legittimità di una tecnica normativa controversa*, 2023.

51. Massimo Francesco ORZAN, *La tutela cautelare nei ricorsi diretti dinanzi alla Corte di giustizia dell'Unione europea*, 2023.

52. Criseide NOVI, *Corte di giustizia e competenze esterne dell'Unione europea*, 2023.

53. Francesco Emanuele CELENTANO, Rosanna DE MEO, Mariano ROBLES (a cura di), *Tutela multilivello dell'ambiente ed economia circolare nell'industria alimentare*, 2023.

54. Rossana PALLADINO, *Il principio di proporzionalità nel diritto dell'Unione europea. Natura, funzioni e controllo*, 2024.

55. Luisa MARIN, *Solidarity and Crises in the European Union: a constitutional principle in the pandemic and energy crises*, 2024.

ISBN 979-12-5965-417-5
ISSN 2784-8566

€ 18,00