



## SOLIDARITY IN EUROPEAN UNION LAW AND ITS APPLICATION IN THE ENERGY SECTOR

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**Abstract** This article explores the meaning of solidarity in European Union (EU) law in the context of the energy sector and the ongoing energy crisis. Energy provides a powerful and topical sectoral example of the fundamental role and diverse functions of solidarity in EU law. In its *OPAL* ruling in 2021, the Court of Justice of the EU established that energy solidarity constitutes a legally binding principle of EU energy law that should inform EU institutions and the Member States in their energy decisions. This article adds to legal scholarship on solidarity in three ways. First, it further develops the understanding of the ambiguous solidarity concept in EU law through the lens of the energy sector. Secondly, it contributes to the emerging body of energy law scholarship that seeks to advance the discipline of energy law by focusing on its doctrine rather than on its substantive developments. Finally, it provides a timely and novel analysis of the EU's recent emergency responses to address the acute energy crisis from the point of view of solidarity.

**Keywords:** European Union law, solidarity, *OPAL* ruling, energy sector, energy crises.

### I. INTRODUCTION

European integration is founded on the idea of solidarity.<sup>1</sup> Solidarity underpins the values of the European Union (EU),<sup>2</sup> and, at its heart, the internal market is expected to promote solidarity among the EU Member States.<sup>3</sup> However, the content and scope of solidarity are not explained in the treaties and,

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<sup>1</sup> See the Robert Schuman Declaration of 9 May 1950, which reads: '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.' <[https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950\\_en](https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en)>. In early case law, see joined Cases 6 and 11–69 *Commission of the European Communities v French Republic* ECLI:EU:C:1969:68, para 16. In the literature, see P Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union' (2015) 34 *YEL* 257; A Biondi, E Dagilyté and E Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018).

<sup>2</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU) art 2.

<sup>3</sup> *ibid.*, art 3(3).

consequently, its legal meaning suffers from definitional ambiguity.<sup>4</sup> Contributions in legal scholarship give it different interpretations in different contexts and treat it as being variously a principle, an obligation, a ‘constitutional value’,<sup>5</sup> an ‘idea’<sup>6</sup> and ‘political rhetoric’,<sup>7</sup> or categorize it on the basis of its functions.<sup>8</sup> Furthermore, it is not entirely clear to which fields and areas of competence solidarity extends. In some instances, the treaties make reference to solidarity as a principle, while in others they stipulate that Member States should act ‘in a spirit of solidarity’<sup>9</sup> or ‘show mutual solidarity’<sup>10</sup> and ‘enhance and develop their mutual political solidarity’.<sup>11</sup> In legal scholarship, solidarity has been explored from various points of view, with some highlighting the failures and shortcomings of the principle in the contexts of migration and monetary policy, for instance.<sup>12</sup>

Energy provides a powerful and topical sectoral example of the fundamental roles and diverse functions of solidarity in EU law. In its 2021 *OPAL* ruling, the Court of Justice of the EU (the CJEU or ‘Court’) established that energy solidarity constitutes a legally binding principle of EU energy law that should inform EU institutions and the Member States in their energy decisions.<sup>13</sup> Curiously, this is so far the first and only legally binding principle of EU energy law that can clearly and explicitly be identified from EU legal sources.<sup>14</sup> This sets energy law apart from related fields such as environmental and climate law, which have already played host to a broad-spectrum scholarly discussion on the principles of these disciplines.<sup>15</sup>

The year following the *OPAL* judgment has been tumultuous for the European energy sector. The acute energy supply shock caused by the Russian invasion of Ukraine has led to dramatic energy price increases, destabilizing European energy security and threatening its

<sup>4</sup> Aptly described in Y Borgmann-Prebil and M Ross, ‘Promoting European Solidarity – Between Rhetoric and Reality?’ in M Ross and Y Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP 2010) 1.

<sup>5</sup> A Biondi, E Dagilytė and E Küçük, ‘Introduction: European Solidarity – What Now?’ in Biondi et al (n 1) 6. <sup>6</sup> Borgmann-Prebil and Ross (n 4) 1. <sup>7</sup> Hilpold (n 1).

<sup>8</sup> P Van Cleynenbreugel, ‘Typologies of Solidarity in EU Law: A Non-Shifting Landscape in the Wake of Economic Crises’ in Biondi et al (n 1); F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015).

<sup>9</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) arts 122, 194. <sup>10</sup> eg TEU (n 2) art 32. <sup>11</sup> *ibid*, art 24.

<sup>12</sup> See recently, M Klamert, ‘Loyalty and Solidarity as General Principles’ in KS Ziegler, PJ Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022) Ch 7. <sup>13</sup> Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:598.

<sup>14</sup> K Huhta, ‘The Coming of Age of Energy Jurisprudence’ (2021) 39(2) JERL 199.

<sup>15</sup> E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017); P Sands and J Peel, *Principles of International Environmental Law* (4th edn, CUP 2018); R Macrory, I Havercroft and R Purdy, *Principles of European Environmental Law* (Europa Law Publishing 2004); J Peel, ‘Climate Change Law: The Emergence of a New Legal Discipline’ (2008) 32(3) MULR 922; J Verschuuren, *Principles of Environmental Law: The Ideal of Sustainable Development and the Role of Principles of International, European, and National Environmental Law* (Nomos 2003).

economy.<sup>16</sup> As a response, and in a very short period of time, the EU has adopted several legal instruments to address the energy crisis.<sup>17</sup> All of these legal emergency instruments rely heavily on the idea of solidarity and highlight its role in the EU's crisis responses. This overwhelmingly transformed security and economic environment in the energy sector and in EU energy law provides a timely and dynamic context in which contemporary EU solidarity functions.

This article explores solidarity in EU law in the context of the energy sector and the ongoing energy crisis. It contributes to legal scholarship in three ways. First, it further develops the understanding of the ambiguous solidarity concept in EU law through the lens of the energy sector. Secondly, it contributes to the emerging body of energy law scholarship that seeks to advance the discipline of energy law by focusing on its doctrine—concepts, principles and theories—rather than on substantive developments within it.<sup>18</sup> Finally, it provides a timely and novel analysis of the EU's recent emergency responses to address the acute energy crisis from the point of view of solidarity. While the contribution is EU specific, its findings on the way in which the principle is used to further the (economic) integration of the EU Member States in the energy field extends its relevance to a much wider audience.

Through analysis of the relevant constitutional provisions, the CJEU's case law and the recent secondary legislation adopted to address the energy crisis, this article shows how solidarity functions in the energy sector and how it is understood in these different normative contexts. In other words, the article builds an understanding of how notions of solidarity differ depending on the legal source in which they appear and how these differences in the meaning and content of solidarity influence legal decisions in the energy sector. Based on this analysis, the article explains whether and how the development of energy solidarity could contribute to the development of energy law as an independent legal discipline. The energy law instruments adopted prior to the

<sup>16</sup> J Osička and F Černoch, 'European Energy Politics after Ukraine: The Road Ahead' (2022) 91 *Energy Res Soc Sci* 102757.

<sup>17</sup> Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L1261/1 (High Energy Prices Intervention Regulation); Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L206/1 (Gas Demand-Reduction Regulation); Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders [2022] OJ L335/1 (Gas Solidarity Regulation); Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36 (Regulation on Accelerating the Deployment of Renewable Energy); and Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices [2022] OJ L335/45 (Market Correction Mechanism).

<sup>18</sup> K Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law* (Ashgate 2011).

*OPAL* case and, hence, prior to the establishment of the energy solidarity principle, are left outside the scope of this article.<sup>19</sup>

The article is structured as follows. Section II outlines the role of solidarity in a constitutional context from the point of view of the energy sector and energy law scholarship. Section III analyses the Court's *OPAL* ruling and demonstrates how the case fundamentally changed 'the spirit of solidarity' in the energy sector from a politically loaded expression to a legally binding principle. Section IV focuses on the EU's emergency measures to address the energy crisis and shows the diversity of meanings for solidarity in this secondary legislation. Section V offers conclusions by way of connecting the analysis with the broader development of energy law as a legal discipline.

## II. ENERGY AND SOLIDARITY IN EU CONSTITUTIONAL LAW

Solidarity has been part and parcel of EU treaty law from the outset, with the 1951 Preamble to the Treaty Establishing the European Coal and Steel Community Treaty noting that 'Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development'.<sup>20</sup> Since these early years of what is now the EU, primary EU law has essentially been based on the idea of solidarity. It is one of the essential values of the EU, together with democracy and the rule of law,<sup>21</sup> and its role in the internal market context is pivotal.<sup>22</sup> Treaty law recognizes solidarity as a fundamental governance principle<sup>23</sup> and includes multiple references to it.<sup>24</sup> The fundamentality of solidarity was also explicitly acknowledged in the Court's early case law.<sup>25</sup> Nevertheless, the treaties do not contain a definition of solidarity.

Treaty law includes two references to solidarity that place specific emphasis on energy. Articles 122 and 194 of the Treaty on the Functioning of the European Union (TFEU) are both legal bases that can be used to adopt legally binding legislation in the energy sector. Article 122 of the TFEU enables the Council to decide on legislative measures 'appropriate to the economic situation, in particular if severe difficulties arise in the supply of

<sup>19</sup> Solidarity in the energy sector prior to the *OPAL* ruling has been discussed in eg K Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013).

<sup>20</sup> Treaty Establishing the European Coal and Steel Community. Translated into English in A Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) OJLS 213, 213.

<sup>21</sup> I Hartwig and P Nicolaides, 'Elusive Solidarity in an Enlarged European Union' (2003) 2003 (3) *Eipascope* 19.

<sup>22</sup> TEU (n 2) art 3(3).  
<sup>23</sup> For a detailed discussion see also E Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23(6) MJ 965.

<sup>24</sup> TEU (n 2) arts 2, 3, 21, 24, 31, 32 and TFEU (n 9) arts 67, 80, 122, 194, 222, as well as Protocol 28 and Declarations 37 and 62.

<sup>25</sup> *Commission of the European Communities v French Republic* (n 1) para 16.

certain products, notably in the area of energy'. These measures must be decided 'in a spirit of solidarity between Member States'.<sup>26</sup>

The origins of Article 122 of the TFEU lie in Article 103 of the Treaty Establishing the European Economic Community (since repealed) on conjunctural policy, which empowered the Council to adopt legislation on a proposal from the Commission to address any difficulties arising in the supply of certain products. Energy and solidarity were added later, but the provision had key elements in common with what is now Article 122 of the TFEU and was used as early as the 1960s as a basis for the adoption of security-of-supply legislation for the energy sector.<sup>27</sup> Before the most recent emergency measures to address the energy supply shock of 2022, Article 122 of the TFEU was used as the basis for three energy-specific legal instruments, two directives on minimum oil stocks in 2006 and 2009 and one on security of gas supply in 2004.<sup>28</sup> All of these instruments include references to solidarity.<sup>29</sup>

Article 122 of the TFEU has a general scope of application. However, in terms of energy, it is a *lex specialis* provision that only applies where severe difficulties arise in respect of supply, whereas Article 194 of the TFEU is the general legal basis for all energy policy measures. Article 194 of the TFEU aims to ensure the functioning of the energy market and security of energy supply in the EU, to promote energy efficiency and energy saving and the development of new and renewable forms of energy, and to promote the interconnection of energy networks. These objectives are to be pursued by using the ordinary legislative procedure,<sup>30</sup> 'in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment' and 'in a spirit of solidarity between Member States'.<sup>31</sup> This energy-specific legal basis has only been available for energy measures a little longer than a decade since being introduced by the Treaty of Lisbon in 2009. The initiative to include the spirit of solidarity within this provision came from Poland, which argued that solidarity between Member States should be enforced in the energy

<sup>26</sup> TFEU (n 9) art 122(1).

<sup>27</sup> See, for instance, Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products [1968] OJ L308/14.

<sup>28</sup> 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 [2009] OJ L265/9; Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (Codified version) [2006] OJ L217/8; Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply [2004] OJ L127/92.

<sup>29</sup> Council Directive 68/414/EEC (n 27) recitals 9, 28, 33 and art 1; Council Directive 2006/67/EC, *ibid*, recital 18; and Council Directive 2004/67/EC, *ibid*, recital 13.

<sup>30</sup> This procedure is the most common legislative procedure for the adoption of legislative acts in the EU. In the literature, see A Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018) 75–98.

<sup>31</sup> TFEU (n 9) art 194(1).

sector.<sup>32</sup> Despite this, the spirit of solidarity in Article 194 of the TFEU was long considered as the expression of a politically loaded wish rather than being legally binding.<sup>33</sup>

In fact, several legal scholars have questioned the legal relevance of solidarity under Article 194 of the TFEU. Kim Talus has stated that ‘the general and open-ended and primarily political nature of the references to solidarity in the TFEU suggests that this addition will have limited judicial impact. Its role would be primarily in policy-making and it would affect political negotiations rather than judicial proceedings.’<sup>34</sup> Ruven Fleming has suggested that the reference to solidarity is ‘more of a programmatic statement that does not give a concrete definition’.<sup>35</sup> Max Münchmeyer has referred to the understanding of solidarity ‘as a mere political guiding principle that is not justiciable by itself but can, at most, find legal expression through secondary law’.<sup>36</sup> Furthermore, the principle has been interpreted in the past as a ‘corrective of the subsidiarity principle’,<sup>37</sup> in the sense that if the aims listed in Article 194 of the TFEU cannot be adhered to at a purely national level then cooperation and action at the EU level will be needed.<sup>38</sup>

These kinds of interpretations of solidarity were common until 2019 when the General Court first gave its ruling in *OPAL*, followed by the CJEU’s confirmation of the General Court’s approach in 2021.<sup>39</sup> Against the historical background of how solidarity was included in Article 194 of the TFEU, it is not entirely surprising that the confirmation of solidarity as a legally binding principle of EU energy law emerged in a case where Poland was a party.<sup>40</sup>

Albeit in different ways, both Articles 122 and 194 of the TFEU are fundamentally underpinned by the notion of solidarity. However, until the *OPAL* ruling and the most recent emergency measures to address the energy

<sup>32</sup> D Phinnemore, *The Treaty of Lisbon: Origins and Negotiation* (Palgrave Macmillan 2013) 118–42; J-C Pielow and BJ Lewendel, ‘Beyond “Lisbon”: EU Competences in the Field of Energy Policy’ in B Delvaux, M Hunt and K Talus (eds), *EU Energy Law and Policy Issues* (Intersentia 2012) 300.

<sup>33</sup> Talus (n 19) 280; M Münchmeyer, ‘The Principle of Energy Solidarity: Germany v Poland’ (2022) 59 CMLRev 915, 916–17.

<sup>34</sup> Talus (n 19) 280.

<sup>35</sup> R Fleming, ‘A Legal Perspective on Gas Solidarity’ (2019) 124 Energy Policy 102, 107.

<sup>36</sup> Münchmeyer (n 33) 916–17.

<sup>37</sup> JC Pielow and BJ Lewendel, ‘The EU Energy Policy after the Lisbon Treaty’ in A Dorsman et al, *Financial Aspects in Energy: A European Perspective* (Springer 2011) 153.

<sup>38</sup> *ibid* 153.

<sup>39</sup> Case T-883/16 *Poland v Commission* ECLI:EU:T:2019:567 and *Germany v Poland* (n 13); and in the literature A Boute, ‘The Principle of Solidarity and the Geopolitics of Energy: *Poland v. Commission* (OPAL Pipeline)’ (2020) 57(3) CMLRev 889; M Iakovenko, ‘Case C-848/19 P: *Germany v Poland* and its Outcomes for EU Energy Sector: An Extended Case Note on the European Court of Justice Judgment in the OPAL Case: Judgment of the Court (Grand Chamber) of 15 July 2021, C-848/19 P, *Germany v Poland*, ECLI:EU:C:2021:598’ (2021) 14(6) JWEL&B 436; Münchmeyer (n 33).

<sup>40</sup> K Huhta, ‘The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector’ (2021) 70(4) ICLQ 991, 1003.

supply shock, there was extremely limited understanding of the formal role of solidarity as a legal norm in EU energy law. These recent developments are not only pivotal in terms of EU energy law itself, but fundamental for energy law scholarship, which has not developed and matured over time in the same way as have environmental and climate law scholarship, which are its close relatives.<sup>41</sup> One of the reasons for this is that energy law scholarship has not been able to derive and develop the key principles from legal sources that would solidify the foundations of energy law in the same way as the precautionary principle or the ‘do no significant harm’ principle did for environmental law, for instance.<sup>42</sup>

Energy law scholarship has made limited (but widely cited) attempts to develop energy law principles.<sup>43</sup> In 2018, Raphael Heffron et al suggested eight principles of energy law intended to ‘act as a guide to policy-makers, academics, lawyers, judges and arbitrators when adjudicating, enforcing, making or formulating documentation, laws, regulations, judgments, etc on energy law’.<sup>44</sup> In other words, this contribution suggested principles that *ought* to be followed by ‘policymakers, academics, lawyers, judges and arbitrators’<sup>45</sup> but energy law scholarship has not conducted a systematic study of which principles *are* followed or emerge from legal sources of energy law. In the attempts to identify the principles of energy law, there is also considerable diversity in terms of how key elements of energy law are theorized and framed. For instance, in a 2022 contribution on the evolution of energy law principles, Iñigo del Guayo identifies security of supply as a *principle* of energy law even though security of supply is customarily understood as an *objective* of energy law.<sup>46</sup> Overall, principles suggested in this manner should not be considered to have normative weight in the same way as principles emerging from legal sources such as treaties or judicial decision-making.

Against this background of energy law scholarship, the new legal sources on and the new interpretations of solidarity in EU energy law have tremendous potential for the advancement of energy law as an independent legal discipline and as means by which to solidify the foundations of EU energy law. Solidarity is to date the first and only legally binding principle of EU energy law that can clearly and explicitly be identified from EU legal sources.<sup>47</sup> However, because of the differences in the scope, application and orientation of Articles 122 and 194 of the TFEU, respectively, it seems that

<sup>41</sup> RJ Heffron et al, ‘A Treatise for Energy Law’ (2018) 11(1) JWEL&B 34; RJ Heffron and K Talus, ‘The Development of Energy Law in the 21st Century: A Paradigm Shift?’ (2016) 9(3) JWEL&B 189; Huhta (n 14).

<sup>42</sup> Scotford (n 15); Sands and Peel (n 15); Macrory, Havercroft and Purdy (n 15); Peel (n 15); Verschuuren (n 15). <sup>43</sup> Heffron et al (n 41). <sup>44</sup> *ibid* 47. <sup>45</sup> *ibid*.

<sup>46</sup> I del Guayo, ‘The Evolution of Principles of Energy Law (a Review of the Content of the *Journal of Energy & Natural Resources Law*, 1982–2022)’ (2022) 40(1) JERL 43, 52.

<sup>47</sup> Huhta (n 14). The forthcoming recast Energy Efficiency Directive will change this as it includes a legally binding ‘energy efficiency first’ principle. The directive is expected to enter into force some time in 2023. See European Commission, Proposal for a Directive of the

solidarity should be perceived differently depending on the legal source from which it emerges. Article 122 of the TFEU does not appear to share the politically charged background of Article 194 of the TFEU, and its approach to solidarity in secondary legal instruments seems to differ from that adopted in Article 194 of the TFEU. These differences in the interpretation and functions of solidarity are analysed in Sections III and IV.

### III. ENERGY SOLIDARITY IN THE LIGHT OF THE *OPAL* CASE

#### *A. The Facts and Background of the Case*

The Grand Chamber of the CJEU gave its judgment in the *OPAL* case in July 2021. The judgment is an appeal from an earlier judgment of the General Court of the EU (the General Court) in the *Poland v Commission* case from September 2019.<sup>48</sup> The appeal case concerned the question of whether energy solidarity within the meaning of Article 194 of the TFEU required Germany (and, by implication, other Member States and the European Commission) to take into account the energy supply-related interests of other EU Member States in adopting decisions based on the Gas Market Directive.<sup>49</sup> The General Court held that the Commission's Decision to allow and require modifications to the exemption regime for the Ostseepipeline-Anbindungsleitung (*OPAL*) was in breach of the principle of energy solidarity. The Grand Chamber of the CJEU largely confirmed the findings of the General Court and dismissed the appeal. It further clarified the legal status of the principle. This section first presents the General Court's findings before explaining its judgment and discussing how the ruling has changed the interpretation of energy solidarity from a political notion to a legally binding principle.

The *OPAL* connects the Nord Stream 1 pipeline to the existing pipeline grid in Central and Western Europe and is owned by the Russian majority State-owned company Gazprom. The origins of the dispute date back to 2009, when the Commission instructed the German regulatory authority to modify its decisions to exempt the capacities for cross-border transmission of the *OPAL* from the application of the rules on third-party access and tariff regulation laid down in the Gas Market Directive. In particular, the Commission requested the German regulatory authority to ensure that a dominant undertaking, such as Gazprom, was prevented from reserving the majority of the pipeline's capacity unless certain guarantees were given. These conditions were met in the decision made by the German regulatory

European Parliament and of the Council on energy efficiency (recast), 14 July 2021, COM(2021) 558 final.

<sup>48</sup> *Poland v Commission* (n 39).

<sup>49</sup> Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57. Directive 2003/55/EC was repealed by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (Gas Market Directive).



authority until 2016, when it notified the Commission of its intention to modify its exemption decision. This modification essentially involved the German regulatory authority lifting the requirement to limit the capacities that could be reserved by a dominant undertaking.

The Commission's approval of this 2016 Decision<sup>50</sup> was not favourably received by Poland, Lithuania and Latvia, which considered that the grant of a new exemption relating to the OPAL would 'considerably undermine the diversification of sources of supply of gas',<sup>51</sup> increase dependence on Russian gas supply and threaten security of supply in Europe. Poland applied to the General Court to seek annulment of the 2016 Decision on the ground that it infringed the principles of energy security and energy solidarity, among other things. In particular, Poland argued that the energy solidarity principle enshrined in Article 194 of the TFEU

obliges both the Member States and the Union institutions to implement the Union's energy policy in a spirit of solidarity. In particular, the measures of the Union institutions that undermine the energy security of certain regions or Member States, including their security of supply of gas, would be contrary to the principle of energy solidarity.<sup>52</sup>

The Commission disagreed with this interpretation and argued, among other things, that solidarity within Article 194(1) of the TFEU is addressed to the legislator and not to the administration applying the legislation, and that, in any event, the relevant provisions of the Gas Market Directive are already a concretization of energy solidarity and, therefore, recourse to the provisions of treaty law was not necessary.<sup>53</sup> In other words, the Commission contended that the principle of energy solidarity should, in the first place, be understood as a principle that ought to guide the legislator in the development of new directives and regulations in the field of energy.

### *B. The General Court's Interpretation of the Energy Solidarity Principle*

The General Court's judgment interpreted the principle of energy solidarity in a broad manner that reached far beyond the political perspective previously taken in respect of solidarity in the energy sector. It held that energy solidarity is not limited to extraordinary situations but that, on the contrary, the principle 'also entails a general obligation on the part of the Union and the Member States, within the framework of the exercise of their respective powers, to take into account the interests of the other actors'.<sup>54</sup> Furthermore, this general obligation

implies that the Union and the Member States must endeavour ... to avoid taking measures which may affect the interests of the Union and the other Member States,

<sup>50</sup> Commission Decision of 28.10.2016 on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC, C(2016) 6950 final.

<sup>51</sup> *Poland v Commission* (n 39) para 51.

<sup>52</sup> *ibid.*, para 61.

<sup>53</sup> *ibid.*, para 65.

<sup>54</sup> *ibid.*, paras 68–72.

with regard to security of supply, its economic and political viability and the diversification of sources of supply or supply, in order to assume their interdependence and *de facto* solidarity.<sup>55</sup>

The General Court also established some broad limits in respect of what the principle of energy solidarity can be regarded as requiring. It held that the principle of energy solidarity does not mean that ‘EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy’.<sup>56</sup> Instead, both ‘EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict’.<sup>57</sup>

Application of the principle of energy solidarity in the General Court’s reasoning led to the conclusion that the Commission should have assessed whether its 2016 Decision could affect the energy security interests of Member States other than Germany.<sup>58</sup> Furthermore, if that assessment had proved that Member States’ energy security interests could have been affected, the Commission should have balanced those interests against the positive effects gained through adoption of the 2016 Decision. The General Court took the view that the Commission should also have ‘observed the wider aspects of the principle of energy solidarity’.<sup>59</sup> In other words, the General Court adopted a broad interpretation of the principle of energy solidarity. The CJEU did not shy away from confirming this broad interpretation, as shown in the next subsection.

### *C. From the Politically Loaded ‘Spirit of Solidarity’ to a Legally Binding Principle*

Displeased with the General Court’s ruling, Germany appealed to the CJEU. Among other grounds, it invoked the ‘incorrect legal assessment of the principle of energy solidarity’,<sup>60</sup> highlighting that the principle ‘does not have binding effect, in the sense that it does not entail rights and obligations for the European Union and the Member States’<sup>61</sup> and that it is ‘an abstract, purely political notion, and not a legal criterion for the assessment of the validity of an act of an EU institution’<sup>62</sup> that needs to be implemented in secondary legislation in order to become a legal criterion.

The CJEU dismissed Germany’s pleas and instead strengthened the General Court’s reasoning. It began by confirming that the principle of solidarity is a fundamental principle of the EU that underpins its entire legal system.<sup>63</sup> It

<sup>55</sup> *ibid.*, para 73 and repeated by the CJEU in *Germany v Poland* (n 13) para 71.

<sup>56</sup> *Poland v Commission* (n 39) para 77.

<sup>57</sup> *ibid.*, para 77.

<sup>58</sup> *ibid.*, para 81.

<sup>59</sup> *ibid.*, para 82.

<sup>60</sup> *Germany v Poland* (n 13) para 26.

<sup>61</sup> *ibid.*, para 27.

<sup>62</sup> *ibid.*, para 27.

<sup>63</sup> *ibid.*, paras 37–41.

stressed the principle's interlinkage with that of sincere cooperation, which not only obliges Member States to cooperate with each other but also obliges the EU's institutions to cooperate in good faith with the Member States.<sup>64</sup> However, the core of the ruling does not contribute to the interpretation of the general principle of solidarity but specifically concerns energy solidarity.

The Court took the view that the wording of Article 194(1) of the TFEU is an energy-specific expression of solidarity,<sup>65</sup> which entails rights and obligations with vertical and horizontal effects for the Member States and the EU institutions.<sup>66</sup> Curiously, the wording of Article 194(1) of the TFEU only directly supports the vertical side of this interpretation as it only refers to the spirit of solidarity 'between Member States' and not between a Member State and the Union. Nevertheless, the CJEU gave the principle a broad interpretation. It held that the principle of energy solidarity 'forms the basis of all of the objectives of the European Union's energy policy, serving as the thread that brings them together and gives them coherence'<sup>67</sup> and, as a consequence, the legality of all energy policy (by the Member States and the EU institutions) must be assessed in the light of this principle.<sup>68</sup> In other words, it established energy solidarity as a balancing act between positive and negative impacts of energy decisions rather than requiring a specific end result or an outcome.<sup>69</sup> This kind of open-ended approach with no common methodology for assessing energy solidarity is extremely broad and opens up the prospect of energy solidarity taking on unpredictable roles in EU energy policy in the future.

The Court also explicitly broadened the reach of energy solidarity beyond energy security alone. It stated that the obligation to assess measures in the light of solidarity is not limited to the requirement to ensure energy security (Article 194(1)(b)) but applies equally to all other objectives enshrined in Article 194 of the TFEU, which include ensuring the functioning of the energy market and promoting energy efficiency and energy saving and the development of new and renewable forms of energy and the interconnection of energy networks.<sup>70</sup> Arguably, the application of a principle this broad could mean very different things for energy security and for the promotion of renewable energy sources, for instance. It seems likely that energy solidarity could even be used to balance the objectives of Article 194 of the TFEU and to manage the trade-offs, but the CJEU's ruling in *OPAL* is silent on this possibility. The Court did not elaborate on how the principle should be applied as between different energy policy objectives.

<sup>64</sup> *ibid.*, para 41.

<sup>65</sup> *ibid.*, para 37.

<sup>66</sup> *ibid.*, para 49.

<sup>67</sup> *ibid.*, para 43.

<sup>68</sup> *ibid.*, paras 43–45.

<sup>69</sup> K Talus, 'The Interpretation of the Principle of Energy Solidarity – A Critical Comment on the Opinion of the Advocate General in *OPAL*' (Oxford Institute for Energy Studies, April 2021) 3 <<https://www.oxfordenergy.org/publications/the-interpretation-of-the-principle-of-energy-solidarity-a-critical-comment-on-the-opinion-of-the-advocate-general-in-opal/>>.

<sup>70</sup> *Germany v Poland* (n 13) para 47.

The Court also addressed the arguments put forward by the Commission and Germany as to the role of solidarity under the Gas Market Directive. It held that direct references to solidarity in secondary legal instruments such as the Gas Market Directive do not relieve the Member States or EU institutions from the obligations imposed on them by the solidarity principle enshrined in Article 194 of the TFEU. It follows from this that all secondary legislation in the area of energy needs to be interpreted and assessed while taking into account potential solidarity issues and the interests of both the Member States and the EU.

The Court also gave hints as to the relationship between solidarity within the meaning of Article 194 of the TFEU and under Article 122 of the TFEU. It highlighted that the energy solidarity principle of Article 194 of the TFEU is not restricted to emergency measures but also encompasses measures needed to prevent crises before they arise.<sup>71</sup> It also pointed out that solidarity within the meaning of Article 194 of the TFEU reaches far beyond the situations mentioned in Article 222 of the TFEU, which allows EU action in emergency situations of a terrorist attack or a natural or man-made disaster.<sup>72</sup>

The Court's reasoning has fundamentally turned the politically loaded language of the 'spirit of solidarity' into an obligation requiring the institutions and the Member States actively to assess the potential effects of energy legislation on other Member States prior to its adoption. Curiously, no secondary measures that explicitly refer to energy solidarity have been adopted under Article 194 of the TFEU since this judgment. Instead, several legislative instruments have been adopted on the basis of Article 122 of the TFEU to address the acute energy crisis. The following section examines how these notions of solidarity can be interpreted and whether their content differs from that established in the *OPAL* ruling.

#### IV. SOLIDARITY IN THE EU'S LEGISLATIVE MEASURES TO ADDRESS THE ENERGY CRISIS

##### *A. The EU's Response to the Energy Supply Shock*

As a result of the Russian invasion of Ukraine in early 2022, Europe is experiencing an unprecedented energy supply shock, which has dramatically increased energy prices and led to widespread and well-founded concerns over the resilience of European households and the economy.<sup>73</sup> In a short period of time, the EU has adopted both a political strategy to address the energy crisis and several energy-specific legal instruments to provide Member States with a coordinated toolkit to minimize the adverse effects of the war on the energy sector and, by extension, the economy. This subsection

<sup>71</sup> *Germany v Poland* (n 13) para 69.

<sup>73</sup> *Osička and Černoč* (n 16).

<sup>72</sup> *ibid*, para 61.

reviews these political and legislative initiatives before focusing, in the following subsections, on the approach taken to solidarity.

The legal instruments adopted to address the ongoing energy crisis are based on two key political initiatives that the Commission adopted shortly after the Russian invasion of Ukraine on 24 February 2022: the REPowerEU Communication<sup>74</sup> and the REPowerEU Plan,<sup>75</sup> which call for ‘Joint European Action for more affordable, secure and sustainable energy’. The REPowerEU Communication only refers to the term ‘solidarity’ once, but the REPowerEU Plan, presented only two months later, relies heavily on solidarity-related language.<sup>76</sup> Noting the European Council’s desire to phase out the Union’s dependence on Russian energy, the REPowerEU Plan refers to ‘fairness and solidarity’ as being ‘defining principles’ of the European Green Deal, which is a green growth strategy put forth by the Commission in 2019.<sup>77</sup> The REPowerEU Plan also outlines the need to ‘build an integrated energy market that secures supply in a spirit of solidarity’ which can be done by implementing ‘long pending projects, with a particular focus on cross-border connections’.<sup>78</sup> The need for a stable and secure energy supply is therefore cast in the light of solidarity, ie as an objective that can only be achieved through cooperation between Member States.

The REPowerEU Plan contains several additional explicit references to the concept of ‘solidarity’, including the need to conclude ‘outstanding bilateral solidarity arrangements’<sup>79</sup> and the possibility of ‘solidarity measures’<sup>80</sup> that 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’.<sup>81</sup> The references to solidarity are accordingly both political and legal in nature. The REPowerEU Plan’s conclusions, however, primarily emphasize the political conceptualization of ‘solidarity’ by referring to the fact that the Plan aims to ‘[accelerate] diversification and more renewable gases, frontload energy savings and electrification with the potential to deliver as soon as possible the equivalent of the fossil fuels Europe currently imports from Russia every year’<sup>82</sup> ‘with strong European solidarity’.<sup>83</sup> Reference is then made to ‘a double urgency’<sup>84</sup> comprising the ‘climate crisis’<sup>85</sup> which is ‘severely compounded by Russia’s aggression against

<sup>74</sup> 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, REPowerEU: Joint European Action for more affordable, secure and sustainable energy, 8 March 2022, COM(2022) 108 final (REPowerEU Communication).

<sup>75</sup> 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, REPowerEU Plan, 18 May 2022, COM(2022) 230 final (REPowerEU Plan).<sup>76</sup> *ibid.*

<sup>77</sup> European Commission, Communication from the Commission: The European Green Deal, 11 December 2019, COM(2019) 640 final. In the literature, see J van Zeben, ‘The European Green Deal: The Future of a Polycentric Europe?’ (2020) 26(5–6) EJM 300.

<sup>78</sup> REPowerEU Plan (n 75) 12. <sup>79</sup> REPowerEU Plan (n 75) 19. <sup>80</sup> *ibid.* <sup>81</sup> *ibid.*

<sup>82</sup> REPowerEU Plan (n 75) 20. <sup>83</sup> *ibid.* <sup>84</sup> *ibid.* <sup>85</sup> *ibid.*

Ukraine, and EU's dependence on fossil fuels, which Russia uses as an economic and political weapon'.<sup>86</sup> During its special meeting of 30 and 31 May 2022, the European Council called upon the Council rapidly to examine the Commission's proposals in respect of the REPowerEU objectives, and noted that:

[i]n a spirit of European solidarity, preparedness for possible major supply disruptions and the resilience of the EU gas market should be improved, in particular through swiftly agreeing on bilateral solidarity agreements and a coordinated European contingency plan, which should ensure that major supply disruptions are mitigated.<sup>87</sup>

On the basis of these political initiatives from early 2022, five legislative measures, all of which have entered into force, have been put forward to date.<sup>88</sup> The first was a Council Regulation on coordinated demand-reduction measures for gas, which establishes rules to address a situation of severe difficulties in the supply of gas in the EU with a view to safeguarding security of gas supply in a spirit of solidarity (Gas Demand-Reduction Regulation).<sup>89</sup> The second instrument focuses on electricity and establishes emergency intervention measures to mitigate the effects of high energy prices (High Energy Prices Intervention Regulation).<sup>90</sup> The third instrument is a gas-specific Council Regulation, which promises to enhance solidarity through better coordination of gas purchases and to introduce mechanisms to protect citizens and the economy and against excessively high prices (Gas Solidarity Regulation).<sup>91</sup> The fourth instrument is a Council Regulation laying down a framework to accelerate the deployment of renewable energy (Regulation on Accelerating the Deployment of Renewable Energy).<sup>92</sup> The final instrument is a Council Regulation that establishes a temporary market correction mechanism to limit episodes of excessively high gas prices which do not reflect world market prices (Market Correction Mechanism).<sup>93</sup> All these emergency legal instruments use Article 122 of the TFEU as their legal basis and, as required by the wording of Article 122 of the TFEU, all have been adopted by the Council alone, rather than by Council and Parliament under the joint legislative procedure or by the Commission on a delegated basis under a Council–Parliament measure.

<sup>86</sup> *ibid.*

<sup>87</sup> European Council, 'Conclusions adopted by the European Council at the Special Meeting of 30 and 31 May 2022', EUCO 21/22 (Brussels, 31 May 2022) <<https://www.consilium.europa.eu/media/56562/2022-05-30-31-euco-conclusions.pdf>>.

<sup>88</sup> Changes tracked until 16 January 2023.

<sup>89</sup> Gas Demand-Reduction Regulation (n 17) art 1.

<sup>90</sup> High Energy Prices Intervention Regulation (n 17) art 1.

<sup>91</sup> Gas Solidarity Regulation (n 17) art 1.

<sup>92</sup> Regulation on Accelerating the Deployment of Renewable Energy (n 17).

<sup>93</sup> Market Correction Mechanism (n 17).

In addition, on 29 December 2022, the Commission published a Notice on the Guidance to Member States for the update of the 2021–2030 national energy and climate plans.<sup>94</sup> The Notice provides an overview of the above-mentioned instruments and indicates in the preamble that ‘a strong Energy Union and coordinated climate action are the prerequisite for solidarity, prosperity and sustainability in the European Union’.<sup>95</sup> Solidarity is accordingly considered as a goal to be achieved through a strong Energy Union and coordinated climate action. The Notice also indicates that solidarity and collective action are central to national energy and climate plans. Finally, the Notice reiterates the fact that fairness and solidarity are key objectives and ‘an integral part of’ the European Green Deal.

As required by the wording of Article 122 of the TFEU, all these legal instruments rely heavily on solidarity. However, the meaning accorded to this term differs between them. A careful analysis of the legal instruments suggests that it is used in three distinct contexts and for three different purposes within the four legal instruments: (1) solidarity as an expression of the internal market approach; (2) solidarity as a description of risk-sharing between Member States; and (3) solidarity as a means of protecting those most affected by the energy crisis. These three categories are discussed in the following subsections.

### *B. Solidarity as an Expression of the Internal Market Approach*

The first way that the new emergency instruments utilize the principle of solidarity is by reference to the internal market and the interdependence it has created. The internal market for energy is expected to achieve, or at least positively contribute to, EU energy policy objectives, including energy security.<sup>96</sup> The internal market approach in the energy sector is based on the idea of pooling all Member States’ energy resources by creating an area without trade restrictions, so that those resources can be utilized in the most cost-efficient way.<sup>97</sup>

Solidarity plays a key role in this internal market approach because the increased interdependence due to shared resources necessitates mutual trust, solidarity and faith across Member States that the operation of the internal market will lead to energy resources being available to buy and sell so as to fulfil demand and ensure energy security across EU Member States.<sup>98</sup> The connection between the internal market and solidarity is not unique to Article 122 of the TFEU, but is also the bedrock of Article 194(1) of the TFEU,

<sup>94</sup> Commission Notice on the Guidance to Member States for the update of the 2021–2030 national energy and climate plans (2022/C 495/02) [2022] OJ C495/24. <sup>95</sup> *ibid.*

<sup>96</sup> See eg 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 [2019] OJ L158/125, recital 2.

<sup>97</sup> K Huhta, ‘Too Important to Be Entrusted to Neighbours? The Dynamics of Security of Electricity Supply and Mutual Trust in EU Law’ (2018) 43(6) ELR 920, 933. <sup>98</sup> *ibid.*

according to which EU energy policy should be pursued ‘in the context of the establishment of the internal market’. Connections between the internal market and solidarity are also made elsewhere in secondary energy law.<sup>99</sup> This line of internal market thinking also finds expression on numerous occasions within the emergency legal instruments of 2022.<sup>100</sup>

For example, the High Energy Prices Intervention Regulation states that protecting ‘the integrity of the internal electricity market’ is fundamental in order to ‘preserve and enhance the necessary solidarity between Member States’<sup>101</sup> and that ‘in a spirit of solidarity, measures adopted in one Member State should, in the interconnected Union market, also have a positive effect in other Member States’.<sup>102</sup> Similar notions of solidarity and the internal market appear throughout the emergency instruments, with the Gas Demand-Reduction Regulation pointing out that in the light of the ‘significant distortions of the internal market which are likely to occur if Member States react in an uncoordinated manner to a potential or actual further disruption of Russian gas supply, it is crucial that all Member States reduce their gas demand in a spirit of solidarity’.<sup>103</sup>

These notions of solidarity show that the internal market is a key instrument for ensuring solidarity and also vice versa: that solidarity underpins and is a necessary precondition for the achievement and functioning of the internal market.<sup>104</sup> As a consequence of the internal market approach, Member States are expected to share not only the benefits of the internal market, but also the potential risks of increased interdependence. The application of solidarity in the context of sharing risks between Member States is the focus of the next subsection.

### *C. Solidarity as a Description of Risk-sharing between Member States*

The second way in which the new emergency instruments utilize the principle of solidarity is by using solidarity as a means of describing necessary risk-sharing between Member States. In practice, solidarity as risk-sharing is ‘an agreement

<sup>99</sup> See eg Council Directive 2009/119/EC (n 28) recital 33.

<sup>100</sup> See eg Council Directive 2004/67/EC (n 28) recital 13; and European Commission, Explanatory Memorandum to the Proposal for a Council Regulation laying down a framework to accelerate the deployment of renewable energy, 9 November 2022, COM(2022) 591 final, section 1, which states as follows: ‘The shortage in gas and power supply and the relatively inelastic energy demand have led to significant increases in prices and volatility of gas and electricity prices in the EU. National measures to counter these trends may lead to fragmentation of the internal market and may not guarantee solidarity.’

<sup>101</sup> High Energy Prices Intervention Regulation (n 17) recital 9.

<sup>102</sup> *ibid*, recital 12.

<sup>103</sup> Gas Demand-Reduction Regulation (n 17) recital 14. Similar connections between the internal market and solidarity can be found in Gas Solidarity Regulation (n 17) recitals 10–66 and arts 1, 3, 4.

<sup>104</sup> Elsewhere in the literature, see T Sokol, ‘Public Health Emergencies and Export Restrictions: Solidarity and a Common Approach or Disintegration of the Internal Market?’ (2020) 57(6) *CMLRev* 1819.



between states to intervene on a reciprocal basis if one encounters unforeseen difficulties – one for all and all for one'.<sup>105</sup> In these instances, solidarity is used to explain why and how the EU Member States must share the dangers and threats that other Member States face. While this second expression of solidarity is also linked to the internal market approach, the focus on risk-sharing highlights the importance of the energy security objective rather than market functioning. That is to say that the focus is on ensuring security of supply rather than on the operation of the market for the available supply of energy.

The idea of solidarity as an 'all for one and one for all' approach shows up in several ways within the emergency legislative instruments. First, solidarity is used as a solution for managing the risks of the energy sector in the best possible way. In fact, this is one of the starting points of the Gas Demand-Reduction Regulation.<sup>106</sup> The Regulation highlights that:

the recent escalation of disruption of gas supply from Russia points to a significant risk that a complete halt of Russian gas supplies may materialise in the near future, in an abrupt and unilateral way. The Union should therefore anticipate such a risk and prepare, in a spirit of solidarity, for the possibility of a full disruption of gas supply from Russia at any moment.<sup>107</sup>

A similar outlook can be detected in the Market Correction Mechanism.<sup>108</sup>

Secondly, solidarity as a risk-sharing effort between Member States is used to justify the legislative measures that the EU adopts by contending that solidarity requires the EU to take a certain type of action. For instance, the Demand-Reduction Regulation highlights that to:

prevent significant economic harm to the Union as a whole, it is crucial that each Member State reduce its demand after a Union alert has been declared. That reduction will ensure that there is sufficient gas for all, even during the winter. The demand reduction across the Union is an expression of the principle of solidarity, enshrined in the Treaty.<sup>109</sup>

Similarly, the Regulation on Accelerating the Deployment of Renewable Energy emphasizes that in the implementation of the principle of energy solidarity is a means by which to achieve the 'cross-border distribution of the effects of faster deployment of renewable energy projects'.<sup>110</sup> Furthermore, the recitals to the Gas Solidarity Regulation argue that the 'restrictions imposed on market operators by the extension of solidarity protection to critical gas volumes are necessary to ensure security of the gas supply during a situation of reduced

<sup>105</sup> Talus (n 19) 278.

<sup>106</sup> Gas Demand-Reduction Regulation (n 17) recital 8.

<sup>107</sup> *ibid.*, recital 5. See also Regulation on Accelerating the Deployment of Renewable Energy (n 17) recitals 3, 20.

<sup>108</sup> Market Correction Mechanism (n 17) recital 53.

<sup>109</sup> Gas Demand-Reduction Regulation (n 17) recital 25.

<sup>110</sup> Regulation on Accelerating the Deployment of Renewable Energy (n 17) recital 19.

gas supply and increased demand during the winter season'.<sup>111</sup> In other words, solidarity operates as a justification for the adoption of these emergency measures.<sup>112</sup>

One could even argue that solidarity, in this context, is a corollary of the subsidiarity principle, because it is used to justify why the EU needs to take action instead of the Member States taking unilateral action.<sup>113</sup> Similar observations have been made in fields beyond energy law. Luisa Marin and Emanuela Pistoia, as well as Marco Balboni, came to a similar conclusion in examining the interlinkage between subsidiarity and solidarity when analysing these principles in the context of asylum and migration law.<sup>114</sup> According to Balboni the principles of solidarity and subsidiarity 'point in the same direction'.<sup>115</sup> Marin and Pistoia go even further and submit that there is a 'new role for subsidiarity', moving away from an interpretation of subsidiarity that 'limits the exercise of the Union's shared competences'<sup>116</sup> to being a 'spur for the Union's law-makers to make the best use of the Union's competences in this area'.<sup>117</sup>

#### D. Solidarity as a Means of Protecting the Most Affected Citizens and Communities

The third way in which the emergency instruments utilize the principle of solidarity is by using solidarity as means of protecting the people, households and communities most affected by the energy supply shock caused by the Russian invasion of Ukraine. In other words, solidarity is used as means of mitigating the impact of high energy prices or the unavailability of energy.<sup>118</sup> The ways in which this is done within the emergency instruments varies.

<sup>111</sup> Gas Solidarity Regulation (n 17) recital 61.

<sup>112</sup> See also Market Correction Mechanism (n 17) recital 53.

<sup>113</sup> Sami Andoura argues that, in the past, energy measures (related to the internal market) were developed mostly 'in keeping with the principle of subsidiarity, but without addressing the specific implications of energy solidarity in particular'. See S Andoura, *Energy Solidarity in Europe: From Independence to Interdependence* (Notre Europe, Jacques Delors Institute 2013) 25.

<sup>114</sup> L Marin and E Pistoia, 'Captured between Subsidiarity and Solidarity: Any European Added Value for the Pact on Migration and Asylum?' (2021) 2021(2) *Freedom, Security & Justice* 167; M Balboni, 'Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy' in G Walzenbach and R Alleweldt (eds), *Varieties of European Subsidiarity: A Multidisciplinary Approach* (E-International Relations 2021).<sup>115</sup> Balboni *ibid.*

<sup>116</sup> Marin and Pistoia (n 114). Also further discussed in R Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68(3) *CLJ* 525.

<sup>117</sup> Marin and Pistoia (n 114). On subsidiarity as a justification for moving powers up and centralizing, see N Emiliou, 'Subsidiarity: An Effective Barrier against "the Enterprises of Ambition"?' (1992) 17(5) *ELR* 383; N Emiliou, 'Subsidiarity: Panacea or Fig Leaf?' in D O'Keefe and PM Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley 1994) 65; A Toth, 'A Legal Analysis of Subsidiarity' in D O'Keefe and PM Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley 1994) 37; A Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' (1992) 29(6) *CMLRev* 1079.

<sup>118</sup> See eg High Energy Prices Intervention Regulation (n 17) and Market Correction Mechanism (n 17) recital 6.

The emergency measures often mention solidarity in conjunction with the protection of household consumers and, in particular, those who are in the most vulnerable socio-economic position due to the crisis. While the EU's approach to energy price regulation has always been hesitant and governed by legal conditions,<sup>119</sup> the legislative instruments used to address the energy crisis have brought about a fundamental shift in this approach and justified interventions to address market-based price formation on grounds of solidarity as the just redistribution of the burdens caused by the energy shock.<sup>120</sup> Such approaches to energy solidarity appear throughout the emergency measures. In fact, the main aim of the Gas Solidarity Regulation, for example, is to safeguard gas supply for the most critical customers.<sup>121</sup> It even includes a definition of a 'solidarity protected customer'.<sup>122</sup> Similarly, the High Energy Prices Intervention Regulation requires that energy companies that gain exceptional profits due to high prices provide a 'solidarity contribution' from their profits. This is to be used, among other things, for the provision of financial support measures to final energy customers, and in particular vulnerable households, to mitigate the effects of high energy prices.<sup>123</sup> A solidarity contribution refers to a measure intended to address surplus profits of energy companies to mitigate the exceptional price developments in the energy markets for Member States, consumers and companies.<sup>124</sup>

The protection of vulnerable consumers and households from the effects of the energy supply shock through obligations such as the solidarity contribution has interesting implications for the scope of solidarity. While the interpretation of solidarity in the *OPAL* ruling and under Article 194 of the TFEU was established in such a way as to apply to Member States and EU institutions, the solidarity contribution adopted under Article 122 of the TFEU seems to extend it to apply also to private companies. The solidarity contribution, although temporary, acts as a redistribution measure aimed at contributing to 'the improvement of the energy crisis in the internal market'.<sup>125</sup>

#### V. ANALYSIS AND CONCLUDING THOUGHTS

As a result of the Russian invasion of Ukraine, 2022 was an eventful year in EU energy policy. Recent developments within EU energy law include

<sup>119</sup> For retail energy prices, see Case C-265/08 *Federutility and Others* ECLI:EU:C:2010:205. In the literature, see S Fischerauer and A Johnston, 'State Regulation of Retail Energy Prices: An Anachronism in the Liberalized EU Energy Market' (2016) 9(6) *JWEL&B* 458.

<sup>120</sup> This kind of approach directly links the emergency measures to discussions on energy justice. See BK Sovacool, *Global Energy Justice: Problems, Principles, and Practices* (CUP 2014).

<sup>121</sup> Gas Solidarity Regulation (n 17) art 1.

<sup>122</sup> *ibid*, art 2. Defined on the basis 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 [2017] OJ L280/1, art 2(6).

<sup>123</sup> High Energy Prices Intervention Regulation (n 17) recitals 15 and 57–62.

<sup>124</sup> *ibid*, art 2(19). <sup>125</sup> *ibid*, recital 51.

confirmation of the existence of a principle of energy solidarity by the CJEU. As part of the EU's response to the existing energy security-related concerns, the EU institutions have made ample use of this newly confirmed principle as the basis for legislative measures aimed at addressing the acute energy crisis. While this may initially only appear relevant for EU energy law, the recent role and interpretations of energy solidarity have much broader implications for the functioning of EU law and the internal market. The different ways in which (primarily) the European Commission has used various forms of 'solidarity' to describe and justify interventions in the EU energy market and the adoption of measures aimed at fostering energy supply security render this contribution, and the developments described therein, of relevance to a much wider audience.

This article has explored solidarity in EU energy law in the context of the ongoing energy crisis. It has developed a general understanding of the ambiguous solidarity concept in EU law through the lens of the energy sector and provided a topical overview of the EU's emergency responses to address the acute energy crisis. The analysis shows that while there are commonalities between the interpretation of solidarity in Articles 122 and 194 of the TFEU, such as its connections with the internal market, the concept reflected by the term is understood in a fundamentally different manner depending on the context and the legal basis on which it relies.

First, solidarity under Article 122 of the TFEU does not seem to share the politically charged origins of solidarity under Article 194 of the TFEU. Perhaps because of this, the approach to solidarity in instruments that use Article 122 of the TFEU as a legal basis seems more clearly defined and less abstract than that adopted in the *OPAL* ruling.

Secondly, the interpretation of the solidarity principle in the *OPAL* ruling and under Article 194 of the TFEU seems to impose rights and obligations upon the Member States and EU institutions, whereas solidarity in the emergency instruments and under Article 122 of the TFEU can also require action from private undertakings in the form of the solidarity contributions, for example.

Thirdly, solidarity within the meaning of Article 194 of the TFEU is significantly broader in scope than the solidarity enshrined in Article 122 of the TFEU. The *OPAL* ruling established that the energy solidarity principle within the meaning of Article 194 of the TFEU applies to all EU energy policy objectives, whereas solidarity under Article 122 of the TFEU is fundamentally security and crisis-oriented, and therefore narrower in scope. Furthermore, the scope of Article 194 of the TFEU reaches beyond the crisis- and emergency-focused scope of Article 222 of the TFEU.<sup>126</sup> The Court also appeared to confirm that secondary legislation in the area of energy needs to be interpreted and assessed with this broader notion of energy solidarity in

<sup>126</sup> Also explicitly highlighted by the Court in *Germany v Poland* (n 13) para 67.

mind, irrespective of whether or not that secondary legislation separately mentions solidarity.

Because of the breadth of the energy solidarity principle within the meaning of Article 194 of the TFEU and the *OPAL* interpretation, it is also more susceptible to criticism than solidarity under Article 122 of the TFEU.<sup>127</sup> Measures adopted on the basis of the latter are crisis-related and temporary, whereas the former interpretation is so broad that it can allow energy solidarity to have undesirably unpredictable roles in EU energy policy in the future. The broad interpretation of the principle also risks competence creep in the energy sector, where Member States still hold certain competences that are ring-fenced from EU legislative action.<sup>128</sup> One could also argue that the substantive element of energy solidarity has been broadened by the legislator since the adoption of the emergency measures and hence the scope of the principle has also expanded.

The breadth and abstraction of the energy solidarity principle within the meaning of Article 194 of the TFEU mean that the courts will have the role of concretizing the content of the principle for years to come before its precise limits and potentialities can be comprehensively assessed. In other words, it seems that the boundaries of the very broadly defined solidarity principle within the meaning of Article 194 of the TFEU will only be gradually fine-tuned through the case law of the European courts.

Finally, this article has contributed to the emerging body of energy law scholarship that seeks to advance the discipline of energy law by focusing on its doctrine—concepts, principles and theories—rather than on substantive developments within it. In this context, the emergence and confirmation of the energy solidarity principle and new interpretations of it present an exciting avenue for the development of EU energy law scholarship. However, as the principle's diffuse and convoluted nature and its diverse usages and interpretations show, many questions remain to be answered.

<sup>127</sup> Boute (n 39); Talus (n 69); Münchmeyer (n 33); Iakovenko (n 39).

<sup>128</sup> Huhta (n 40).