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TOPIC III – QUESTIONNAIRE

Energy solidarity and energy security – from green transition to the EU’s crisis management

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CHAPTER I MULTIDIMENSIONALITY OF ENERGY SOLIDARITY AND ENERGY SECURITY IN EU AND NATIONAL LAW

Energy solidarity and energy security¹ are two interrelated concepts that both play an important role in the field of EU energy law. Considered as “quintessence of what is both the *raison d’être* and the objective of the European project”², solidarity operates as a “consolidating agent” carrying the European project ahead. The multifaceted principle of solidarity is given a specific expression in various fields of EU law, notably within the Union’s energy policy under Article 194(1) TFEU. In recent years, challenges related to the Union’s energy policy have become a true litmus test for the solidarity *between the Member States and Union’s citizens* in its various dimensions. Security of energy supply constitutes a key objective of EU energy policy under Article 194 TFEU, which has gained a particular importance in the aftermath of the energy crisis and requires continuous adaptation, notably in view of the cybersecurity threats. Beyond its relevance at the level of the Union’s energy policy, energy security may be explored from the national legal and constitutional perspective. Against the background of shared competence between the Union and its Member States in the field of energy, the purpose of this chapter is to analyse the evolution and the boundaries of both the principle of energy solidarity and the objective of energy security in the context of EU and national law.

What are the multidimensional elements of the principle of energy solidarity and the objective of energy security and their impact on the EU and national constitutional frameworks?

1. What is the place and nature of the concepts of energy solidarity and energy security (security of energy supply) in your national legal order? Do these concepts form part of the national constitutional framework, as interpreted by the national courts, including the constitutional courts? How are these concepts articulated and reconciled in the national case law, as well as national constitutional and legislative practice? In its judgement in the *OPAL case*³ the Court of Justice of the EU (hereafter ‘the Court’) confirmed that the EU principle of energy solidarity is not purely political and programmatic, but a legally binding principle. In this context, how are the principles of energy solidarity or energy security operationalized in the national jurisprudence?

2. In the *OPAL case*⁴, the Court ruled that “the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the

¹ Article 194 TFEU refers to “security of supply”.

² See Opinion of Advocate General Bot in joined cases *Slovakia v Council*, C-643/15, C-647/15, EU:C:2017:631, point 17.

³ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598.

⁴ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598.

principle of solidarity, which is itself one of the fundamental principles of EU law”.⁵ How would you define the impact of this conceptualisation of energy solidarity as a “specific expression”, on the fundamental principle of solidarity in EU law, and potentially on a comparable principle in national law? Should energy solidarity be viewed as a “corrective tool”, outlining the limits to the national sovereignty in the field of energy in the name of common interest? Should it be viewed as a building block of the Union’s constitutional framework, reaching *beyond* particular national interests and forming part of the “Union’s constitutional identity” as referred to in the *Rule of law conditionality judgements* of the Court⁶? In the latter case, should energy solidarity as part of the Union’s constitutional identity be considered both in the internal and the external context?

3. Pursuant to Article 194 TFEU, EU’s energy policy aims “in a spirit of solidarity between Member States”, to ensure the functioning of the energy market, to ensure 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. Given that energy solidarity applies to all objectives of EU’s energy policy, is there a tension between those various objectives and, if so, how can they be reconciled? Is energy solidarity liable to trigger legal effects in relation to green transition? Are social and fundamental rights dimensions of EU law relevant in this context?

4. Tensions between environmental and economic objectives frequently arise in the energy field, both at the Union’s level and in bilateral relationships between Member States. As the Court’s case law shows, these tensions particularly arise in the case of large industrial installations. This is due to the cross-border dimension of possible environmental damage, and to the fact that large projects potentially affect energy choices of a given Member State (cf. *Hinkley Point, Turów, CEZ*).⁷ Moreover, these tensions play a particular role in the context of interconnected energy networks, where several EU secondary law acts refer to regional and bilateral dimensions of solidarity.⁸ Have such cross-border, bilateral tensions occurred in your Member State and did they lead to legal and jurisprudential developments? Did they lead to a coordinated action with other Member States, for instance, in response to a supply crisis? Have the concepts of energy solidarity and energy security been invoked in this context?

5. The principle of energy solidarity does not exclude that EU energy policy may in some cases have negative impact for the individual interests of a given Member State. Thus, its application may have to be balanced against the principle of proportionality. EU energy measures trigger very diversified consequences for Member States owing to the particularity of their constitutional, economic, geographic and social characteristics. Should the need to ensure a proper balance between solidarity and proportionality in EU energy law take into account divergences between the Member States, or should it be based on a common denominator?

⁵ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598, point 38.

⁶ Judgment of the Court in case *Poland v Parliament/Council*, C-157/21, EU:C:2022:98, point 145.

⁷ Judgment of the Court in case *Austria v Commission (Hinkley Point)*, C-594/18 P, EU:C:2020:742; order of the vice-President of the Court in case *Czech Republic v Poland (Mine de Turów)*, C-121/21, EU:C:2021:420 and judgment of the Court in case *ČEZ*, C-343/04, EU:C:2006:330.

⁸ See for instance 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 (OJ L 211, p. 94–136); 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, p. 1–56); 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, p. 1–21).

6. Pursuant to Article 4(2)(i) TFEU, energy belongs to the area of shared competence between the EU and the Member States. How would you define, in the current state of development of EU law, the intensity of this shared competence? Specifically, since in a growing number of instances the objectives under Article 194 TFEU cannot be achieved at the national level only, does energy solidarity, as interpreted by the Court, contribute to the shift towards the predominant exercise of the competence by the EU in the field of energy? Taking the example of electricity and the realities of an interconnected grid, one may wonder to what extent there can be a purely national energy policy. Similar thoughts can be entertained in the context of gas – and in the future also hydrogen – where sourcing and consumption are no longer taking place on a purely national basis⁹. In that context how do you interpret the notion of “*spirit of solidarity between Member States*” in Article 194 TFEU in the context of energy security?

7. Defining the content of security of energy supply is particularly challenging in the Union’s multilevel legal architecture. Also, in the modern digitalized world, the need to make critical energy infrastructure more resilient requires its continuous adaptations, including those due to real-time requirements and cascading effects of energy systems. In the current state of EU law, in particular in the light of EU measures adopted in the context of the crisis following Russia’s war of aggression against Ukraine, what are the main components of the concept of “security” in the field of EU energy law and national law? How does this concept take into account constitutional, economic, geographical and political specificities of the Member States? Given potential cybersecurity threats, how do you assess current resilience and risk preparedness at the Union’s level and at the level of your Member State? In the same vein, given the recent pipelines incidents (North Stream, Balticconnector), should the concept of energy security be seen in a wider sense than from the angle of “security of supply”?

8. Energy solidarity implies rights and obligations both for the Union and for the Member States. Thus, questions of the Union’s unity arise *vis a vis* the outside world, including in the field of external energy policy. In this context, how does the principle of energy solidarity affect the exercise of EU’s external policy, in particular in relation to the projects of common interest¹⁰? Through the prism of security of supply and the imperative of diversifying supply routes and creating new routes that decrease the EU’s dependence on a single supplier, what is an interplay between energy solidarity and energy security in the external relations? How does the objective of security of supply affect EU’s external competence in the field of energy?

9. An important step in the EU’s energy policy was the Energy Union strategy, which encompasses energy security¹¹. However, whilst a number of initiatives focusing on reinforcing

⁹ 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, p. 1–35) was adopted as part of the crisis response. That Regulation includes measures to jointly purchase gas, to limit excessive gas prices and market volatility as well as measures to tackle a possible gas supply emergency in a coordinated manner and certain aspects of demand aggregation and of a joint purchasing mechanism. A Commission report published on 28.09.2023 found that these measures have played an important role in stabilising energy markets and ensuring an adequate supply of gas to the EU over the past year, and that certain aspects of the demand aggregation and joint purchasing mechanism could be made more permanent. Arguably that Regulation (and other measures adopted in response to the energy crisis) is a further signal that energy law and policy may have shifted more to a supranational approach.

¹⁰ Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ L 109, p. 14–31). In parallel, see Memorandum of Understanding on a Strategic Partnership in the field of energy, concluded by President von der Leyen and President Aliyev in Baku on 18 July 2022.

¹¹ 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

the cooperation may be launched at the level of the Union, security of supply remains Member States' responsibility. Using the gas market example, how would you evaluate the current state of security supply from the governance perspective? In particular, what is the impact of shared responsibility¹² for the security of gas supply on the security supply of the Union as a whole? Is the current governance model, involving multiple actors at national and Union level, adequate, or should it evolve towards the Union driven one? Which conclusions do you draw from the experiences of the recent energy crisis in this context?

CHAPTER II ENERGY SOLIDARITY, ENERGY SECURITY AND GREEN TRANSITION

In the aftermath of the EU Green Deal, a wave of legislative acts and pending proposals under the European Commission's "Fit for 55" initiative has a potential to profoundly change the Union's legal framework. The clean energy transition, aiming at reducing greenhouse gas emissions and enhancing the quality of life of the EU citizens is indeed one of the flagship objectives of the European Green Deal. How do the considerations of fairness and solidarity, and of leaving no one behind in the context of green transition, affect the articulation of the EU's climate objectives?

What is generally an interplay between (i) the climate neutrality, (ii) energy solidarity and (iii) security of energy of supply?

10. Given important economic and political differences between the Member States in the energy field, could and should the (energy) solidarity be relied upon to ensure coherence in the process of reshaping the climate neutral future of the Union's economy? Or, rather, is the 2050 climate neutrality objective such a powerful concept that it is gradually reshaping the meaning of energy solidarity and energy security in EU and national law?

11. What is the impact of the EU measures adopted so far in the context of "Fit for 55"¹³ on the development and application of EU and national energy law and, in particular, on the concepts of energy solidarity and energy security? Have any specific legal issues and challenges been discussed in your Member State, especially, by reference to these concepts?

12. Given its broad scope, could the constantly evolving principle of "do no significant harm"¹⁴ play a significant role in the area of energy law, in particular given the integration clause contained in Article 11 TFEU, as well as the wording of Article 194 TFEU which refers to the need to preserve and improve the environment? Are there any comparable national legal concepts, mirroring the EU notion of "do no significant harm" or resonating with it?

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, p. 1–77).

¹² Article 3 and 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 (OJ L 280, p. 1–56).

¹³ https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal/fit-55-delivering-proposals_en.

¹⁴ See Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, p. 13–43). Applicable in the context of the post-Covid recovery, the mandatory respect of the "do no significant harm" principle is also essential under the RRF Regulation (Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57p. 17–75)).

13. EU law includes the notion of “energy poverty” which is currently encompassed also in non-energy legal acts.¹⁵ In the global perspective, an inevitable link between energy and sustainable development¹⁶ implies that the availability of energy at an affordable price for all consumers must be understood through the prism of climate change. How would you evaluate the social dimension of green transition in the field of energy law at the Union’s level and its impact at national level? Does the concept of energy security in your national framework encompass social components? Has the financing under the Just Transition Fund¹⁷ contributed to the fair green transition in your country so far?

14. One of the crucial aspects of the EU law is State aid control. The impact of State aid measures in the area of energy must be viewed in the context of the Union’s integrated and interconnected energy market, as well as its underlying legal principles, in particular since the rationale behind State aid may conflict with the solidarity rationale. Whilst it seems that the assessment of measures under Article 106 TFEU is open to environmental scrutiny, as confirmed in the *Hinckley Point* case¹⁸, is there any potential for the energy solidarity scrutiny in the State aid context? To what extent can State aid measures be reconciled with the concept of energy solidarity?

15. The recently revised TEN-E Regulation¹⁹ amounts to one of the most comprehensive measures regarding the energy infrastructure. How would you define the relationship between Articles 170-172 TFEU and Article 194 TFEU? In particular, what is the relationship between the concept of energy solidarity and the concept of projects of common interest under Articles 170-172 TFEU and Regulation (EU) 2022/869?

16. How to define the relationship between decarbonization and security of energy supply? For instance, to what extent should efforts to decrease fossil fuels also be pursued for energy security reasons at the level of the Union?

17. How to define, in the current state of development of EU law, the relationship between Article 192(2)(c) TFEU and Article 194 TFEU? Are there any limits in EU law to the Member States’ freedom to set their energy mix ? If not, should there be any? Does energy solidarity amount to such a limit? What margin is there left to individual 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*”?

18. The impact of the climate change on the way Member States construe their choices between different energy sources is inevitable. What are the main legal tools adopted in your Member State to tackle the climate related considerations in the context of its energy mix ?

¹⁵ 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, p. 1–51) and Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast) (OJ L 231, 20.9.2023, p. 1–111).

¹⁶ World Energy Assessment: Energy and the Challenge of Sustainability, 2000 UNDP.

¹⁷ Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund (OJ L 231, p. 1–20).

¹⁸ Judgment of the Court in case *Austria v Commission (Hinkley Point)*, C-594/18 P, EU:C:2020:742.

¹⁹ Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013 (OJ L 152, p. 45–102).

19. The Union suffers from scarcity of natural resources, in particular regarding the energy resources. In the 2000 Green Paper ‘Towards a European energy security strategy’²⁰, the Commission referred to the ‘Gulliver in chains’, noting the problem dependence on external supplies. Scarcity of resources emphasizes the need to diversify energy supplies and to enhance trade relationships with worldwide partners. While in the field of energy the EU has shared external competence, in the light of the Court’s case law, in particular the COTIF judgment,²¹ the shared nature of that competence does not preclude the EU to act alone in this area. How do the respective roles of the EU and of the Member States keep evolving in external sphere, in particular, regarding security of supply?

20. How would you evaluate the impact of REPowerEU²² regarding energy security from your Member State’s perspective? Has your Member State applied for particular support to finance reforms in the energy sector including in diversifying energy supplies? How would you evaluate REPowerEU’s impact from the cohesion policy and energy security perspective in your country?

Chapter III The EU’s crisis management in the field of energy and its limits

In response to the energy crisis, in 2022, the EU has significantly enhanced its legal toolbox of crisis management measures. In particular, Article 122(1) TFEU has become one of the most widely used legal bases ensuring the Union’s reactivity and resilience. The crisis management measures are anchored in energy solidarity, whilst responding to the objective of energy security. This chapter explores the role of both concepts in the context of a crisis, while discussing the sufficiency of existing EU crisis management instruments.

What are the limits of the Union’s energy crisis managements tools?

21. In the *OPAL* case,²³ the Court considered that the wording of Article 194 TFEU does not give any indication that, in the field of EU energy policy, the principle of energy solidarity should be limited to the situations referred to in Article 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU must inform any action relating to EU energy policy. Thus, the principle of energy solidarity encompasses measures to be adopted in order to prevent crises before they arise. Do you consider that Article 194 TFEU is an appropriate tool to manage an energy crisis at the Union’s level both before and during potential crisis or is Article 122 TFEU a more suitable legal basis, given notably its celerity and adoption procedure? Would it be justified to argue that operationalising of the Union’s legal toolbox in crisis should rely to the widest possible on expeditious recourse to Article 194 TFEU, which remains the classic legal basis of the EU energy policy²⁴, possibly combined with other legal bases? If so, why?

²⁰ COM(2000) 769 final.

²¹ Judgment of the Court in case *Germany v Council (COTIF)*, C-600/14, EU:C:2017:935.

²² 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).

²³ Judgment of the Court in case *Germany v Poland*, C-848/19 P, EU:C:2021:598.

²⁴ See, amendments of Directive 2009/119/EC which requires Member States to maintain emergency minimum oil stocks). The scope of application of Gas Directive 2009/73/EC extends to future gas pipelines to and from third countries, with derogations for existing pipelines. Special provisions exist under Directive 2013/30/EU on the safety of offshore oil and gas operations.

22. The recent energy crisis measures²⁵ have demonstrated both the risks of the Union's energy dependence and the need of enhanced energy solidarity. Such measures must, nevertheless, remain commensurate to the crisis management context. What are the limits for the role of energy solidarity in the times of crisis? What are the limits of Article 122 TFEU, including the possibility of extension in time of the measures adopted in the emergency framework? Were these crisis management instruments more efficient from the security of supply perspective compared to the classic measures of EU energy legislation? Can you identify any legal issues related to such measures in your national legal order?

23. Do the Treaties provide a sufficiently robust Union energy crisis management toolbox? The crisis response might also be needed in the case of natural disasters which, in the era of a climate change, are liable to affect the Union's economy and the lives of its citizens. Is it thus possible to revitalize, in parallel, other Treaty instruments, including Article 222 TFEU, in case of major climate related threats jeopardising security of energy supply of the Union?

²⁵ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261I, p. 1–21) and 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, p. 1–35).