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EU emergency measures in energy law – opportunities and challenges of a new legal instrument

Abstract: In recent years, the Council of the European Union increasingly invoked the emergency competence of Art 122(1) TFEU for the adoption of legislative acts. The present article sheds light on the scope and limits of this article and aims to contribute to the provision’s hitherto scarce academic analysis. The Council of the European Union adopted six “emergency regulations” based on Article 122(1) TFEU to overcome the energy crisis. According to the wording of the provision alone, the requirements for invoking Article 122(1) TFEU as a legal basis do not seem to be high. This is surprising as the European Parliament and other institutions are not involved in the law-making process under Article 122 TFEU, and the Council decides by qualified majority. Therefore, four unwritten, or to be defined in more detail, conditions need to be fulfilled for the adoption of measures based on Article 122(1) TFEU: there must be serious economic difficulties, the measures adopted must be “appropriate” to the economic situation, there must be a causal relationship between the cause of economic difficulties that authorize the taking of measures and the objectives pursued by the Commission and the Council, and there must be an urgency that manifests itself in the fact that the ordinary legislative procedure cannot be awaited. Article 122(1) TFEU constitutes an exception from other EU competences, in particular Article 194 TFEU; therefore, there is a need to analyse whether it is reasonable to waive the specific requirements set out in these rules. One may think of the sovereignty limitations in Article 194(2) TFEU and the special requirements under Article 194(3) TFEU. The criterion “in the spirit of solidarity” is to be understood rather broadly and requires the balancing of the affected interests, including those of the Member States and of the Union as a whole.

Keywords: emergency measures, emergency regulations, energy law, energy crisis, spirit of solidarity.

Introduction

The energy crisis is only the latest in a series of crisis events¹ that severely affected the European Union in recent years. The global COVID-19 pandemic, the migration crisis or the financial crisis, to name but a few, posed significant challenges for the EU and its Member States and led to the adoption of secondary legislation on the basis of “EU emergency competences”.² The latter are part of the general competences within the Treaty on the Functioning of the European Union³ (TFEU) and, in many cases, characterized by a shift of power to the executive branch and a weakening of the democratically legitimized legislator, in particular the European Parliament.⁴ By way of derogation from the ordinary legislative procedure, the Council adopts legislative acts on a proposal from the Commission either after consulting the European Parliament⁵ or with no involvement of the European Parliament at all.⁶ The subordinate role of the European Parliament and the application of a special legislative procedure is justified by the need for rapid and decisive responses to crisis events that precludes lengthy decision-making processes. However, respect for the scope and limits of emergency competences and the invoking of the correct legal basis for adopting secondary legislation is crucial – not only in the vertical relationship between the European and national legislators but also in the horizontal relationship between different EU institutions with legislative powers.

In the wake of the energy crisis, the Council, most recently, adopted a total of six emergency regulations to mitigate social and economic risks associated with energy shortages.⁷ Alongside measures to reduce the demand for gas or to

¹ In the academic discourse, different meanings are attributed to the term “crisis”, but they all refer to a “threat that must be urgently averted or addressed in order to avoid dire consequences”, cf. A. Boin, M. Ekengren, M. Rhinard, *The European Union as Crisis Manager*, Cambridge 2013, p. 6.

² EU emergency competences are part of EU emergency law which refers to EU primary and secondary law that serves to respond to sudden threats to core values and structures of the Union or its Member States, cf. B. De Witte, “EU Emergency Law and its Impact on the EU Legal Order,” *Common Market Law Review* 59, 2022, no. 1, pp. 3–4.

³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

⁴ Article 78(3) TFEU authorizes the Council to adopt, on a proposal from the Commission, provisional measures for the benefit of Member States confronted by an emergency characterized by a sudden inflow of nationals of third countries; Article 122(2) TFEU enables the Council, on a proposal from the Commission, to grant financial assistance to a Member State where it is in difficulty or seriously threatened with severe difficulties caused by natural disaster or exceptional occurrences beyond its control.

⁵ Cf. Article 78(3) TFEU.

⁶ Cf. Article 122(1) TFEU, which does not provide for any involvement of the European Parliament, and Article 122(2) TFEU which requires the President of the Council to inform the European Parliament of the decision taken.

⁷ Cf. Chapter II.

coordinate the purchase of gas, the emergency regulations, *inter alia*, provided for emergency interventions to address high energy prices. The Council referred to the emergency competence of Article 122(1) TFEU as the legal basis. The latter allows for the adoption of “measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy”. It provides for a special legislative procedure and authorizes the Council to adopt emergency measures on a proposal from the Commission; participation of the European Parliament is ruled out. Therefore, and with regard to the fact that emergency regulations based on Article 122 (1) TFEU are capable of overruling other secondary acts previously adopted in the ordinary legislative procedure, i.e., with the European Parliament and the Council as joint legislators, it appears to be worth investigating whether the emergency measures were rightly based on Article 122(1) TFEU.

This article examines the scope and limits of Article 122(1) TFEU, especially in relation to Article 194(3) TFEU. It provides an overview of emergency regulations in the energy sector with particular attention to Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices and whether the latter was rightly based on Article 122(1) TFEU.

1. EU emergency measures in the energy sector

The Council has adopted a total of six emergency regulations to date to respond to the energy crisis.

- Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas⁸ aims to secure gas supplies within the European Union. The regulation provides for voluntary demand reduction and for measures to better coordinate, monitor and report on national gas demand-reduction measures. Also, it establishes the possibility of declaring an “EU alert”, which triggers a mandatory EU-wide demand-reduction obligation.
- Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices⁹ introduces measures to reduce the demand for electricity and to redistribute surplus energy sector revenues and profits to household customers and businesses to mitigate the effects of the rising energy prices.

⁸ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L 206/1.

⁹ Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ LI 261/1.

- 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 borders¹⁰ provides for rules on the coordination of gas purchases in the Union, as well as demand aggregation and joint purchasing of gas. Further, it establishes measures to enhance the use of LNG facilities, gas storage facilities and pipelines, measures to prevent excessive gas prices and rules that apply in a gas emergency.
- Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy¹¹ aims to accelerate the permit-granting process related to energy production from renewable sources. It lays down emergency provisions related to certain renewable energy technologies and projects capable of achieving a short-term acceleration of the pace of deployment of renewables in the Union. Acceleration of permit-granting, among other things, applies to solar energy equipment, the repowering of renewable energy power plants and renewable energy projects and related grid infrastructure.
- Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices¹² was adopted to respond to exceptionally volatile natural gas prices. The regulation establishes a temporary market correction mechanism “to limit episodes of excessively high gas prices in the Union which do not reflect world market prices”.
- Council Regulation (EU) 2023/706 of 30 March 2023 amending Regulation (EU) 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation¹³ extends the period for voluntary demand reduction and the mandatory EU-wide demand reduction in the case of an EU alert until 31 March 2024.

There is currently no established term for energy regulations based on Article 122(1) TFEU. The regulations themselves speak of “urgent action”¹⁴ and

¹⁰ 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 L 335/1.

¹¹ Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L 335/36.

¹² 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 L 334/45.

¹³ Council Regulation (EU) 2023/706 of 30 March 2023 amending Regulation (EU) 2022/1369 as regards prolonging the demand-reduction period for demand-reduction measures for gas and reinforcing the reporting and monitoring of their implementation [2023] OJ L 93/1.

¹⁴ Council Regulation (EU) 2022/2577, recital 22.

“emergency intervention”;¹⁵ the term “emergency measure”¹⁶ was commonly used in the literature. These terms indicate that the above legal acts adopted on the basis of Article 122(1) TFEU constitute a response to exceptional circumstances.

2. The scope and limits of Article 122(1) TFEU

According to Article 122(1) TFEU, the Council, acting on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon measures appropriate to the economic situation. The Council may do so if severe difficulties arise in the supply of certain products, notably in the area of energy. Article 122(1) TFEU applies without prejudice to any other procedures provided for in the Treaties. The formal and material requirements for the application of Article 122(1) TFEU will be discussed below.

2.1. Procedure

The procedure specified in Article 122(1) TFEU differs from the ordinary legislative procedure in several respects: first and foremost, the European Parliament is not involved in the legislative process; the Council is neither required to consult the European Parliament before its decision-making nor to later inform the Parliament of the decision taken.¹⁷ In addition, Article 122(1) TFEU does not provide for the involvement of the Committee of the Regions and the Economic and Social Committee or the participation of stakeholders. The Commission, however, must inform the European Parliament, the Economic and Social Committee, the Committee of the Regions and national parliaments of its proposal. The Council adopts secondary legislation under Article 122(1) TFEU with a qualified majority (Article 16(3) TEU); unanimity, as was required before the adoption of the Treaty of Nice,¹⁸ is no longer needed.

¹⁵ Cf. the title and Article 1 of Council Regulation (EU) 2022/1854.

¹⁶ B. De Witte, “EU Emergency Law . . .”, pp. 3–8; E. Chachko, K. Linos, “Ukraine and the Emergency Powers of International Institutions,” *The American Journal of International Law* 116, 2022, no. 4, pp. 775–785.

¹⁷ This does not apply in case of legislative initiatives which are expected to have significant economic, environmental or social impacts. In a later case, the Commission will carry out an impact assessment, the final results of which will be made available to the European Parliament, as well as to the Council and national parliaments, compare the Interinstitutional Agreement of 13 April 2016 on better law-making [2013] OJ L 123/1.

¹⁸ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80/1.

2.2. Measures appropriate to the economic situation

The adoption of measures on the basis of Article 122(1) TFEU requires a difficult economic situation or imminent economic problems. The “severe difficulties [...] in the supply of certain products” referred to in Article 122(1) TFEU thereby only constitute a subset of economic difficulties – other economic problems may also justify the adoption of secondary legislation.¹⁹ Article 122(1) TFEU – implicitly – requires economic problems to be of particular gravity, as Member States principally remain responsible for economic policy.²⁰ Article 122(1) therefore constitutes an emergency competence which – by way of exception – authorizes the Union to take measures to respond to all kinds of economic problems.²¹

In addition to serious economic difficulties, Article 122(1) TFEU requires measures to be “appropriate” to the economic situation. In determining the “appropriateness” of a particular measure, the Council enjoys broad discretion, as Article 122(1) TFEU does not set out permissible policy measures or other criteria for determining “appropriateness”.²²

Arguably, the relatively broad scope of Article 122(1) TFEU is further limited by an additional, unwritten criterion: there must be a causal relationship between the cause of economic difficulties that authorize the taking of measures and the objectives pursued by the Commission and the Council – Article 122(1) TFEU shall not develop into a general clause.²³

The first EU Emergency Regulation 2022/1369 addresses the urgency of responding to the energy crisis; three reasons for its adoption are highlighted:²⁴

- the exceptional situation caused by the reduction of gas supplies from the Russian Federation, which led to historically high and volatile energy prices, contributing to inflation and creating the risk of a further economic downturn in Europe;

¹⁹ U. Häde, „Art. 122 [Maßnahmen bei gravierenden Schwierigkeiten,]” [in:] *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta Kommentar*, eds. Ch. Calliess, M. Ruffert, München 2022, pp. 1555–1558.

²⁰ D.E. Khan, C. Richter, “Art. 122 [Gravierende Schwierigkeiten,]” [in:] *EUV/AEUV Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union Kommentar*, eds. R. Geiger et al., München 2023, pp. 661–663.

²¹ Ulrich Häde, “Art. 122 [Maßnahmen bei gravierenden Schwierigkeiten,]” [in:] *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta Kommentar*, eds. Ch. Calliess, M. Ruffert, München 2022, pp. 1555–1558.

²² T. Hackermann, D. Weiler, “EU-NotfallVO: Vereinbarkeit der EU-NotfallVO mit Art. 122 Abs. 1 AEUV und mögliche Auswirkungen auf das EU-EnergieKGB,” *Internationale SteuerRundschau* 12, 2023, no. 3, pp. 70–75.

²³ M. Nettesheim, ““Next Generation EU”: Die Transformation der EU-Finanzverfassung,” *Archiv des Öffentlichen Rechts* 145, 2020, no. 3, pp. 381–409.

²⁴ Cf. Council Regulation (EU) 2022/1369, recitals 1–10.

- existing plans to reduce the Union’s dependence on fossil fuels from Russia (the Commission’s REPowerEU plan), measures already taken by the Commission, such as the reviews of all national emergency plans, and legal acts adopted, such as Regulation (EU) 2022/1032 of the European Parliament and of the Council to prepare for gas supply disruptions, as well as calls by the European Council and the European Parliament for the Commission to make proposals on the security of supply as a matter of urgency;
- the “significant risk” that “a complete halt of Russian gas supplies” may take place in the near future “in an abrupt and unilateral way”, which is why the Member States should take measures now to reduce their demand ahead of the 2022-23 winter season.

In this light, the existence of serious economic difficulties and a causal relationship between the latter and the adoption of the measure is unquestionable. However, the appropriateness of the individual measures adopted must be determined with reference to the content of the emergency regulations.

In any case, the adoption of a regulation rather than any other legal instrument appears consistent: It has a “general scope” and is “directly and immediately applicable” in all Member States.²⁵ Also, it constitutes a rapid, uniform and Union-wide approach to overcome serious difficulties.²⁶ If regulations grant Member States a degree of discretion, implementation measures by the latter are not wholly ruled out.

2.3. In the spirit of solidarity

All six emergency regulations adopted to respond to the energy crisis contain references to solidarity in their recitals; for example, they express that “common action is needed in a spirit of solidarity”. Seemingly, “in a spirit of solidarity” is not only the prerequisite for the adoption of regulations on the basis of Article 122(1) TFEU but also their objective: the regulations constitute “an expression of energy solidarity” and the Union seeks to strengthen solidarity by means of regulations.²⁷ Council Regulation 2022/1854, for example, states that “safeguarding the integrity of the internal electricity market is [...] crucial to preserve and enhance the necessary solidarity between Member States.”²⁸

²⁵ Commission, “Proposal for a Council Regulation on coordinated demand reduction measures for gas” COM (2022) 361 final.

²⁶ Commission, “Proposal for a Council Regulation on coordinated demand reduction measures for gas” COM (2022) 361 final; Commission, “Proposal for a Council Regulation on an emergency intervention to address high energy prices” COM (2022) 473 final; Commission, “Proposal for Council Regulation laying down a framework to accelerate the deployment of renewable energy” COM (2022) 591 final.

²⁷ Cf. Council Regulation (EU) 2022/2578, recital 53; Council Regulation (EU) 2022/2576.

²⁸ Council Regulation (EU) 2022/1854, recital 9.

The European Court of Justice (ECJ) recently recognized “energy solidarity” as one of the “fundamental principles of EU law” without providing further guidance as to its content. In the OPAL pipeline judgment,²⁹ the ECJ comprehensively discussed the legal bases of “energy solidarity”, including Article 194(1) TFEU, according to which European energy policy is to be pursued “in a spirit of solidarity between Member States” and “in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment”.³⁰ Other legal bases of energy solidarity include the Preamble to the Treaty on European Union³¹ (TEU), as well as Article 2, Article 3(3)(3), Article 21(1) and Article 24(2) and 3 TEU, as well as Article 67(2), Article 80, Article 122(1) and Article 222 TFEU. The principle is further closely related to the principle of sincere cooperation pursuant to Article 4(3) TEU and binds the European legislator, as well as the Commission.³²

However, the principle of energy solidarity remains relatively vague and empty of content; it is hardly possible to determine its substance.³³ This is particularly clear when the principle of energy solidarity requires the balancing of affected interests, including those of the Member States and of the Union as a whole.³⁴ The European Union and its Member States are under a general obligation to consider the interests of all stakeholders potentially affected when exercising their respective competences in the EU energy policy. They are obliged to avoid “the adoption of measures that might affect their interests, as regards security of supply, its economic and political viability and the diversification of supply, and to do so in order to take account of their interdependence and de facto solidarity”.³⁵

With reference to the “spirit of solidarity” between Member States, parts of the literature suggested that Article 122(1) TFEU does not authorize the Union to interfere with national economic policies against the will of Member States. It was argued that Article 122(1) TFEU constitutes an instrument that enables the Council to provide aid in exceptional circumstances. This perception is, however, clearly defective. The Council decides upon emergency measures by a qualified majority and – as EU emergency measures in the energy sector show – may do so against the will of a Member State.³⁶

²⁹ Case C-848/19P *Federal Republic of Germany v European Commission* (ECJ 15 July 2021) ECLI:EU:C:2021:598.

³⁰ C-848/19P, para. 37.

³¹ Consolidated version of the Treaty on European Union [2012] OJ C 236/13.

³² C-848/19P, paras. 39–41.

³³ For a detailed analysis, compare K. Talus, J. McCulloch, “The interpretation of the principle of energy solidarity – A critical comment on the Opinion of the Advocate General in OPAL,” *Energy Insight* 89, 2021, pp. 1–10.

³⁴ C-848/19P, paras. 53, 69 and 73.

³⁵ C-848/19P, para. 71.

³⁶ U. Häde, „Art. 122 [Maßnahmen bei gravierenden Schwierigkeiten,“ [in:] *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta Kommentar*, eds. Ch. Calliess,

Arguably, secondary legislation is adopted “in a spirit of solidarity” if all Member States vote in favour of its adoption. With regard to the emergency regulations, this was not the case: Five out of six regulations were not adopted unanimously in the Council. Poland and Hungary voted against Regulation 2022/1369,³⁷ Slovakia and Poland voted against Regulation 2022/1854,³⁸ Hungary voted against Regulation 2022/2577³⁹ and Regulation 2022/2578, in the vote on which the Netherlands and Austria abstained.⁴⁰ Further, Hungary and Poland voted against Regulation 2023/706.⁴¹ Therefore, it is doubtful whether they were adopted “in a spirit of solidarity”. Also, in material terms, solidarity only reflects in emergency regulations occasionally, for example, in provisions intended to reduce gas consumption. In contrast, solidarity does not underlie the acceleration of the award of permits or the “solidarity contribution”. In the latter case, the terminology used cannot obscure the fact that companies from fossil fuel-producing Member States are more affected than others – the underlying spirit of solidarity is therefore not readily apparent.⁴²

2.4. Without prejudice to any other procedures provided for in the Treaties

According to Article 122(1) TFEU, measures appropriate to the economic situation may be adopted “without prejudice to any other procedures provided for in the Treaties”. In relation to other competences, Article 122(1) TFEU is therefore subsidiary.⁴³ For the adoption of the above emergency regulations, Article 122(1) TFEU was invoked as a legal basis despite the existence of the energy competence in Article 194 TFEU. The relationship between the two competences must therefore be clarified in order to determine whether the emergency regulations were rightfully based on Article 122(1) TFEU.

The choice of the correct legal basis and respect for the scope and limits of individual competences is crucial in the vertical relationship between the Euro-

M. Ruffert, München 2022, pp. 1555-1558; D.E. Khan, C. Richter, “Art. 122 [Gravierende Schwierigkeiten],” [in:] *EUV AEUV Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union Kommentar*, eds. R. Geiger et al., München 2023, pp. 661–663.

³⁷ Council of the European Union, Interinstitutional File 2022/0225/NLE, CM 4101/22.

³⁸ Council of the European Union, Interinstitutional File 2022/0289(NLE), CM 4715/22.

³⁹ Council of the European Union, Interinstitutional File 2022/0367(NLE), CM 5902/22.

⁴⁰ Council of the European Union, Interinstitutional File 2022/0393(NLE), CM 5890/22.

⁴¹ Council of the European Union, Interinstitutional File 2023/0087(NLE), CM 2304/23.

⁴² T. Hackermann, D. Weiler, “EU-NotfallVO...”, pp. 70–77.

⁴³ D.E. Khan, C. Richter, “Art. 122 [Gravierende Schwierigkeiten],” [in:] *EUV AEUV Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union Kommentar*, eds. R. Geiger et al., München 2023, pp. 661–663.

pean and national legislators and in the horizontal relationship between different EU institutions with legislative powers. The ECJ accordingly held that the choice of a legal basis must be based on “objective factors which are amenable to judicial review” and include “the aim and content of the measure”.⁴⁴ And “where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision”.⁴⁵

a) Article 194 TFEU

Before the introduction of Article 194 TFEU, Article 114 TFEU (ex Article 95 TEC) constituted the primary legal basis for enacting secondary EU legislation in energy law. Article 114 TFEU was complemented by the provisions of the Treaty on the European Atomic Energy Community⁴⁶ and specific provisions in the TFEU, including Article 170 *et seq.* on trans-European networks and Article 191 *et seq.* on the environment. Of further relevance to the energy law are the provisions enshrined in Article 101, 202 and 106–108 TFEU on competition, as well as Article 34 TFEU on the free movement of goods.

In 2007, the Treaty of Lisbon⁴⁷ eventually established Article 194 TFEU as the legal basis for secondary legislation in energy law. The European energy policy accordingly aims to (a) ensure the functioning of the energy market, (b) ensure security of energy supply in the Union, (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy and (d) promote the interconnection of energy networks. These objectives are to be pursued in a spirit of solidarity between the Member States, in the context of the establishment and functioning of the internal market and with regard to the need to preserve and improve the environment.⁴⁸ The European Parliament and the Council, after consultation of the Economic and Social Committee and the Committee of the Regions, acting in accordance with the ordinary legislative procedure, shall adopt measures to achieve the above objectives.⁴⁹

Article 194(2)(2) TFEU restricts EU competences in pursuit of energy policy objectives in favour of Member State sovereignty. EU secondary legislation shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choices between different energy sources and the general structure of its energy supply. These reservations apply without prejudice to Article

⁴⁴ Case C-300/89 *Commission/Council* (ECJ 11 June 1991) para. 10.

⁴⁵ Case C-490/10, *European Parliament/Council of the European Union* (ECJ 6 September 2012) ECLI:EU:C:2012:525, para. 44.

⁴⁶ Consolidated version of the Treaty establishing the European Atomic Energy Community [2012] OJ C 327/1.

⁴⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.

⁴⁸ Article 194(1) TFEU.

⁴⁹ Article 194(2)(1) TFEU.

192(2)(c) TFEU, i.e., without prejudice to the EU's competence in environmental policy.⁵⁰

If measures under Article 194(2) TFEU are of fiscal nature, the Council shall, in accordance with a special legislative procedure, adopt them anonymously after consulting the European Parliament.⁵¹

b) The Exceptional Nature of Article 122(1) TFEU

The relationship between Article 194 and Article 122 TFEU is currently unclear. According to Article 122(1) TFEU, the Council may decide “without prejudice to any other procedures provided for in the Treaties”. Still, Article 122(1) TFEU is only invoked in exceptional cases.⁵²

The exceptional nature of Article 122(1) TFEU is already apparent from its wording, which mentions “severe difficulties [...] in the supply of certain products” as a possible example of economic difficulties. In *Pringle*, the ECJ only briefly dealt with Article 122(1) TFEU but indicated that the provision “does not constitute an appropriate legal basis for any financial assistance from the Union to the Member States who are experiencing, or are threatened by, severe financing problems”.⁵³

The exceptional nature of Article 122(1) TFEU primarily arises from the procedural rules provided therein: in general, Article 122(1) TFEU may be invoked as a legal basis only if the duration of the ordinary legislative procedure is likely to frustrate the regulatory objective pursued. The European Parliament is not involved in the legislative procedure pursuant to Article 122(1) TFEU. In the light of the institutional balance between EU institutions and the imperative of representative democracy pursuant to Article 10 TEU, the exclusion of the European Parliament underlines the exceptional nature of Article 122(1) TFEU.⁵⁴ In the titanium dioxide case,⁵⁵ the ECJ emphasized that the involvement of the European Parliament in the Union's legislative process reflects the democratic principle, according to which “peoples should take part in the exercise of power through the intermediary of a representative assembly” and that, therefore, the choice of a legal basis cannot be free. Instead, institutions should, in principle, invoke

⁵⁰ This refers to measures which significantly affect a Member State's choice between different energy sources and the general structure of its energy supply. Such measures shall be adopted unanimously by the Council in accordance with special legislative procedure after consultation of the European Parliament. The Council may, however, decide that the ordinary legislative procedure shall apply, see Article 192(2)(2) TFEU.

⁵¹ Article 194(3) TFEU.

⁵² D.E. Khan, C. Richter, “Art. 122 [Gravierende Schwierigkeiten],” [in:] *EUV AEUV Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union Kommentar*, eds. R. Geiger et al., München 2023, pp. 661–663.

⁵³ Case C-370/12, *Pringle* (ECJ 27 November 2012) ECLI:EU:C:2012:756, para. 116.

⁵⁴ M. Nettesheim, “Next Generation EU...”, pp. 381–409.

⁵⁵ Case C-300/89, *Commission v Council* (ECJ 11 June 1991) ECLI:EU:C:1991:244, para. 20.

a legal basis that allows for the European Parliament's participation in the legislative process.⁵⁶

The same could be valid for the reservation in Article 194(2) TFEU that protects the sovereignty of the Member States regarding the conditions for exploiting energy sources, the choice between different energy sources and the general structure of the energy supply. Member State sovereignty in these areas is crucial for national economic and energy policies. Therefore, it appears reasonable to only deviate from Article 194(2) TFEU in exceptional cases, as the latter also implies overruling the national sovereignty reservation provided therein.

Article 122(1) TFEU was only invoked in exceptional circumstances in the past, in particular during the economic crisis and the Covid-19 pandemic.⁵⁷ Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (European Union Recovery Instrument – EURI)⁵⁸ was justified by “unprecedented measures” taken in response to the “exceptional situation caused by Covid-19”, which “caused significant disturbances to economic activity”. In turn, the latter were reflected in a “steep decline in gross domestic product” and a “significant impact on employment, social conditions, poverty and inequalities”, and was being expected to result in a “sharp contraction of growth in the Union” and a risk that recovery would be “very uneven” across Member States.⁵⁹

Pursuant to Regulation (EU) 2020/2094 and the Council's decision on the system of own resources of the European Union,⁶⁰ which authorized the Commission to raise funds of up to EUR 750 billion at 2018 prices on the capital market by means of the Regulation to deal with the consequences of the COVID-19 crisis, the Commission launched the “Next Generation EU” – NGEU (European Union Recovery Instrument – EURI-Regulation).⁶¹ As the legal basis, the Council invoked Article 311(2) and 3 TFEU (“The Union's Own Resources”) in conjunction with Article 122(1) and 2 TFEU.

The German Federal Constitutional Court, which considers itself competent for *ultra vires* review on European integration, did not consider the adoption of

⁵⁶ Case C-300/89, para. 20.

⁵⁷ E.g., Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L 159/1.

⁵⁸ Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23.

⁵⁹ Council Regulation (EU) 2020/2094, recitals 1 to 3.

⁶⁰ Cf. Article 5 of Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU [2020] OJ L 424/1.

⁶¹ Council Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17.

“Next Generation EU” as *ultra vires*.⁶² Underlying the decision were doubts as to whether there was a sufficient connection between the consequences of the pandemic and the wording of Article 122(2) TFEU, which requires “severe difficulties caused by natural disaster or exceptional occurrences”. Further, it was questioned whether Article 122(1) TFEU constitutes a suitable legal basis for adopting measures that promote the Union in general or its objectives not linked to the pandemic, such as climate neutrality or digitization. In the literature, it was rightly suspected that the crisis was, in part, instrumentalized to broaden and advance the agenda of the eurozone to the whole of the European Union.⁶³

Still, the German Federal Constitutional Court considered Article 122 TFEU and Article 311 TFEU to be suitable legal bases for the enactment of the NGEU. The Court’s finding rested on the fact that the Union’s ability to borrow on capital markets was limited in volume and duration and that borrowed funds did not considerably exceed its own resources. In addition, the Own Resources Decision ensured that borrowed funds could only be used for specific purposes.⁶⁴ The Constitutional Court further held that Article 122 TFEU is to be interpreted narrowly, as it addresses “exceptional situations of severe difficulties”⁶⁵ and despite the broad discretion granted to the Commission and the Council.⁶⁶

For practical reasons, one might deem the question of competence to be insignificant. The ECJ indeed interprets Union competences openly to provide political leeway. Moreover, the German Federal Constitutional Court’s jurisdiction shows that dogmatic support can hardly be expected from Karlsruhe.⁶⁷ However, this does not exclude calls for greater dogmatization of competence law.

2.5. Temporally limited scope?

Measures adopted on the basis of Article 122(1) TFEU are, in many cases, limited in their temporal scope. Even though Article 122(1) TFEU does not require such temporal limitation, it appears to be common practice: EU emergency regulations in the energy sector remain effective between one⁶⁸ and one and a half

⁶² Bundesverfassungsgericht 6 December 2022, 2 BvR 547/21 (ERatG – NGEU).

⁶³ M. Ruffert, “Europarecht für die nächste Generation. Zum Projekt Next Generation EU,” *Neue Zeitschrift für Verwaltungsrecht* 24, 2020, pp. 1777–1780.

⁶⁴ Bundesverfassungsgericht 6 December 2022, 2 BvR 547/21 (ERatG – NGEU) margin 162.

⁶⁵ Bundesverfassungsgericht 6 December 2022, 2 BvR 547/21 (ERatG – NGEU) margin 174.

⁶⁶ U. Häde, „Art. 122 [Maßnahmen bei gravierenden Schwierigkeiten],“ [in:] *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta Kommentar*, eds. Ch. Calliess, M. Ruffert, München 2022, pp. 1555-1558; on economic policy measures compare Article 103(2) of the Treaty establishing the European Community and Case 5/73 Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof (ECJ 24 October 1973) ECLI:EU:C:1973:109, para. 18.

⁶⁷ M. Nettesheim, “Next Generation EU...,” pp. 381–411.

⁶⁸ Article 10 of Council Regulation (EU) 2022/1369; Article 31 Council Regulation (EU) 2022/2576; Article 12(1) Council Regulation 2022/2578.

years,⁶⁹ Covid measures between two and a half⁷⁰ and six years.⁷¹ Presumably, the temporal limitation arises from the requirement that measures must be appropriate to the economic situation, i.e., they are adopted to overcome an existing or impending (critical) economic situation. Remarkably, emergency regulations based on Article 122(1) TFEU are capable of overruling (other) secondary legislations adopted by the Council in conjunction with the European Parliament, e.g., Directive (EU) 2019/944 on common rules for the internal market for electricity⁷² which was, in part, overruled by Council Regulation (EU) 2022/1854.⁷³ The Council's ability to unilaterally overrule secondary acts previously adopted by the European Parliament and the Council as joint legislators calls for a temporally limited scope of such unilateral measures.

Remarkably, five of six EU emergency measure regulations for the energy sector provide that the Commission may propose an extension of the respective Regulation's temporal scope.⁷⁴ Regulation 2022/2577 is the only exception. According to this Regulation, the Commission may propose to amend it to include OTC-traded derivatives in its scope or to review the elements that are relevant for determining the reference price.⁷⁵ However, the absence of the Commission's mandate to propose an extension of the temporal scope in Regulation 2022/2577 is of little relevance. The Commission has the general right of initiative. Therefore, it is entitled to propose the adoption or amendment of any regulation at any time (cf. Article 122, 289, 294 TFEU and Article 17(2) TEU). If, however, the explicit anchoring of the Commission's mandate to propose an extension of the temporal scope of EU emergency regulations indicates that a (potential) extension should (only) be effectuated in accordance with Article 122(1) TFEU, the requirements provided therein must be satisfied. In particular, the economic situation must justify the extension, for example, because severe difficulties in the supply of certain goods, especially in the energy sector, prevail.

⁶⁹ Article 10 Council Regulation (EU) 2022/2577; a differentiated approach was adopted in Article 22(2) Council Regulation 2022/1854.

⁷⁰ Article 12(3) of Council Regulation (EU) 2020/672.

⁷¹ Article 3(9) of Council Regulation (EU) 2020/2094.

⁷² 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 L 158/125.

⁷³ A detailed analysis is provided in chapter IV.

⁷⁴ Article 9 of Council Regulation (EU) 2022/1369; Article 20(1) Council Regulation (EU) 2022/1854; Article 30 Council Regulation (EU) 2022/2576; Article 9 Council Regulation (EU) 2022/2577; Article 9 Council Regulation (EU) 2023/706.

⁷⁵ Article 10 of Council Regulation (EU) 2022/2578.

3. Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices

Council Regulation (EU) 2022/1854 establishes measures to reduce the demand for electricity and to redistribute surplus revenues of the energy sector to households and businesses to mitigate the effects of high energy prices. Measures provided for in the Regulation will be described below to determine whether the Regulation was rightfully based on Article 122(1) TFEU.

3.1. Emergency measures

Regulation 2022/1854 introduced emergency measures to address high energy prices. These include:

- Measures to reduce gross electricity consumption: The Regulation introduces a voluntary reduction target of 10% per month and a mandatory 5% reduction target during peak hours. Member States are obliged to identify peak hours during which demand is to be reduced and to adopt measures to reduce electricity consumption.
- Mandatory cap on energy market revenues: According to Article 6, market revenues of electricity producers are generally capped at 180 EUR per MWh generated, whereby “market revenue” means realized income, which a producer receives in exchange for the sale and supply of electricity in the Union. The market cap allows for the determination of “surplus revenues”, which refer to market revenues in excess of the threshold of EUR 180 per MWh of electricity. Surplus revenues are then used to finance measures in support of final electricity customers that mitigate the impact of high electricity prices.
- Retail measures: Member States are vested with the authority to intervene in setting electricity supply prices for residential customers and small and medium-sized enterprises. Furthermore, they may exceptionally and temporarily set a price for the supply of electricity below cost.
- Temporary solidarity contribution: Regulation 2022/1854 introduces a temporary mandatory solidarity contribution for Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors to contribute to affordable energy prices for households and companies. It is calculated on the basis of annual taxable profits, which are above a 20% increase of the average taxable profits between 2018 and 2021 and amounts to at least 33% of the base.

Notably, Regulation 2022/1854 temporarily overrules Directive 2019/944 on common rules for the internal market for electricity:⁷⁶ according to the latter, suppliers are (principally) free to determine the price at which they supply electricity consumers.⁷⁷ Public interventions in price setting are only permitted with regard to (a) energy poor or vulnerable household consumers⁷⁸ and (b) other household customers and microenterprises under certain conditions and on a transitional basis.⁷⁹ Public interventions in price setting for small and medium-sized enterprises are not permitted. Further, transitional public interventions in price setting must be set at a price that is above cost and at a level where effective price competition can take place.⁸⁰ Regulation (EU) 2022/1854 temporarily overrules these conditions: temporary price setting for electricity is permitted below cost and also for small and medium-sized enterprises, if, among other things, the measure retains an incentive for reducing demand.

3.2. Appropriateness to the economic situation

The need for emergency measures and their appropriateness to the economic situation is evident: in 2022, electricity prices rose significantly, and there was (and still is) a risk that end customers of electricity, especially households, will face excessive financial burdens. High energy prices are attributable to several factors, namely declining gas supplies from Russia, exceptionally high temperatures in summer 2022 which increased the demand for electricity for cooling, an exceptional drought that caused a reduction in the generation of electricity by nuclear power plants because of shortages of cooling water and low electricity generation from hydropower because of low water levels in major rivers.⁸¹ In the light of this, adopting measures to reduce gross electricity consumption and public interventions in setting electricity prices for final customers appears justified.

3.3. In a spirit of solidarity

Slovakia and Poland voted against the adoption of Regulation 2022/1854.⁸² Therefore, it is questionable whether it was adopted “in a spirit of solidarity”. Also, in terms of content, the underlying notion of solidarity is not readily apparent, at least insofar as it goes beyond the harmonization of responses to the energy

⁷⁶ 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 L 158/125.

⁷⁷ Article 5(1) of Directive (EU) 2019/9444.

⁷⁸ Article 5(3) of Directive (EU) 2019/9444.

⁷⁹ Article 5(6) of Directive (EU) 2019/9444.

⁸⁰ Article 5(7)(c) of Directive (EU) 2019/9444.

⁸¹ Cf. Directive (EU) 2019/9444, recitals 2 and 3.

⁸² Council of the European Union, Interinstitutional File 2022/0289(NLE), CM 4715/22.

crisis.⁸³ With regard to the “solidarity contribution” the terminology used cannot obscure the fact that companies from fossil fuel producing Member States are more affected than others.

3.4. Without prejudice to any other procedures provided for in the Treaties

In the light of the general energy competence in Article 194 TFEU and in particular its para. 3, it is questionable whether the Council acted rightfully in adopting the above rules regarding surplus revenues and the solidarity contribution on the basis of Article 122(1) TFEU. According to Article 194(3) TFEU, the Council shall, in accordance with a special legislative procedure and by way of derogation from Article 194(2) TFEU, adopt measures referred to in paragraph 2 when they are primarily of fiscal nature. Therefore, it needs to be determined whether Regulation 2022/1854 is “primarily of a fiscal nature” to determine whether Article 194(3) TFEU should have been invoked instead of Article 122(1) TFEU.

a) Fiscal nature?

First, it should be established whether surplus revenues and the solidarity contribution are “of a fiscal nature” in the sense of Article 194(3) TFEU. In the literature, a narrow interpretation of the phrase “of a fiscal nature”, which does not include levies other than (direct) taxes, is widely accepted.⁸⁴ However, this interpretation is not convincing, as Article 194(3) TFEU does not refer to “taxes” but to “measures [...] of a fiscal nature”. Other language versions also suggest a broad interpretation, compare the French “*nature fiscale*”, the Italian “*natura fiscale*” or the Polish “*charakter fiskalny*”, to name but a few.⁸⁵ A broader understanding of “fiscal nature” is further confirmed by the fact that Member States are very restrictive in attributing tax competences to EU institutions – Article 114(2) TFEU (internal market) and Article 192(2)(a) TFEU (environment) provide intriguing examples.

It is helpful to distinguish surplus revenues from the solidarity contribution to determine whether they are of a “fiscal nature”:

⁸³ T. Hackermann, D. Weiler, “EU-NotfallVO...”, pp. 70–77.

⁸⁴ Ch. Calliess, “Art. 194 [Energiepolitik],” [in:] EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta Kommentar, eds. Ch. Calliess, M. Ruffert, p. 1908-1918; S. Hirsbrunner, “Article 194 [Ziele; Maßnahmen],” [in:] *EU-Kommentar*, eds. Ulrich Becker et al., Baden-Baden 2019, pp. 2474–2481.

⁸⁵ In its German version, Article 110 TFEU refers to “levies” instead of taxes. However, this does not allow the conclusion that Article 194(3) TFEU distinguishes between levies and taxes (as German law does). Article 110 TFEU clearly refers to “taxation” in its English version, further compare the French “*d’impositions*”, the Italian “*imposizioni*” and the Polish “*podatków*”. Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [2003] OJ L 283/51 was adopted on the basis of Article 93 TEC (now Article 113 TFEU), which then required unanimity.

As indicated above, “surplus revenues” refer to the positive difference between market revenues of producers per MWh of electricity and the cap on market revenues of 180 EUR per MWh of electricity. The market cap for revenues was introduced to respond to the diverging effects of gas supply shortages in the Member States and their differing capabilities in financing support measures from their national budgets. Severe distortions in the internal market would have taken place, had only wealthy Member States protected their customers and suppliers.⁸⁶ The market cap aims to siphon inframarginal surplus revenues to relieve household customers throughout the Union. Remarkably, Regulation 2022/1854 does not conceptually equate the surplus revenue with a tax or levy.⁸⁷ It does not require the allocation of surplus revenues to the national budget. Surplus revenues may just as well be transferred to household customers by energy companies directly or via grid companies. The latter approach was adopted in Germany,⁸⁸ whereas the Austrian legislation conceptualized surplus revenues as a federal levy.⁸⁹ However, Member State discretion in implementation should not obscure the fact that the obligation to transfer surplus revenues constitutes a public payment obligation and therefore is “of a fiscal nature” within the meaning of Article 194(3) TFEU.

On the other hand, the solidarity contribution is clearly “of a fiscal nature”. Non-electricity-generating enterprises in the energy sector have the general obligation to pay solidarity contributions to level the playing field and to reduce the economic impacts of high energy prices on the public budget, end consumers and companies throughout the Union. The solidarity contribution therefore taxes surplus profits that would not have been made in normal circumstances. Unlike surplus revenues, the solidarity contribution is to be applied “in parallel” with regular business taxes levied on companies in the Member States.⁹⁰ Notably, the solidarity contribution is earmarked for targeted financial support measures for end customers and the mitigation of high energy prices. In addition, it should be used to reduce energy consumption, support companies in energy-intensive sectors and develop energy autonomy. Member States may also assign the solidarity contribution to the common financing of measures to reduce the negative effects of the energy crisis, including support for protecting employment and the reskilling and upskilling of the workforce, etc.⁹¹

⁸⁶ Council Regulation (EU) 2022/1854, recital 12.

⁸⁷ Compare Article 2 para 9 Council Regulation (EU) 2022/1854.

⁸⁸ §§ 4, 14 Gesetz zur Einführung einer Strompreisbremse (Strompreisbremsengesetz – Strom-PBG) vom 20. Dezember 2022, dt. BGBl I S. 2512 (German Federal Law regarding a Cap on Electricity Prices).

⁸⁹ § 1(2) Bundesgesetz über den Energiekrisenbeitrag-Strom (EKBSG), BGBl I 220/2022 (Austrian Federal Act on the Energy Crisis Contribution – Electricity).

⁹⁰ Article 15 Council Regulation (EU) 2022/1854.

⁹¹ Article 17 Regulation 2022/1854.

Both surplus revenues and the solidarity contribution are “of a fiscal nature”. The respective provisions occupy substantial parts of Regulation 2022/1854. It follows that Regulation 2022/1854 is “primarily of a fiscal nature”. Although it also includes measures to reduce gross electricity consumption (Articles 3–5) and extends the possibility of public intervention in setting electricity prices (Articles 12 and 13), the market cap and resulting surplus revenues (Articles 6–11) and the solidarity contribution (Articles 14–18) constitute the Regulation’s primary subject, not only quantitatively but also in terms of their impact. This observation is reinforced by the fact that measures to reduce gross electricity consumption are directed at the Member States and merely authorize certain conduct instead of prescribing it.

b) Relationship between Article 122(1) TFEU and Article 194(3) TFEU?

Regulation 2022/1854 is “primarily of a fiscal nature” and therefore principally falls within the scope of Article 194(3) TFEU. The relationship between Article 122(1) TFEU and Article 194(3) TFEU needs to be clarified to determine whether Article 122(1) TFEU was rightly invoked as the legal basis. Interestingly, both provisions constitute an exception – Article 194(3) regarding fiscal measures, Article 122(1) regarding the special economic situation required for its application. In this respect, both provisions appear to be of equal rank. However, Regulation 2022/1854 mainly comprises provisions related to surplus revenues and the solidarity contribution, which aim to redistribute revenues and profits. Article 194(3) TFEU must therefore take precedence over Article 122(1) TFEU.

The ECJ’s decision in the titanium dioxide case⁹² supports the primacy of Article 194(3) TFEU over Article 122(1) TFEU:⁹³ if the exceptional provision of Article 194(3) TFEU is relevant in crisis situations and if the Commission and the Council have extensive discretion under Article 122(1) TFEU, then the latter must be subject to special urgency requirements, namely to the effect that consultation with the European Parliament in the legislative procedure would jeopardize the measure’s objective. However, this is neither apparent in the case of surplus revenues nor with regard to the solidarity contribution. Especially as Article 194(3) TFEU does not require the European Parliament’s consent but purely the consideration of its opinion, which – supposedly – is possible at short notice. The Commission issued the Proposal for Regulation 2022/1854 on 14 September 2022; the Regulation was adopted on 6 October 2022. Therefore, consultation with the European Parliament in accordance with Article 194(3) TFEU would have been possible.

Furthermore, it is worth noting that Article 122(1) TFEU is not relevant for all measures under Regulation 2022/1854; for example, it is not relevant for the use of the solidarity contribution. The energy crisis poses a threat to employment;

⁹² Case C-300/89, *Commission/Council* (ECJ 11 June 1991) ECLI:EU:C:1991:244.

⁹³ On invoking two legal bases for the adoption of one secondary act (which is not relevant in the present case), compare I. Härtl, “Die Zuständigkeiten der Union,” [in:] *Europarecht. Grundlagen und Politiken der Union*, ed. M. Niedobitek, Berlin 2019, pp. 447–523.

therefore, retraining and upskilling the workforce is reasonable. However, the provisions on the solidarity contribution do not guarantee that funds are used to protect only those jobs which are under threat as a result of the energy crisis.

The bottom line is that Article 122(1) TFEU should be interpreted more narrowly than the Commission and the Council have done – provisions regarding surplus revenues and the solidarity contribution should have been based on Article 194(3) TFEU.

4. Conclusions

This article has shed some light on the scope and limits of Article 122(1) TFEU, which is to be invoked as a legal basis only in exceptional circumstances. The exceptional nature of Article 122(1) TFEU is already clear from its wording (“severe difficulties [...] in the supply of certain products”) but primarily arises from its procedural rules. Compared to the ordinary legislative procedure, Article 122(1) TFEU provides for a shift of power from the European Parliament to the Council. The latter may adopt legislative acts on a proposal from the Commission without any involvement of the Parliament. Even though the need for swift and decisive responses to crisis events justifies the application of a special legislative procedure, it is important to respect the scope and limits of the emergency competence of Article 122(1) TFEU. The latter may be referred to only in the case of “severe economic difficulties” and provided that the participation of the Parliament would jeopardize the objective pursued.

As for the emergency regulations in the energy sector, the relationship between Article 122(1) TFEU and Article 194 TFEU is of particular significance. Article 194 TFEU generally takes precedence over Article 122(1) TFEU, as it provides for the participation of the European Parliament in its paragraph 2 and consultation of the European Parliament in its paragraph 1. On the other hand, Article 122(1) TFEU is only applicable in the case of an emergency that rules out the involvement of the parliament because of time constraints. When adopting Regulation 2022/1854, the Council interpreted Article 122(1) TFEU excessively broadly: due to the fiscal nature of the measures that were introduced, Regulation 2022/1854 falls within the scope of Article 194(3) TFEU and should have been based on the competence of the latter, especially as it is not evident that consultation with the parliament would have jeopardized its objective. The Council was mistaken in invoking Article 122(1) TFEU. Greater dogmatization of competence law, therefore, appears inevitable. The significance of choosing the correct legal basis and respecting the scope and limits of emergency competences is particularly clear when threatened by the annulment of substantively justified measures.⁹⁴

⁹⁴ Cf. the pending Case T-802/22 *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council* in which the applicants alleged, among other things, a lack of competence insofar as Article 122(1) TFEU provides an invalid legal basis.

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